



SECURITIES CLIENT ALERT

SEC Limits Shareholder Proposals on Climate Change:

What Energy Companies Need to Know

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Under its current chair, Jay Clayton, the U.S. Securities and Exchange Commission (SEC) is limiting the scope of acceptable shareholder proposals that attempt to prescribe a course of action for companies to take on issues concerning climate change and other environmental topics.

Rule 14a-8 of the Securities Exchange Act of 1934 provides that a company may exclude a shareholder proposal if the proposal deals with a matter relating to the company's "ordinary business operations." According to the Division of Corporation Finance, the purpose of the "ordinary business exception" is to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.¹ This is of particular importance for energy companies, who are facing an increasing number of shareholder proposals to adopt greenhouse gas policies or implement practices that will reduce carbon emissions. One recent illustration of this can be seen in the case of Exxon Mobil.

Just last month, securities regulators let Exxon block shareholders from voting on a proposal that would have required the company to adopt and disclose goals for reducing greenhouse gas emissions. The proposal was initiated by activist investors (led by the New York state comptroller) who sought to bring the company's emissions in line with goals set by the 2015 Paris Climate Agreement. Exxon asked the SEC for permission to exclude the proposal from its proxy statement. The SEC's Division of Corporation Finance effectively gave Exxon permission to exclude the proposal by notifying both sides that it would not recommend an enforcement against Exxon if the proposal was left out of its annual shareholder meeting, noting that the adoption of the resolution "would micromanage the company by seeking to impose specific methods for implementing complex policies in place of the ongoing judgments of management as overseen by its board of directors."

Similar proposals from shareholders of Devon Energy Corporation and Chevron Corporation were also rejected during the most recent proxy season. On the other hand, the SEC did not allow Anadarko Petroleum Corporation to exclude a proposal demanding a report describing "if, and how, it plans to reduce its total contribution to climate change and align its operations and investments" with the Paris Climate

¹ SEC Division of Corporation Finance, [Staff Legal Bulletin No. 14J](#) (Oct. 23, 2018).

Agreement. It appears as though the SEC finds a subjective distinction between general requests related to climate change policies and requests for more information about specific targets, such as greenhouse emissions. As a result, companies may be more successful in excluding shareholder proposals that affirmatively require the company to address climate change.

Companies should remember that the SEC considers whether the “ordinary business” exception applies on a case-by-case basis and that application of the “ordinary business” exception rests on two central considerations. The first relates to the proposal’s substance. The second concerns the degree to which the proposal “micromanages” the company “by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.”² As was the case for Exxon, the SEC has explained that the second consideration “may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.”³

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² Release No. 34-40018 (May 21, 1998).

³ *Id.*