

DEVELOPMENTS IN ENVIRONMENTAL AND CLIMATE CHANGE DISCLOSURE

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There have been developments on both sides of the border regarding disclosure requirements for reporting issuers in the areas of environmental disclosure and climate change. In Canada, the Ontario Securities Commission released OSC Staff Notice 51-717 *Corporate Governance and Environmental Disclosure* as well as the OSC report to the Ontario Minister of Finance on the OSC corporate sustainability initiative.

OSC Initiatives

The OSC Staff Notice looked at the sufficiency of the current environmental disclosure requirements affecting reporting issuers and notified the investment community that OSC staff intends to issue a further Staff Notice providing additional guidance on compliance with the existing environmental disclosure requirements contained in National Instrument 51-102 *Continuous Disclosure Obligations*.

OSC staff indicated that it intends to publish the further guidance on environmental disclosure by December 2010, so that reporting issuers will be able to consider the guidance well in advance of preparing their 2010 annual continuous disclosure documents.

It is expected that the OSC environmental disclosure guidance will also deal with climate change disclosure. In its report to the Ontario Minister of Finance, the OSC referenced climate change risk and disclosure issues in various ways. It also referred to a survey conducted by the Climate Change Lawyers Network and endorsed by British Columbia Investment Management Corporation, Ceres and Climate Action Network Canada of the continuous disclosure filings of various Ontario reporting issuers with

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market capitalizations of more than \$1 billion, across nine different industry sectors. The survey concluded that the public filings of these issuers contained very limited disclosure, if any, of climate change risks.

It can be expected that this will be an area of continued interest from the OSC and the Canadian Securities Administrators as a whole, and reporting issuers should be aware that it is likely that increased disclosure in this area and, in particular, of any material environmental risks or issues affecting the reporting issuers will be required in their continuous disclosure documents.

U.S. SEC Interpretive Guidance

The Securities and Exchange Commission in the United States has released interpretive guidance on existing SEC disclosure requirements for reporting companies relating to the issue of climate change. The purpose of the interpretive release was to provide guidance on certain existing disclosure rules that may require a company to disclose the impact that developments related to climate change may have on its business.

The SEC initiative follows a longstanding discussion in the U.S. of the sufficiency of climate change disclosure by public companies. The SEC identified four areas for public companies to evaluate and, where appropriate, provide sufficient disclosure in their public documents:

- the actual and potential impact on the issuer of existing and pending climate change legislation and regulation;
- the actual and potential impact of international agreements and treaties on climate change or greenhouse gas emissions;
- the actual and potential indirect consequences of climate change regulation or industry trends affecting that public company (for example, where there is an anticipated reduction in demand for carbon-intensive products); and

- the actual and potential impact of the physical effects of climate change on manufacturing, supply chains, markets, insurance (premiums and availability of coverage) and other operational matters.

The guidance reflects the increased attention that regulators and business are paying to climate change. The U.S. Environmental Protection Agency (EPA) released an “endangerment and cause or contribute finding” for greenhouse gases under the U.S. *Clean Air Act*, which sets the stage for the EPA to regulate greenhouse gas emissions. U.S. federal legislators have also been considering several climate change bills, the most prominent of which contemplates an economy-wide cap-and-trade system. Impatient with the pace of regulation at the U.S. federal level, several U.S. states, alone or in regional cooperation, have also moved to regulate emissions.

There have also been several major U.S. initiatives to require companies to disclose their emissions. As of January 1, 2010, the EPA is requiring about 10,000 of the country’s biggest emitters to collect and report emissions data. Similar requirements are already in place in many states. The New York Attorney General took the aggressive approach of commencing litigation against five large energy companies to seek improved disclosure of emissions data and climate change risk. Three of the defendants have settled.

Investors too have been seeking improved disclosure. Many institutional investors have been petitioning the SEC and OSC for guidance about climate change disclosure requirements. The 2010 proxy season has already seen investors file 99 climate change-related shareholder resolutions with 88 U.S. and Canadian reporting issuers, a 45% increase over last year.

The SEC guidance is therefore a timely, if not somewhat overdue, clarification of the SEC’s expectations with respect to climate change disclosure. However, as the SEC has been careful to emphasize, the new guidance does not contain any new disclosure rules.

Rather, the guidance with respect to the four subject areas listed above is intended to assist reporting issuers in identifying and organizing information that would already have to be disclosed under existing rules. As SEC Chairman Mary Shapiro put it when releasing the guidance, “If something has a material impact on a company then it is something that needs to be disclosed – that has always been the case.” As the guidance makes clear, uncertainty about a particular outcome does not necessarily make that potential outcome immaterial. The onus will be on issuers to assess the likelihood and potential magnitude of both regulatory and physical impacts and to decide whether such potential impacts are material.

In light of the SEC disclosure requirements and the OSC’s climate change disclosure

initiative, reporting issuers should be prepared to provide meaningful qualitative and quantitative disclosure of climate change risk. Meeting the evolving expectations of securities regulators will require the careful attention of issuers and their advisers. Perhaps more significantly, this will require senior management to integrate the analysis of emissions regulations and the physical effects of climate change into their strategic and operational plans.

If you have any questions concerning this bulletin or if you would like any further information on how these issues will affect your business, please contact the authors or your usual contact at Davis LLP.

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