

IT'S GETTING HOT IN HERE: THE SEC'S REGULATION OF CLIMATE CHANGE SHAREHOLDER PROPOSALS UNDER THE ORDINARY BUSINESS EXCEPTION

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I. INTRODUCTION

The Republic of Maldives is a small island nation located in the Indian Ocean, consisting of 1,192 small, low lying coral islands.¹ The Maldives have been inhabited for up to 2,500 years² and it has a current population of approximately 350,000.³ But the Maldivian islands may not exist for another 2,500 years because of climate change.

Fossil fuel emissions and changes in land use are increasing global atmospheric concentrations of greenhouse gases and aerosols, which taken together lead to regional and global changes in temperature.⁴ This phenomenon, known as climate change, brings with it many dramatic and potentially devastating environmental, social and economic effects on a global scale.⁵ Increases in global temperature create changes in precipitation and other climate

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1. REPUBLIC OF MALDIVES MINISTRY OF HOME AFFAIRS HOUSING AND ENVIRONMENT, FIRST NATIONAL COMMUNICATION OF THE REPUBLIC OF MALDIVES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 2 (2001) [hereinafter MALDIVES COMMUNICATION].

2. *Id.* at 3.

3. CIA World Fact Book: Maldives, <http://www.cia.gov/cia/publications/factbook/geos/mv.html> (last visited Nov. 19, 2005).

4. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, THE REGIONAL IMPACTS OF CLIMATE CHANGE: AN ASSESSMENT OF VULNERABILITY 3 (Robert Watson et al. eds., 1997) (explaining climate change science).

5. See *id.* (summarizing the adverse consequences of climate change).

variables, potentially leading to drastic worldwide environmental transformations, including a global mean sea level rise,⁶ changes in soil moisture levels, and increased likelihood of extreme high-temperature events such as floods and droughts.⁷ Such environmental change will in turn affect societies and economies by impacting food and water resources,⁸ ecosystems and biodiversity,⁹ human settlements,¹⁰ and human health.¹¹

In response to climate change, the international community entered into a treaty known as the Kyoto Protocol that bound its signatories to commit to reductions in national greenhouse gas emission levels.¹² However, the United States is currently not part of the protocol.¹³ A major factor behind the American government's failure to adopt the Kyoto Protocol was its potentially huge economic implementation costs and its adverse effect on American business profitability.¹⁴ The United States absence from the protocol reflects in part the American corporate community's unwillingness to address the problem of climate change, and the United States government has failed to address the situation sufficiently.¹⁵

Environmentally and socially conscious activists have tried to remedy this corporate attitude through the shareholder proposal

6. *See id.* (predicting that global mean sea level will rise by 15-95 cm by 2100).

7. *See id.* (describing how climate change may alter the global environment).

8. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT, SUMMARY FOR POLICY MAKERS 12 (Robert Watson et al. eds., 2001) (illustrating how changes in rainfall will lead to decreasing crop yields and exacerbate water shortages in many water-scarce regions in the world).

9. *See id.* at 16 (describing how a shift in climatically defined habitats may lead to a breakdown of terrestrial and marine ecosystems resulting in increased risk of species extinction).

10. *See id.* at 12 (warning that populations that inhabit small islands, deltas, or low lying coastal areas will face the risk of displacement).

11. *See id.* at 9 (stating that climate change can affect human health through fluctuating temperature stresses, loss of life in floods and storms, and changes in disease vectors, water quality and food availability).

12. *See, e.g.,* Richard W. Thackeray Jr., *Struggling for Air: The Kyoto Protocol, Citizens' Suits Under the Clean Air Act and the United States' Options for Addressing Climate Change*, 14 IND. INT'L & COMP. L. REV. 855, 866-71 (2004) (outlining the history of the Kyoto Protocol).

13. *See* Kyoto Protocol, Status of Ratification (last modified on Sept. 19, 2005), http://unfccc.int/files/essential_background/kyoto_protocol/application/pdf/kpstats.pdf (last visited Nov. 19, 2005).

14. *See* Thackeray, *supra* note 12, at 875 (noting the Bush Administration's pronouncement that compliance with the protocol would be "potentially prohibitive," and that "drastic cuts in emissions will have serious repercussions on the US economy").

15. *See id.* (detailing the Bush Administration's "outright hostility" toward the Kyoto Process).

process.¹⁶ The shareholder proposal process is a procedure where eligible shareholders propose resolutions at annual shareholder meetings that request company boards to undertake specified actions.¹⁷ If the resolutions meet statutory guidelines, they are published in the company's annual proxy statement and all the company's shareholders vote to endorse or reject the proposal.¹⁸ Shareholder proposals that address climate change typically urge company boards to report on the company's operational contributions to global warming, and to address business exposure to regulatory and market pressures.¹⁹ The shareholder proposal process potentially gives shareholders significant influence over corporate management, and there has been significant controversy over the proper scope of its use.²⁰

Part II of this comment provides an overview of the shareholder proposal process under the 1934 Securities Act.²¹ Part II also describes how environmentally conscious shareholders have used shareholder proposals to influence corporate behavior, and explains why climate change is a significant social policy and investment issue that is applicable to the shareholder proposal process.²² Part III illustrates the problems with the current SEC no-action letter process, and demonstrates that SEC decisions regarding climate change shareholder proposals during the years 1998-2005 have been inconsistent and even contradictory.²³ Part III also analyzes current commentary criticizing the shareholder proposal process, and provides recommendations on how the SEC could reform the process to ensure more predictable results.²⁴

16. See Robert Monks et al., *Shareholder Activism on Environmental Issues: A Study of Proposals at Large U.S. Corporations (2000-2003)*, 28 NAT. RESOURCES F. 317, 317-19 (2004) (explaining how investors conduct socially responsible investing through the use of shareholder proposals).

17. *Id.* at 318.

18. *Id.*

19. See *id.* at 324 (illustrating how shareholder proposals address climate change).

20. See Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 24 (2004) (introducing the debate over the proper use of shareholder proposals).

21. *Infra*, Parts II.A, II.C.

22. *Infra* Part II.B.

23. *Infra* Part III.A.

24. *Infra* Part III.B-C.

II. BACKGROUND

A. *Shareholder Proposals, the Securities Act of 1934, and the SEC*

Companies hold annual shareholder meetings where shareholders vote on important corporate management issues, such as mergers and acquisitions, sales of substantial assets, director elections, and amendments to articles of incorporation.²⁵ The Securities Exchange Act of 1934 allows eligible shareholders to submit shareholder proposals at these meetings.²⁶ A shareholder proposal is a shareholder recommendation or requirement that a company take a specified course of action.²⁷ Shareholders vote to approve or disapprove the proposal at annual company shareholder meetings.²⁸

However, the 1934 Act allows a company to exclude proposals from shareholder meetings if 1) the proposal fails to comply with the statutory procedural or eligibility guidelines,²⁹ or 2) the proposal's subject matter is excludable under one of the statutory exceptions.³⁰ To exclude a shareholder proposal, a company must file with the Securities and Exchange Commission 1) a copy of the proposal, 2) any statement in support of the proposal submitted by the proponent, and 3) a statement of the company's reasons why the omission is proper in the particular case.³¹

A company may also request the SEC to issue a no-action letter; the SEC staff will inform the company whether it believes that the company can properly exclude a proposal after considering the facts

25. See, e.g., Shireen B. Rahnema, *The SEC's Reversal of Cracker Barrel: A Return to Uncertainty*, 7 U. MIAMI BUS. L. REV. 273, 283 (1999) (explaining the corporate context in which shareholder proposals operate).

26. 17 C.F.R. § 240.14a-8(b) (2006).

27. 17 C.F.R. § 240.14a-8(a) (2006).

28. *Id.*

29. See 17 C.F.R. §§ 240.14a-8(a)-(h) (2006) (outlining the shareholder eligibility and procedural requirements that a shareholder must follow in order to submit a shareholder proposal).

