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Corporate Climate Change Reporting: Recent Developments

As world leaders coalesced in Paris to agree on an historic treaty to commit nearly 200 countries to a global greenhouse gas reduction target, a similar, renewed focus has been brought recently across borders to enhance corporate disclosure to stakeholders on the effects of climate change on their operating and financial results. Corporate climate change reporting remains a fragmented and inconsistent practice around the world and even within many countries, largely because disclosure practices have been driven by ad hoc corporate social responsibility, or CSR, initiatives using any number of voluntary standards such as the Global Reporting Initiative's G4 Sustainability Reporting Guidelines and CDSB's Climate Change Reporting Framework. Of late, however, there has been some push to crystallise and harmonise reporting, at least on the national level. Here, we discuss the most significant recent enforcement, regulation and industry initiative developments as related to corporate climate change reporting to stakeholders.

The Principal US "Requirement" to Date: the 2010 SEC Climate Change Disclosure Interpretive Release

To date, the most significant document at the US federal level calling for corporate climate change disclosure is the 2010 interpretive release issued by the US Securities & Exchange Commission, or SEC. At the time it was issued, the SEC stressed that the guidance was not intended to change existing SEC disclosure requirements, nor was it intended to change long-standing SEC interpretations of materiality. Nonetheless, the mere issuance by the SEC of the guidance resulted in a significant change in the landscape of climate change reporting by public companies in the United States.

In the guidance, the SEC highlighted four areas where climate change may trigger disclosure requirements when evaluating materiality related to a company's business, risk factors, legal proceedings and operating and financial review:

- The impact of any existing or pending climate change legislation or regulation.
- The risks or effects of climate change-related international accords or treaties.
- The actual and potential indirect consequences of climate change-related regulation or business trends, such as increased or decreased demand for goods or services.
- The actual and potential physical impacts of climate change, such as increased droughts or storms, other changes in weather or rising sea levels.

There has been no new US federal requirement on corporate climate change reporting since the 2010 guidance. Other key US federal reporting requirements did emerge around the same time, such as a 2009 rule by the US Environmental Protection Agency, or EPA, requiring large source emitters of greenhouse gasses and certain fossil fuel suppliers and vehicle manufacturers to disclose their emissions data annually. However, the EPA rule applies only to certain industry sectors or large greenhouse gas emitters, not all public companies listed in the United States, and the requirement is to report to a designated environmental regulator rather than to all stakeholders.

New York Attorney General Enforcement and Settlements on Climate Change Disclosure

So far there has not been any significant SEC enforcement related to climate change reporting. The principal federal effect of the 2010 guidance has been increased but relatively informal SEC correspondence to reporting companies commenting about their disclosure on the subject.

In this context, the New York Attorney General, or AG, has emerged as the most visible US public body policing climate change reporting. Invoking broad anti-fraud state statutes known as the Martin Act and the Executive Law, the AG initially issued subpoenas in 2007—before the SEC interpretive release—to five companies to collect information on what investigations they were historically conducting and what they had concluded at the time about the effects of climate change on their businesses, in order to determine whether their disclosure to investors on these effects was inadequate. The five companies were four power generators, AES, Dynegy, Xcel and Dominion Resources, and Peabody Energy, the world's largest private sector coal producer. Although the SEC guidance had yet to be issued in 2007, media and investor interest in climate change reporting had already gathered considerable steam.

Without the subpoenas progressing to a formal claim or the imposition of fines, three of the four power generators—AES, Dynegy and Xcel—agreed to beef up their climate change disclosure. The more interesting settlement was with Peabody last November, again without a formal claim or the imposition of fines, but in the much more robust disclosure landscape now. The Peabody settlement focussed on two allegations:

- Peabody's statements that the company could not reasonably predict the future impact of any climate change regulation were inconsistent with the fact that the company and its consultants had looked into the issue at some length and had projected material and severe impacts from certain potential regulations.
- Peabody "cherry-picked" disclosure of projections by the International Energy Agency, or IEA, on the future of the coal market as impacted by climate change developments. For example, Peabody mostly omitted reduced demand projections based on IEA's "New Policies Scenario," which assumes implementation of announced government carbon commitments/policies and which IEA considers its central scenario. Peabody frequently discussed demand only in the more favourable context of IEA's "Current Policies Scenario," which assumes announced government commitments/policies will not necessarily be implemented and is the scenario likely to result in a rise in global temperatures of 6ºC. This was not black and white—more the case of a significant imbalance in the disclosure.

The *Peabody* settlement is likely to send industrial companies back to the drafting table to determine whether their disclosure aligns with internal projections or awareness of climate change impacts, including the cost of regulatory compliance, changes in market demands for products, and physical impacts such as weather patterns or changes

in the availability of raw materials. *Peabody* crystallised the notion that it is no longer acceptable for a company to report that it does not know or cannot predict impacts when it is at least aware of a range of meaningful possibilities, even if it is not certain which one will arise.

In addition, companies are likely to revisit points in their disclosure where projections are made as to market/demand for any product, and to consider whether those projections reflect all conventional scenarios on the impact of climate change regulation on demand or are imbalanced in favour of any one scenario.

