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SABIN CENTER FOR CLIMATE CHANGE LAW

LEGAL TOOLS FOR CLIMATE ADAPTATION ADVOCACY:

Securities Law

By Nina Hart

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1. INTRODUCTION

Corporations today face increasing risks from climate change. These risks threaten not only the operations and infrastructure of the corporations, but ultimately their long-term financial soundness as well. For example, as has been noted with respect to the oil and gas industries, refineries often do not have high profit margins because most of the profits come from extraction. Therefore, refineries, which frequently are near the coasts and vulnerable to increasing sea levels and storms surges, could suffer material financial losses if their operations were disrupted.[1] To prevent this physical infrastructure or operational damage, as well as the attendant financial losses, corporations need to adapt and implement measures to address these risks.

This chapter focuses on how governments and investors can use financial disclosure as a tool to incentivize or pressure publicly traded companies to undertake climate change adaptation measures. The chapter explains why financial disclosure is a powerful tool, describes the relevant regulatory schemes, and outlines both regulatory or enforcement and market-based strategies for improving corporate responses to climate change.

2. WHY FOCUS ON FINANCIAL DISCLOSURE

Financial disclosure is the foundation of corporate accountability, both to government regulators that work to ensure a fair marketplace and to shareholders concerned about the integrity and soundness of their investments. For investors, reviewing financial disclosure reports presents several opportunities in the context of climate change. First, investors can use these reports to hold corporations accountable for failing to report material financial risks that are attributable to climate change.[2] Second, investors may be able to use disclosure reports to

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[1] Center for Science and Democracy at the Union of Concerned Scientists, *Stormy Seas, Rising Risks: What Investors Should Know About Climate Change Impacts at Oil Refineries*, 2-3 (2015), http://www.ucsusa.org/sites/default/files/attach/2015/02/stormy-seas-rising-risks-ucs-2015.pdf.

[2] *See* Part III *infra*.

incentivize or pressure corporations to take steps to address risks from climate change.[3] This second opportunity is particularly important because corporations possess expertise, innovative capacity, and financial leverage that give them great potential to contribute to efforts to combat climate change.[4]

Further, although sometimes framed as a burden on corporations, financial disclosure presents corporations with new opportunities and potential benefits. Numerous executives and shareholders have recognized that improved financial disclosure with respect to climate change is in the financial interest of the corporations.[5] In particular, such disclosure requires corporations to identify the best long-term investments, which ultimately safeguards and improves profitability. In fact, evidence shows that the corporations making the greatest effort to implement adaptation measures are financially outperforming their competitors.[6] Thus, to the extent that disclosure can trigger corporations to consider investing more in adaptation measures, it is in their best interests to improve financial disclosure of climate change risks.

Although financial disclosure of risks related to climate change has been identified as beneficial to corporations, the question remains as to whether disclosure can play a role in encouraging corporations to undertake adaptation efforts. For example, corporations face increased risks to infrastructure and other assets from temperature variations and the corresponding impacts, including "water scarcity, flooding, extreme weather and temperature events, [and] sea level rise."[7] Disclosure can provide investors with the information necessary

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[3] *See* Part IV *infra*.

[4] *See* Swenja Surminski, *Private-sector adaptation to climate risk*, 3 Nature Climate Change 943, 944 (2013), http://www.nature.com/nclimate/journal/v3/n11/pdf/nclimate2040.pdf.

[5] Stuart Hammer & Lauren M. Boccardi, *Climate Change Disclosure*, NATIONAL ASSOCIATION OF CORPORATE DIRECTORS (July 26, 2011), http://www.directorship.com/climate-change-disclosure-in-sec-filings/ [https://perma.cc/PN2V-TWZD].

[6] CDP, *The A List: The CDP Climate Performance Leadership Index 2014*, 9 (2014), https://www.cdp.net/CDPResults/CDP-climate-performance-leadership-index-2014.pdf (noting that corporations that invest in activities to reduce emissions have a higher rate of return on investment); *see also* Jo Confino, *Sustainable Corporations Perform Better Financially, Report Finds*, THE GUARDIAN (Sept. 23, 2014), http://www.theguardian.com/sustainable-business/2014/sep/23/business-companies-profit-cdp-report-climate-change-sustainability.