30. See 17 C.F.R. § 240.14a-8(i) (2006) (listing the basis upon which a company can exclude shareholder proposals: 1) improper under state law, 2) violation of law, 3) violation of proxy rules, 4) personal grievance, 5) relevance, 6) absence of power/authority, 7) management functions, 8) relates to election, 9) conflicts with company's proposal, 10) substantially implemented, 11) duplication, 12) resubmissions, and 13) specific amount of dividends).

31. *Amalgamated Clothing & Textile Workers Union v. Wal-Mart*, 821 F. Supp. 877, 883 (S.D.N.Y. 1993).

and reasoning presented by both the proponent and the company.³² In addition to no-action letters, the SEC issues interpretative releases³³ and staff legal bulletins³⁴ that clarify and direct the shareholder proposal process.

However, SEC agency interpretations or decisions do not prevent a party from bringing an enforcement action in court.³⁵ Courts give deference to both SEC interpretive releases and no-action letters but agency decisions are not binding.³⁶ When a court interprets an SEC regulation or ruling, the SEC's general interpretation is controlling unless the court decides the interpretation is plainly erroneous or inconsistent with the regulation.³⁷

Courts award SEC interpretative releases more deference than SEC no-action letters.³⁸ Interpretative releases provide formal guidance and seek to introduce general and consistent principles on a particular issue, but SEC no-action letters address specific issues that arise in the SEC's "daily contact with the practical workings of this rule" and are ad-hoc in nature.³⁹ However, courts have relied upon SEC no-action letters when deciding the excludability of a proposal, analyzing their reasoning and their consistency or inconsistency of positions on particular issues.⁴⁰ Courts are the final arbiters in the shareholder proposal process.⁴¹

32. See Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 490 (1997) (describing the SEC no-action letter process).

33. See, e.g., Amendments to Rules of Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106 (May 28, 1998) [hereinafter Amendments] (to be codified at 17 C.F.R. pt. 240) (providing legal guidance regarding shareholder proposals).

34. See, e.g., SEC Staff Legal Bulletin No. 14C, June 28, 2005, <http://www.sec.gov/interp/legal/cfslb14c.htm> [hereinafter Staff Legal Bulletin No. 14C] (clarifying the shareholder proposal process).

35. Geltman & Skroback, *supra* note 32, at 490.

36. *Amalgamated Clothing & Textile Workers Union v. Wal-Mart*, 821 F. Supp. 877, 883 (S.D.N.Y. 1993).

37. *Id.*

38. See *id.* at 885 (explaining how courts construe SEC interpretative releases and SEC no-action letters).

39. *Id.* at 884.

40. *Id.* at 885.

41. See *Roosevelt v. E.I. Dupont de Nemours & Co.*, 958 F.2d 416, 425 (D.C. Cir. 1992) (holding that shareholders may seek "declaratory and injunctive relief [in court] when management refuses to distribute their proposals").

B. *The Environment, Climate Change, and Shareholder Proposals*

Activists have frequently used shareholder proposals to advocate better corporate environmental responsibility.⁴² For example, after the Exxon Valdez oil spill in 1991, shareholders filed numerous proposals requiring companies to adopt environmentally friendly practices known as the Valdez Principles.⁴³ The principles required corporations, among other things, to voluntarily adhere to greater environmental disclosure requirements.⁴⁴

Social awareness is not the only driving factor behind shareholder proposals advocating better corporate environmental performance; investors focus on a company's environmental performance because a bad environmental record equals financial liabilities.⁴⁵ The Exxon Valdez oil spill cost Exxon over \$2 billion in clean up costs.⁴⁶ Shareholders react to losses on their investment, and environmental liabilities create financial costs that drive down the value of investments.⁴⁷

Investors cannot ignore the effects of climate change because it exposes companies to various types of risks and these risks affect the value of investments.⁴⁸ Companies face regulatory risk as governments increase regulation in order to meet international and

42. See Geltman & Skroback, *supra* note 32, at 477 (illustrating how environmental groups use proxy rights and shareholder meetings to initiate changes in corporate practices impacting the environment).

43. See Nell Minow & Michael Deal, *Corporations, Shareholders, and the Environmental Agenda*, 12 CARDOZO L. REV. 1359, 1365-66 (1991) (reviewing shareholder proposal activity after the Exxon-Valdez oil spill).

44. See *id.*, at 1365-66 (listing the ten Valdez principles: 1) Protection of the Biosphere, 2) Sustainable Use of Natural Resources, 3) Reduction and Disposal of Waste, 4) Wise Use of Energy, 5) Risk Reduction, 6) Marketing Safe Products and Services, 7) Damage Compensation, 8) Disclosure, 9) Environmental Directors and Managers, and 10) Assessment and Annual Audit).

45. See *id.* at 1365 (asserting that "environmental violations carry stiff penalties, extensive clean up costs, and dramatic loss of public goodwill").

46. *Id.*

47. See Mitchell F. Crusto, *Endangered Green Reports: "Cumulative Materiality" in Corporate Environmental Disclosure After Sarbanes-Oxley*, 42 HARV. J. ON LEGIS. 483, 490-91 (2005) (arguing that corporate measures that protect the environment may protect the value of investments).

48. See CERES & WORLD RES. INST., QUESTIONS AND ANSWERS FOR INVESTORS ON CLIMATE RISK 3 (CERES & World Res. Inst. eds., 2004), available at <http://www.ceres.org/pub/docs/Ceres%5Fqanda%5FInvestors%5Fon%5FClimate%5FRisk%5F1204.pdf> [hereinafter CLIMATE RISK] (listing the numerous climate change risk factors that affect the value of investments).

national commitments to decrease greenhouse gas emission levels.⁴⁹ The 1997 Kyoto Protocol is currently the most notable international greenhouse gas emission regulatory scheme and global companies must spend substantial resources in order to comply.⁵⁰ Corporations face competitiveness risk because if they do not mitigate climate risk factors they will become less competitive in relation to their competitors who have taken proactive measures.⁵¹ Companies that develop clean technologies and innovative approaches are in a better position to adapt to a growing regulatory environment⁵² and will likely seize new markets or obtain greater market shares.⁵³

Climate change also brings physical risk in the form of increased droughts, floods, storms and a global sea level rise and this will affect businesses and their bottom line.⁵⁴ For example, climate change will have a detrimental impact on the insurance industry.⁵⁵ Insurance companies calculate insurance rates on the basis of historical data, but more frequent and unpredictable catastrophic weather-related disasters will render historical data unreliable and actuarial risk assessment nearly impossible.⁵⁶ Mistakes in insurance rate calculations could potentially bankrupt the industry.⁵⁷

49. *See id.* (predicting that high greenhouse gas-emitting industries like electric power, manufacturing, oil and gas, and transportation will face increasing regulation and rising financial compliance costs).

50. Elizabeth E. Hancock, *Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the SEC Disclosure Dilemma*, 17 GEO. INT'L ENVTL. L. REV. 233, 239 (2005).

51. CLIMATE RISK, *supra* note 48, at 4.

52. *See* DURWOOD ZAELKE, ET. AL. EDS., 2 MAKING LAW WORK: ENVIRONMENTAL COMPLIANCE & SUSTAINABLE DEVELOPMENT 434-35 (2005) (explaining how properly designed environmental regulations can pressure companies to innovate and that these innovations will result in greater efficiencies which offset the costs of compliance).

53. CERES & UNITED NATIONS FOUND., INSTITUTIONAL INVESTOR SUMMIT ON CLIMATE RISK: FINAL REPORT 23 (CERES ed. 2003) available at <http://www.ceres.org/pub/docs/Ceres%5F2005IISummit%5Ffinalreport%5F1005.pdf>.

