

NEWSROOM
PRESS RELEASES
MEDIA COVERAGE
PUBLICATIONS
EVENTS
MEDIA CONTACTS
SEARCH NEWSROOM
PUBLICATION SIGNUP



Public Company Climate Change Disclosure Developments

December 9, 2008
Eric Rothenberg, John Rousakis, Lisa Wing Stone

While greenhouse gas ("GHG") emissions tracking and other climate change policies have become standard practice for many companies, there is no common paradigm for disclosure of such practices by public concerns. The change in administrations in Washington and developments on many other fronts will accelerate, and hopefully clarify, climate change disclosure requirements in the coming year. Below are a few of the key developments that OMM is following in this area.

Dynegy and Xcel Settlements

On October 23, 2008, Dynegy Inc. ("Dynegy") became the second company to enter into a ground-breaking agreement with the Attorney General for New York to provide structured disclosures of material risks associated with climate change in its Annual Report on Form 10-K. Xcel Energy ("Xcel") settled a similar matter with the Attorney General for New York by entering a nearly identical agreement in August 2008. These two settlements provide concrete markers for companies examining their climate change disclosure practices.

Both settlements stem from a series of inquiries into climate change disclosure practices initiated by the Attorney General for New York, Andrew Cuomo, in September 2007. Three additional energy companies, AES Corporation, Dominion Resources, and Peabody Energy, received similar subpoenas last September. The Attorney General's office reports that its inquiries into these remaining companies are ongoing.

Together, the Dynegy and Xcel settlement agreements provide an outline for climate change disclosure. The disclosure regime agreed to in the settlements demonstrates an emphasis on providing company-specific disclosures, as opposed to a generic statement regarding the inherent risks of climate change. The settlements provide that the company's Form 10-K must address the following topics, to the extent they will **materially affect the company**:

- current and "expected" legislation or regulation on GHG emissions;
- litigation relating to climate change; and
- physical impacts of climate change.

Each of the companies also agreed to provide disclosure on the following topics relating to their company's GHG emissions:

- a statement of the company's "current position on climate change";
- a quantification of the prior year's GHG emissions (including but not limited to carbon dioxide), expected increases from planned projects, and a discussion of strategies to reduce the company's climate change risk; and
- the company's corporate governance actions concerning climate change.

A Push and Pull Toward Greater Disclosure

related practices
ERIC ROTHENBERG
JOHN ROUSAKIS
LISA WING STONE

related practices
CLIMATE CHANGE
ENERGY
ENVIRONMENTAL LAW AND NATURAL RESOURCES

While the Dynegey and Xcel settlements directly apply to only these two companies, institutional investors continue to press for more widely-applicable guidance from the Securities Exchange Commission. On October 23, 2008, a coalition of fourteen of the nation's largest institutional investors sent a letter to the SEC requesting SEC guidance on a standardized format for climate risk disclosure. The letter was filed in response to the SEC's request for public comment on its 21st Century Disclosure Initiative, File No. 4-467. A similar request for guidance filed with the SEC in September 2007 by a group of 22 state pension plans and institutional investors went unanswered.

In the meantime, institutional investor groups (including many pension funds) have adopted investment guidelines including climate change disclosure for use in both public and private company investments. Such guidelines include the UN Principles for Responsible Investment (subscribed by over 150 institutional investors controlling an estimated \$13 trillion), the Corporate Governance Policy of Counsel of Institutional Investors (130 mostly pension fund investors), and the Corporate Social Responsibility, Partners for Progress principles of the Organisation for Economic Co-operation and Development ("OECD").

Even in the absence of SEC guidance, more U.S. companies are providing greater climate change disclosure in response to shareholder requests. The Carbon Disclosure Project ("CDP"), an independent not-for-profit organization which collects climate change data, reports that in 2008, corporations in the United States continued an upward trend toward providing more detailed disclosures on climate change, including disclosures of actual GHG emissions and reduction strategies. The CDP reported a corresponding decline in generic climate change risk disclosures.

Congress Weighs In

Additional pressure on both public and non-public companies to report GHG emissions is coming from Congress. On December 26, 2007, as part of its Fiscal Year 2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110-161), Congress directed the EPA to publish a mandatory GHG reporting rule for "all sectors of the economy" as part of the agency's existing authority under the Clean Air Act. Although the Appropriations bill instructed the EPA to publish a proposed rule within 9 months (e.g., September 2008), and a final rule within 18 months (e.g., by June 2009), no rule has emerged yet. While it waits for the EPA to act on its earlier legislation, several bills are under consideration by both the Senate and the House which would establish a national GHG registry.

State, Local and Regional Initiatives

Public companies can expect to face mounting disclosure pressure as well from state and regional regulation requiring GHG controls, often under cap and trade programs. Foremost among these are the northeastern Regional Greenhouse Gas Initiative, the Western Climate Initiative (which includes the western states and Canadian provinces) and the Midwest Regional Greenhouse Gas Reduction Accord. In addition, on November 21, 2008, over 900 mayors became signatories to the Conference of Mayors Climate Protection Agreement, a commitment to reduce emissions to 7 percent below 1990 levels by 2012.

Obama Agenda and SEC Disclosure

President-elect Obama has called for a national gas cap-and-trade program to reduce GHG emissions by 80% by 2050. With this goal in mind, on November 21, 2008, Senator Barbara Boxer, who chairs the Environment and Public Works Committee, announced plans to introduce a streamlined cap-and-trade bill to eliminate some of the elements that made the Lieberman-Warner bill (S.2191) controversial and led to its demise. Both S.2191 and S.485 (sponsored by Senator Kerry) included provisions requiring the SEC to issue GHG disclosure guidance. The increased likelihood that climate change legislation will be passed in the next Congressional session may change the SEC reporting equation for many companies, especially in light of Item 101 of Regulation S-K, which requires disclosure of material expenditures necessary for compliance with environmental laws. The materiality concept in the rule requires an analysis of probability and magnitude, so that, although the ultimate costs of compliance may be uncertain in the absence of Congressional action, the increased probability of legislation may make disclosure necessary. In addition, Item 303

of Regulation S-K requires disclosure of “any known trends, demands, commitments, events or uncertainties” that are reasonably likely to have a material effect on financial conditions or results of operations.

Conclusion

Affected public companies should be poised to consider adoption or revision of climate change disclosures in this rapidly evolving regulatory climate. In addition to formal securities filings, the corporate disclosure committee should be mindful of other public statements and documents released by the company, including those issued under state or local regulations, non-U.S. regulatory regimes (e.g., EU Directive 2003/51/EC), and such as statements regarding the company’s carbon footprint and voluntary efforts to reduce emissions. Steps taken now to either enhance the company’s climate change disclosure, or document why the current disclosure is appropriate, can provide valuable protection for public companies from possible challenges from shareholders or regulatory authorities.