

# Shareholder Climate Activism Comes for 401(k) Plans: Lessons Learned from Amazon and Comcast

June 9, 2022

In December 2021, *As You Sow*, a non-profit foundation promoting environmental and social corporate responsibility, filed shareholder proposals on behalf of Amazon.com and Comcast Corporation shareholders for action at each of their 2022 annual meetings. The Amazon proposal and the Comcast proposal were identical, requesting that the board of directors prepare a report with the board's assessment of how the company's retirement plan options align with the company's climate action goals. The supporting statement suggested that the report include, at the discretion of the board of directors, how the company could provide employees with more sustainable investment options, such as a default option, that are better aligned with the company's climate goals, and if the board does not intend to include additional low-carbon investment options in its 401(k) plan, that it explain why.

Each of Amazon and Comcast sought to exclude the shareholder proposals under Rule 14a-8(i)(7) as relating to their ordinary business operations, specifically general employee and compensation benefits. In April 2022, the Securities and Exchange Commission (the "SEC") rejected [Amazon's](#) and [Comcast's](#) Rule 14a-8 no-action requests and allowed the stockholders to vote on these proposals, concluding that the proposals "transcend ordinary business matters."

Each of Amazon's and Comcast's shareholders ultimately rejected these proposals at their 2022 annual meetings by a majority of 91% (Amazon) and 94% (Comcast) of the votes cast on the proposals. Although the shareholders of both Amazon and Comcast voted against the shareholder proposals, there are important lessons we can learn from the SEC's decision allowing the shareholder proposals to proceed.

---

## The SEC's decisions signal that the SEC may be more likely to allow climate-related shareholder proposals to proceed on the grounds that they raise significant policy issues that transcend ordinary business operations

Rule 14a-8(i)(7) provides that a company can omit from its proxy materials a shareholder proposal that relates to the company's ordinary business operations, including general employee compensation and benefits. In the case of Amazon and Comcast, each company sought to exclude the shareholder proposal requesting that the board prepare a report of its assessment of how the company's 401(k) plan investment options align with the company's climate action goals on the basis that the matter related to the company's ordinary business operations. The SEC allowed the shareholder proposals to proceed on the grounds that the proposals transcended ordinary business matters. The SEC provided no rationale for its decision.

The SEC's determinations in Amazon and Comcast are in tension with a line of prior no-action letters allowing companies to exclude proposals relating to the administration of employee retirement plans under the ordinary business operation exception. Although the Amazon and Comcast shareholder proposals requested a report analyzing the alignment of the company's retirement plan investment options with the company's climate action goals, rather than directing a particular outcome or action, the proposals undoubtedly relate to general employee compensation and benefits. However, the conclusions reached in Amazon and Comcast may in part be a function of the SEC's recent [Staff Legal Bulletin 14L](#), which made it easier for shareholders to get proposals on the ballot for policy matters that may previously have been excluded under the ordinary business operation exception by removing the requirement for there to be a nexus between the policy matter and the company. Staff Legal Bulletin 14L provides that the SEC will "no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal."

The SEC's decisions in Amazon and Comcast signal that, after Staff Legal Bulletin 14L, climate-related topics are more likely to be found to raise significant policy issues that transcend ordinary business operations and therefore will not be excludable under Rule 14a-8(i)(7), even if the proposal relates to general employee compensation outside of the authority of the board of directors, as discussed in greater detail below. We expect to continue to see climate-related shareholder proposals included in this new paradigm, along with other environmental, social and governance ("ESG") matters.

---

## Shareholders may solicit through shareholder proposals climate-related compensation information that is beyond the scope of the SEC's proposed climate disclosure rules

Mandating that the board of directors prepare a report assessing how the company's retirement plan options align with the company's climate action goals would require the collection and sharing of climate-related compensation information beyond what is contemplated by the SEC's recently [proposed rule](#) on the "Enhancement and Standardization of Climate-Related Disclosures for Investors."<sup>1</sup>

The proposed rule would require SEC registrants to provide climate-related disclosures in their registration statements and annual reports, including disclosure of information regarding any climate-related risks that would be reasonably likely to have a material impact on business, operations or financial condition, along with disclosure of climate-related targets or goals. In issuing this proposal, the SEC explicitly determined to exclude any disclosure requirement regarding the connection between executive remuneration and the achievement of climate-related targets or goals because the existing executive compensation disclosure regime is sufficient. The SEC noted in the proposed rule that its "existing rules requiring a compensation discussion and analysis should already provide a framework for disclosure of any connection between executive remuneration and achieving progress in addressing climate-related risks."

The SEC's existing executive compensation disclosure rules in Item 402 of Regulation S-K would generally require disclosure regarding climate-related targets in executive compensation plans in which the "named executive officers"—generally the CEO, CFO and other top three most highly compensated executive officers—participate. Nothing in these existing rules, however, would require any disclosure regarding the basis for offering investment options in tax-qualified defined contribution plans, such as 401(k) retirement plans. The only disclosure required by Item 402 as it relates to tax-qualified retirement plans is the amounts of employer contributions to these plans for the named executive officers.