54. *See id.* at 22 (illustrating how the physical effects of climate change directly affects sectors such as agriculture, fisheries, health care, insurance and tourism); *see also* Fiona Harvey, *Katrina: 'First Taste of a Bitter Cup'*, FIN. TIMES, Oct 10, 2005, (FT Report – Sustainable Business) at 1 (reporting that Hurricane Katrina is one example of how climate change has contributed to increases in severe weather activity).

55. *See* Michael Northrop, *Leading by Example: Profitable Corporate Strategies and Successful Public Policies for Reducing Greenhouse Gas Emissions*, 14 WIDENER L.J. 21, 32 (2004) (describing the insurance industry's reliance upon historical climate data for accurate risk assessment).

56. *Id.*

57. *See id.* (noting that if insurance calculations are based on unreliable historical data “there will be no difference between insurance and gambling”).

Corporations that neglect the climate change issue will also face reputational risk as the general public and consumers become more aware of the climate change issue.⁵⁸ Companies like ExxonMobil are becoming targets for boycotts because of their opposition to climate change regulation.⁵⁹ Companies that are responsible for high levels of greenhouse gas emissions may also face litigation risk as plaintiffs sue companies with high greenhouse level emissions for damages associated with the physical effects of climate change.⁶⁰

However, despite the risks involved with ignoring the consequences of climate change, companies rarely ratify and adopt shareholder proposals that address climate change.⁶¹ One study conducted a review of shareholder proposals at eighty-one United States corporations during the years 2000-2003 and found that climate change resolutions only received an average support of thirteen percent over the four year period.⁶² In addition, under most state laws, shareholder proposals are not binding upon corporations unless their corporate by-laws stipulate otherwise; even majority shareholder support may not automatically ensure that a company board will implement a proposal's directives.⁶³

Nevertheless, a shareholder proposal does not need a majority vote or favorable corporate by-laws to realize its objectives.⁶⁴ In many cases a significant minority vote on a specific issue is likely to influence management behavior.⁶⁵ Company boards are wary of shareholder reaction and accord shareholder resolutions

58. See CLIMATE RISK, *supra* note 48, at 4 (noting that a company's reputation in regards to climate change will affect an informed consumer's loyalty to that company).

59. See, e.g., Felicity Barringer, *Environmental Groups Planning to Urge Boycott of ExxonMobil*, N.Y. TIMES, July 12, 2005, at A14. (reporting on environmental groups planning a boycott of ExxonMobil products).

60. See Hancock, *supra* note 49, at 242-49 (analyzing the potential for litigation surrounding the effects of climate change); see also Julie Ziegler, *Nigerian Court Orders an End to Gas Flaring; If Companies Don't Stop, Prison Time a Possibility*, HOUSTON CHRONICLE, Nov. 15, 2005, at 10 (reporting on a Nigerian federal court ruling that enjoins Royal Dutch Shell, Chevron, ExxonMobil and other oil companies in Nigeria to stop gas flaring or risk prison time and fines).

61. Monks et al., *supra* note 16, at 319.

62. See *id.* at 321 (analyzing shareholder support for corporate social responsibility proposals during the years 2000-2003).

63. Brownstein & Kirman, *supra* note 20, 41.

64. See Monks et al., *supra* note 16, at 319 (asserting that there is no exact definition of what constitutes a "passing vote" in shareholder resolutions because even a significant minority shareholder pressure on management can effect change).

65. See *id.* (illustrating how the shareholder proposal process is more akin to "a survey of shareholder sentiment rather than . . . a political election").

corresponding attention.⁶⁶ This is increasingly true in today's corporate governance climate because recent increases in governmental legislation and shareholder activism are fostering greater corporate transparency and accountability.⁶⁷ Consequently, a proponent's ability to include and maintain a proposal on a company's annual proxy statement is a key success factor in the shareholder proposal process.⁶⁸ However, statutory exceptions under the Securities Exchange Act of 1934 inhibit the ability to submit shareholder proposals.⁶⁹

C. Shareholder Proposals May Not Relate to a Corporation's "Ordinary Business"

Rule 14a-8(i)(7) is a statutory exception under the 1934 Act that allows a company to exclude shareholder proposals that deal with matters relating to the company's "ordinary business operations."⁷⁰ The ordinary business exception allows a company to exclude proposals that involve business matters that are mundane in nature, and do not involve any substantial policy or other considerations.⁷¹ The exception is consistent with most state corporate laws that maintain that it is the corporate officers and boards, not shareholders, who manage a corporation's ordinary business affairs.⁷² Under state law, corporate boards have a fiduciary duty to act independently in a company's best interests and "mechanical compliance" with shareholder proposals can potentially violate this fiduciary duty.⁷³

The ordinary business exception has had a confusing history; the exception's vague language and inconsistent SEC interpretation has resulted in much debate and litigation.⁷⁴ The SEC currently follows a

66. Brownstein & Kirman, *supra* note 20, at 68-69.

67. *See id.* at 66 (discussing the transformation in corporate governance climate after the notable Enron and WorldCom scandals and legislation like the Sarbanes-Oxley Act of 2002).

68. *See* Monks et al., *supra* note 16, at 319 (explaining that simply placing a proposal on the proxy statement is likely to increase awareness among shareholders, as well as the general public, and to pressure management action).

69. 17 C.F.R. § 240.14a-8(i) (2006).

70. 17 C.F.R. § 240.14a-8(a)(i)(7) (2006).

71. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 41 Fed. Reg. 52994, 52997 (Dec. 3, 1976) [hereinafter Adoption of Amendments].

72. *See* Amendments, *supra* note 33, at 29108-29109 (explaining the rationale behind the ordinary business exception).

73. Brownstein & Kirman, *supra* note 20, at 42-44.

74. Phillip R. Stanton, *SEC Reverses Cracker Barrel No-Action Letter*, 77 WASH. U. L.Q. 979, 981-90 (1999).

case-by-case approach, and there are no binding rules or guidelines.⁷⁵ However, the SEC does identify two factors that it considers when conducting an ordinary business analysis.⁷⁶

First, the SEC considers a proposal's subject matter and will approve a company's decision to exclude the proposal if it relates to tasks "fundamental to management's ability to run a company on a day-to-day basis."⁷⁷ However, if the same proposal focuses on a sufficiently significant social policy issue, the SEC asserts that such proposals are appropriate for a shareholder vote because such policy issues transcend day-to-day matters.⁷⁸ Second, the SEC looks to the degree to which the proposal seeks to "micromanage" the company.⁷⁹ Shareholders are not in a position to make an informed judgment about matters that involve intricate detail, specific time-frames or complex policy implementation, and a company may exclude such proposals.⁸⁰

In addition, the SEC has provided further guidance on the ordinary business exception through a staff legal bulletin, specifically addressing shareholder proposals that relate to environmental issues.⁸¹ The SEC advised that a company may exclude proposals that require it to conduct "an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment."⁸² However, a company is not allowed to exclude proposals that focus on its minimizing or eliminating operations that may harm the environment.⁸³

III. ANALYSIS

A. The Problems with an Inconsistent SEC No-action Letter Process

Despite the SEC's attempts to provide guidance on the ordinary business exception through interpretative releases and staff legal bulletins, the SEC's current case-by-case approach has resulted in

75. Amendments, *supra* note 33, at 29108.

76. *Id.* at 29108-09

77. *Id.* at 29108.

78. *Id.*

79. *Id.*

80. *Id.*

81. See Staff Legal Bulletin No. 14C, *supra* note 34, at 4-5 (explaining how the SEC analyzes environmental proposals that relate to an "evaluation of risk").

82. *Id.* at 5.

