Client Alert

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SEC Refuses to Allow Bank to Omit Climate Change Proposal from Proxy Materials

In an apparent departure from past no-action letters issued by the Staff of the U.S. Securities and Exchange Commission ("SEC" or "Commission"), Staff in the SEC's Division of Corporation Finance ("CorpFin") recently stated it "fail[ed] to concur" that PNC Financial Services Group, Inc. ("PNC" or "the Bank") could properly exclude from its proxy statement a shareholder proposal that would require the Bank to report to shareholders "greenhouse gas emissions resulting from its lending portfolio and its exposure to climate change risk in its lending, investing, and financing activities."

The Staff's interpretation in effect requires PNC to include the climate-related proposal in its proxy statement. Although it is far from certain whether the shareholder proposal will ultimately pass at PNC's April 23, 2013, shareholder meeting, this development could encourage similar efforts by activist shareholders and will raise the profile of climate change in the arena of lending and investing.

Background

Under the SEC's proxy rules, eligible shareholders may submit certain kinds of proposals to public companies in which they invest for inclusion in the company's annual proxy statement to shareholders. The rules provide grounds for exclusion of shareholder proposals, and companies intending to omit an apparently defective proposal may petition CorpFin, in the form of a no-action letter request, to concur that the proposal may be omitted. During proxy season, CorpFin receives several hundred such requests each year. Many companies also negotiate directly with the proponents to withdraw their proposals in exchange for enhanced corporate disclosure or other remedial action, and a small number of these proposals are litigated each year in federal district court. Whether CorpFin grants or denies no-action relief, its action does not reflect a policy judgment or action by the Commission itself. Although the SEC's rules theoretically permit an appeal of the Staff's action to the Commission itself, as a practical matter, no such appeals have been taken in recent years.

PNC received a shareholder proposal from activist investor Boston Common Asset Management ("Boston Common") to include the proposal in its upcoming annual meeting materials. Citing CorpFin no-action letters from the mid-2000s on similar proposals, the Bank requested that CorpFin declare that it would not recommend enforcement action if PNC omitted the proposal from its proxy materials, because the proposal deals with matters related to the ordinary business of the company that are properly within the authority of a company's board of directors. The Bank also argued that the proposal sought to "micro-manage" the institution 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.

Although PNC noted that a 2009 SEC Staff Legal Bulletin provides that if a proposal's underlying subject matter "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 … as long as a sufficient nexus exists between the nature of the proposal and the company," the Bank argued that there was no sufficient nexus between PNC and the nature of the proposal, because the Bank itself "is not involved in coal mining, mountain top removal mining, the construction of coal burning power plants or other resource-intensive activities."

Refusing to concur with the Bank, on February 13, 2013, the SEC Staff took the position that because the proposal "focuses on the significant policy issue of climate change … we do not believe that PNC may omit the proposal from its proxy materials."

Significance

Boston Common claims that CorpFin's action "will require banks to rethink their roles and responsibilities in contributing, mitigating, and adapting to climate change," and that "[b]anks and other financial institutions contribute to climate change through their financed emissions, … dwarf[ing] their other climate impacts and expos[ing] them to significant reputational and operational risks."

The letter is also not the first time in recent years that CorpFin has suddenly reversed its position on a controversial matter of corporate governance. For example, in a 2012 letter involving AT&T, CorpFin switched its prior position and found that a shareholder proposal concerning so-called "net neutrality" was no longer excludable. Relatedly, in a letter involving Home Depot in 2011, CorpFin waded into the complicated debate on corporate political spending by not permitting the company to exclude a shareholder proposal on that topic.

Nonetheless, in the matter concerning the Bank, the reversal from CorpFin is part of a growing trend in climate change disclosure. In 2010, the Commission adopted climate disclosure guidance that encouraged corporations to include broader discussions of climate change issues in their annual SEC reporting. *See* 75 Fed. Reg. 6290 (Feb. 8, 2010). The guidance laid out a number of potential scenarios in which, depending on an individual company's facts and circumstances, additional climate change disclosure could be required: (1) impacts of climate change legislation and regulation such as California's cap-and-trade system or EPA's proposed new source performance standards for power plants; (2) international accords like the Kyoto Protocol that may affect companies with international operations; (3) indirect consequences of regulation or business trends, such as reputational damage or changes in demand for goods based upon a company's carbon footprint; and (4) physical impacts of climate change like rising sea levels and changes in weather patterns.

This SEC guidance is part of a broader corporate social responsibility trend that has led financial institutions to publicly report climate change risk factors and strategies. Moreover, numerous financial institutions have committed to apply standards like the International Finance Corporation's Equator Principles to address environmental and social risks in project-lending portfolios. However, the extent to which lenders must report climate change-related issues in their portfolios remains a subject of discussion and debate.

Hunton & Williams attorneys have been active for years in advising both financial institutions and public companies in the areas of climate change disclosure and their broader environmental and social responsibility risks, seeking to develop proactive strategies that anticipate marketplace trends.

Contacts

F. William Brownell
bbrownell@hunton.com

Tauna M. Szymanski
tszymanski@hunton.com

Scott H. Kimpel
skimpel@hunton.com

Brian E. Barner
bbarner@hunton.com