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SUSTAINABILITY DISCLOSURE:
PROXY EXCLUSION & THE IMPACT OF SEC'S DECISION IN *PNC FINANCIAL*

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INTRODUCTION

On February 13, 2013, the Securities and Exchange Commission (the "SEC" or the "Commission") rejected the determination by PNC Financial Services Group, Inc. ("PNC") that, like many companies before it, PNC could exclude a shareholder proposal relating to climate change from its annual proxy materials. PNC had asked the staff of the Commission's Division of Corporation Finance (the "Staff") to issue a no-action letter, to confirm that PNC could properly exclude a request by Boston Common Asset Management ("BCAM"). BCAM had requested that the PNC Board of Directors report to shareholders its assessment of the risks that arise from greenhouse gas emissions and climate change and are imbedded in PNC's lending portfolio, investing, and financing activities. Surprisingly to many observers, the Staff declined to do so. Instead they found that BCAM's

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proposal did not "deal[] with matters related to the ordinary business of [PNC]."[1]

The PNC decision comes after a rapid rise in the number of shareholders proposals that have sought greater disclosure from companies relating to climate change specifically and sustainability more generally. These proposals have received increasing levels of support from stakeholders.[2] The growing demand on corporations to expand the universe of disclosure is the product of several related factors, including recent extreme weather events; the changing public discourse on global warming; stakeholder preferences across a broad suite of environmental issues; legislation and regulation that have created new carbon emission compliance obligations (particularly SEC guidance and reporting requirements); and corporate planning around all of these factors, as well as the obvious self-interest of management in wanting to be prepared.

These pressures have been far-reaching and multi-layered as they pertain to global warming; and investor demand and management's incentive for greater disclosure on the broader issues embodied in the term "sustainability" have also increased. Carbon emissions, in turn, have

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[1] Letter from Ted Yu, Senior Special Counsel, U.S. SEC, to George P. Long, The PNC Financial Services Group (Feb. 13, 2013) *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/bostoncommon021313-14a8.pdf.

[2] For example, shareholder support on climate change proposals was 25.9 percent in 2012, up from 17 percent in 2011 according to Institutional Shareholder Services. 2012 U.S. Proxy Season Review, Environmental & Social Issues, *available at* http://www.issgovernance.com/files/private/2012USProxySeasonReviewES.pdf.

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become part of a larger picture, in which the focus is long-term corporate social responsibility.

The PNC decision is noteworthy because it is both a product of these pressures and will likely accelerate them. By rejecting the "ordinary course of business" exception, the Staff opened the door to other shareholder proposals that focus on "the significant policy issue of climate change,"[3] as well as to any other issue that can be similarly characterized, making the *PNC* decision emblematic of what is taking place on the broader stage of sustainability disclosure. Because PNC has a critical financial relationship with many companies that must manage their risk, it seems likely that the impetus to disclose such information will quickly be spread to them. Of greater possible significance is an even wider application of the *PNC* template. Financial services companies with a broad, but indirect or derivative, stake in climate change or sustainability may well become pressure points for disclosure, and behavioral change, in much the same way that they were sought out to sign the Equator Principles[4] a decade ago.

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[3] *Id.*

[4] The Equator Principles ("EPs") is a credit risk management framework for determining, assessing, and managing environmental and social risk in Project Finance transactions. The EPs are primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making and have been adopted by some financial institutions where total project capital costs exceed US $10 million. The EPs were launched in Washington, D.C. on June 4, 2003, and were initially adopted by ten global financial institutions: ABN AMRO Bank N.V., Barclays plc, Citi, Crédit Lyonnais, Credit Suisse First Boston, HVB Group, Rabobank Group, The Royal Bank of Scotland, WestLB AG, and Westpac Banking Corporation. There were over forty further EP adoptions during the first three year implementation period, and there are currently 79 adopting financial institutions. *See* THE EQUATOR PRINCIPLES Ass'n., History of the Equator

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I. THE EXPANDING CLIMATE AND SUSTAINABILITY LANDSCAPE

The past several years have seen an ongoing shift in the legal and political ramifications of climate change and sustainability, resulting in increased and focused interest in disclosure on how climate change might affect current and future operations, as well as what corporations are doing to make their operations more sustainable across the board.

