2013

Securities Regulation as Gap-Filler: The Example of Hydraulic Fracturing

Wendy Gerwick Couture
University of Idaho College of Law, wgcouture@uidaho.edu

Securities Regulation As Gap-Filler: The Example of Hydraulic Fracturing

*By Wendy Gerwick Couture**

I. Introduction

Hydraulic fracturing is a controversial well stimulation process used to maximize the extraction of underground resources like oil and gas. Indeed, this process has been the unlikely subject of the Oscar-nominated documentary *Gaslands*,[2] a responsive documentary *FrackNation* that was recently screened for members of Congress,[3] and the drama *Promised Land* starring Matt Damon.[4] Many opponents of unregulated hydraulic fracturing have criticized the slow federal regulatory response to hydraulic fracturing. Often lost in this outcry is the recognition that the securities laws already regulate hydraulic fracturing. This Article explores the securities regulation of hydraulic fracturing and draws some broader conclusions about the gap-filling role of securities regulation.

This Article proceeds in four additional parts. Part II summarizes the current perception that the federal government has been slow to regulate hydraulic fracturing. Part III explains how the Securities Exchange Act's periodic disclosure requirements operate to regulate public companies that engage in hydraulic fracturing operations. Part IV explains how the Exchange Act's proxy access rules operate to allow shareholders to include various hydraulic fracturing-related proposals in the proxy statements of public companies. Finally, Part V briefly concludes with some reflections on the role of securities regulation as a gap-filler to address novel issues affecting public companies.

II. Perceived Slow Federal Regulatory Response to Hydraulic Fracturing

There has been significant public and scholarly outcry for a federal regulatory response to hydraulic fracturing.[5] For example, Professor Jody Freeman argued in a recent *New York Times* Op-Ed that "only a national regulatory system can strike the right balance, simultaneously realizing hydraulic fracturing's energy promise and minimizing the risks while respecting state authority."[6]

---

*Wendy Gerwick Couture is an Associate Professor of Law at the University of Idaho in Boise, where she teaches securities regulation, white collar crime, and other business and commercial law courses.

There have been a number of federal responses to hydraulic fracturing, although none that rises to the level of comprehensive regulation. Among the federal responses are proposed legislation to repeal the exemption for hydraulic fracturing in the Safe Drinking Water Act,[7] an ongoing Environmental Protection Agency study on the impacts of hydraulic fracturing on drinking water resources,[8] an executive order establishing an Interagency Working Group to Support Safe and Responsible Development of Unconventional Domestic Natural Gas Resources,[9] new E.P.A. regulations under the Clean Air Act requiring operators to use "green completion" to capture natural gas that escapes from hydraulically fractured gas wells,[10] an E.P.A. proposal to regulate the usage of diesel fuel in hydraulic fracturing under the Safe Drinking Water Act,[11] and Interior Department plans to issue a revised proposal regulating hydraulic fracturing on public lands.[12]

Despite the perception of a slow federal regulatory response to hydraulic fracturing, one area of federal regulation has dealt extensively with hydraulic fracturing: securities regulation. In particular, public companies that are engaged in hydraulic fracturing operations must (1) make extensive periodic disclosures under Securities Exchange Act regulations; and (2) comply with the Exchange Act's regulations regarding shareholder access to company proxy statements. Securities regulation significantly impacts public companies that are engaged in hydraulic fracturing operations. Each impact is briefly discussed below.

III. Securities Exchange Act Disclosure Regulation of Hydraulic Fracturing

The Securities Exchange Act, and the regulations promulgated thereunder, require public companies to make extensive periodic disclosures,[13] with the goal of providing "investor protection both in public offerings and in the securities markets, at a minimum burden to public companies."[14]

In order to provide a snapshot of the disclosure obligations of public companies engaged in hydraulic fracturing operations, this Article's author reviewed 15 10-K annual reports,[15] which were randomly selected from those filings meeting the following specifications: (1) each 10-K was filed by a company with the Standard Industry Classification (SIC) Code 1311: "Crude Petroleum & Natural Gas"; (2) each 10-K is for the fiscal year that ended on December 31, 2012; and (3) each 10-K includes the term "hydraulic fracturing" at least once. A number of trends emerged.

