

Legal Updates

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Hurry Up and Wait: 2010 Climate Change Disclosure May Impact 2012 Proxy Access

If we had surveyed the corporate disclosure teams of public companies in August 2010, and asked them if they were pondering their climate change disclosure obligations, we believe the uniform response would have been a resounding “no.” Instead, these folks were hurrying to digest the Dodd-Frank Act and its consequences, including immediately effective changes in the rules of the road regarding credit ratings disclosures, and soon thereafter, the SEC’s final proxy access rules. The response would have been very different had we conducted our survey in early February 2010, after the SEC [approved](#) its [Interpretive Release](#) addressing a public company’s disclosure obligations with respect to business or legal developments related to climate change.

The timing and mandates of the release suggested that public companies needed hurriedly to review and assess many factors, including whether pending legislation and regulations under consideration were reasonably likely to be enacted. In that case, unless management determined that these developments were not reasonably likely to occur, companies were required to proceed on the assumption that the legislation or regulations would be enacted, and disclose any potential material consequences to the company that enactment would be reasonably likely to have.

In hindsight, climate change disclosure became a classic hurry up and wait game. While the SEC suggested in the release that it planned to hold a public roundtable on disclosure regarding climate change matters in the spring of 2010, and would “determine whether further guidance or rulemaking relating to climate change disclosure is necessary or appropriate,” these plans were quickly eclipsed by financial services reform legislation, continuing issues in the financial markets’ performance, and, presumably, by the unavoidable conclusion that new energy legislation was not going to become a reality in the current Congress. So the hurry up aspect of climate change disclosure in 2010 came to an end, and the wait began. The SEC has been silent in terms of official statements on the topic since publishing the release. There have been statements made by commissioners and staff regarding a desire for improved risk factor disclosure, which has application, but not exclusive application, to this topic.

However, a new hurry up and wait game soon began – this time for the topic of proxy access. On Aug. 25, 2010, using the authority conferred on it by the Dodd-Frank Act, the

SEC [approved new rules for proxy access](#), which purported to change significantly the director nomination process for public companies.

The new rules would give certain shareholders access to public company proxy materials in order to solicit votes for director candidates nominated by those shareholders. Companies were given little time to digest the rules and prepare for their impact. If they mailed their 2010 annual meeting proxy on or after March 13, 2010, they were subject to the new rules for their 2011 annual meetings, and might have received Schedule 14N's alerting them to possible consorting shareholders as early as Oct. 18, 2010.

Then hurry up changed once again – to wait. A lawsuit was filed Sept. 29, 2010, by the Business Roundtable and Chamber of Commerce of the United States challenging the proxy access rules, and a stay of their effectiveness was requested by the plaintiffs from the court and from the SEC. On Oct. 4, 2010, the SEC agreed to a stay of the proxy access rules, in all likelihood delaying their effectiveness until the 2012 proxy season.

Is there a lesson for public companies caught up in the game of hurry up and wait? We believe there is. And that is – do not relax and wait.

While many companies are tempted to treat climate change disclosure and proxy access as sleeping dogs to let lie, when coupled together, it doesn't take a crystal ball to see that if proxy access comes back, a new forum will exist for interested parties first to evaluate, and second to take issue with a company's approach to climate change – a topic which historically has not been subject to shareholder address.

It was only one year ago on Oct. 27, 2009, that the SEC issued [Staff Legal Bulletin No .14E \(CF\)](#), modifying its prior approach to “proposals relating to risk” under Rule 14a-8(i)(7), preventing companies from continuing to exclude on ordinary business grounds shareholder proposals relating to environmental, financial or health risks if the proposal “focused on a company engaging in an internal assessment of the risks and liabilities that the company faces as a result of its operations”

Staff Bulletin 14E, the release, and proxy access (even in its current stayed form) are evidence that in the future, a company's climate change policies (and their consequences) are not only for management to know, but are subject to shareholder review and engagement. By making it clear that climate change disclosure should appear, if material, in companies' disclosure documents, the SEC has laid out a path by which shareholders can conduct their review and voice their views, as the case may be, by using their right to proxy access should it return following the litigation.

No one should be terribly surprised to read the Oct. 12, 2010, report by ISS Corporate Services, “Disclosing Climate Risks: How 100 Companies Are Responding to New SEC Guidelines,” which suggests that the volume of climate change disclosure did not meaningfully increase as a result of the release.

We believe the timing of the release, coupled with the impossibility of predicting what form of climate change regulation or legislation is reasonably likely to be enacted – let alone the material consequences that could result from all the different forms being proposed in Congress, at the EPA, at the state level, and internationally – made disclosure

changes in 2010 nearly impossible. We also believe that public companies in the energy industry for whom these issues are clearly material had an established practice of focusing on them, and their disclosure was largely already solidified in this area (as the release acknowledged).

Companies might be tempted to treat this year no differently than the last. Commentators suggest that Congress is unlikely to act on an energy bill before the new members take office in January 2011, and the form of the legislation, and consequently its likely impact, is still largely unknown. EPA regulation of greenhouse gas emissions under its 2009 endangerment finding is being challenged in the courts and perhaps in Congress. The uncertainties are there.

But uncertainty does not necessarily mean that silence is the answer. And it definitely does not mean that the topic should be wholly ignored in the process of developing 2011 disclosures. The release identifies a broad range of topics under the climate change umbrella, many of which are not directly related to potential federal legislation (which for the time being may be far enough off the radar screen not to be specifically addressed). See our [recent memo](#) summarizing the content of the release. There are a number of potentially significant issues associated with this topic, particularly from the standpoint of some consumers' and investors' preferences and other indirect effects. What can also be taken into account as the drafting of the 10-K proceeds is what your shareholders are concerned about in the area of climate change. Companies that consider the framework of the release, and the past and present concerns of their more vocal shareholders (or those of other similarly situated companies), may be able to avoid SEC comment on their 2011 climate change related disclosures (or lack thereof) and, if proxy access returns, director nominees supported by the proponents of corporate policy changes in this area.

In summary, we believe the climate change disclosure issue is still important for public companies in this next 10-K season. Not only might the SEC review disclosure more closely, but shareholders with an interest in this topic are more likely to increase their focus. Recent articles in the financial press indicate increasing investor interest in socially responsible investments, leading to the conclusion that the number of investors in this category may be increasing. Companies have a pass for proxy access this year, but disclosure decisions made over the next four months may very well become the basis for shareholders using proxy access in 2012.

McGuireWoods LLP assists large and small public companies in connection with disclosure and compliance matters under the federal securities laws, and is actively engaged in monitoring developments in this area. Our climate change practice group consists of seasoned practitioners and consultants from our environmental, energy, corporate and securities, capital markets, litigation and government relations groups. We can assist with climate change and greenhouse gas disclosure matters for our public clients.

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MORE INFORMATION

[Jill Misage Webb](#)

804.775.1180

jwebb@mcguirewoods.com

[Jane Whitt Sellers](#)

704.373.8967

jsellers@mcguirewoods.com

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