A. Pressures on Corporations Relating to Climate Change

While Congress remains reluctant to enact sweeping greenhouse gas legislation, in 2007, the U.S. Supreme Court held in *Massachusetts v. EPA*[5] that greenhouse gasses are "pollutants" subject to regulation under the Clean Air Act,[6] and directed the U.S. Environmental Protection Agency to determine whether such gasses "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[7] This decision has spawned a number of regulations, ranging from emission limitations on motor vehicles, carbon dioxide limits on new and existing power plants, a greenhouse gas reporting regime, and rules relating to carbon sequestration. At the same time, states and localities have taken aggressive action on climate change, leading to standards on energy

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Principles, *available at* http://www.equator-principles.com/index.php/about-ep/about-ep/38-about/about/17 (last visited Apr. 19, 2013).

[5] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[6] 42 U.S.C. § 7401 et seq.

[7] *Id.* at § 7601(a)(1).

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efficiency and climate adaptation, as well as the creation of regional alliances to reduce carbon dioxide emissions in the absence of federal legislation.[8]

In addition to facing new obligations under federal and state environmental laws, climate change disclosure has been subject to increased scrutiny under the federal securities laws. In 2010, the SEC specifically brought climate disclosure under the traditional rubric of reporting obligations in an interpretive release on climate change (the "SEC Release" or "Release").[9] In addition to specifying where climate disclosure should reside in a corporation's periodic filings,[10] the SEC Release described the sources of exposure that a corporation might face on account of climate change, and stated that climate change may create both new risks and new opportunities arising from legal, technological, political, and scientific developments.[11] The SEC also found that corporations are more likely to face reputational risks based upon the public's perception of

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[8] For example, in California, the Global Warming Solutions Act of 2006 and regulatory actions by the California Air Resources Board have resulted in restrictions on greenhouse gas emissions. In addition, state and regional programs, such as the Regional Greenhouse Gas Initiative (including nine Northeast and Mid-Atlantic states) and the Western Climate Initiative (including seven Western states and four Canadian provinces) have been developed to restrict greenhouse gas emissions. For a more detailed list of state action on climate change, *see* CENTER FOR CLIMATE CHANGE AND ENERGY SOLUTIONS, U.S. STATES & REGIONS NEWS, *available at* http://www.c2es.org/us-states-regions/news (last visited Apr. 15, 2013). *See also* Commission Guidance, *infra* note 9.

[9] Commission Guidance Regarding Disclosure Related to Climate Change, SEC Release Nos. 33-9106; 34-61469; FR-82 (effective date Feb. 8, 2010), *available at* http://www.sec.gov/rules/interp/2010/33-9106.pdf ("Commission Guidance").

[10] Climate change may trigger specific disclosure obligations under Items 101, 103, 303 and 503 of Regulation S-K. *Id.* at 22.

[11] *Id.* at 25.

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the company's greenhouse gas emissions policies and climate change exposure.[12]

In recent years, more frequent and pervasive weather events have intensified the public's focus on climate change-related risks. Severe weather (floods, hurricanes, drought and related wildfires) has caused catastrophic harm to physical plants and facilities and has disrupted manufacturing and distribution processes; rising sea levels have placed coastal assets at risk; and droughts have reduced the arability of farmland and the availability and quality of water. If such events continue or worsen, insurance claims, liabilities and premiums are likely to increase, while the companies that are not prepared for such events are likely to face significant adverse financial consequences.

In order to make investment decisions based on these risks, investors, especially those with a fiduciary obligation to retain long term value or to generate predictable long term returns, such as large state pension funds, have increasingly sought information related to companies' susceptibility to adverse impacts from climate change. The SEC Release itself was issued partly in response to several petitions for interpretative guidance, including one by the California Public Employees' Retirement System ("CALPERS"). CALPERS, along with several political figures, including the California State Controller, the New York State Attorney

[12] *Id.*

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General and the Kentucky State Treasurer, were signatories to a Petition to the SEC to provide guidance to corporations on how to disclose the risks associated with climate change (the "CALPERS Petition").[13] The CALPERS Petition explicitly asserted that companies' financial condition "increasingly depends upon their ability to avoid climate risk and to capitalize on new business opportunities by responding to the changing physical and regulatory environment."[14]

B. The Broader Stage: Sustainability

Just as companies are being called to analyze the impacts of climate change on every level of their operations, so, too, public and regulatory pressure, coupled with increasing internal recognition that efficient operation has direct economic benefits, has led companies to integrate sustainability into corporate operations—across a broad range of issues.