First, almost every company defined the term "hydraulic fracturing," either in a separate glossary section or in the narrative text. The definitions were generally consistent, with Resolute Energy Corporation's definition among the most detailed:

Hydraulic fracturing or "fracing" is a process used by oil and gas producers in the completion or re-working of some oil and gas wells. Water, sand and certain chemical additives are injected under high pressure into subsurface formations to create and prop open fractures and thus enable fluids that would otherwise remain trapped in the formation to flow to the surface.[16]

Other definitions referred to this technique as a means to "improv[e] a well's production,"[17] to "stimulate" production,[18] to "maximize productivity,"[19] to "increase the productivity,"[20] to "allow flow of hydrocarbons into the wellbore";[21] to "stimulate and improve the flow of hydrocarbons,"[22] to "allow oil or natural gas to flow more freely to the wellbore."[23]

Additionally, most companies emphasized the importance of hydraulic fracturing to their businesses, describing the technique as one that the company "routinely" uses,[24] that is "required to economically develop the properties,"[25] that is "necessary to produce commercial quantities of oil and natural gas from many of the reservoirs that we operate,"[26] that is used as a means to increase the "productivity of almost every well that we drill and complete,"[27] and that a "significant majority of our operations utilize."[28] Several companies provided specific information about the importance of hydraulic fracturing to their ability to access their reserves. For example, Approach Resources Inc. disclosed: "All of our proved non-producing and proved undeveloped reserves associated with future drilling, completion and recompletion projects will require hydraulic fracturing."[29] Laredo Petroleum Holdings, Inc. disclosed: "[A]pproximately 59% of our total estimated proved reserves as of December 31, 2012, require hydraulic fracturing."[30]

Unsurprisingly, almost all of the companies discussed the potential impacts of the federal regulatory responses summarized above in Part II. They commonly cited the following anticipated impacts: increased cost,[31] delay,[32] increased difficulty of production,[33] curtailment or cessation of production,[34] and reduced amount of production.[35] Indeed, in an effort to secure safe harbor protection for their forward-looking statements, almost half of the companies identified hydraulic fracturing regulation[36] in their "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."[37] Somewhat surprisingly, in light of the apparent importance of hydraulic fracturing to these companies' operations and the risks of regulation,[38] few companies mentioned the term "hydraulic fracturing" in the "Management's Discussion and Analysis of Financial Condition and Results of Operations" (MD&A) section of the 10-K.[39]

Many companies discussed the important role of water in hydraulic

fracturing and their aspirations to use recycled water for this process. Half of the companies identified shortages of water as an important risk factor[40]—with potential causes of shortages listed as drought[41] and resultant local water district restrictions.[42] One company stated that it used recycled or treated water "when commercially and technically feasible,"[43] and another expressed a "plan to reuse and recycle flow-back and produced water in 2013."[44] Two other companies disclosed their efforts to use recycled water, with one stating that it was "in the process of testing recycled flowback/produced water in our fracing operations"[45] and the other stating that it had "technical staff dedicated to the development of water recycling and re-use systems."[46] Additionally, two companies noted that they were required by state law to disclose the volume of water used in their hydraulic fracturing.[47] At the other end of the process, many companies identified the inability to dispose of wastewater as an important risk factor—with regulation as the most likely potential cause.[48] At least one company stated that, in anticipation of regulatory difficulties in disposing of its wastewater, it had "begun to rely more on recycling of flowback and produced water from well sites as a preferred alternative to disposal."[49]

Many companies identified the risks of spillage of, and contamination from, hydraulic fracturing chemical additives, with the resultant potential for liability.[50] Several companies added that these risks might not be fully insured.[51] In addition, many companies identified the protective practices that they had implemented to prevent these occurrences, including continuously monitoring the hydraulic fracturing process in real time,[52] pressure testing well construction and integrity,[53] and using casing and cementing to ensure separation from groundwater.[54]

A few companies expressed concern that if federal regulations compelled them to disclose the chemicals used in their hydraulic fracturing operations, they would be subject to increased litigation risk. For example, Northern Oil & Gas, Inc. stated: "The availability of this information could make it easier for third parties opposing the hydraulic fracturing process to initiate legal proceedings based on allegations that specific chemicals used in the fracturing process could adversely affect groundwater."[55] On the other hand, several companies reported that they already publicly disclose the chemicals used in their hydraulic fracturing operations in the FracFocus database at http://www.fracfocus.org. Some of these companies described their FracFocus disclosures as "voluntary,"[56] while others stated that they were doing so under state or tribal mandate.[57]

Reviewing the 10-K's en masse revealed the degree of Balkanization of hydraulic fracturing regulation. Combined, these 15 annual reports discussed the regulatory schemes in the states of Colorado, Kansas,

Louisiana, Montana, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Texas, West Virginia, and Wyoming, as well as in the Navajo Nation.

