Directors and officers can be held liable for omissions and material misrepresentations in disclosures to stockholders regarding the effects of climate change on the corporation.

Climate Change Is Heating Up D&O Liability

CAROL A.N. ZACHARIAS

The question has been answered: There will be — indeed, has been — climate change litigation that goes beyond pollution litigation. The new cases address the adequacy of a company's assessment of the financial consequences of climate changes and the adequacy of disclosures to shareholders of that financial impact. Since questions regarding disclosures to shareholders raise the prospect of management liability exposure, these developments present liability risks to directors and officers that should be considered.

This article examines existing laws and regulations that have been applied in recent corporate climate change litigation and resulting settlements that have set high standards for management disclosure, analysis, and assessment of the financial impact of climate risk.

The article also examines new and proposed federal, state, and foreign laws that are creating a matrix of even more restrictions and obligations for companies that can provide a basis for additional litigation.

The developing jurisprudence makes clear that the question is no longer *whether* there will be actions arising out of how a company and its leadership assess, quantify, and disclose climate change risks, but rather *how extensive* the litigation will be and *when* it will be lodged against directors and officers.

Disclosure Liability

Public companies and their boards labor under disclosure requirements imposed by federal and state securities laws, requirements that were in place well before climate change became part of our lexicon. The disclosure obligations are designed to ensure that investors have material information about a company so that they can make informed investing decisions.

Regulation S-K of the U.S. Securities Laws

Regulation S-K of the U.S. securities laws details the disclosure requirements for periodic reports and public offerings.[1] Two items in Regulation S-K drive climate change disclosure discussions today.

- Item 101 requires that companies disclose the "material effects" that compliance with environmental regulations "may have upon the capital expenditures, earnings and competitive position of the registrant…."[2] Hence, where climate change regulations may have a "material effect" on the company or its financials, disclosure is required.

- Item 303 requires that companies disclose "any known trends or uncertainties that have had or that the [company] reasonably expects will have a material favorable or unfavorable impact on net sales or revenue or income from continuing operations."[3] Information is deemed material under the federal securities laws if a reasonable investor would consider it important in making a decision to invest.[4] Thus, disclosure is mandated where changes in climate patterns, or where climate-change-related laws or regulations, become "known trends or uncertainties" that may have a material financial impact on the company.

With Increased Disclosure Comes the Risk of Increased Liability

Companies are evaluating whether, when, and to what extent climate changes or the impact of climate-change regulations present material risks, warranting disclosures under Items 101 and 303. With increased disclosure comes the risk of increased liability, since directors and officers can be liable for omissions or material misrepresentations under Section 10b of the Securities Exchange Act of 1934[5] and, in the case of a public offering, under Sections 11 and 12 of the Securities Act of 1933.[6] Hence, the disclosure decision is critical.

Some suggest that climate change disclosures necessary under the existing standards of materiality are inadequate. One study estimated that 53 percent of the largest public companies are doing a poor job of disclosing climate-related risk, putting the companies "at risk of shareholder lawsuits."[7]

Reflecting the dissatisfaction with disclosures to date, a group consisting of 22 state pension funds, environmental groups, and other investors managing more than $1.5 trillion in assets have petitioned the Securities and Exchange Commission for clarification on whether and to what extent Regulation S-K requires more comprehensive disclosure of climate risks in public company periodic reports.[8] The group complains that the disclosures have been "scant and inconsistent," and their petition demands greater specificity. The group seeks disclosure of any actual and potential physical damage to facilities on account of weather-related changes; any shifts in demand for products or services on account of weather-related changes; and any legal proceedings related to climate change.

Legal Cases Involving Climate Change

In two recent settlements, regulators have wrought even greater levels of specificity in climate-risk disclosures. In one settlement with the New York Attorney General, a major energy company agreed to include the following climate-change risk disclosures in its annual reports:

- analysis of state regulations relating to climate change, which have a material financial effect on the company;

- discussion of trends in greenhouse-gas legislation and regulation that would have a material financial effect on the company's business and an assessment of what that financial effect would be;

- description of climate-change litigation involving the company;

- assessment of any climate-change-related decisions by the U.S. Supreme Court or any court in any jurisdiction in which the company operates that the company concludes is likely to have a material financial effect on its business; and

- analysis of all material financial risks to the company's operations from the physical impact of climate change, including increases in sea levels and weather changes.