[13] Petition For Interpretive Guidance on Climate Risk Disclosure, File No. 4-547 (Sept. 18, 2007), *available at* http://www.sec.gov/rules/petitions/2007/petn4-547.pdf; as supplemented by Request For Interpretive Guidance on Climate Risk Disclosure (June 12, 2008), *available at* http://www.sec.gov/rules/petitions/2008/petn4-547-supp.pdf and Supplemental Petition For Interpretive Guidance on Climate Risk Disclosure (Nov. 23, 2009), *available at* http://www.sec.gov/rules/petitions/2009/petn4-547-supp.pdf. For other petitions, *see* Petition for Interpretive Guidance on Business Risk of Global Warming Regulation, File No. 4-549 (Oct. 22, 2007),*available at* http://www.sec.gov/rules/petitions/2007/petn4-549.pdf; Petition for Interpretive Guidance on Public Statements Concerning Global Warming and Other Environmental Issues, File No. 4-563 (July 21, 2008), *available at* http://www.sec.gov/rules/petitions/2008/petn4-563.pdf. *See also* Ceres, Inc. and Environmental Defense Fund, *Climate Risk Disclosure in SEC Filings: An Analysis of 10-K Reporting by Oil and Gas, Insurance, Coal, and Transportation and Electric Power Companies* (June 2009), *available at* http://www.ceres.org/resources/reports/climate-risk-disclosure-2009.

[14] Petition for Interpretive Guidance on Climate Risk Disclosure, *supra* note 13, at 7.

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Sustainability, which seeks to incorporate inter-generational equity and balance into everyday behavior,[15] has manifested itself in the business arena through corporate social responsibility ("CSR"). Corporate boards and management, traditionally driven by the desire to maximize profits for shareholders,[16] have begun to explore whether CSR principles can allow them to address significant medium and long-term issues that a narrow focus on profit maximization and share price performance might cause them to ignore.[17]

Although CSR efforts have traditionally been associated with minimizing an organization's direct impacts on the environment, CSR has expanded to capture indirect impacts, such as the sustainability of corporate supply chains, business travel, waste, and procurement.[18] For instance, some companies, such as Visa, are creating new markets in the developing world by closely aligning social causes with their overarching

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[15] Matthew T. Bodie, *Nascar Green: The Problem of Sustainability in Corporations and Corporate Law*, 46 WAKE FOREST L. REV. 491 (2011) ("On the most basic level . . . the sustainability movement strives to evaluate our capacity to endure as a species and a planet, both now and into the future. The United Nations report, *Our Common Future* (commonly called the Brundtland Report), offered the first synopsis of sustainability: 'meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs.'") (quoting Rep. of World Comm'n on Env't & Dev., 14th Session, June 8-19, 1987, Our Common Future, Ch. 2, P 1, U.N. Doc. A/43/427 (1987)).

[16] *See* Heiko Spitzeck & Erik G. Hansen, *Stakeholder Governance: How Stakeholders Influence Corporate Decision Making*, 10 CORPORATE GOVERNANCE 4 (2010).

[17] *See, e.g.*, Joseph E. Stiglitz, *The Financial Crisis of 2007/2008 and its Macroeconomic Consequences* (Columbia University, Initiative for Policy Dialogue, Working Paper, 2009), *available at* http://hdl.handle.net/10022/AC:P:10161.

[18] *See* Brighter Planet, *Top Corporate Sustainability Efforts to Watch in 2012*, *available at* http://attachments.brighterplanet.com/press_items/local_copies/107/original/trends-2011.pdf.