Finally, several companies discussed the risks associated with negative public perception of hydraulic fracturing, including that nongovernmental organizations might "restrict certain buyers from purchasing oil and natural gas produced from wells that have utilized hydraulic fracturing in their completion process,"[58] that negative public perception might lead to "greater opposition, including litigation, to oil and gas production activities using hydraulic-fracturing techniques,"[59] and that governmental authorities in the exercise of their discretion might "cause the permits that we need to conduct our operations to be withheld, delayed, or burdened."[60]

In order to put these public disclosures in context, this Article's author also reviewed some of the Securities and Exchange Commission's correspondence with companies about their hydraulic fracturing disclosures. The S.E.C. has been quite vigilant in mandating extensive disclosures, such as those reflected in the 15 10-Ks discussed above. In addition, surprisingly, in the summer of 2011, the S.E.C. asked a number of companies to disclose to the S.E.C. the chemicals used in their hydraulic fracturing fluid formulations, including the volume, concentration, and total amounts utilized.[61] Even more surprisingly, many of these companies responded by publicly disclosing this information.[62] Other companies responded to this request confidentially,[63] and one company declined because "[t]he exact mixtures/formulations of chemical are considered proprietary by our service providers, and we are not privy to this proprietary information."[64]

Finally, the specter of S.E.C. enforcement and securities litigation incentivizes companies to ensure the accuracy and completeness of their disclosures regarding hydraulic fracturing. Indeed, the law firm of King & Spalding recently published an article titled, "Securities Litigation and the Energy Sector," which warned its clients that their disclosures about hydraulic fracturing "could lead to shareholder litigation and increased SEC involvement."[65] For example, the S.E.C. has issued subpoenas to several companies as part of an investigation into whether companies are overstating the long-term productivity of their natural gas wells.[66]

In sum, the Securities Exchange Act, and the regulations promulgated thereunder, impose significant disclosure requirements on companies engaged in hydraulic fracturing operations.

IV. Securities Exchange Act Proxy Access Regulation of Hydraulic Fracturing

In addition to regulating periodic disclosures, the Securities

Exchange Act regulates proxy statements. Exchange Act Rule 14a-8 mandates that public companies provide shareholders access to company proxy statements, so that shareholders can submit proposals for shareholder vote without financing their own proxy statements.[67] There are a series of exceptions to the proxy access rule.[68] When a public company wishes to rely on an exception, it must file its reasons for excluding the proposal with the S.E.C.[69] Recently, the S.E.C. has refused to issue no-action letters with respect to several companies' planned exclusion of shareholder proposals related to hydraulic fracturing, effectively forcing these companies to include these proposals in their proxy materials.

On a number of occasions,[70] the S.E.C. has refused to concur in the exclusion of proposals similar to this one, which was submitted to Chesapeake Energy Corporation:

> Resolved: that the Board of Directors prepare a report by November 1, 2010, at a reasonable cost and omitting confidential information such as proprietary or legally prejudicial data, summarizing 1. the environmental impact of fracturing operations of Chesapeake Energy Corporation; 2. potential policies for the company to adopt, above and beyond regulatory requirements, to reduce or eliminate hazards to air, water, and soil quality from fracturing; and 3. other information regarding the scale, likelihood and/or impacts of potential material risks, short or long term, to the company's finances or operations, due to environmental concerns regarding fracturing.[71]

Each company argued that the proposal was excludable under the "management functions" exception in Rule 14a-8(i)(7), which permits the exclusion of a proposal that "deals with a matter relating to the company's ordinary business operations."[72] On each occasion, the S.E.C. was unable to concur because the proposal did "not seek to micromanage the company to such a degree" that exclusion of the proposal would be appropriate.[73] By comparison, relying on Rule 14a-8(i)(7), the S.E.C. issued the requested no-action letter with respect to the exclusion of a proposal requesting that "the board prepare a report discussing possible short and long term risks to the company's finances and operations posed by the environmental, social, and economic challenges associated with the oil sands."[74] The S.E.C. noted that this proposal "addresses the 'economic challenges' associated with the oil sands and does not, in our view, focus on a significant policy issue."[75]