[7] IPIECA, *Addressing Adaptation in the Oil and Gas Industry*, 4 (2013), *available at* http://www.ipieca.org/publication/addressing-adaptation-oil-and-gas-industry.

to ensure the corporations are taking steps to reduce risks to operations or infrastructure from climate change. Separately, to the extent that government entities bring actions alleging nondisclosure that amounts to securities fraud, settlements of these lawsuits might be an avenue through which to require corporations to undertake adaptation measures. Thus, disclosure reports, combined with other regulatory and enforcement tools, may prove an important tool for investigating or assessing corporations' adaptation measures.

3. ENFORCEMENT AND REGULATORY SOLUTIONS

3.1 SEC Regulation

Since the 1930s, the Securities and Exchange Commission (SEC) has required public companies to file annual disclosure reports, 10-Ks, and other periodic reports that include information about material financial risks facing the companies.[8] Pursuant to its broad statutory authority to require "information and documents" and annual or quarterly reports,[9] the SEC has periodically refined the reporting requirements via regulations and also issued interpretive guidance documents, which are meant to assist corporations in determining what to report.

3.1.1 Relevant Regulations

There are four regulations, promulgated pursuant to the SEC's authority under the Securities Exchange Acts of 1933 and 1934, relevant to disclosure of climate change risks. First, Item 101 requires corporations to describe all material information related to its business operations, such as the cost of complying with environmental laws and regulations.[10] Second, Item 103 requires corporations to disclose pending legal proceedings, including proceedings with environmental claims, that could materially impact their operations, except where the

[8] Securities Exchange Act of 1933, 15 U.S.C. §§ 77a–77aa (2014); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2014).

[9] 15 U.S.C. § 78m (2014).

[10] 17 C.F.R. § 229.101 (2014); *id*. § 229.101(c)(1)(xii); *id*. § 229.101(h)(4)(xi).

proceedings are "ordinary routine litigation incidental to the business."[11] Third, Item 303, known as Management Discussion and Analysis (MD&A), requires corporations to discuss their "financial condition, changes in financial condition and results of operations."[12] This discussion must include trends and uncertainties related to liquidity and capital resources, and should "provide to investors and other users information relevant to an assessment of the financial condition and results of operations" of the corporation.[13] Item 303 analysis, however, grants corporations a great deal of discretion in terms of determining what constitutes a trend or material uncertainty.[14] Finally, Item 503 requires corporations to provide information about "the most significant factors that make [an] offering speculative or risky" and how those risks "affect[] the issuer or the securities being offered."[15]

3.1.2 2010 Interpretive Guidance

In 2010, the SEC issued its first, and to date, only guidance document explicitly related to disclosure of material risks related to climate change.[16] Of import is the fact that the SEC acknowledges that risks attributable to climate change fall within the scope of the existing regulatory scheme.[17] It then identifies four topics that might trigger the disclosure provisions: 1) impact of legislation and regulation; 2) international accords; 3) indirect consequences of regulation and business trends; and 4) physical impacts of climate change.[18]

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[11] 17 C.F.R. § 229.103 (2014). However, "ordinary routine litigation incidental to business" need not be included. *Id*.
[12] 17 C.F.R. § 229.303 (2014).
[13] *Id*.
[14] Management's Discussion & Analysis of Financial Condition & Results of Operations; Certain Investment Company Disclosures, SEC Release, Nos. 33-6835, 34-26831, IC-16961 (May 18, 1989) *available at* http://www.sec.gov/rules/interp/33-6835.htm.
[15] 17 C.F.R. § 229.503 (2014).
[16] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 (Feb. 8, 2010), http://www.sec.gov/rules/interp/2010/33-9106.pdf.
[17] *Id*. at 3.
[18] *Id*. at 22–27.