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corporate strategies.[19] Others, like Wal-Mart, have made ambitious commitments to sustainability as a way to save money and tighten their supply chain.[20]

Because information about a given company's environmental record and labor practices is easily available (and readily posted and tweeted), and like-minded individuals can band together to attempt to influence corporate behavior, companies, even those without strong consumer-facing platforms, must pay increasing attention to what their customers do and say.[21] As a result, investors are asking corporations to expand their initiatives, and, in turn, their disclosures relating to CSR. In a recent study by Brighter Planet, shareholder pressure on corporate accountability was the fastest-growing motivator for sustainability initiatives, up 10 percentage points in 2011 over 2009.[22] A 2012 Ernst & Young report also found a 40 percent year-over-year growth rate in sustainability shareholder resolutions.[23]

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[19] *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, TIME, May 28, 2012 *available at* http://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/#ixzz2PuCSJERO.

[20] *Id.*

[21] *Id.* "In the Information Age, customers have more access to information. They're more educated. They're no longer hidden from how their food is produced or how their iPods are made. And, because of things like social media, like-minded people more easily find each other, have their say and effect change. There's a level of transparency that wasn't there before." Robert Grosshandler, CEO of iGive.com.

[22] Brighter Planet, *supra* note 18.

[23] *Id. See also* Ernst and Young, *Leading Corporate Sustainability Issues in the 2012 Proxy Season* (2012), *available at* http://www.ey.com/Publication/vwLUAssets/Four_key_trends_of_the_2012_proxy_season/$FILE/1207-1372854_ProxyGovernance_CF0035_071612.pdf.

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Furthermore, public interest has recently been reflected in regulations governing corporate behavior. In August 2012, for instance, the SEC promulgated rules under The Dodd-Frank Wall Street Reform and Consumer Protection Act[24] requiring companies to disclose whether they manufacture products using so-called "conflict minerals" sourced from the Democratic Republic of Congo or adjoining countries[25] and to disclose payments to foreign governments and the U.S. Federal Government relating to oil, gas, and mineral extraction to address sustainability in the corporate supply chain.[26]

II. PNC AND THE PROXY FORUM

The evolving climate change and sustainability discourse and the related pressures that have led to increased corporate disclosure are mirrored in changes that have taken place in the proxy process—culminating in the PNC decision.

Increasingly, activist shareholders are making use of the SEC's proxy access rules to influence corporate actions having social-policy implications. Until recently, proposals related to social-policy goals

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[24] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"). For a discussion of the potential impact of environment-related rules promulgated by the SEC under the Dodd-Frank Act, *see* Jeffrey A. Smith, Danielle Sugarman & Robby Stein, *Dodd-Frank and the Environment: From the Belly of the Trojan Horse*, 4 ENV. LIABILITY 1 (2012).

[25] 17 C.F.R. §§ 240.13p-1 and 249.448; s*ee also* Dodd-Frank Act §1502; 15 U.S.C. § 78m(p) (2012).

[26] 17 C.F.R §§ 240.13q-1 and § 249.448; s*ee also* Dodd-Frank Act §1504; 15 U.S.C. § 78m(q) (2012).

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received a relatively low level of shareholder support.[27] They thus served mainly as a medium for one shareholder to express views to the board, to other shareholders, and to the public at large, rather than as a mechanism for corporate change.[28]

Recently, however, social-policy proposals have received growing levels of shareholder support. A survey published in the Manhattan Institute's Proxy Monitor indicated that from 2006 through 2012, the most commonly introduced shareholder proposals at Fortune 200 companies involved environmental issues, such as greenhouse gas emissions, climate-change risk, and general concerns about "sustainability."[29] In 2012, 41 percent of shareholder proposals listed on Fortune 250 companies' proxy ballots involved social policy issues.[30] Although many shareholder proposals never make it onto a proxy ballot, because the company invokes an exclusion under the SEC's proxy access rules, in recent years, the Staff has made a number of refinements to its analysis of social policy proposals

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[27] H. Rodgin Cohen & Glen T. Schleyer, *Shareholder vs. Director Control over Social Policy Matters: Conflicting Trends in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. Pol'y 81, 122-23 (2012).