83. *Id.*

inconsistent no-action letter positions.⁸⁴ Courts understand that the no-action letter process is ad-hoc and inconsistent.⁸⁵ The SEC faces staff and time constraints and cannot afford no-action letters “the kind of in-depth study that would be essential to a definitive determination.”⁸⁶ However, although courts do not defer to an individual no-action letter position, they have relied on the consistency or inconsistency of the SEC’s position on no-action letter issues.⁸⁷

The SEC no-action letter process serves as an important guidepost for courts. However, inconsistencies in SEC decisions have the potential to confuse judicial decision-making, which in turn promotes inefficiencies for both shareholders and company boards.⁸⁸ In order for participants to find it useful, the SEC no-action letter process needs to be consistent. But an analysis of SEC no-action letters regarding climate change shareholder proposals during the years 1998-2005 reveals that SEC guidance on the matter is still lacking and that reform is needed.

1. The SEC Needs to Articulate its Reasoning Behind No-action Letter Decisions: When Words Speak Louder than Actions

The SEC currently does not articulate the reasoning behind its no-action letter decisions, and simply states its concurrence or its disagreement with a company’s request to exclude the proposal from its proxy statements.⁸⁹ This lack of transparency becomes especially pronounced when the SEC makes inconsistent decisions on shareholder proposals that essentially encompass the same substantive request.⁹⁰

In a February 1, 2005 no-action letter, the SEC did not allow the Ryland Group to exclude a shareholder proposal which requested the

84. See Amendments, *supra* note 33, at 29108 (recognizing that the SEC has repeatedly adjusted its definition of “ordinary business” and will now follow a case-by-case approach).

85. See *Amalgamated Clothing & Textile Workers Union v. Wal-Mart*, 821 F. Supp. 877, 885 (S.D.N.Y. 1993) (declaring that a court does not need to defer to an individual no-action letter position).

86. *Id.*

87. *Id.*

88. See *Rahnema*, *supra* note 25, at 297 (asserting that fluctuating and contradictory SEC no-action letter decisions will encourage displeased shareholders and managers to litigate in court).

89. See *e.g.*, *The Ryland Group, Inc., SEC No-Action Letter*, 2005 SEC No-Act. LEXIS 145, at *1 (Feb. 1, 2005).

90. See Amendments, *supra* note 33, at 29108 (acknowledging that the lack of bright-line rules will render some no-action letter decisions tenuous).

Ryland Group to report on “how the company is responding to rising regulatory, competitive, and public pressure to increase energy efficiency and reduce greenhouse gas[es].”⁹¹ However, in a January 8, 2005 no-action letter, the SEC allowed Wachovia to exclude a shareholder proposal that requested Wachovia to report on how climate change risk factors affected Wachovia’s business strategy.⁹² The proposal requested that the board of directors prepare a report including “a discussion of the effects of (a) rising public and regulatory pressures to limit the emission of greenhouse gases, and (b) changes in the physical environment.”⁹³

The SEC allowed Wachovia to exclude the proposal because it related to an evaluation of risk.⁹⁴ Wachovia argued that climate change risk evaluation is a part of its day-to-day operations in determining the value of its financial products, and the proposal essentially would summarize Wachovia’s ordinary business operations.⁹⁵ However, the Ryland Shareholder proposal also requires risk evaluation.⁹⁶ A report on how the company is responding to rising regulatory, competitive, and public pressures necessarily involves an assessment of risk factors that affect a company’s financial and competitive position.⁹⁷ Notwithstanding the similarities, the SEC did not allow the Ryland group to exclude the proposal.⁹⁸

The Wachovia shareholder proposal and the Ryland Group shareholder proposal encompass the same request for a discussion of rising public and regulatory pressures and its impact on business strategy.⁹⁹ The difference in outcome illustrates the problem with an opaque no-action letter process; decisions appear ad-hoc and inconsistent because the SEC does not articulate the reasoning behind its no-action letter decisions.

91. The Ryland Group, Inc., SEC No-Action Letter, *supra* note 89, at *23.

92. Wachovia Corp., SEC No-Action Letter, 2005 LEXIS 128, at *1 (Mar. 23, 2005).

93. *Id.* at *2.

94. *Id.* at *1.

95. *Id.* at *12-*15.

96. The Ryland Group, Inc., SEC No-Action Letter, *supra* note 88, at *15-*17.

97. *Id.* at *15-*16.

98. *Id.* at *1.

99. *Compare* The Ryland Group, Inc., SEC No-Action Letter, *supra* note 89, at *17-*19 (arguing that the proposal requires the Ryland Group to report on the company’s ability to comply with rising regulatory pressures and seeks to micromanage the company) *with* Wachovia Corp., SEC No-Action Letter, *supra* note 92, at *13-14 (arguing that the proposal’s requirement that Wachovia provide a report on rising regulatory pressures to limit greenhouse gases focuses on Wachovia’s fundamental day-to-day activities).

2. SEC Decisions Appear to Turn on Semantic Differences: It's All In How You Say It

The SEC currently allows companies to exclude shareholder proposals that require an evaluation of risk.¹⁰⁰ However, it is unclear how the SEC construes risk evaluation because SEC no-action letter decisions often appear to turn on semantic, not substantive, differences in shareholder proposals.

In a March 23, 2005 no-action letter, the SEC addressed an ExxonMobil shareholder proposal that requested the company to “undertake a comprehensive review and publish a report on how it will meet the greenhouse gas reduction targets of those countries in which it operates which have adopted the Kyoto Protocol.”¹⁰¹ The proponents hoped the report would contain 1) cost projection, 2) timelines for meeting mandatory targets, 3) an evaluation of whether earlier actions, as undertaken by key ExxonMobil competitors, would have reduced these costs, and 4) a feasibility study of reducing emissions in the United States, which does not have restrictions on emissions at the federal level but might implement them in the future.¹⁰²

ExxonMobil argued that the proposal should be excluded on the grounds that it requested an “evaluation of risks and benefits.”¹⁰³ The SEC did not concur.¹⁰⁴ This decision creates two inferences: 1) climate change is a sufficiently significant policy issue that transcends day-to-day matters, and 2) the proposal’s requests did not attempt to micro-manage the company.¹⁰⁵ Consequently, it logically follows that the SEC will support shareholder proposals that contain substantively similar requests to the ExxonMobil proposal.

However on April 1, 2003 the SEC allowed Xcel Energy to exclude a shareholder proposal that also addressed climate change. The proposal requested a report on “a) the economic risks associated with the Company’s past, present, and future emissions . . . and the public stance of the company regarding efforts to reduce these emissions and b) the economic benefits of committing to a substantial

100. Staff Legal Bulletin No. 14C, *supra* note 34, at 5.

101. ExxonMobil, Corp., SEC No-Action Letter, 2005 SEC No-Act. LEXIS 466, at *1 (Mar. 23, 2005).

102. *Id.* at *39.

103. *Id.* at *19.

104. *Id.* at *1.

105. *See* Amendments, *supra* note 33, at 29108-29109 (articulating the considerations in an ordinary business analysis).

reduction of those emissions related to its current business activities.”¹⁰⁶

Xcel argued that the proposal seeks an “appraisal of the economic risks and benefits concerning the emission of certain pollutants” and that a financial evaluation of risks is a fundamental part of ordinary business operations.¹⁰⁷ Similarly, ExxonMobil argued that the SEC should exclude its proposal because it related to “risks and potential benefits faced by ExxonMobil in connection with a particular regulatory compliance issue.”¹⁰⁸ Both proposals address climate change, and both proposals advocate risk evaluation which address the financial and economic competitiveness of the company.¹⁰⁹

However, the SEC reached contradictory decisions in the ExxonMobil and Xcel Energy no-action letters. The difference in outcome appears to be based on the proposals’ semantics and not their substantive content; arguably, the SEC would have excluded the ExxonMobil proposal as relating to an evaluation of risks and benefits if the ExxonMobil proposal used the words “report on the economic risks” instead of “provide a comprehensive review.”¹¹⁰

3. The SEC Appears to Distinguish Between Industries When Conducting an Ordinary Business Analysis: Pick and Choose Your Industry

The SEC appears to differentiate between different industries when deciding whether a climate change proposal is excludable as relating to an evaluation of risk under the ordinary business exception. The SEC is likely to concur with industries where risk evaluation is a core business function, as in the financial services industry and insurance industry where risk evaluation is the business itself.¹¹¹ However, the SEC is not likely to concur with industries where risk evaluation is an internal business function; industries

106. Xcel Energy Inc., SEC No-Action Letter, 2003 LEXIS 500, at *1 (April 1 2003).

107. *Id.* at *7.