3.1.3 Strategies for Investors

3.1.3.1 Petitioning the SEC

As noted above, the SEC sometimes issues interpretive guidance to assist corporations with understanding their disclosure obligations. Sometimes, these documents are the result of public petitions. In fact, the 2010 interpretive guidance addressing climate change was the result of a public petition filed by over forty entities, including state government entities and nonprofits.[19]

Although the SEC has issued interpretive guidance on climate change, more needs to be done. As a 2011 report by Ceres noted, after the 2010 interpretive guidance, more corporations addressed climate change, but they did so in brief, superficial statements.[20] New petitions for interpretive guidance can focus on the shortcomings of the 2010 guidance, and request more specific examples of when the disclosure provisions might be triggered and more guidance regarding the depth of analysis required. For instance, as the SEC has acknowledged, a number of companies have released carbon emissions and other quantitative data to nonprofits and nongovernmental organizations but not included such data in their SEC filings.[21] This oddity indicates that it may be appropriate to petition the SEC to issue further guidance on this and similar issues. Further, although the 2010 guidance gives some examples of events or actions falling within the four topics potentially triggering disclosure requirements,[22] the guidance fails to give concrete guidance regarding how such information should be disclosed.

In other contexts, the SEC has provided more specific guidance. For example, in the context of Rule 14a-9, which covers false or misleading statements in proxy statements, the SEC has indicated that a false or misleading statement in a solicitation includes "[p]redictions as to specific future market values" and "[m]aterial which directly or indirectly impugns character,

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[19] 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.
[20] JIM COBURN, SEAN H. DONAHUE & SURIYA JAYANTI, DISCLOSING CLIMATE RISKS & OPPORTUNITIES IN SEC FILINGS 20 (Ceres 2011) *available at* http://www.ceres.org/resources/reports/disclosing-climate-risks-2011.
[21] *See* Commission Guidance, *supra* note 16, at 8-9.
[22] Part III. a. ii., *supra*.

integrity or personal reputation . . . without factual foundation."[23] Similar examples could be given to provide clearer guidance to corporations and investors on what should be disclosed regarding climate change adaptation. For instance, although the SEC noted in its 2010 guidance document that physical impacts should be disclosed, it could further specify that corporations must address their awareness of these impacts and what steps they are taking to address them.[24] The SEC could also require that companies quantify these risks as opposed to make generic statements indicating that their assets or operations might be negatively impacted by these risks.

A description of how to file a petition and list of all past public petitions is available here: http://www.sec.gov/rules/petitions.shtml.

3.1.3.2 Filing Comments

The public may file comments on all proposed rulemakings and certain other initiatives undertaken by the SEC. Currently, the SEC is performing a disclosure effectiveness project, and focusing initially on disclosures required in Forms 10-K, 10-Q, and 8-K.[25] The four regulations discussed above[26] address information provided in annual and other periodic filings, and the public may file comments online regarding disclosure effectiveness, including as it pertains to climate change.

Comments may be filed here: https://www.sec.gov/cgi-bin/ruling-comments. Examples of past comments from the Carbon Tracker Initiative are available here: http://www.carbontracker.org/wp-content/uploads/2015/02/Feb-13-2015-SEC-Letter-A3.pdf.

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[23] 17 C.F.R. § 240.14a-9 advisory note.

[24] Recently, shareholders of Phillips 66 requested similar information. Specifically, they asked that the company disclose not only that it faces risks from rising sea levels, but also to include information "regarding the company's awareness of and preparation for" the resulting risks. Phillips 66 Physical Climate Impacts 2015 (2015), *available at* http://www.ceres.org/investor-network/resolutions/phillips-66-physical-climate-impacts-2015.

[25] SEC, Disclosure Effectiveness, https://www.sec.gov/spotlight/disclosure-effectiveness.shtml (last visited Mar. 19, 2015).

[26] Part III. a. i., *supra*.

3.1.3.3 Demand Letters

Investors may file demand letters with the SEC, which most frequently allege that a particular corporation has failed to disclose all material financial information. If an investor believes that such a failure violates securities laws, then the investor may file a request for an investigation with the SEC.

Investors have already filed demand letters questioning disclosure of climate change-related risks. For instance, in November 2013, a group of investors asked the SEC to investigate the disclosure practices of three biogenic energy companies.[27] The investors alleged that the companies misrepresented the carbon neutrality of their operations, and argued that this misrepresentation exposed the companies and investors to risk from regulatory changes. The decision from the SEC on whether to review the disclosures is pending.[28]

Instructions on how to file an online complaint or demand letter are available here: https://tts.sec.gov/oiea/Complaint.html.

