

KAZMAREK GEIGER & LASETER LLP

ENVIRONMENTAL ADVISORY

Climate Change Regulatory Update #2: SEC Guidance on Greenhouse Gas Reporting (February 11, 2010)

This is the second update related to various “climate change” regulatory initiatives. In this, we address a recent SEC guidance document pertaining to disclosure of climate-related risks and opportunities confronting publicly traded companies.

Publicly traded companies have long been required to report information on known and probable environmental liabilities. The rules governing how such liabilities are to be reported and accounted for have changed over the years, but mostly represent simply a special gloss on standard FAS-5 requirements, further complicated by the nuances of SOX controls.

Lately, however, there has been a push from a variety of sources for companies to focus on environmental considerations that are not “liabilities” in the conventional sense, but rather represent “risks” that could materially affect the company, its costs, income, or business activities. A common focus in this respect has been on how companies should evaluate and report how the emerging climate change laws and treaties will affect their business.

The SEC has now entered that debate. On February 8, 2010, the SEC issued “Commission Guidance Regarding Disclosure Related to Climate Change.” A copy of the SEC guidance is also available on our website, here:

<http://www.kglattorneys.com/resources.html>

According to the SEC, the release was intended to “remind” companies of their

obligations under current disclosure laws and, in SEC’s view at least, does not represent new disclosure obligations.

SEC’s guidance is based on its assumption that businesses may face several kinds of risks in a the developing legal and business environment: (1) risks from changes in laws and regulations; (2) risks from requirements under treaties; and (3) the “indirect” consequences of regulation or business trends in a carbon-focused world, such as regulation of products. All of this seems straightforward, and SEC seems justified in concluding that reporting of material risks in such respects should be done under current disclosure requirements. Nonetheless, this seemingly simple principle still leaves open the exact nature and content of such disclosures, especially since the form and nature of such future risks is subject to considerable uncertainty.

In SEC’s view, however, such risks are “known uncertainties.” Accordingly, unless management has sufficient reason to believe that climate change laws and regulations affecting the company through those areas of risk are not “reasonably likely,” the company must assume such laws and regulations will be enacted and make a determination as to whether the effects of such will be material. Significantly, SEC also identifies as a potentially disclosable material adverse consequence, damage to the company’s “reputation” from a focus on greenhouse gas emissions.

The second area in which SEC has chosen to dabble is more problematic. SEC adopts the increasingly dubious proposition that climate change will lead to substantial changes in weather patterns, such as increases in extreme weather events, sea-level rise, and droughts, floods, and other “bad” climate. IPCC has already started backing away from such assertions, and the projection of an increase in severe weather events was never all that strong scientifically anyway. Nevertheless, SEC states that with these kinds of weather effects, “there may be significant physical effects of climate change that have the potential to have a material effect on a registrant’s business and operations.” “Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events...” Unlike the presumption of such circumstances stated for legal and indirect business consequences, SEC has not stated that businesses must presume such extreme weather events will occur.

All of these issues, and countless others, will continue to play out in the agencies and the courts. If you have any questions regarding climate change issues and how they may affect your business, feel free to contact the lawyers at Kazmarek Geiger & Laseter LLP, 404-812-0839 or info@kglattorneys.com.