[28] *Id.*

[29] Manhattan Institute's Center for Legal Policy, Proxy Monitor, *A Report on Corporate Governance and Shareholder Activism*, *available at* http://www.proxymonitor.org/pdf/pmr_04.pdf.

[30] Manhattan Institute's Center for Legal Policy, Proxy Monitor, *Political Spending, Say on Pay, and other Key Issues to Watch in the 2013 Proxy Season*, *available at* http://www.proxymonitor.org/Forms/pmr_05.aspx.

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that have made it increasingly difficult for companies to exclude proposals that deal with climate change and sustainability.[31]

A. Background: Rule 14a-8

Historically, Rule 14a-8 has provided the basis for shareholder access to proxies. Promulgated by the SEC under the Exchange Act of 1934, as amended,[32] Rule 14a-8 provides that a shareholder who has continuously held at least $2,000 in market value, or 1 percent, of a company's securities entitled to be voted at a meeting of the company's shareholders (and follows the procedural requirements thereunder) may submit a proposal, defined as a "recommendation or requirement that the company and/or its board of directors take action," to the company for inclusion in the company's proxy materials.[33]

If a shareholder satisfies the eligibility and procedural provisions of Rule 14a-8, a company may nevertheless exclude a proposal on certain enumerated substantive grounds.[34] In the event a company intends to so exclude a proposal, it must file its reasons with the SEC no later than 80 calendar days before it files its definitive proxy statement and form of proxy.[35] In response, the SEC usually provides the company its informal determination about exclusion on substantive grounds pursuant to Rule

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[31] Cohen & Schleyer, *supra* note 27, at 122-23.
[32] 17 C.F.R. § 240.14a-8.
[33] *Id.* §§ 240.14a-8(a)-(d).
[34] *Id.* § 240.14a-8(i).
[35] *Id.* § 240.14a-8(j).

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14a-8.[36] Although the SEC's interpretations of its own rule are not legally binding,[37] they provide useful guidance, especially given the costs (monetary and otherwise) of litigating the issue of exclusion of a shareholder proposal.

Among other exclusionary bases, a company may properly exclude a shareholder proposal under Rule 14a-8 if it deals with matters ordinarily handled by management on a day-to-day basis.[38] The so-called "ordinary business" exclusion has been the most frequently used justification when corporations seek to exclude policy-related proposals, and it was at issue in *PNC*.

B. The Ordinary Business Exclusion

Initially adopted in 1954,[39] Rule 14a-8 permits a company to exclude a shareholder proposal if it "deals with a matter relating to the company's ordinary business operations."[40] The SEC recognized that "management

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[36] The Division of Corporation Finance of the SEC has published a brief discussion of its informal procedures regarding shareholder proposals. *See* SEC, Division of Corporate Finance, *Informal Procedures Regarding* [sic] Shareholder Proposals, *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8-informal-procedures.htm. There, the SEC notes that its responses to such a submission by a company "reflect only informal views. . . [that] "do not and cannot adjudicate the merits of a company's position with respect to the proposal." *Id.*

[37] *See id.* ("Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy material.").

[38] *Id.* § 240.14a-8(i)(7).

[39] *See* SEC Release No. 34-4979 (Jan. 6, 1954).

[40] 17 C.F.R. § 240.14a-8(i)(7).

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cannot exercise its specialized talents effectively if corporate investors assert the power to dictate the minutiae of daily business decisions"[41] and adopted the ordinary business exception "to save management the cost and burden of including a proposal in proxy material that would be improper if raised by a shareholder at the annual shareholder meeting."[42] As early as 1976, however, the SEC established that the ordinary business exclusion may not be available if the subject matter of the proposal focuses on significant social policy issues, which, "as well as others that have major implications, will . . . be considered beyond the realm of an issuer's ordinary business operations."[43]

C. The Changing Tide

As set forth in Staff Legal Bulletin 14C,[44] prior to 2009, the Staff's framework for deciding whether to issue a no-action letter on a proposal involving environmental or public health issues, can be summarized as follows: (i) to the extent that a proposal focuses on an internal assessment

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[41] *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 883 (S.D.N.Y Apr. 26, 1993) (quoting *Medical Committee for Human Rights v. SEC*, 432 F.2d 659, 679 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972)).