In addition, the company must include in its annual reports a statement of the company's current position on climate change, company strategies to reduce its climate-change risk, and plans to adapt to climate changes.[9]

In another climate-change case, New York's Attorney General subpoenaed five large energy companies to investigate whether the company disclosures were adequate with respect to the climate impact of operation of coal-burning power plants.[10] Settlement with one of the companies requires periodic disclosure of the financial risks posed by climate change and its associated risks.[11] These settlements illustrate that with disclosure comes accountability and increasing liability risk.

Shareholders Demanding More Information

In addition to regulators, shareholders are also demanding more and more climate-change risk information disclosures from the companies in which they invest.[12] There has been a sharp escalation in the number of shareholder resolution submissions seeking information on whether companies have evaluated, communicated, priced, and planned for mitigating exposure to climate change. (See Exhibit 1.)

Advocacy Groups Demand Disclosure

The Carbon Disclosure Project is a coalition of 475 institutional investors with $55 trillion in investor assets under management.[13] The Project is working with corporations towards an increase in climate-change-related disclosures. It surveys 1,550 of the largest global corporations for disclosure of company greenhouse-gas footprints, as well as disclosure of how a company manages climate-change risks.[14]

A broad-based group of institutional investors released a statement on the kind of climate disclosures that investors expect from a company in a document titled "Global Framework for Climate Risk Disclosure."[15] The group seeks rigorous and enhanced analysis and disclosure and complains that, as of October 2006, companies provided only one quarter of the kind of climate-risk assessments that would meet the Global Framework standards and that, in general, climate-change disclosure practices are "severely lacking."[16]

In addition to regulators and shareholders, various advocacy groups are also clamoring for greater climate-change-related disclosures by corporations. Asset managers and leading U.S. institutional investors have written the Securities and Exchange Commission (SEC), requesting that the SEC require corporations to provide greater disclosure about climate change exposure and management.[17] In addition, an investment advocacy group Web site, cookingyournestegg.

Exhibit 1

Shareholder Resolution Submissions Regarding Climate Change

Secure	Vulnerable
2001	6
2004	28
2005	30
2007	43

Source: Young, Beth, "Whose Carbon Footprint is Too Big for Their Corporate Boot?" The Corporate Library LLC (December 2007): 5, for 2001, 2005, and 2007 statistics, available at www.thecorporatelibrary.com; see www.firstenvironment.com/html/climate_change for 2004 statistic.

org, provides investors in the 24 largest mutual funds with information about the environmental risks of the companies in which their funds are invested.

Other Legal Cases Asserting Climate-Change-Related Liability

In addition to shareholder resolutions and cases cited earlier, a wide variety of other parties have sued companies, asserting climate-change-related liability.

- California sued automobile manufacturers, alleging that their automobiles are a substantial contributing cause of global warming, which is a factor in damaging flooding and wildfires.[18]

- Oil companies were sued in the wake of Hurricane Katrina, subjecting them to allegations that their refining operations created greenhouse gases that increased the severity of the storm and consequential damages.[19]

- An eco-activist group, the Climate Justice Programme, is lobbying to hold alleged perpetrators liable for violations of existing domestic and international laws relating to climate change.[20]

- On February 26, 2008, an Inupiat Eskimo village on a barrier reef on the northwest coast of Alaska, 70 miles north of the Arctic Circle, filed a complaint against various energy companies. Plaintiffs allege that the carbon dioxide emissions from local oil, coal, and power plants caused global warming, resulting in rising sea levels and flooding of their homeland on the barrier reef. The U.S. Army Corps of Engineers has concluded that the entire village must be moved, at considerable expense and consequence to all residents.[21]

These cases make clear that the question is no longer whether there will be actions arising out of climate change, but rather how far-reaching the litigation will be, and when, or if, it will be lodged against directors and officers.

