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GLOBAL CLIMATE CHANGE PROMPTS NEW CORPORATE DISCLOSURES

Securities Laws May Require Disclosure of Climate Risk

Climate change and the legal responses to it are creating material risks and opportunities for companies. Some publicly-traded corporations must disclose these risks and opportunities under SEC Regulation S-K. Others are voluntarily choosing to report them in order to demonstrate responsible action in the face of climate change concerns. On both fronts, companies need to be aware of climate change and its implications for corporate disclosure.

Mandatory Disclosure of Climate Risk

Public corporations may already be required to make certain disclosures related to the environmental and legal implications of climate change. The Securities and Exchange Commission (SEC) has long required public companies to disclose material information necessary for potential shareholders to make informed investment decisions. Global climate change now raises new “material” risks and opportunities for businesses that can trigger reporting requirements under SEC Regulation S-K.

The emerging climate change-related risks and opportunities fall into four, key categories:

Weather-related risks: the risk that climate change will affect weather patterns in significant ways. It has been widely publicized that climate change may affect weather systems in ways that increase the likelihood or impact of drought, flooding, storms, hurricane intensity, ice melt, and sea level rise. While uncertainties about the nature and scope of these effects remain, prudent firms are beginning to consider the potential weather-related risks to supply chains, energy sources, and other core infrastructure.

Regulatory Risk: the risk that a business will incur increased costs as a result of government regulation of greenhouse gas (GHG) emissions. Many states are already developing regulations to reduce GHG emissions, including rigorous cap-and-trade systems that will impose binding GHG limits on some facilities. At the federal level, the Supreme Court in *Massachusetts v. EPA* held that GHG qualify as “pollutants” under the Clean Air Act. The U.S. EPA is now deciding whether, and how, to regulate GHG emissions under a variety of Clean Air Act programs. Meanwhile, Congress is debating federal cap-and-trade GHG legislation. The coming years promise to bring a host of new regulatory initiatives intended to reduce industry's GHG emissions.

Litigation Risk: the risk that a particular industry, or its critical customers, will be sued for their contribution to climate change. Such litigation is already underway. Plaintiffs have brought public nuisance suits against the electrical utility and automobile manufacturing industries. Recently, the village of Kivalina, Alaska brought a public nuisance suit against twenty large producers of GHG. The suit alleges that defendants' emissions are causing Arctic ice to melt and plaintiffs' village to fall into the ocean. To date, the courts have been largely unreceptive to these claims. However, should suits such as these succeed they will open the door to similar litigation against other industries and companies with significant GHG emissions.

Opportunities: Some companies will find significant opportunities in addressing the challenge of climate change. For example, corporations in the renewable energy or energy efficiency sectors could see increased demand for their products and services. Others may find themselves able to reduce their GHG emissions at low cost, thereby generating valuable emission rights in a trading system. Such companies may need to report these material opportunities in their securities filings.

The risks and opportunities described above have important implications for publicly traded corporations' compliance with SEC Regulation S-K. For example, Item 303 requires companies to disclose currently known, material "trends, events and uncertainties." This could potentially encompass the regulatory risk that an impending regional cap-and-trade system creates for the company, the litigation risk that climate-change related lawsuits pose for the company or its important customers, the weather-related risk that more intense hurricane and storm activity creates for a company's supply chain, or the opportunities that demand for energy efficiency technologies creates for the company's products.

Item 101 of Regulation S-K requires firms to disclose environmental compliance costs that may have material effects on earnings, capital expenditures and competitive position. This could, in the future, cover a company's expenditures on fuel-switching or other GHG control technology to comply with cap-and-trade limits or with new Clean Air Act requirements.

Item 103 requires companies to disclose material legal proceedings to which they are a party. Companies subject to the current public nuisance suits, and those that may be the target of such suits in the future, should remain carefully aware of the reporting obligations associated with such litigation.

Finally, Item 503(c) requires discussion of the factors that make investment in the corporation speculative or risky. Climate change's potential impacts on energy prices or on demand for a company's products may, in certain cases, rise to this level.

In each of these areas, the risks and opportunities associated with climate change have important implications for mandatory corporate disclosure.

Voluntary Disclosure of Climate Risk and Strategy

Some corporations are voluntarily disclosing their climate risk and their strategies for dealing with it, in order to demonstrate that they are effectively and responsibly managing this high-profile challenge. Public and private companies should be aware of the potential benefits, and hazards, of such reporting. They should also pay careful attention to the relationship between their voluntary reporting and their legal disclosure obligations.