AG's Subpoena to Exxon Mobil

Days before the *Peabody* settlement the AG issued its most high profile climate change-related subpoena yet: to Exxon Mobil. Although the subpoena is not public, it reportedly seeks information back to 1977 on what the company knew and when on the impacts of climate change, in order to compare against the company's disclosure. The AG's subpoena reportedly followed an investigative series published by *InsideClimate News* and the *Los Angeles Times* that reported that Exxon scientists were warning company executives as far back as nearly four decades ago of the potentially catastrophic consequences of global warming. Exxon Mobil has denied any inadequacy with its historic disclosure on the matter and has, perhaps unsurprisingly, missed a 4 December deadline to hand over documents to the AG going back that far. As a next step, the AG and Exxon Mobil are likely to agree a new schedule for document production in 2016.

Financial Stability Board Task Force on Climate Related Financial Disclosures

In late September, Mark Carney, the normally guarded governor of the Bank of England, surprised many listeners at a Lloyds of London dinner by speaking of the "potentially huge" losses investors faced from climate change regulation that could make vast reserves of fossil fuels "literally unburnable." On the heels of this speech, the Financial Stability Board or FSB, an international body chaired by Mr. Carney that coordinates national financial authorities and international standard-setting bodies to develop financial sector policies, announced on 4 December that it has established a task force to develop "voluntary, consistent climate-related financial risk disclosures for use by companies in providing information to lenders, insurers, investors and other stakeholders."

The task force is headed by ex-New York mayor Michael Bloomberg and will consider "the physical, liability and transition risks associated with climate change and what constitutes effective financial disclosures in this area." In particular, the FSB noted that the "wide range of existing disclosure schemes relating to climate or sustainability highlights the need for companies and relevant stakeholders to reach a consensus on the characteristics of effective disclosures and examples of good practices."

That a mainstream financial organisation, rather than organisations focused on environmental, sustainability or governance issues, has highlighted the importance of uniform climate change reporting marks a turning point in this area. The task force is aiming to publish its recommendations by the end of 2016.

Recent European Developments

The United Kingdom and the European Union as a whole have also seen some noteworthy developments recently in climate change disclosure requirements. The United Kingdom, which already required disclosure of relevant environmental issues by "quoted companies" in their directors' reports, now requires quoted companies to disclose annual greenhouse gas numerical emissions data in their directors' reports. While many public UK companies have

already been providing such data in their CSR reports for some time, the disclosure has been a voluntary, industry-led and somewhat ad hoc practice until this requirement, which was introduced by the UK Climate Change Act 2008 and came into effect in October 2013.

Specifically, under the implementing Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, quoted companies are required to disclose the annual quantity of their greenhouse gas emissions in tonnes of carbon dioxide equivalent (i) from the combustion of any fuel or the operation of any facility, and (ii) separately, from the purchase of electricity, heat, steam or cooling by the company for its own use. The regulations do not prescribe a methodology for quantification, but the company must disclose the methodology used. “Quoted companies” are UK-organised companies whose shares are listed on the London Stock Exchange's Main Market, any main exchange in the European Economic Area, or the NYSE or Nasdaq.

The same regulations imposed an expanded requirement on quoted companies to report, in the strategic report part of their annual report, on their environmental policies and the effectiveness of those policies. This is a general environmental requirement and not specific to the subject of climate change.

Meanwhile, the European Union recently adopted a directive calling for large companies Europe-wide to disclose annually non-financial matters to stakeholders, including environmental matters. Whilst this requirement is also not specific to climate change matters, it is the first time company disclosure to stakeholders under the environmental rubric has become a clear, standard requirement as an EU matter.

Specifically, Directive 2014/95/EU on the disclosure of non-financial and diversity information—which amended Accounting Directive 2013/34/EU, and which came into force on 5 December 2014 and requires Member State implementation by 6 December 2016—requires large EU corporates to disclose in their annual report (or in a separate filing that is filed with their management report or made available on their website) relevant and useful information on their policies, main risks and outcomes relating to at least:

- environmental matters, including greenhouse gas emissions;
- social and employee-related matters;
- respect for human rights;
- anticorruption and bribery issues; and
- diversity in their board of directors.

There is significant flexibility for companies to tailor the disclosure through the use of recognised international, European or national guidelines, such as the Global Reporting Initiative's Sustainability Reporting Guidelines, the UN Global Compact Principles, the OECD Guidelines for Multinational Enterprises or ISO 26000. In this way again, the EU Directive begins to formally regulate voluntary, widespread but inconsistent CSR disclosure practice by large companies.

The large companies covered by the Directive are companies incorporated in EU Member States that:

- have more than 500 employees;

- are "public interest" organisations, which include, among others, EU exchange-listed companies; and
- have a balance sheet of at least €20 million or a net turnover of at least €40 million.

Subject to certain exceptions, through the EU Transparency Directive, this Directive applies equally to non-EU companies that have a listing of transferable securities on a regulated EU exchange.

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What is abundantly clear from the Paris climate agreement is that legal requirements for companies to reduce greenhouse gases will continue to emerge and become more stringent. As they do, so will requirements for corporates to disclose both their carbon footprint and the impact that carbon regulations—and carbon awareness—have on their businesses. Such is the traction in this area that the OECD published in November its report on Climate Change Disclosure in G20 Countries: Stocktaking of Corporate Reporting Schemes, linked here: http://www.oecd.org/daf/inv/mne/Report-on-Climate-change-disclosure-in-G20-countries.pdf. France's *Grenelle II* legislation and Denmark's Finance Statements Act 2008 are yet further examples, and several other countries or groups of countries such as Australia, Canada and the European Union's Emissions Trading System already require at least reporting of greenhouse gas emissions by regulated entities to a government regulator.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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