In another interesting example, the S.E.C. refused to concur in the exclusion of the following proposal, which was submitted to Exxon Mobil Corporation: "RESOLVED, the shareholders request the Board of Directors to create a comprehensive policy articulating our company's respect for and commitment to the human right to water."[76] The company argued that the proposal could be excluded under the

"substantially implemented" exception in Rule 14a-8(i)(10).[77] The S.E.C. was unable to concur because it "did not appear that ExxonMobil has a policy that compares favorably with the guidelines of the proposal."[78]

A shareholder proposal, even if included in the company's proxy statement, must also receive the requisite number of shareholder votes. The Institutional Shareholder Services, Inc. (ISS), which is "estimated to advise half the world's common stock,"[79] wields a tremendous amount of influence on the success or failure of shareholder proposals.[80] The ISS recently issued the following proxy voting guidelines, in favor of shareholder proposals requiring greater disclosure of hydraulic fracturing:

> Generally vote FOR proposals requesting greater disclosure of a company's (natural gas) hydraulic fracturing operations, including measures the company has taken to manage and mitigate the potential community and environmental impacts of those operations, considering:
>
> - The company's current level of disclosure of relevant policies and oversight mechanisms;
> - The company's current level of such disclosure relative to its industry peers;
> - Potential relevant local, state, or national regulatory developments; and
> - Controversies, fines, or litigation related to the company's hydraulic fracturing operations.[81]

In sum, the Securities Exchange Act, and the regulations promulgated thereunder, require companies to include a variety of shareholder proposals related to hydraulic fracturing on the companies' proxy statements, and the ISS's support for these proposals suggests that many of these proposals will be successful.

V. Concluding Remarks About the Role of Securities Regulation Within the Federal Regulatory Scheme

These examples of how the securities laws regulate hydraulic fracturing, albeit indirectly, will hopefully spark a broader discussion about the role of securities regulation within the federal regulatory scheme. When novel issues arise, there is often a delay before the primary federal regulator can implement comprehensive new regulations, with the delay in federal regulation of hydraulic fracturing as an example. When novel issues affect public companies, the securities laws serve as a gap-filler by requiring certain disclosures about these issues and by mandating that shareholder proposals about these issues be heard. In addition to serving as a gap-filler, therefore, the disclosure and access requirements may actually help inform the primary federal regulator about the corporate and shareholder interests at issue, the various strategies followed by the states and tribes, the

voluntary practices adopted by public companies, and the proposals approved by shareholders. In some ways, then, the federal securities laws enable the process of "iterative federalism."[82] This gap-filling role of securities regulation is not limited to the example of hydraulic fracturing. Corporate political contributions[83] and network neutrality[84] are other examples of cutting-edge issues affecting public companies where, until primary federal regulation is adopted and withstands court challenges, securities regulation is serving as a gap-filler.

NOTES:

[2]Gasland (2010) (directed by Josh Fox).

[3]FrackNation (2013) (directed by Phelim McAleer, Ann McElhinney &Magdalena Segieda); Patrick Gavin, Congress Gets Crack at "FrackNation," Politico.com (Feb. 26, 2013).

[4]Promised Land (2012) (directed by Gus Van Sant).

[5]*E.g.*, Burford, The Need for Federal Regulation of Hydraulic Fracturing, 44 Urb. Law. 577, 588 (2012) ("While the United States needs to use the method of hydraulic fracturing, it also needs access to safe drinking water. In order for both goals to be achieved, it is necessary for hydraulic fracturing to be regulated at the federal level.").

[6]Jody Freeman, The Wise Way to Regulate Gas Drilling, N.Y. Times (July 5, 2012).

[7]*See* H.R. 1084 and S. 587, The Fracturing Responsibility and Awareness Chemicals Act (FRAC Act), introduced in the 112th Congress.

[8]U.S. Environmental Protection Agency, Office of Research and Development, Study of the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources: Progress Report (Dec. 2012).

[9]President Barack Obama, Executive Order—Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources (Apr. 13, 2012).