108. ExxonMobil, Corp., SEC No-Action Letter, *supra* note 101, at *19 (arguing that the proposal should be excluded because it is an ordinary business matter).

109. *Compare id.* at *40 (requesting a report including projections of greenhouse reduction costs, and an evaluation of whether earlier action would have reduced such costs) *with* Xcel Energy Inc., SEC No-Action Letter, *supra* note 106, at * 1 (asking for a report on economic risks associated with carbon dioxide emissions).

110. *See* Xcel Energy Inc., SEC No-Action Letter, *supra* note 105, at *1 (allowing the company to exclude a shareholder proposal that called for disclosing “economic risks” as an “evaluation of risks and benefits”).

111. *See, e.g.*, The Chubb Corp., SEC No-Action Letter, 2004 SEC LEXIS 115, at *12-*14 (Jan. 25, 2004).

where risk evaluation is a secondary to its main business operations but conducted in order to ensure operational viability.¹¹²

In 2005, the SEC allowed the Chubb Corporation to exclude a shareholder proposal that requested “a report providing a comprehensive assessment of Chubb’s strategies to address the impacts of climate change on its business.”¹¹³ The Chubb Corporation is an insurance provider, and it argued that company’s core business centers on the management and evaluation of risks.¹¹⁴ Climate change has a bearing on how the Company evaluates risks and it accounts for such risks when “writing insurance policies and pricing its products. . . .”¹¹⁵

In 2004, the SEC also allowed the American International Group to exclude a proposal that requested “a report providing a comprehensive assessment of AIG’s strategies to address the impacts of climate change on its business.”¹¹⁶ AIG is also an insurance provider, and it also argued that the proposal relates to the company’s core business of underwriting risk.¹¹⁷ The impacts of climate change are taken into account when determining insurance coverage and costs, and “the proposal relates directly to the company’s policies and practices for product offerings.”¹¹⁸

Compare the above no-action decisions with a series of climate change shareholder proposals filed at energy companies during the 2004 and 2003 proxy season. In a March 5, 2004 no-action letter the SEC did not allow Reliant Resources Inc. to exclude a shareholder proposal on the basis that it related to the company’s ordinary business.¹¹⁹ The proposal requested Reliant’s board to “assess how the company is responding to rising, regulatory, competitive, and public pressure to significantly reduce carbon dioxide and other

112. See, e.g., Unocoal Corp., SEC No-Action Letter, 2004 SEC No-Act. LEXIS 394, at *10-*11 (Feb. 23, 2004) (asserting that an energy company’s assessment of “rising regulatory, competitive and public pressure” on its operations constitutes risk evaluation).

113. The Chubb Corp., SEC No-Action Letter, *supra* note 111, at *19.

114. See *id.* at *16 (asserting the subject matter of the proposal involves a matter of ordinary business).

115. *Id.* at *13.

116. American International Group. Inc., SEC No-Action Letter, 2004 SEC No-Act. LEXIS 260, at *21-*22 (Feb. 11, 2004).

117. *Id.* at *16.

118. *Id.* at *16-*17.

119. Reliant Resources, Inc., SEC No-Action Letter, 2004 SEC No-Act. LEXIS 460, at *1 (Mar. 5, 2004).

emissions and report to shareholders.”¹²⁰ The SEC also refused to allow corporate boards at the Unocal Corporation,¹²¹ the Valero Energy Corporation,¹²² the Apache Corporation,¹²³ and Anadarko Corporation,¹²⁴ to exclude identical shareholder proposals.

Reliant argued that the SEC should allow it to exclude the shareholder proposal because the proposal requested an evaluation of risk, concentrating on the economic benefits and risks the company faces regarding emissions reductions.¹²⁵ However, the SEC did not allow Reliant to exclude the shareholder proposal.¹²⁶ In contrast to the AIG proposal, the SEC refused to find that the proposal related to risk evaluation.¹²⁷

In addition, in a February 6, 2004 no-action letter, the SEC did not agree with Valero Corp.’s view that Valero could exclude the proposal as relating to an evaluation of risk.¹²⁸ However, the potential impact of petroleum products and by-products are very important risk variables in refinery management; the Valero Corporation had already installed oversight systems to ensure regulatory compliance, evaluate competitive and reputation risks, and their respective economic consequences.¹²⁹ Thus, the Valero shareholder proposal that requested an assessment of “rising regulatory, competitive, and public pressure to significantly reduce carbon dioxide and other greenhouse gas emissions”¹³⁰ is arguably asking Valero Corp. to undertake risk evaluation that is excludable under the ordinary business exception. But the SEC did not agree.

Consequently, it appears that the SEC differentiates between shareholder proposals at industries where risk evaluation is an internal business function, as in the Reliant and Valero no-action

120. *Id.* at *17.

121. Unocoal Corp., SEC No-Action Letter, *supra* note 112, at *1.

122. Valero Energy Corp., SEC No-Action Letter, 2004 SEC No-Act. LEXIS 204, at *1 (Feb. 6, 2004).

123. Apache Corp., SEC No-Action Letter, 2004 SEC No-Act. LEXIS 225, at *1 (Feb. 6, 2004).

124. Anadarko, Petroleum Corp., SEC No-Action Letter, 2004 SEC No-Act. LEXIS 234, at *3 (Feb. 4, 2004).

125. Reliant Resources, Inc., SEC No-Action Letter, *supra* note 119, at *7.

126. *Id.* at *1.

127. *See* American International Group, Inc., SEC No-Action Letter, *supra* note 116, at *1 (excluding the proposal as relating to “evaluation of risks and benefits”).

128. Valero Energy Corp., SEC No-Action Letter, *supra* note 122, at *1.

129. *Id.* at *6-*10.

130. *Id.* at *16.

letters, from shareholder proposals at industries where risk evaluation addresses core business functions, as found in the Chubb Corp. and AIG proposals.¹³¹ However, this apparent distinction between core business risk evaluation and internal business risk evaluation is not in conformance with the SEC's own guidelines. In a staff legal bulletin, the SEC specifically addressed environmental shareholder proposals and advised that companies may exclude such proposals if they relate to an evaluation of risk. Specifically, a company may exclude proposals that address internal risk and liability assessments that a company faces as a result of its operations that may adversely affect the environment.¹³² Under this definition the SEC should afford climate change shareholder proposals at all industries the same treatment so long as they relate to an evaluation of risk. But the results, as seen above, are inconsistent.

4. The SEC is Unclear on What Constitutes an Excludable Shareholder Request for an Intricate Report

Climate change shareholder proposals generally ask a company to report on climate change effects on business but do not ask companies to undertake actual operational steps to mitigate climate change effects.¹³³ A shareholder proposal that requests that a company undertake operational steps is clearly an attempt to dictate managerial action.¹³⁴ However, it is unclear when a shareholder reporting request becomes an attempt to dictate managerial action, or constitutes a demand for an "intricate report," which is excludable under the ordinary business exception.¹³⁵

In a March 2, 2004 no-action letter, the SEC concurred with the Ford Motor Company that it could exclude a shareholder proposal that requested the company to provide an annual report on climate change science, including "detailed information on temperatures, atmospheric gases, sun effects, carbon dioxide production, carbon dioxide absorption, and costs and benefits at various degrees of

131. Compare American International Group, Inc., SEC No-Action Letter, *supra* note 116, at *1 (excluding the proposal as relating to "evaluation of risks") with Reliant Resources, Inc., SEC No-Action Letter, *supra* note 119, at *1 (refusing to exclude the shareholder proposal despite arguments that it related to risk evaluation).