3.1.3.4 Shareholder Suits

If corporations fail to disclose material financial information related to climate change that falls within Items 101, 103, or 503, shareholders might consider filing 10b-5 class actions suits.[29] Rule 10b-5 prohibits any person from, *inter alia*, "mak[ing] any untrue statement of a material fact or []omit[ting] to state a material fact . . . in connection with the purchase or sale of

[27] Letter from Partnership for Public Integrity to the Securities and Exchange Commission, (Nov. 20, 2013), http://www.pfpi.net/wp-content/uploads/2013/11/Investor-letter-to-SEC-on-bioenergy-Nov-20-2013.pdf. Although the SEC sometimes indicates publicly that it is conducting an investigation, the best way to find out if a decision has been made likely will be from any public announcements made by the Partnership for Public Integrity on its web site.

[28] The investors followed up on their SEC demand letter with a shareholder proposal to force Dominion to evaluate the environmental and climate change impacts of its bioenergy strategy. Dominion Energy's attempt to strike the shareholder proposal from its 2014 AGM was rejected by the SEC on February 27 2014, Dominion Resources, Inc., SEC No-Action Letter, (Feb. 27, 2014), http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/marionedey022714-14a8.pdf.

[29] Item 303 likely cannot ever be enforced in court because the SEC has taken the position that the provision of most information defined as "forward-looking" is voluntary. Suzanne J. Romajas, *The Duty to Disclose Forward-Looking Information: A Look at the Future of MD&A*, 61 FORDHAM L. REV. S245, S253 (1993).

any security."[30] However, potential plaintiffs face a number of hurdles with respect to these suits.

First, individual plaintiffs must prove a number of elements to mount a viable 10b-5 suit. The key elements are listed below:

- Purchaser or seller: plaintiffs must typically be a purchaser or seller of shares whose value has allegedly been inflated due to false statements or omissions of material fact[31]
- Materiality: the fact misrepresented or omitted must be material, which means a reasonable investor would consider it important in deciding whether to sell or purchase[32]
- Scienter: the Supreme Court has never clarified the precise level of intent required, but the defendant's action must show that it acted with a "mental state embracing intent to deceive, manipulate, or defraud"[33]
- Reliance: plaintiffs must have relied on the fact in making a decision[34]
- Damages: plaintiffs must have suffered an economic loss[35]
- Causation: plaintiffs must show a link between misrepresentation and subsequent economic loss[36]

In a number of cases, the damages element has proved difficult for plaintiffs to overcome because plaintiffs must be able to calculate and supply proof of actual damages.[37] In the context of climate change, however, a greater difficulty might be assessing whether the risks identified are "material" because climate change and its attendant harms sometimes are

[30] 17 C.F.R. § 240.10b-5 (2014).
[31] Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983).
[32] Basic v. Levinson, 485 U.S. 224 (1987). In the context of contingent or speculative events, a "fact-specific inquiry" is required. *Id*. at 240.
[33] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 (2007). Complaints will survive motions to dismiss only if they show that an inference of scienter, which is drawn from the facts presented, is "cogent and at least as compelling as any opposing inference one could draw from the facts." *Id*. at 324.
[34] Halliburton, Inc. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407-08 (2014) (reaffirming that plaintiff can establish reliance through rebuttable presumption of "fraud on the market").
[35] *Id*. at 2407.
[36] Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 346 (2005).
[37] *See* Pierre J. LeLandais & Co., Inc. v. MDS-Atron, Inc., 543 F.2d 421, 425 (2d Cir. 1976) (dismissing plaintiffs' 10b-5 claim for failure of "proof of what actual damages, if any, they sustained as a result of the exchange").

thought of as remote.[38] This difficulty may explain why shareholder suits involving nondisclosure of risks from climate change have not yet been brought.

With respect to climate change, these elements are largely why no suits have yet been brought challenging a company's failure to disclose material information.

Although 10b-5 suits may be difficult to mount, if viable, they present plaintiffs with several opportunities. First, to the extent that target corporations deny that certain risks related to climate change are material or need to be disclosed, this might be an opportunity to present scientific and financial data to the contrary in court filings or proceedings. Second, such lawsuits can create the potential for creative settlements that require corporations to disclose certain information related to adaptation measures they have already committed to undertake, or to take new affirmative adaptation measures, such as to assess and disclose increased risks to existing assets from climate change.