[10]40 C.F.R. §§ 60.5360 et seq; E.P.A., Overview of Final Amendment to Air Regulations for the Oil and Natural Gas Instrustry Fact Sheet (Apr. 17, 2012).

[11]E.P.A., Draft Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels (May 2012).

[12]Alan Kovski & Tripp Baltz, BLM to Pull Back Proposed Fracking Rule, Will Issue Revised Version in First Quarter, http://www.bnc.com (Jan. 22, 2013).

[13]Securities Exchange Act §§ 13(a) and 15(d); 15 U.S.C.A. §§ 78m(a) and 78o(d); SEC Rules 13a-1 and 15d-1, 17 C.F.R. §§ 240.13a-1 and 240.15d-1 (annual reports requirement); SEC Rules 13a-13 and 15d-13, 17 C.F.R. §§ 240.13a-13 and 240.15d-13 (quarterly reports requirement); SEC Rules 13a-11 and 15d-11, 17 C.F.R. §§ 240.13a-11 and 240.15d-11 (current reports requirement).

[14]Proposed Comprehensive Revision to System for Regulation of Securities Offerings, Exchange Act Release No. 6235, 1980 WL 20867, *4 (Sept. 2, 1980).

[15]Approach Resources Inc., Form 10-K (filed on Feb. 28, 2013); Cabot Oil & Gas Corporation, Form 10-K (filed on Feb. 28, 2013); Carrizo Oil & Gas, Inc., Form 10-K (filed on Feb. 28, 2013); Chesapeake Energy Corporation, Form 10-K (filed on March

1, 2013); Constellation Energy Partners LLC, Form 10-K (filed on March 11, 2013); Continental Resources, Inc., Form 10-K (filed on Feb. 28, 2013); Eagle Rock Energy Partners, L.P., Form 10-K (filed on March 1, 2013); EP Energy LLC, Form 10-K (filed on March 1, 2013); EV Energy Partners, L.P., Form 10-K (filed on March 1, 2013); Gastar Exploration Ltd. and Gastar Exploration USA, Inc., Form 10-K (filed on March 11, 2013); Laredo Petroleum Holdings, Inc., Form 10-K (filed on March 12, 2013); Northern Oil and Gas, Inc., Form 10-K (filed on March 1, 2013); PostRock Energy Corporation, Form 10-K (filed on March 12, 2013); QR Energy, LP, Form 10-K (filed on March 6, 2013); Resolute Energy Corporation, Form 10-K (filed on March 7, 2013).

[16]Resolute Energy 10-K, p.23.

[17]Northern Oil 10-K, p.ii.

[18]Approach 10-K, p.4; Constellation 10-K, p.15; Continental 10-K, p.ii; Eagle Rock 10-K, p.31; EV Energy 10-K, p.18; Gastar 10-K, p.19; Laredo 10-K, p.25; QR Energy 10-K, p.23.

[19]EP Energy 10-K, p.15.

[20]Chesapeake 10-K, p.20.

[21]PostRock 10-K, p.23.

[22]Carrizo 10-K, p.25.

[23]Cabot 10-K, p.20.

[24]Eagle Rock 10-K, p.50; Gastar 10-K, p.19; QR Energy 10-K, p.23; Resolute Energy 10-K, p.23.

[25]EV Energy 10-K, p.22.

[26]EP Energy 10-K, p.34.

[27]Chesapeake 10-K, p.32; Laredo 10-K, p.22.

[28]Continental 10-K, p.37.

[29]Approach 10-K, p.3.

[30]Laredo 10-K, p.22.

[31]Constellation 10-K, p.22; Eagle Rock 10-K, p.50-51; EP Energy 10-K, p.35; EV Energy 10-K, p.34; Laredo 10-K, p.25; Resolute 10-K, p.23.

[32]EP Energy 10-K, p.35; EV Energy 10-K, p.34.

[33]Constellation 10-K, p.22; Eagle Rock 10-K, p.50-51; Laredo 10-K, p.25.

[34]Chesapeake 10-K, p.21; EP Energy 10-K, p.35; EV Energy 10-K, p.34.

[35]Chesapeake 10-K, p.21; Constellation 10-K, p.22; Eagle Rock 10-K, p.50-51; Resolute 10-K, p.23.