Allegations

Potential litigation against directors and officers may include a myriad of allegations, including:

- liability disclosure: failure to disclose risk of climate-change liability as required under federal and state securities laws;

- financial impact disclosure: failure to prepare for or respond to the financial impact of climate changes, in violation of fiduciary duties;

- business strategy disclosure: failure to develop and implement adaptive climate-change business strategies, in violation of fiduciary duties;

- compliance failure: failure to comply with climate-related emissions regulations and other environmental laws;

- ancillary violations: violation of laws such as the Endangered Species Act, causing environmental harm;[22]

- investments liability: liability for imprudent investment in sectors exposed to climate-change losses; and

- liability arising out of new energy strategies: liability for mismanagement and nondisclosure of alternative new risks taken in response to climate change, such as risks related to use of nuclear power, renewable energy, hydrogen, carbon offsetting, and cap and trades (see Global Laws, later in this article).

Companies at Risk

Certain industries pose heightened compliance and disclosure risks, and therefore, liability exposures. Industries using or producing hydrocarbon fuels, such as coal, oil, and natural gas, have higher exposure because carbon emissions are a necessary by-product of production.[23] Production entails combustion, and combustion necessarily creates emissions that build up in the atmosphere, acting as windowpanes keeping heat in the earth's atmosphere and adding to global warming. Specific sectors under attack include transportation and utilities, since cars and power plants are responsible for 60 percent of U.S. carbon dioxide emissions.[24]

Flooding

In addition, doing business in certain regions poses higher liability risk to a broad spectrum of companies. Global sea levels may rise as much as 23 feet in decades to come.[25] Consequent flooding risks must be managed by companies operating in low-lying regions of the world. Rising sea levels may engulf parts of coastal Florida, Louisiana, Alabama, and Texas, placing at risk businesses in or reliant upon production or services in the area.[26] Similarly, businesses in the sea-level regions of Indonesia and Thailand are at greater risk for interruption in production or services.[27]

Drought and Fire

In contrast to flooding, some regions will experience higher temperatures, reduced rainfall, and drought brought on by global warming. Higher temperatures warm seas, resulting in lightning, which, combined with drought, causes raging wildfires. Businesses in or reliant upon production or services in drought-ridden regions are at greater risk. For example:

- water levels in the second largest lake in the United States, Lake Okeechobee, dropped so drastically in 2008 that the drying marsh along the 12,000 acre lakebed caught fire;[28]

- Australia's great outback regions have been so dry over the last five years that there have been severe drought conditions and fires;[29] and

- today, North China is in the midst of its worst drought in half of a century, with 4.4 million people and 2.1 million cattle without adequate drinking water.[30]

Directors and officers will be challenged to evaluate these risks, anticipate them, prepare for them as appropriate, and disclose them under existing and new laws or be subject to liability for failure to do so.

New Laws, New Liabilities

Laws and regulations relating to climate change are proliferating at the federal, state, and global level.

Federal Laws

At the federal level, more than 235 bills, resolutions, and amendments have been introduced into Congress to regulate factors contributing to climate change.[31] This is a substantial increase over the 106 introduced during the 2005–2006 congressional term.[32] The bills include the Lieberman-Warner Climate Security Act of 2008 (S. 3036), the Global Warming Reduction Act of 2007 (S. 485), and the Global Warming Pollution Reduction Act (S. 309). (See Sidebar.) The new laws seek clarification on what must be disclosed and seek a standardized format for disclosure.

State Laws

At the state level, more than 14 states have passed mandatory targets for the reduction in greenhouse gases, such as:

- Illinois' Clean Coal Portfolio Standard Law requires coal-fueled power plants to capture and store half of the carbon emissions between 2009 and 2015. Between 2016 and 2017, the plants must capture and store 70 percent, and after 2017, the plants must capture and store 90 percent. By 2025, 25 percent of all electricity used in Illinois must come from these plants that capture and store their emissions.[33]

- Virginia, California, Florida, Michigan, and Wisconsin have signed agreements with the United Kingdom to collaborate on ways to mitigate climate-change risks, such as reducing emissions and developing renewable energy.[34]

- California's Global Warming Solutions Act of 2006 requires manufacturers to reduce greenhouse-gas emissions to 1990 levels by 2020.[35]

- Ten states have joined the Regional Greenhouse Gas Initiative, agreeing to a mandatory cap and trade program for carbon dioxide emissions.[36]

- Several states also signed the "U.S. Mayors' Climate Protection Agreement," which, like the Kyoto Protocol, seeks to reduce greenhouse-gas emissions by 7 percent below 1990 levels by 2012.[37]

These and other state laws and regulations mean increased accountability and disclosure obligations, which means increased regulatory and investor scrutiny.

