

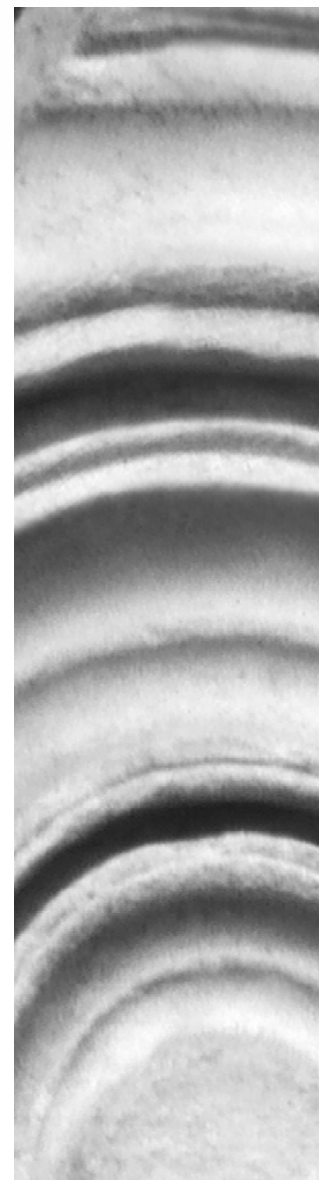
# FOCUS ON CLIMATE AND CLEAN ENERGY

## Climate Change Disclosure: Emerging Practices

In September 2007, New York Attorney General Andrew Cuomo issued subpoenas under New York's Martin Act to five of the nation's largest energy companies (AES Corporation, Dominion Resources, Dynegy, Peabody Energy, and Xcel Energy) requesting information regarding the disclosure of climate change risk in the companies' public filings. On August 27, 2008, Cuomo announced an agreement ending the investigation into Xcel contingent upon Xcel's disclosure of certain climate change risks in its annual report on Form 10-K. Cuomo accompanied this announcement with a statement that the agreement "sets a new industry-wide precedent that will force companies to disclose the true financial risks that climate change poses to their investors." Pursuant to this agreement, Xcel must provide the following disclosures in its reports under the Securities Exchange Act of 1934, as amended:

- **Analysis of material financial risks from present and probable future regulation with respect to climate change, including:**
  - **Identification of current regulation and discussion of expected trends in future regulation in jurisdictions in which Xcel operates**
  - **Analysis of material financial effects, including discussion of factors that may affect the company's business**
- **Analysis of material financial effects of climate change-related litigation to which Xcel is a party and any climate change-related decisions, judgments, or orders in jurisdictions in which the company operates that may have a material financial effect**
- **Analysis of material financial risks from physical impacts of climate change, including sea level, weather conditions and extreme weather, changes in precipitation, and changes in temperature**
- **Strategic analysis of climate change risk and emissions management**
  - **The company's "current position on climate change"**
  - **The company's estimated greenhouse gas (GHG) emissions**

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- **The company's expected increase in GHG emissions from new coal-fired generation**
- **The company's strategies to reduce climate change risk, including actions to limit GHG emissions**
- **The results of strategies undertaken to date**
- **The expected effect of strategies on future GHG emissions and GHG emission reduction goals the company seeks to achieve**

The legal bases for requiring such disclosure include: 1) Securities and Exchange Commission (SEC) Regulation S-K Item 101, which requires a narrative description of the business, including disclosure as to the material effects that compliance with federal, state, and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings, and competitive position of the company and its subsidiaries; 2) SEC Regulation S-K Item 103, which requires disclosure of material pending legal proceedings to which the company is a party or of which any of its properties are subject, including proceedings in which the company is not directly a party but which may have a material impact on the business or financial condition of the company; and 3) SEC Regulation S-K Item 303, which requires disclosure of known trends or uncertainties reasonably likely to have material impacts on liquidity, capital resources, and results of operations.