[42] *Id.*

[43] SEC Release No. 34-12599 (July 7, 1976) (stating that "the term 'ordinary business operations' has been deemed on occasion to include certain matters which have significant policy, economic or other implications inherent in them. For instance, a proposal that a utility company not construct a proposed nuclear power plant has in the past been considered excludable . . . . In retrospect, however, it seems apparent that the economic and safety considerations attendant to nuclear power plants are of such magnitude that a determination whether to construct one is not an 'ordinary' business matter.").

[44] SEC, Division of Corporation Finance, *Shareholder Proposals, Staff Legal Bulletin No. 14C* (June 28, 2005), *available at* http://www.sec.gov/interps/legal/cfslb14c.htm.

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of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health, the Staff would find grounds for exclusion;[45] (ii) to the extent that a proposal focuses on a company minimizing or eliminating operations that may adversely affect the environment or the public's health, the Staff would not concur with the company's view that there is a basis for exclusion.[46]

In 2009, the Staff issued Staff Legal Bulletin No. 14E ("Bulletin 14E"),[47] which reframed how the Staff would treat no-action requests seeking to exclude proposals relating to environmental, financial, or health risks under Rule 14a-8. As opposed to focusing on whether a proposal deals with a company's internal assessment of risks or liabilities associated with climate change, the Staff stated that it would instead focus on the subject matter to which the risk pertains or that gives rise to the risk.[48] The Staff concluded that when the underlying subject matter of a 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)

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[45] *See*, *e.g.*, Xcel Energy Inc., SEC No-Action Letter, (Apr. 1, 2003).
[46] *See*, *e.g.*, Exxon Mobil Corp., SEC No-Action Letter, (Mar. 18, 2005).
[47] SEC, Division of Corporation Finance, *Shareholder Proposals, Staff Legal Bulletin No. 14E* (Oct. 27, 2009), *available at*: http://www.sec.gov/interps/legal/cfslb14e.htm.
[48] *Id.*

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as long as a sufficient nexus exists between the nature of the proposal and the company."[49]

During the 2010 proxy season, the Staff declined to issue no-action relief, i.e., it declined to agree with the company that a basis for exclusion existed, on the basis of the ordinary business exclusion where a proposal focused "primarily on the environmental impacts of [the company's] operations." By contrast, the Staff issued no-action letters, i.e., it agreed with the company's position that it could exclude a proposal, where the relevant proposal addressed "matters beyond the environmental impact of [the company's] decisions."

In 2011, as a result of the submission of proposals by a conservative shareholder group to a number of companies that called into question the quality, integrity, and accuracy of global warming science, and that asked for a report on the business risk to the company relating to climate change developments, the Staff expanded the approach outlined in Staff Bulletin 14E to risks that do not arise from the company's operations, but that may nevertheless have an impact on the company.[50] In the foregoing cases, the proposals did not imply that the companies' operations had any impact on global warming. Nevertheless, the Staff did not issue no-action relief, and

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[49] *Id.*

[50] *See* Cohen & Schleyer, *supra* note 27, at 139; *see also* Wal-Mart Stores, Inc., SEC No-Action Letter, (Mar. 28, 2011), 2011 WL 304197; General Electric Co., SEC No-Action Letter, (Feb. 8, 2011), 2010 WL 5124311; The Goldman Sachs Group, Inc., SEC No-Action Letter, (Feb. 7, 2011), 2010 WL 5196317.

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used newly-expanded language to note that the proposals focused on the significant policy issue of climate change.

D. *PNC*

In November 2012, BCAM gave notice to PNC of its submission of its proposal for inclusion in PNC's 2013 proxy statement. Shortly thereafter, PNC filed a letter with the Staff describing the reasons for why it believed it could exclude BCAM's proposal. On February 13, 2013, the SEC responded by declining to concur with PNC's determination, stating to PNC simply that:

> We are unable to concur in your view that PNC may exclude the proposal under rule 14a-8(i)(7). In arriving at this position, we note that the proposal focuses on the significant policy issue of climate change.