Global Laws

At the global level, U.S. companies with overseas operations must ensure that their foreign operations are in compliance with the growing number of foreign laws and regulations. The Climate Change Bill has been introduced in the United Kingdom, addressing greenhouse-gas emission regulation.[38] Effective in January 2005, the Kyoto Protocol set up a greenhouse-gas regulatory system of cap and trade.[39] Approximately 12,000 factories and power stations were given carbon dioxide quotas, popularly known as caps. If a company exceeds its quota, it can buy extra allowances in the market, known as a trade, or pay a financial penalty. If a company will not use its quota, it can sell the unused allowances in the market to a company needing and willing to buy the allowances.

Conclusion

Climate-change-related litigation against companies has already started, and several settlements have

A Sample of Proposed Federal Legislation

The Lieberman-Warner Climate Security Act of 2008 (S. 3036)

Sponsored by Senator Joseph Lieberman, Senator John Warner, and 10 others as S.2191 in 2007; resubmitted by Sen. Barbara Boxer in 2008 as S. 3036. Still on Senate Calendar.

This bill requires the Environmental Protection Agency (EPA) to 1) establish a system for specified facilities to report fossil fuel usage and greenhouse gas (GHG) production and 2) establish specified quantities of GHG emission allowances that will decrease each year from 2012 to 2050. The EPA would allocate and distribute emission allowances based on certain enumerated criteria. Such allow-ances could then be traded, saved, or borrowed. A certain quantity of allowances would be auc-tioned; the proceeds would fund government programs to address the impact of climate change in various ways.

The Global Warming Reduction Act of 2007 (S. 485)

Sponsored by Senator John Kerry. Not passed.

This bill amended the Clean Air Act to direct the EPA to 1) promulgate regulations necessary to reduce global warming pollution emissions, 2) establish a market-based emissions cap, and 3) establish a global warming pollutants trading program, including a renewable energy credit program and penalties for exceeding allowances. The bill addressed biological sequestration of pollutants, requirements for renewable fuel volume in gasoline, and amendment of the Internal Revenue Code to provide higher credits for building and driving environmentally sound vehicles.

The Global Warming Pollution Reduction Act

Sponsored by Senator Bernard Sanders. Not passed.

This bill also amended the Clean Air Act to increase EPA involvement in reducing global warming pollution. It directs the EPA to 1) set milestones to reduce aggregate net levels of emissions through market-based programs, 2) set emission requirements for autos manufactured in 2016 and after, 3) contract with the National Academy of Sciences to study the contribution of nonhighway transpor-tation toward meeting the emission reduction goal, and 4) establish a low-carbon-generation trading program. Other provisions relate to energy efficiency requirements, grants for geological disposal deployment projects, and research regarding global warming and climate change.

already set unprecedented and high standards for detailed management disclosure and analysis under existing laws. In addition, new climate-change-related laws are proposed at the federal, state, and foreign levels. Activists and investors alike are pushing for more and more corporate assessment and disclosure. Where management disclosure duties exist, liability exposure for directors and officers exists as well.

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Carol Zacharias is senior vice president and chief counsel to Ace USA's Professional Risk division, a leading provider of directors and officers, employment, fiduciary, miscellaneous professional liability, errors and omissions, kidnap and ransom, architects and engineer, lawyers, and surety insurance. Ms. Zacharias received her masters degree in corporate law from New York University School of Law and her law degree from the New England School of Law. She has served as chairman of the American Bar Association Business Law Section's Business Insurance Committee and vice chairman of the Professional, Officers' and Directors' Liability Law Committee of the Tort and Insurance Practice Section. She is co-chair of the insurance subcommittee of the American Bar Association Litigation Section's Committee on Corporate Counsel. She is a member of the bar of the United States Supreme Court, the Federal and New Jersey bars, the American Bar Association, and the American Corporate Counsel Association.

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