Banks Dragged Into Climate Change Fight With SEC Order

By Keith Goldberg

Law360, New York (March 01, 2013, 7:26 PM ET) -- The U.S. Securities and Exchange Commission recently told PNC Financial Services Group Inc. that the bank had to consider a shareholder request to assess the climate change impacts of its investment portfolio, a novel order attorneys say could spark new fights over the environmental disclosures made by publicly traded financial institutions.

In a Feb. 13 notice, the SEC’s Division of Corporate Finance rejected PNC’s contention that it could exclude from its 2013 proxy statement a proposal by shareholder Boston Common Asset Management LLC that the bank create an assessment of the greenhouse gas emissions resulting from its lending portfolio and its exposure to climate change risk in its lending, investing and financing activities.

Massachusetts-based Boston Common, which bills itself as an investment firm dedicated to sustainability, in making its shareholder proposal cited concerns over PNC’s financing of coal mining companies that practice mountaintop removal. The request was supported by other environmentally active investment firms.

PNC argued that the Securities Exchange Act allows companies to exclude shareholder proposals dealing with “ordinary business operations” from proxy statements.

An SEC attorney disagreed, noting that “the proposal focuses on the significant policy issue of climate change.”

“It does look like the [SEC] staff is taking a pretty expansive view,” Hogan Lovells corporate partner and former SEC attorney Alan Dye told Law360. “What the implications are for other companies is that if they get a proposal, they too will be required to include it in their proxy statements.”

That will embolden environmentally active investors to make similar demands on other financial firms, who will have to include them in their proxy statements and put them to a shareholder vote, attorneys say.

"These proposals tend to come in groups,” Schulte Roth & Zabel LLP partner Michael Littenberg, who specializes in securities law compliance, told Law360. "It wouldn't surprise me if, this year or next year, you see similar proposals at other financial institutions."

The SEC issued guidance for publicly traded companies in 2010 as to how existing disclosure
requirements applied to climate change. Basically, the regulator said the requirement for disclosing climate change risks was the same as any other risk — if it poses a material liability to a company, it has to be disclosed, according to E. Lynn Grayson, who co-chairs Jenner & Block LLP’s environmental and workplace health & safety law practice.

However, Grayson says the rejection of PNC’s bid to exclude the shareholder proposal is the first time she’s seen the SEC aggressively push back against a company over the climate change issue.

“I think this is a line in the sand,” Grayson told Law360. “The SEC is saying, ‘No, climate change is important and significant, and you need to disclose it.’”

Attorneys say providing disclosures on the risks that climate change pose to their operations would be an onerous and costly task for financial institutions, which aren’t like other companies that might have more physical operations where things like greenhouse gas emissions may be more easily measured.

“Financial institutions have these tremendously large portfolios, and they have a great deal of information about the nature of the assets, but it may not drill down to the knowledge of greenhouse gas emission baselines and such,” Grayson said. “The message you’re getting from the SEC is perhaps the time has come where they’ll have to take a deeper dive. That's potentially a really expensive undertaking for a lot of financial institutions.”

In PNC’s case, if the bank’s shareholders were to approve Boston Common’s proposal, PNC would need to figure out the impact of global warming on every one of its borrowers, according to Dye.

“That would be a lot of work, if it could even gather all the information,” Dye said. “That could [also] result in a change in the company’s lending policies.”

PNC’s annual shareholder meeting is scheduled for April 23.

"Given the climate crisis, we know that a business based on current emissions levels is unsustainable," Meredith Benton, Boston Common’s client portfolio manager, said in a statement last month. “As investors, we want to ensure that the PNC Board and top management understand climate change as an issue, and the implications it may have for their business.”

However, the chances that a majority of PNC shareholders will approve the investment firm’s proposal are slim, attorneys say. But that may be beside the point — the goal of shareholders making social issue proposals isn’t necessarily to win; rather, it’s to bring the issue to the attention of fellow shareholders and the company’s management and board of directors.

"Social responsibility proposals almost never pass," Littenberg said. "Instead, they are a tool for relevant shareholder constituencies to seek to drive more engagement around a particular topic. They often lead to dialogue around an issue and sometimes more disclosure, whether in public filings or on the issuer's website."

Regardless of whether the bank’s shareholders ultimately approve Boston Common’s proposal, “this proposal is going to get in front of a lot of people, because every investor is going to get a copy of this proxy statement,” Dye said.
The SEC’s blessing of the proposal — and likely, similar proposals — indicates that the regulator is taking climate change seriously and that publicly traded financial institutions may need a deeper understanding of their assets and what the impacts of those assets might be on climate change, according to Grayson.

“That may be a lot to ask for a financial institution, but that seems to be the message the SEC is sending,” Grayson said.

--Editing by Sarah Golin and Chris Yates.