132. Staff Legal Bulletin No. 14C, *supra* note 34, at 4-5 (2005).

133. *E.g.*, ExxonMobil, Corp., SEC No-Action Letter, *supra* note 101, at *1.

134. Amendments, *supra* note 33, at 29108.

135. *See id.*

heating and cooling.”¹³⁶ The SEC reasoned that the proposal related to ordinary business operations because it demanded “the specific method of preparation and the specific information to be included in a highly detailed report.”¹³⁷ The Ford Motor Company argued that there are a “myriad of reasons” that determine company policy decisions, and that it would “cause havoc for companies to have such decisions subject to examination by shareholders.”¹³⁸ The Company also argued that it has limited resources and it is the directors’ prerogative, not the shareholders’, when deciding to use corporate resources to “expend additional capital to either confirm or disprove scientific studies regarding global warming. . . .”¹³⁹ The Ford Motor company’s reasoning is correct in that management, not shareholders, should dictate how corporate resources are allocated.¹⁴⁰ However, the Ford Motor Company’s argument that the shareholder proposal can be excluded because corporate policy is not an appropriate subject matter for shareholder consideration is wrong; the current shareholder process is specifically designed to allow shareholders to examine and influence corporate action in areas of significant social policy.¹⁴¹

In a March 15, 2005 ExxonMobil no-action letter the SEC addressed a proposal very similar to the Ford proposal; the proposal requested the board of directors to “make available research data relevant to ExxonMobil’s stated position on the science of climate change.”¹⁴² ExxonMobil’s argument followed Ford’s reasoning; the report was a “highly detailed report” because it requested “primary research data and a discussion of peer-reviewed publications in a highly technical field of science. . . .”¹⁴³ However, despite the Ford proposal and ExxonMobil proposal’s similarities, the SEC reached opposite conclusions in the two no-action letter

136. Ford Motor Co., SEC No-Action Letter, 2004 SEC No-Act. LEXIS 441, at *1 (Mar. 2, 2004).

137. *Id.*

138. *Id.* at *27.

139. *Id.* at *28.

140. Amendments, *supra* note 33, at 29108.

141. *Id.*

142. ExxonMobil Corp., SEC No-Action Letter, 2005 SEC No-Act. LEXIS 414, at *1 (Mar. 2, 2005).

143. *Id.* at *3.

decisions.¹⁴⁴ Thus, it is unclear what exactly constitutes a highly detailed report and excludable under the ordinary business exception.

Companies have also argued that shareholder reporting requests are unnecessary and moot because of the Management Discussion and Analysis (MD&A) disclosure requirements under the securities laws.¹⁴⁵ These requirements already mandate disclosure of all material information relating to corporate operations, and companies argue that reports that only duplicate information already required or available have no value.¹⁴⁶ Many shareholder requests for reports simply ask for a general assessment and greater disclosure surrounding management decisions; they do not “seek to impose specific time-frames or methods for implementing complex policies.”¹⁴⁷ Thus, companies argue that although such proposals cannot be excluded on “micro-managing” grounds, the SEC should nevertheless allow companies to exclude them because MD&A requirements render them moot.¹⁴⁸ However this proposition ignores that a fundamental tenet of the shareholder proposal process is to facilitate shareholder participation in corporate decision-making.¹⁴⁹ Under the MD&A requirements it is the management, not the shareholders, who control the content of disclosure.¹⁵⁰ Consequently, although a company’s management is required to make all material disclosures, the current trend is that companies do not sufficiently disclose or discuss climate change effects despite the risks involved.¹⁵¹

144. Compare Ford Motor Co., *supra* note 136, at *1 (allowing the company to exclude a proposal that requested the company to report on climate change science) with ExxonMobil Corp., SEC No-Action Letter, *supra* note 142, at *1 (refusing to allow the company to exclude a proposal that asked it to make available climate change research data).

145. Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii) (2006).

146. See, e.g., Cinergy Corp., SEC No-Action Letter, 2003 LEXIS 159, at *23 (Feb. 5, 2003).

147. Amendments, *supra* note 33, at 29115.

148. See Cinergy Corp., SEC No-Action Letter, *supra* note 146, at *23.

149. See Beth-Ann Roth, *Proactive Corporate-Shareholder Relations: Filling the Communications Void*, 48 CATH. U. L. REV. 101, 102 (1998).

150. See Regulation S-K, 17 C.F.R. § 229.303(a) (2006).

151. See MICHELLE CHAN-FISHEL, FRIENDS OF THE EARTH, THIRD SURVEY OF CLIMATE CHANGE DISCLOSURE IN SEC FILINGS OF AUTOMOBILE, INSURANCE, OIL & GAS, PETROCHEMICAL, AND UTILITIES COMPANIES, 3-4 (2004), <http://www.foe.org/camps/intl/corpacct/wallstreet/secsurvey2004.pdf> (noting that although companies are reporting climate risk as a material risk in disclosures, serious reporting deficiencies exist in automobile, petrochemical and insurance sectors).

B. Commentator Proposals to Reform the Current Shareholder Proposal Process

The current SEC approach in evaluating ordinary business and the lack of transparency behind its decisions has resulted in an ad-hoc and inconsistent no-action letter process.¹⁵² Commentators have proposed various alternatives to the current approach and this section will identify and analyze four of the more persuasive proposals: 1) corporations and shareholders should increase shareholder participation through voluntary communicative measures,¹⁵³ 2) the SEC should create a separate Office of Shareholder Relations,¹⁵⁴ 3) the SEC can eliminate the ordinary business standard entirely in favor of a state law analysis,¹⁵⁵ and 4) the SEC should adopt an “override mechanism” which will allow a designated percentage of shareholders to by-pass management decisions, and automatically place shareholder proposals on a proxy statement.¹⁵⁶

1. The SEC Should Encourage Better Voluntary Corporate-Shareholder Communication

Some commentators hold the view that the shareholder process is, and should remain, a limited communicative measure that permits shareholders to make advisory recommendations, not binding referendums.¹⁵⁷ Thus, a solution to ensure shareholder participation in corporate governance should transcend a legal approach; companies should treat the problem as a corporate policy issue and voluntarily create mechanisms that will enhance shareholder-company communication.¹⁵⁸ Although shareholder proposals do not constitute binding referendums, directors should treat majority vote resolutions seriously in today’s corporate governance climate.¹⁵⁹ Companies should set up shareholder relations departments that specialize in dealing with shareholder concerns and allow shareholders to

152. See discussion *supra* Part III.A.

153. See discussion *infra* Part III.B.1.

154. See discussion *infra* Part III.B.2.

155. See discussion *infra* Part III.B.3.

156. See discussion *infra* Part III.B.4.

157. See Brownstein & Kirman, *supra* note 20, at 74-75 (asserting that shareholder proposals are not binding but precatory under Rule 14a-8, and that management must ignore majority shareholder resolutions that may be contrary to its fiduciary duties under state law).