[36]Carrizo 10-K, p.3; Approach 10-K, p.iii; Eagle Rock 10-K, p.i; Gastar 10-K, p.5; Laredo 10-K, p.25; QR Energy 10-K, p.8.

[37]15 U.S.C.A. §§ 77z-2(c)(1)(A)(i) and 78u-5(c)(1)(A)(i).

[38]Companies describe in their MD&A "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." Regulation S-K, Item 303(a)(3). Under S.E.C. guidance, discussion and analysis is required "unless a company is able to conclude either that it is not reasonably likely that the trend, uncertainty or other event will occur or come to fruition, or that a ma-

terial effect on the company's liquidity, capital resources or results of operations is not reasonably likely to occur." Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Exchange Act Release No. 8350, 2003 WL 22996757, *11 (Dec. 19, 2003).

[39]Continental Resources, Inc. included two paragraphs in its MD&A section discussing the potential impacts of hydraulic fracturing regulation, under the heading "Pending Legislative and Regulatory Initiatives." Continental 10-K, p.74.

[40]*E.g.*, Cabot 10-K, p.30; Carrizo 10-K, p.33; Eagle Rock 10-K, p.50; Gastar 10-K, p.26; Northern 10-K, p.11; QR Energy 10-K, p.35; Resolute 10-K, p.34.

[41]Approach 10-K, p.16; EP Energy 10-K, p.28; Laredo 10-K, p.36.

[42]Approach 10-K, p.16; Laredo 10-K, p.36.

[43]EP Energy 10-K, p.16.

[44]Approach 10-K, p.5.

[45]Laredo 10-K, p.22.

[46]Chesapeake 10-K, p.20.

[47]EV Energy 10-K, p.22; Laredo 10-K, p.25.

[48]*E.g.*, Cabot 10-K, p.30; Carrizo 10-K, p.33; Eagle Rock 10-K, p.50; Laredo 10-K, p.25.

[49]Cabot 10-K, p.31.

[50]*E.g.*, Cabot 10-K, p.27; Carrizo 10-K, p.35; Continental 10-K, p.34; EV Energy 10-K, p.31-32; Gastar 10-K, p.31.

[51]*E.g.*, Cabot 10-K, p.27; Continental 10-K, p.34; EV Energy 10-K, p.31-32; Gastar 10-K, p.31.

[52]*E.g.*, Approach 10-K, p.5; Chesapeake 10-K, p.20; EV Energy 10-K, p.22; Laredo 10-K, p.22.

[53]*E.g.*, Approach 10-K, p.5; EP Energy 10-K, p.16.

[54]*E.g.*, Approach 10-K, p.5; EP Energy 10-K, p.16; EV Energy 10-K, p.22; Laredo 10-K, p.22.

[55]Northern Gas 10-K, p.19.

[56]Chesapeake 10-K, p.22; Continental 10-K, p.74.

[57]Laredo 10-K, p.22; Resolute 10-K, p.23.

[58]EP Energy 10-K, p.35.

[59]PostRock 10-K, p.24.

[60]Cabot 10-K, p.25.

[61]S.E.C. Comment Letter, Carbon Natural Gas Company ¶ 9 (Sept. 9, 2011); S.E.C. Comment Letter, Comstock Resources, Inc. ¶ 5 (Aug. 31, 2011); S.E.C. Comment Letter, Range Resources Corporation ¶ 3 (Aug. 17, 2011); S.E.C. Comment Letter, Stone Energy Corporation ¶ 4 (Aug. 8, 2011); S.E.C. Comment Letter, GMX Resources, Inc. ¶ 8 (July 25, 2011); S.E.C. Comment Letter, Memorial Production Partners LP ¶ 18 (July 22, 2011); S.E.C. Comment Letter, Enduro Resource Partners LLC ¶ 2 (July 20, 2011); S.E.C. Comment Letter, SandRidge Permian Trust ¶ 4 (July 15, 2011).

[62]Range Resources Corporation, Responsive Correspondence to the S.E.C. (Sept.

2, 2011); Stone Energy Corporation, Responsive Correspondence to the S.E.C. (Sept. 1, 2011); Enduro Resource Partners LLC, Responsive Correspondence to the S.E.C. (July 25, 2011).