None of these SEC disclosure requirements specifically identifies climate change or climate change regulation as phenomena that companies must consider in disclosing risk. Nevertheless, the following emerging trends reflect increasing public concern about climate change that may influence regulatory actions and impact the nature of risk assessment and disclosure by public companies:

- **Increasing numbers of shareholder proposals seek to require public companies to disclose certain information or undertake certain actions related to climate change risk.**
- **Voluntary disclosure of climate change risk information by public companies has risen sharply, with many companies publishing sustainability reports or participating in such initiatives as the Carbon Disclosure Project. The Carbon Disclosure Project indicates that over 75% of Fortune 500 companies responded to its 2007 survey, although the nature and completeness of the responses varies widely.**
- **In Europe, as in the United States, while securities regulators do not specifically require climate change disclosure, companies appear to be considering climate change risks in the course of satisfying other general disclosure and reporting requirements. Many European companies also publish sustainability reports that go beyond the disclosure required by the mandatory reporting process.**

- In September 2007, a large group of environmental organizations and institutional investors, led by Environment Defense and CERES, petitioned the SEC to provide interpretive guidance regarding climate change risk in the form of a statement that companies must consider climate risk in their review of information that may be material and subject to disclosure. This petition was renewed on June 12, 2008.
- In December 2007, the chairs of the Senate Committee on Banking, Housing and Urban Affairs and the Senate Subcommittee on Securities, Insurance and Investment asked the SEC to issue an interpretive release ensuring greater completeness and consistency in disclosure of information related to climate change.
- In August 2008, the California Senate passed Senate Bill 1550, which would require the Secretary of State to establish standards for climate change disclosure for public companies doing business in California. To date, however, the California Senate has refused to concur in Assembly amendments, and thus it is unclear whether any proposal on the subject will become law in California.
- On September 24, 2008, former Vice President Al Gore called for state attorneys general to force publicly traded companies into disclosing the risks of climate change, stating, “I believe for a carbon company to spend money convincing the stock-buying public that the risk from the global climate crisis is not that great represents a form of stock fraud because they are misrepresenting a material fact.” (Reuters)

In connection with these trends, Hogan & Hartson has looked at the climate change-related disclosures provided by several dozen major public utilities in their 2008 10-K reports. The following summary reveals the extent to which public utilities are disclosing climate change risk:

- **85% of the companies reviewed discuss current and possible future systems of climate change regulation**
  - Of those addressing the issue, 60% discuss material effects of climate change regulation
  - The remaining 40% acknowledge that climate change regulation could have a material effect
- **30% of the companies reviewed discuss their strategies to address climate change and the results of those strategies**
  - An additional 10% simply identify a company strategy addressing climate change
- **25% of the companies reviewed disclose actual GHG emissions**
  - An additional 30% disclose the level of GHG emissions relative to their industry
- **20% of the companies reviewed discuss climate change litigation, to which they were not parties, that could have a material effect**

- **15% of the companies reviewed disclose financial risks from physical impacts of climate change**

Drafting appropriate disclosures regarding climate change risk can be a challenge given the many uncertainties regarding the risk from climate change and the scope and degree of financial risk to particular companies arising in connection with potential climate change regulation. Nevertheless, either reporting on climate change risk exposure, even in reasonably general terms, or, alternatively, conducting a well-documented process of evaluating and determining not to report on climate change risk exposure, can provide useful protection for public companies from what are becoming more common litigation and shareholder challenges associated with climate change reporting.

**For more information about the topics discussed in this publication, please contact the Hogan & Hartson attorney with whom you work or an author listed below.\***

**DENNIS ARFMANN**  
[darfmann@hhlaw.com](mailto:darfmann@hhlaw.com)  
720.406.5374  
Boulder

**ADRIAN EISSLER**  
[aeissler@hhlaw.com](mailto:aeissler@hhlaw.com)  
720.406.5363  
Boulder

**MARY ANNE SULLIVAN**  
[masullivan@hhlaw.com](mailto:masullivan@hhlaw.com)  
202.637.0000  
Washington, D.C.

**TARA L. DUNN**  
[tldunn@hhlaw.com](mailto:tldunn@hhlaw.com)  
303.454.2426  
Denver

*\*A special thanks to **Paul Shoning** for his contribution to this Update.*

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