158. See *id.* at 75.

159. See *id.* (asserting that better communication between management and shareholders will also create the additional benefit of preempting shareholder proposals that address performance or compliance issues).

communicate directly with management.¹⁶⁰ Corporate boards should also increase transparency in their decisions regarding shareholder proposals, and communicate their reasoning and decision-making procedures.¹⁶¹

However a major problem with this communicative approach is that it is premised upon voluntary corporate and shareholder participation; although such corporate action is welcome, inevitably not all corporate boards will adopt such policy proposals.¹⁶² The approach places the onus on corporate boards to take the initiative. Because corporate boards have independent decision-making powers under state laws, they may simply choose to ignore these voluntary processes.¹⁶³ Company boards decide to exclude shareholder proposals under the ordinary business principle because they do not want such proposals on their shareholder agenda. Better communication avenues do not necessarily change this cost-benefit analysis.¹⁶⁴

2. The SEC Should Create an Office of Shareholder Relations

Other commentators have suggested that the SEC should institutionalize communication between shareholders and company boards.¹⁶⁵ The SEC could set up an Office of Corporate-Shareholder Relations that is responsible for 1) providing information on programs that lead to healthy shareholder relations, 2) creating partnering programs for companies to share their experiences with each other, and 3) allowing the SEC to directly share its expertise with shareholder proponents.¹⁶⁶ The Office will provide a non-adversarial contact forum for corporations and their shareholders.¹⁶⁷ However, the creation of a new institution simply formalizes the communicative approach discussed above and it contains the same

160. See Roth, *supra* note 149, at 119-20.

161. See Brownstein & Kirman, *supra* note 20, at 75-77 (recommending that a corporation publicly communicate its decisions regarding shareholder proposals because it is consistent with notions of good governance).

162. C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 80-81 (2002).

163. Brownstein & Kirman, *supra* note 20, at 75. *But see* Roth, *supra* note 149, at 120 (arguing that SEC could standardize communicative avenues through regulation or interpretative pronouncement to facilitate conformance).

164. Monks et al., *supra* note 16, at 320.

165. See Roth, *supra* note 149, at 121-22.

166. *Id.* at 122.

167. *Id.*

voluntary compliance problems. Without clearer legislative guidance, institutionalization may only add another variable into an already confusing process.¹⁶⁸

3. The SEC Should Consider Eliminating the Ordinary Business Exception in Favor of a State Law Analysis

Other commentators have urged the SEC to eliminate the ordinary business exception entirely and instead determine a proponent's right to place proposals on a company's proxy statement by referring to the state law in which the company is incorporated.¹⁶⁹ Because an objective approach is not possible under the current SEC framework, they contend that a better solution is for the SEC to eliminate the ordinary business exception entirely.¹⁷⁰ The SEC already conducts a state law analysis under Rule 14a-8,¹⁷¹ and eliminating the ordinary business exception will streamline the shareholder proposal process.¹⁷² SEC interpretation of state law is likely to be more predictable because the SEC will be less likely to reverse itself under state interpretations than under the confusing standards that it has promulgated.¹⁷³ Moreover since state law already determines shareholders' rights to present a proposal for action at a shareholder meeting, it logically follows that the right to place proposals in a corporate proxy statement should also turn on state substantive law.¹⁷⁴

However, this approach does not address the problems associated in determining whether a subject is a proper subject under state law.¹⁷⁵ Eliminating the ordinary business exception in favor of a state law analysis may simply remove an inconsistent federal standard

168. See Rahnama, *supra* note 25, at 294-96 (noting that the shareholder proposal process has had a very inconsistent history).

169. Kevin W. Waite, *The Ordinary Business Exception to the Shareholder Proposal Rule: A Return to Predictability*, 64 FORDHAM L. REV. 1253, 1274-76 (1995).

170. *Id.* at 1274.

171. See 17 C.F.R. § 240.14a-8(a)(i)(1) (2006) (stating that a company may exclude shareholder proposals that are "not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization").

172. See Waite, *supra* note 169, at 1276 (stating that deleting the exception essentially removes an extra analytical layer).

173. *Id.* at 1275.

174. See *id.* (arguing that federal proxy rules should not limit rights that derive from state law).

175. Cf. Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 120-21 (1988) (explaining that current state laws inhibit shareholder proposals because most proposals are drafted in precatory language to avoid the "proper subject" restriction).

to a similarly confusing state standard.¹⁷⁶ Moreover, since state jurisdictions are free to adopt different “proper subject” standards, a stand-alone state law analysis may add more confusion to an already inconsistent process.¹⁷⁷ Shareholders’ ability to influence management through the process may also be impaired as companies shop around for favorable jurisdictions that allow them greater flexibility to exclude shareholder proposals.¹⁷⁸

4. The SEC Should Adopt an Automatic Override Mechanism

Another group of commentators contend that the Commission should adopt an “override mechanism” which will allow the owners of three percent of a company’s shares to essentially “override” a corporate management’s decision to exclude a proposal from its proxy materials.¹⁷⁹ The SEC initially supported this proposal but it failed to adopt the mechanism.¹⁸⁰ The automatic override mechanism is adverse to the basic notion that the directors, not the shareholders, are responsible for a corporation’s activities.¹⁸¹ However even if the SEC granted shareholders this override mechanism, company directors may still choose to ignore shareholder proposals because they are advisory and not binding under most state jurisdictions.¹⁸²

Shareholder proponents measure success by their ability to place and maintain policy issues on a company’s agenda.¹⁸³ An override mechanism will enable increased shareholder participation in corporate governance. The mechanism works largely in favor of large institutional investors who are likely to own the necessary share holdings required to trigger the automatic override.¹⁸⁴ Institutional investors are more sophisticated than individual shareholders, and the traditional justifications for limiting shareholder participation should not apply.¹⁸⁵ Accordingly, the SEC should afford them greater latitude

176. See Waite, *supra* note 169, at 1276.

177. *C.f.* Christine L. Ayotte, *Reevaluating the Shareholder Proposal Rule in the Wake of Cracker Barrel and the Era of Institutional Investors*, 48 CATH. U. L. REV. 511, 522-23 (1999).

178. See Waite, *supra* note 169, at 1275.

179. See Ayotte, *supra* note 177, at 553-54.

180. *Id.* at 554.

181. See Brownstein & Kirman, *supra* note 20, at 75.

182. See *id.* (reminding corporate boards facing majority shareholder resolutions that such resolutions are rarely legally binding).

183. See Ryan, *supra* note 175, at 121.

184. See Ayotte, *supra* note 177, at 531-32.

185. See *id.* at 555 (explaining that the limitations placed on shareholder participation in corporate governance are premised on the irrationality and procedural problems of individual

to participate and influence corporate management.¹⁸⁶ Nevertheless, the SEC did not adopt the override mechanism and ignored the need to afford institutional investors greater latitude in the shareholder proposal process.¹⁸⁷

Commentators have also disagreed on the level at which the SEC should set the override mechanism's threshold percentage.¹⁸⁸ A shareholder proponent will inevitably find it difficult to solicit proxies and engage in major publicity campaigns against large public corporations because of the practical and financial difficulties involved.¹⁸⁹ Thus, some have argued that even a three percent threshold is too high and that it should be lowered in order to increase the override mechanism's overall effectiveness.¹⁹⁰

C. Recommendations

1. The SEC Should Adopt a Combination of Current Commentator Proposals

The SEC may find it useful to consider adopting combinations of the four approaches outlined above. For example, an SEC reform package that includes creating an SEC Office of Shareholder Relations, pressing for an agenda that increases voluntary corporate-shareholder communication, and adopting a set percentage override mechanism will likely facilitate greater shareholder participation in corporate management.¹⁹¹ However, the approaches outlined above still fail to address a major problem of the shareholder process: the SEC does not provide sufficient guidance in regards to the ordinary business exception, and consequently SEC no-letter action decisions are ad-hoc and inconsistent.¹⁹²

and collective shareholders, and that these problems are not applicable to institutional investors).

186. *See id.* at 553.

187. *See id.* at 554.

188. *See* Rahnema, *supra* note 25, at 292.

189. *Id.*

190. *See id.*

191. *See* discussion *supra* Part III.B.

192. *See* Ayotte, *supra* note 177, at 551 (asserting that the Commission needs to expound a narrowly tailored definition of what constitutes an "ordinary business exception").