On March 14, 2013, PNC filed its definitive proxy statement for its 2013 annual meeting, in which PNC included BCAM's proposal.[51] Nevertheless, the PNC Board included a statement in opposition to the proposal, noting that preparing the report that the proposal sought "would require a monumental analytical effort and would conceivably require extensive additional training for employees, hiring of new employees, implementation of new systems and process, and the engagement of third-

[51] *See* The PNC Financial Services Group, Inc., Proxy Statement Pursuant to Section 14(a) of the SEC Act of 1934, *available at* http://www.sec.gov/Archives/edgar/data/713676/000130817913000071/lpnc_def14a.htm.

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party consultants."[52] The fate of the proposal, and others like it, is currently unknown. It is easy to envision a sequence of events, however, in which the substance of the Board's opposition gains substantial traction with shareholders in this exchange, but that subsequent oppositions on similar grounds rapidly become less successful, as companies have hired the staff, and internalized the analytical costs, because responsible day-to-day operations have required them to do that.

CONCLUSION

As seen through the lens of the PNC decision and the proxy process more generally, corporations have been required to respond simultaneously to stakeholder preferences, a shifting regulatory regime and the impacts of both climate change and sustainability initiatives on their financial results and prospects. Corporations have increasingly been compelled to change their business and their behavior as they relate to climate change and sustainability, and they have communicated these changes through increased disclosure – both mandatory and voluntary.

Developments such as the SEC Release on climate disclosure and the Conflict Minerals and resource extraction issuer rules under Dodd-Frank have spurred an increase in both the volume and breadth of mandatory reporting. Stakeholder pressure and strategic considerations have led to a similar shift in voluntary reporting. Ten years ago, for instance, approximately one dozen

[52] *Id.*

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Fortune 500 companies issued a CSR or sustainability report.[53] Now a majority does.[54]

Just as there is no single driving force behind the proliferation of these reports on climate change and sustainability, there is no dominant template or tone for their contents.[55] Some companies have offered a reflexive trade to their shareholders in lieu of fighting a protracted proxy and media campaign. Others have tried to seize control of the debate early, to channel shareholders' attention and reap independent public relations rewards.[56] Still others appear to have concluded that there was no harm, and potentially some good, in being at least partially transparent with their shareholders and the public on detailed technical and strategic analyses that already were being performed for internal planning reasons.[57] The wide range of templates for sustainability disclosure has recently led to a growing movement to create standards to govern these types of disclosures.[58]

The shift in process has been mirrored by a shift in substance. One of the most striking disclosure developments in the past decade has been the

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[53] *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, *supra* note 19.

[54] *Id.*

[55] Jeffrey A. Smith & Matthew Morreale, *Disclosure Issues*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW, 472-473 (2007).

[56] *Id.*

[57] *Id.*

[58] For example, the Sustainability Accounting Standards Board ("SASB") is a non-profit organization currently engaged in the development and dissemination of industry-specific sustainability accounting standards for use by publicly-listed corporations in disclosing material sustainability issues for the benefit of investors and the public. Over the next several years, SASB will be developing standards for 88 industries in 10 sectors in order to guide disclosures in standard filings such as the Form 10-K and 20-F. *See* SUSTAINABILITY ACCOUNTING STANDARDS BOARD, *available at* http://www.sasb.org/sasb/ (last visited Apr. 19, 2013).

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improvement in the detail and quality of both mandatory and voluntary environmental reports provided by many leading companies.[59] Ultimately, today's disclosure regime is worlds removed from the early days of reporting on climate change and sustainability, in part because of the complexity of climate change and sustainability issues, and in part because of the maturation and increasing sophistication of the audience for reporting on all sustainability topics.

Finally, the *PNC* decision, and others like it, is likely to have knock-on effects. PNC and other financial institutions that are themselves, accumulators of risk, may feel as if they have no alternative but to step, in effect, into the shoes of CALPERS and BCAM, demanding increased disclosure from the companies in which they have a long-term financial interest.

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[59] Smith & Morreale, *supra* note 55.

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