Aside from 10b-5 suits, shareholders may consider bringing actions pursuant to Section 11 of the Securities Exchange Act of 1933. Section 11 gives private plaintiffs an express right of action for any false or misleading statement contained in a registration statement.[39] A registration statement must contain the same items relevant to climate change as the 10-k reports discussed above.[40] To sustain a claim under Section 11, plaintiffs must prove four elements:

- Purchaser: plaintiff must have purchased shares pursuant to the allegedly false registration statement[41]
- Material misrepresentation or omission of material fact[42]
- Defendants must be covered by the statute: Section 11 lists who may be liable in these lawsuits[43]

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[38] Kevin M. LaCroix, *Will the SEC's New Interpretive Guidance Open the Door to Climate Change Disclosure Suits?*, D&O Diary (Feb. 8, 2010), *available at* http://www.dandodiary.com/2010/02/articles/environmental-liability/will-the-secs-new-interpretive-guidance-open-the-door-to-climate-change-disclosure-suits/ (noting the view that "climate change related considerations [are] remote and distant future concerns").
[39] 15 U.S.C. § 77k (2014).
[40] 15 C.F.R. 229.10 (2014).
[41] 15 U.S.C. § 77k(a).
[42] *Id*.
[43] *See id*. § 77k(a), (b).

- Statute of limitations - the lawsuit must be commenced within one year after discovery of the misrepresentation or omission "or after such discovery should have been made by the exercise of reasonable diligence," and must be brought, regardless, within three years after the security was offered to the public[44]

The statute includes a provision on how to calculate damages, indicating that plaintiffs still must show economic loss as with 10b-5 suits.[45] However, reliance and scienter need not be shown.

3.1.4 State "Blue Sky" Laws

State securities laws, known as "blue sky laws," vary in scope and in terms of which entity is in charge. Some give the government great enforcement authority while others are more limited. This section will provide an overview of some of the different statutory schemes as exemplified by New York, California, and Massachusetts, and will discuss how government entities can use these statutes to improve disclosure practices related to adaptation.

For a list of state authorities with jurisdiction over securities disclosure, visit http://www.seclaw.com/stcomm.htm.

3.1.4.1 New York

New York's blue sky law, the Martin Act, is often heralded as the most powerful in the nation. This is in large part because of the vast investigatory and enforcement powers given to the Attorney General. For instance, the Attorney General may investigate any wrongdoing that an entity "shall have employed, or employs, or is about to employ."[46] Additionally, the Attorney General may subpoena any documents deemed relevant or material to the investigation, and failure to comply without reasonable cause may result in the noncompliant party being charged with a misdemeanor.[47] Further, once an action has been opened, failure to comply with a subpoena for testimony or documents constitutes *prima facie* proof that the

[44] 15 U.S.C. § 77m (2014).
[45] 15 U.S.C. § 77k(e).
[46] N.Y. GEN. BUS. LAW § 352(1) (McKinney 2013).
[47] N.Y. GEN. BUS. LAW § 352(4).

defendant has engaged in fraudulent practices.[48] Moreover, the Attorney General may initiate both civil and criminal actions.[49]

3.1.4.2 California

California's blue sky law vests jurisdiction over securities regulation with both the Attorney General and a Corporations Commissioner.[50] The investigatory and enforcement powers of both the Attorney General and Commissioner mirror those of New York.[51] While the Attorney General and Commissioner may act independently, they may also work together on investigations.[52] However, the two authorities may not bring duplicative investigations or actions.[53]

3.1.4.3 Massachusetts

Massachusetts does not vest authority over securities regulation with the Attorney General. Instead, the authority is lodged with the Secretary of the Commonwealth.[54] The Secretary may investigate and issue subpoenas to determine if the law has been or is about to be violated.[55] Failure to comply with a subpoena may result in being held in contempt of court.[56] As in New York and California, jurisdiction extends to both civil and criminal actions.[57]

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[48] N.Y. GEN. BUS. LAW § 353(1).
[49] *Id*. §§ 353(1), 358.
[50] CAL. CORP. CODE § 25531 (West 2013); *id*. § 25606.
[51] *Compare* CAL. CORP. CODE § 25531 (West 2013), *with* N.Y. GEN. BUS. LAW § 352 (McKinney 2013).
[52] CAL. CORP. CODE § 25606; CAL. GOV'T. CODE § 12659.
[53] *See* C. HUGH FRIEDMAN ET AL., CAL. PRAC. GUIDE: CORPS. Ch. 5-C (Rutter Group et al. eds., 2012).
[54] MASS. GEN. LAWS c. 110A, § 406 (2014).
[55] *Id*. § 407.
[56] *Id*.
[57] *Id*. §§ 409, 410.

