

Environmental and Utilities Update

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NOVEMBER 2009

SEC Issues Guidance on Shareholder Proposals That May Strengthen Climate Change Resolutions

Recent SEC guidance will make it more difficult for companies to ignore shareholder resolutions concerning climate change and other environmental and social issues. On October 27, 2009, the Division of Corporation Finance of the Securities and Exchange Commission (SEC) issued Staff Legal Bulletin Number 14E (the Bulletin), which provides guidance regarding shareholder proposals and the submission of requests for "no-action" under Rule 14a-8(i)(7) of the Securities Exchange Act of 1934 (the No-Action Provision). Such requests, when granted by the SEC, typically allow companies to disregard proposed shareholder resolutions focusing on policy issues. In particular, the Bulletin focuses on "the application of Rule 14a-8(i)(7) to proposals relating to risk" and "the manner in which shareholder proponents and companies can notify [the SEC] that they will be submitting correspondence in connection with a no-action request."

The SEC guidance comes at a time when the agency appears to be reevaluating its climate disclosure policies under the Bush administration. Based on SEC statements over the summer, and more recently at an October 2 speech to the Corporate Counsel Institute, the agency is considering issuing interpretive guidance regarding climate disclosures.

Over the past decade, SEC staff analyzed the No-Action Provision in the context of environmental proposals by evaluating whether a shareholder proposal, as a whole, related to the risks and liabilities faced by the company as a result of its operations. To the extent that a proposed resolution focused on a company's internal assessment of its risks and liabilities, the SEC routinely permitted the company to exclude the proposal under Rule 14a-8(i)(7) as relating to an evaluation of risk. In the newly issued Bulletin, the SEC amends its policy regarding risk-based shareholder proposals.

SEC staff will now focus on the *subject matter* to which the risk proposal pertains rather than on whether the proposal relates to an evaluation of risk. If the underlying subject matter does not raise significant policy considerations relevant to the company, the proposal will likely be excludable. If, however, the underlying subject matter of the proposal "transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company." For example, if the SEC considers climate change an issue that "transcends the day-to-day business matters of the company," a company will be required to issue a proxy statement for shareholder resolutions concerning climate change.

The practical implications of this SEC policy change are unclear. The revised policy may require companies to issue proxy statements for certain shareholder proposals that the company previously had been permitted to exclude as relating to ordinary business matters. Further, it is likely that companies can expect to see more risk-related shareholder proposals, in particular

proposals related to climate change and environmental risks, in the future. Regardless of the type of risk, companies should analyze shareholder proposals to determine whether the subject matter of the proposal "transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote" prior to submitting a no-action request.

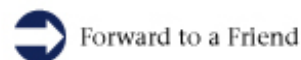
For More Information

The Bulletin may be accessed via the following link: <http://www.sec.gov/interps/legal/cfsib14e.htm>
<http://www.sec.gov/interps/legal/cfsib14e.htm>

At Robinson & Cole, we have experienced environmental attorneys who understand the nexus between environmental and business obligations. For more information, please contact:

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