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Investor groups, energy companies make deals to avoid shareholder resolutions

By Abby Gruen

With proxy season just around the corner, pre-season negotiations with activist shareholders are in full swing. Most U.S. energy industry firms are scheduled to have their annual shareholder meetings from March through June, but investors who want to influence corporate management have been hard at work filing resolutions since fall 2010.

The number of 2011 shareholder resolutions filed with corporate secretaries is on track to match the record set in 2010 — with more than a third related to the environment, according to "Proxy Preview 2011," a Feb. 24 report by [As You Sow](#), a nonprofit corporate accountability group.

"Environment and sustainability are still at about the same proportion as last year," [As You Sow](#) CEO Andrew Behar said in an interview. The focus of these resolutions has shifted to coal, however, after the failure of Congress to pass any cap-and-trade or carbon tax legislation in 2010, Behar said, "because coal has the biggest impact on carbon."

Shareholder groups, such as pension funds and labor unions, say they filed 360 resolutions between September and December 2010, though nearly 70 have already been withdrawn, according to the report.

"The number of withdrawals has gone up," said Heidi Welsh, executive director of the Sustainable Investments Institute and one of the authors of the report. "Those withdrawals are coming because there are deals being made between management and the proponents on the substance of the resolution."

Requests for sustainability reports, for example, are slightly down, to about two dozen filings. Corporations frequently agree to provide these reports during discussions with investors, who then withdraw their requests.

"Companies would rather resolve this stuff out of the limelight, not at annual meetings," Welsh said.

Sustainability reports have been requested for 2011 from [CONSOL Energy Inc.](#) by the California State Teachers' Retirement System, from [Energen Corp.](#) by Calvert Investments and from [SCANA Corp.](#) by Miller/Howard Investments, according to the report.

Historically, the SEC excluded shareholder proposals that related to the day-to-day business of the corporation, said Marc Folladori, a partner at Mayer Brown LLP in Houston who focuses on corporate securities and mergers and acquisitions in the energy field. Now that the resolutions have social and policy implications, however, they have become more significant, he said.

"There is an increasing trend, rather than to just reject every shareholder proposal that comes forward at corporations, to try to dialogue with the proponents," Folladori said. "There has been a lot more engagement in the last five years than in the years prior."

A small number of resolutions are omitted each year after filing because they do not meet all of the SEC legal requirements, Folladori said.

[Dominion Resources Inc.](#) has received seven shareholder proposals for 2011, according to the report, more than any other power company, excluding coal, oil and gas companies. Dominion shareholders report filings that ask the company to "report on coal reliance risks," "report on mountaintop removal coal," "offer renewable energy purchasing," "provide financing for solar/wind power" and "set renewable energy goal[s]."

"Some of the shareholder proposals have been withdrawn or omitted," said Chet Wade, Dominion managing director, corporate communications. "Since our proxy statement has not been issued, it is premature for us to comment specifically on the others."

In a prepared statement, the company said: "Dominion is proud of our environmental record, which is one of the best in our industry. The carbon intensity of our electric generating fleet already is among the lowest among our peers. We also are well on the way to reducing emissions of sulfur dioxide, nitrogen oxides and mercury by 80 percent or more compared with 1998 levels at our power stations in Virginia and New England. The company is committed to meeting Virginia's goal of 15 percent renewable sales by 2025 and North Carolina's mandate of 12.5 percent by 2021. And, customers in both states have the option to participate in green energy programs."

Other power companies targeted for reporting on coal-related issues are [CMS Energy Corp.](#), [Duke Energy Corp.](#), [Energen Corp.](#), [FirstEnergy Corp.](#), [NRG](#)

[Energy Inc.](#), [Public Service Enterprise Group Inc.](#), [Southern Co.](#) and [Xcel Energy Inc.](#)

Adopting goals to cut greenhouse gas emissions is another common climate-related resolution topic. CMS Energy; [Dynergy Inc.](#), FirstEnergy, [Portland General Electric Co.](#) and Southern were each asked to adopt goals by investors, or by [As You Sow](#).

Xcel Energy was cited for "good quality disclosure" regarding its greenhouse gas emissions profile by Ceres, a coalition of large institutional investors and environmental groups, in a guide published Feb. 25 for corporations on climate risk disclosures to the SEC.

In its 2009 Form 10-K filing, Xcel Energy reported that it was calculating CO2 emissions not only from its current generating portfolio, but also on the electricity it purchased for resale, which gave context to its future plans for limiting emissions growth, the report said.

"I think that increased corporate responsibility will have a major impact [on the environment]," Behar said. "And probably the best way for that to happen is from inside the corporation."