[63]Comstock Resources, Inc., Responsive Correspondence to the S.E.C. (Sept. 15, 2011); Memorial Production Partners LP, Responsive Correspondence to the S.E.C. (Aug. 11, 2011); GMX Resources Inc., Responsive Correspondence to the S.E.C. (Aug. 2, 2011); SandRidge Energy, Inc., Responsive Correspondence to the S.E.C. (July 19, 2011).

[64]Carbon Natural Gas Company, Responsive Correspondence to the S.E.C. (Sept. 16, 2011).

[65]Paul L. Bessette, Michael J. Biles & R. Adam Swick, Securities Litigation and the Energy Sector, Energy Newsl. (Aug. 2012), available at http://www.kslaw.com/library/newsletters/EnergyNewsletter/2012/August/article2.html.

[66]Deborah Solomon, SEC Bears Down on Fracking, Wall. St. J. (Aug. 25, 2011) ("The SEC has also been investigating whether companies are overstating the long-term productivity of their natural-gas wells and has issued subpoenas to at least two firms, according to financial disclosures earlier this month."); *e.g.*, Quiksilver Resources Inc., Form 10-Q, at 48 (filed on Aug. 9, 2011) ("On July 26, 2011, we received a subpoena duces tecum from the SEC requesting certain documents. The SEC has informed us that their investigation arises out of recent press reports questioning the projected decline curves and economics of shale gas wells. We understand from the SEC that a number of other shale gas producers received similar subpoenas.").

[67]17 C.F.R. § 240.14a-8.

[68]17 C.F.R. § 240.14a-8(i).

[69]17 C.F.R. § 240.14a-8(j).

[70]Ultra Petroleum Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (March 26, 2010); EOG Resources, Inc., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (Feb. 3, 2010); Cabot Oil & Gas Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (Jan. 28, 2010).

[71]Chesapeake Energy Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 42 (Apr. 13, 2010).

[72]17 C.F.R. § 240.14a-8(i)(7).

[73]Chesapeake Energy Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (Apr. 13, 2010); Ultra Petroleum Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (Mar. 26, 2010); EOG Resources, Inc., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (Feb. 3, 2010); Cabot Oil & Gas Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (Jan. 28, 2010).

[74]Exxon Mobile Corp., S.E.C. No-Action Letter at 1 (Mar. 6, 2012).

[75]Exxon Mobile Corp., S.E.C. No-Action Letter at 1 (Mar. 6, 2012).

[76]Exxon Mobile Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 8 (Mar. 18, 2011).

[77]17 C.F.R. § 240.14a-8(i)(10).

[78]Exxon Mobile Corp., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance at 1 (Mar. 18, 2011).

[79]Belinfanti, The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control, 14 Stan. J.L. Bus. & Fin. 384, 384 (2009).

[80]Cotter, Palmiter and Thomas, ISS Recommendations and Mutual Fund Voting on Proxy Proposals, Vill. L. Rev. 1, 3 (2010) (compiling data and concluding "from the univariate analysis that mutual funds vote consistently with ISS recommendations more than do shareholders generally and that, when management and ISS recommendations diverge, mutual funds tend to vote consistently with ISS recommendations far more than they do with management recommendations").

[81]Institutional Shareholder Services Inc., 2013 U.S. Proxy Voting Summary Guidelines at 62 (Jan. 31, 2013).

[82]Kysar and Meyler, Like a Nation State, 55 UCLA L. Rev. 1621, 1627 (2008) ("Detailed historical analysis of the actual development of environmental law regimes reveals a much more complex arrangement, in which state and federal lawmakers and regulators operate in an iterative fashion, learning from each other's successes and mistakes, prodding each other in formal and informal ways to action . . .").

[83]Bank of America, S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance (Feb. 15, 2013) (unable to concur in Bank of America's view that it could exclude a proposal requesting that "the board study the feasibility of adopting a policy prohibiting the use of treasury funds for direct and indirect political contributions").

[84]*See* Verizon v. F.C.C., No. 11-1355 (D.C. Cir.) (pending appeal challenging the Federal Communications Commission's network neutrality order); AT&T, Inc., S.E.C. Response of the Office of Chief Counsel, Division of Corporation Finance (Feb. 10, 2011) (unable to concur in AT&T's view that it could exclude a proposal requesting AT&T to "publicly commit to operate its wireless broadband network consistent with network neutrality principles"). Thank you to my colleague Professor Annemarie Bridy for bringing this example to my attention.