2. The SEC Should Adopt a New Rule Based on Whether the Shareholder Proposal is Binding or Precatory

The SEC should expound more substantive guidelines and devise rules that ensure more predictability in the no-action letter process.¹⁹³ In creating the new rules the SEC must recognize several central tenets in the shareholder process. First, Congress devised the shareholder proposal process to ensure shareholder participation in corporate management, and SEC guidance must reflect this intent.¹⁹⁴ Second, the SEC cannot ignore the state law concept of fiduciary duty. It is the directors, not the shareholders, who are responsible for corporate activities.¹⁹⁵ Third, the SEC must remember that shareholder resolutions are precatory in most jurisdictions and even majority resolutions are not binding on a company's directors.¹⁹⁶ Consequently, even if the SEC gave shareholders unfettered access to corporate proxy statements, it is unlikely to usurp directors' legal control of their corporations.¹⁹⁷

The SEC could adopt a new test that initially asks whether, given the corporation's jurisdiction or by-laws, the shareholder proposal is binding or precatory. If the proposal is binding, the SEC should refer back to the old ordinary business analysis and allow companies to exclude the proposal if it does not relate to a significant social policy issue or if it attempts to micromanage the company.¹⁹⁸ On the other hand, if the resolution is precatory and advisory, the SEC should automatically allow proponents to include the proposal on a proxy statement. In those circumstances, the benefit of inclusion (increased shareholder participation),¹⁹⁹ substantially outweighs the potential cost (restricting directors' fiduciary duty responsibilities under state law),²⁰⁰ because precatory proposals cannot legally bind management and directors are still free to exercise their independent judgment.²⁰¹

193. See *id.* (noting that the current rule is amorphous, without substantive definitions and rules of application, and left to administrative and judicial interpretation).

194. See Brownstein & Kirman, *supra* note 20, at 40.

195. *Id.* at 42.

196. Monks et al., *supra* note 16, at 319.

197. See *id.* (noting that directors maintain legal control over companies because shareholder proposals are precatory).

198. See Amendments, *supra* note 33, at 29108.

199. See Ayotte, *supra* note 177, at 521 (asserting that the SEC envisioned greater shareholder responsibility and participation in corporate activity when it created Rule 14a-8).

200. See Brownstein & Kirman, *supra* note 20, at 42.

201. See Monks et al., *supra* note 16, at 319.

3. The SEC Should Articulate its Reasoning Behind No-Action Letter Decisions

In addition, the SEC should articulate its reasoning behind no-action letter decisions, instead of merely concurring or not concurring with a company's request to exclude a shareholder proposal.²⁰² However, since the SEC receives a large volume of no-action letter requests every year, this suggestion may not be feasible given time and manpower constraints.²⁰³ Nonetheless, if the SEC could find the resources to provide even a short five hundred word-limit explanation, it will provide more substantive guidance than the current approach.²⁰⁴

4. The SEC Should Create Shareholder Proposal Templates

The SEC should create shareholder proposal templates that entail designated substantive limits. These SEC templates will essentially carry the SEC seal of approval and guarantee a shareholder proponent's access to a corporate proxy statement. For example, one acceptable SEC template may say: "Proponents request that the company should (prepare a report) on how the company is (responding) to (social policy issue)." The SEC could thereafter condition this template on limitations such as 1) the company must provide a report but directors may choose to ignore its findings,²⁰⁵ 2) the report must be provided at reasonable cost, in accordance to SEC stated word limits, and omit all proprietary information,²⁰⁶ 3) the report must be limited to disclosure of information, or 4) the company need not present an analysis of the information disclosed, or of the stated policy issue.²⁰⁷

202. See, e.g., ExxonMobil Corp., SEC No-Action Letter, *supra* note 102, at *1 (refusing to concur with the company's view without substantive explanation).

203. See *Amalgamated Clothing and Textile Workers Union v. Wal-Mart*, 821 F. Supp. 877, 885 (S.D.N.Y. 1993).

204. See *id.* (describing the current no-action letter process' cursory nature).

205. See Brownstein & Kirman, *supra* note 20, at 42-43 (outlining the importance of independent managerial decisions). This limitation will insulate the decisions of boards of directors and limit shareholder pressure. *Id.*

206. See Amendments, *supra* note 33, at 29108 (explaining that proposals that seek "intricate detail" are excludable as attempts to "micro-manage" the company). This limitation will protect management from shareholder proposals that may "micro-manage" the company. *Id.*

207. See Carol Goforth, *Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, But Not Too Late*, 43 AM. U. L. REV. 379, 430-32 (1994) (discussing the corporate management versus shareholder participation dichotomy present in corporate governance issues). This limitation prevents shareholders from micro-managing the

This methodology will increase predictability in the SEC no-action process because it allows shareholders to know exactly what proposals will be allowed by the SEC, and the substantive context to which these acceptable proposals are limited. The SEC may also find it useful to design several different shareholder templates that accommodate specific industry characteristics and needs.²⁰⁸ The SEC should continue to allow shareholders to design their own proposals but these individualized proposals will be subject to the additional tests previously outlined in this section.²⁰⁹

IV. CONCLUSION

The Maldives is one of the most vulnerable countries to climate change; the entire Maldivian population and societal infrastructure is situated very close to mean sea level.²¹⁰ Climate change and consequent increases in global mean sea levels threatens the Maldivian way of life and even its existence.²¹¹ Although climate change will bring many devastating consequences, the United States government has yet to endorse the Kyoto Protocol or introduce commensurate domestic legislation in order to limit such effects²¹² because climate change regulations will affect American business profitability.²¹³

Climate change raises significant social policy and environmental issues, and it is a proper subject matter for shareholder concern. Climate change has the potential to affect business profitability and affect investment value because it creates operational risks, regulatory risks, competitiveness risks, reputational risk, and litigation risks.²¹⁴ However, the current shareholder proposal process does not adequately afford shareholders the tools for sufficient

company while protecting the shareholders' prerogative of influencing corporate behavior by raising social policy concerns. *Id.*

208. See discussion *supra* Part III.A.3 (asserting that the SEC appears to distinguish between industries when conducting an ordinary business analysis).

209. See discussion *supra* Part III.C.2.

210. MALDIVES COMMUNICATION, *supra* note 1, at 5 (explaining that over 80% of the land of the Maldives is less than 1 m above mean sea level).

211. *Id.* (anticipating that climate change will have significant negative impacts on Maldivian society and even a 1 m rise in sea level would result in the loss of the entire land area of the Maldives).

212. Thackeray, *supra* note 12, at 874-75.

213. See *id.* at 875 (quoting President G.W. Bush declaring that Kyoto Protocol compliance "will have serious repercussions on the U.S. economy").

214. See *supra* notes 47-59 and accompanying text.

shareholder participation in corporate governance.²¹⁵ The SEC allows a company to exclude shareholder proposals if the proposals relate to the company's ordinary business, despite the fact that these proposals rarely receive majority support and are non-binding and precatory under most state jurisdictions.²¹⁶ Moreover, vacillating SEC guidance on the matter has created inconsistent and contradictory no-action letter decisions which have the potential to confuse courts, shareholders, and company boards.²¹⁷

The SEC should consider reforming the current shareholder proposal process through adopting a reform package: 1) creating an SEC Office of Shareholder Relations, 2) pressing for an agenda that increases voluntary corporate-shareholder communication, 3) adopting a set percentage override mechanism, 4) adopting a new test based upon whether the shareholder proposal's content is binding or precatory, and 5) issuing shareholder proposal templates that contain condition-subsequent limitations.²¹⁸ The reforms should ensure greater predictability in SEC no-action letter decisions and allow maximum shareholder participation in corporate governance, while also adhering to state law requirements that it the corporate boards, not the shareholders, are responsible for corporate actions and decision-making.

215. See discussion *supra* Part III.A.

216. See Monks et al., *supra* note 16, at 319 (noting that in most states shareholder proposals are not binding upon corporations).

217. See discussion *supra* Part III.A.

218. See discussion *supra* Part III.C.