4. MARKET-BASED SOLUTIONS

4.1 Shareholder Activism

4.1.1 Shareholder Proposals

Another way investors may affect corporate disclosure practices is through shareholder proposals. Under SEC Rule 14a-8, shareholders may submit proposals for consideration, and the corporation is obligated to follow certain procedures upon receiving them.[58]

Under Rule 14a-8, investors must meet certain eligibility thresholds in order to submit proposals. First, an investor must "continuously h[o]ld at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for a least one year by the date" the proposal is submitted.[59] The investor must hold these securities at least until the date of the meeting at which the proposal is considered.[60]

Each investor may submit only one proposal per shareholder meeting, and the proposal must not exceed 500 words.[61] Deadlines for submission are most frequently found in proxy statements from the previous year's annual meeting, in Form 10-Q, or in shareholder reports of investment.[62]

Corporations may exclude proposals from consideration if they are filed late or have other deficiencies. The grounds for exclusion most likely to present obstacles for disclosure and adaptation measures are:

- Relevance: the proposal relates to operations that account for less than five percent of a company's total assets and less than five percent of its net earnings and gross sales, and is not otherwise significantly related to the company's business.
- Management functions: the proposal cannot relate to the company's ordinary business operations.
- Substantially implemented: if the company has already substantially implemented the proposal.

[58] 17 C.F.R. § 240.14a-8.
[59] 17 C.F.R. § 240.14a-8(b).
[60] *Id*.
[61] 17 C.F.R. § 240.14a-8(c), (d).
[62] 17 C.F.R. § 240.14a-8(e).

- Duplication: the proposal substantially duplicates another proposal previously submitted by another proponent that will be included in the proxy materials for the same meeting.
- Resubmission: if a proposal deals with substantially the same subject matter as another proposal that has been included in the proxy materials within the preceding five years, the company may exclude it for any meeting held within three years of the last time it was included depending on the proportion of the vote the proposal previously garnered.[63]

A corporation that seeks to exclude the proposal must demonstrate why it is improper.[64] If a proposal is considered at a shareholder meeting, approval depends on the specific voting rules set forth by each individual corporation in its certificate of incorporation or bylaws.

In recent years, a number of proposals addressing disclosure and adaptation have been submitted to corporations. For example, shareholders of Energen Corporation and Consol Energy, Inc., requested that the companies prepare a report addressing how the company will manage financial consequences arising from climate change, such as increased risks of stranded assets due to lowered demand for oil, and arising from climate change policies, including the 2°C target.[65]

Although these proposals did not seek to impose specific adaptation measures on a company or address disclosure in federal or state regulatory filings, proposals might make such a request. However, as noted above, corporations might attempt to exclude proposals suggesting specific adaptation measures under Rule 14a-8(i) on the basis that they deal with "ordinary business operations."[66] Thus, a shareholder proposal promoting disclosure of climate change risks rather than specific adaptation measures may be more likely to avoid exclusion

[63] 17 C.F.R. § 240.14a-8(i).

[64] 17 C.F.R. § 240.14a-8(f), (g).

[65] Energen Carbon Assset Risk 2015 (2015), *available at* https://www.ceres.org/investor-network/resolutions/energen-carbon-asset-risk-2015; Consol Carbon Asset Risk 2015 (2015), *available at* https://www.ceres.org/investor-network/resolutions/consol-carbon-asset-risk-2015.

[66] There is no set definition of what constitutes an "ordinary business operation." However, the SEC has previously indicated that the exclusion should not be applied so rigidly that it would prevent consideration of issues "which have significant policy, economic or other implications inherent in them." Securities and Exchange Comm'n, *Adoption of Amendments Relating to Proposals by Security Holders*, 41 Fed. Reg. 52994-01, 52997-98 (Dec. 3, 1976). Whether a proposal is one with such significant implications or one that is "mundane in nature" requires a case-by-case determination.

while still encouraging companies to consider strategies to address increased risks to infrastructure or other assets resulting from climate change.