---

## Shareholder proposals may be permitted to proceed despite being inconsistent with ERISA

We believe that many of the shareholder proposals on retirement plans that the SEC's policy position may now allow to proceed will be at least inconsistent with, and potentially in serious conflict with, the principles and operation of the Employee

---

<sup>1</sup> Our analysis of the SEC's proposed rule can be found [here](#) (short version) and [here](#) (long version); additional information can be found on our ESG Resource Center, linked [here](#).

Retirement Income Security Act of 1974 (“ERISA”). As an initial matter, the plan fiduciary of each company’s retirement plans—not the board of directors or a committee thereof, acting in such capacity—has the authority to select and monitor the investment options in the plans. Each of Amazon and Comcast indicated that, like most large, publicly traded companies, it had an investment committee that serves as the plan fiduciary responsible for selecting and monitoring the investment options in consultation with third-party advisors.

In addition, it would be a violation of ERISA for an employer’s plan fiduciary to try to advance the employer’s climate goals in the selection of the 401(k) plan investment options. Under ERISA’s duty of loyalty, the plan fiduciary must select the 401(k) investment options solely in the interests of the plan participants and their beneficiaries. In the Department of Labor’s (the “DOL”) October 2021 [proposed rule](#) on ERISA fiduciary duties and ESG considerations, “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,” the DOL reiterated this duty of loyalty in the context of investment decisions, providing that “a fiduciary *may not* subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and *may not* sacrifice investment return or take on additional investment risk to promote goals unrelated to the plan and its participants and beneficiaries.”<sup>2</sup> Although under the DOL’s proposed rules, a plan fiduciary may take into account ESG factors that are relevant to the risk and return characteristics of an investment, these considerations would still be wholly separate from the employer’s climate goals. Except potentially as indirectly reflected in general corporate policy to the extent that each company’s stock were to be offered as an investment option under the applicable plan, each of Amazon’s and Comcast’s, and any employer’s climate goals, should be kept separate from the financial interests of the participants and beneficiaries in their 401(k) plans.<sup>3</sup>

---

## What if the shareholders had voted in favor of the proposals?

Ultimately, the shareholders voted against these shareholder proposals. If the shareholders of Amazon or Comcast had voted to require the board of each company to prepare a report assessing how the retirement plan investment options align with the

---

<sup>2</sup> Our client update on the DOL’s proposed rule can be accessed [here](#).

<sup>3</sup> The [Comcast 2022 proxy statement](#), in recommending a vote against the shareholder proposal, states, “The fundamental request of this proposal, however, would seek to impose a specific and uniform set of non-economic goals, promoted by Comcast and set for reasons completely outside of any specific financial planning or investment considerations, on all of our retirement plan participants and beneficiaries. There is no connection—and in fact under the law there cannot be a connection—between our climate action goals or other company values and the selection of investment funds made available under our retirement plans. This proposal is misguided in seeking to connect the two.”

company's climate action goals, the ultimate outcome would be just that: a report. The shareholder proposal did not require that the 401(k) plan be amended to include or remove certain investment options based on a climate change analysis.

If the SEC continues to permit similar proposals, one of them may eventually pass, and we offer in closing a few preliminary observations as to the content of the report. We would expect that any such report would be prepared under the direction of the compensation committee or other committee of the board. Ultimately, however, notwithstanding the supporting statement to the shareholder proposal, the board should avoid making specific directions or recommendations in any such report. Decisions regarding the investment options made available under any company's 401(k) plans must be determined by plan fiduciaries in accordance with ERISA. As we note above, an employer dictating that 401(k) plan investment options align with the employer's climate action goals would violate ERISA, and even recommendations may create an atmosphere of conflict that impedes a plan fiduciary's expected independent decisionmaking. This is so even under the more ESG-friendly guidance promulgated by the Biden administration discussed above. Were the plan fiduciaries to act on such directions or recommendations, with a focus on achieving the company's objectives, rather than on seeking the best economic results for the participants, it would subject the company and the plan fiduciaries to litigation risk from the plan participants and beneficiaries.

\* \* \*

Please do not hesitate to contact us with any questions.

#### NEW YORK



Lawrence K. Cagney  
lkcagney@debevoise.com



Eric T. Juergens  
etjuergens@debevoise.com



Matthew E. Kaplan  
mekaplan@debevoise.com



Jonathan F. Lewis  
jflewis@debevoise.com



Peter J. Loughran  
pjloughran@debevoise.com



Steven J. Slutzky  
sjslutzky@debevoise.com

**WASHINGTON, D.C.**



Ulysses Smith  
usmith@debevoise.com



Simone S. Hicks  
sshicks@debevoise.com



Alison E. Buckley-Serfass  
aebuckleyserfass@debevoise.com