Examples of shareholder proposals can be accessed in a Ceres database: http://www.ceres.org/investor-network/resolutions.

4.1.2 Letters to Management

Aside from filing formal proposals, investors should also consider sending letter requests to management or the Board of Directors. Such letters are not subject to Rule 14a-8, a fact that presents investors with both opportunities and risks. First, substantive requests that might be excluded under Rule 14a-8(i) can be submitted in letters. Sending informal letters presents a significant opportunity for investors to have their ideas heard and indicate to management that they are interested in adaptation measures not just for moral or policy reasons but for financial reasons as well. On the other hand, the corporation need not respond to these letters at all, whereas with proposals, it must give a reason for excluding them.

4.2 Strategies for Framing the Issues

Corporations are primarily concerned with two things: the financial bottom line and reputation in the marketplace. These concerns may persuade corporations to undertake adaptation measures even more so than improving disclosure practices. For instance, in January 2015, Shell Oil Company affirmatively urged its shareholders to approve a proposal that would require the corporation to test whether its business model is compatible with the 2°C target for combatting climate change.[67] This public support for the resolution came the same day that the corporation announced that it was forced to cut costs in the amount of $15 billion due to falling oil prices,[68] suggesting that the corporation is primarily concerned with the long-term financial security of the corporation.

Thus, shareholder proposals or letters should attempt to persuade corporations that the requests made are both reasonable and in the corporations' best interests. For example, the

[67] Damian Carrington, *Shell Urges Shareholders to Accept Climate Resolution*, THE GUARDIAN (Jan. 29, 2015), http://www.theguardian.com/environment/2015/jan/29/shell-urges-shareholders-to-accept-climate-change-resolution.
[68] *Id*.

shareholder proposal submitted to Energen Corp. focused on the growing international concern that demand for oil will drop by 2020 and corresponding industry productions costs will leave the company financially "vulnerable" if steps are not taken to change its practices.[69] Citing the Carbon Tracker, the proposal stated that projects requiring "over 95 [dollars]/barrel . . . are clearly in excess of the requirement for fossil fuel investment in a 2 degree scenario, and that there is an estimated 1.1 trillion of capital expenditures earmarked for high cost projects out to 2025 needing a price of over 95 to generate an economic return."[70] Similarly, the proposal submitted to Consol Energy, Inc. focused on the 2°C target, its effect on demand for coal and natural gas, and highlighted a Goldman Sachs report indicating that "most thermal coal growth projects will struggle to earn a positive return for their owners."[71] New proposals can similarly point out that adaptation measures and improved disclosure can improve a corporation's competitiveness and reputation, and potentially improve its bottom line by encouraging sound investments and reducing costs in the long term.

As a last note on drafting, the SEC has indicated that proposals subject to Rule 14a-8 are more likely to be improper if cast as demands as opposed to recommendations or requests.[72] To avoid 14a-8 problems, proposals should therefore be drafted in precatory instead of mandatory terms.

Finally, a study of when shareholder proposals on climate change issues are more likely to induce action indicates that corporations are more likely to take action, although often in a more limited context or more gradually than proposed, when the proposals are negotiated with the firm and the investors agree to withdraw the original proposal.[73] Thus, investors should be open to the idea of negotiating with corporations if that presents the potential for some action as opposed to no action.

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[69] Energen Carbon Asset Risk 2015, *supra* note 67.
[70] *Id*.
[71] Consol Carbon Asset Risk 2015, *supra* note 67.
[72] 17 C.F.R. 240.14a-8(i), note to paragraph (i)(1).
[73] John Byrd & Elizabeth Cooperman, *Do Shareholder Proposals Affect Corporate Climate Change Reporting and Policies?*, Int'l Rev. of Acc'ting, Banking & Finance (Summer 2012), *available at* http://www.irabf.org/publication/4Do%20Shareholder%20Proposals%20Affect%20Corporate%20Climate%20Change%20Reporting%20and%20Policies.pdf.