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Greening the Corporation: Advising Companies on Compliance with Corporate Sustainability Requirements

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For a growing number of businesses, implementing smart environmental policy aids legal compliance and promotes competitiveness. Gone are the days when the only companies concerned about environmental laws were heavy manufacturers. Recent developments in both the U.S. government and private corporate sectors have ushered in a new era of corporate sustainability, in which complying with environmental regulations is moving from a recommendation to a mandate for a wide range of businesses. Just as organizations must develop and enforce policies in the areas of governance, employment, and safety, many companies and public agencies are now required to track and report sustainability measurements to ensure legal compliance. Moreover, many forward-thinking companies are already implementing environmental policies to stay competitive, even though it is not yet a legal requirement. In-house counsel should be aware of the new corporate sustainability requirements and recommendations to advise organizations how to develop policies, avoid liability and succeed in the new green economy.

While 2010 began without a comprehensive U.S. federal climate law or legally binding international agreement, regulatory action and negotiations are ongoing. Despite the failure of the United Nations Climate Change Conference in Denmark last December to produce any binding greenhouse gas emission ("GHG") reduction laws, nations will continue working toward a global climate treaty. In the U.S., a bi-partisan bill being sponsored by Senator John Kerry (D-Mass.) could succeed in bringing the parties together and finally getting a new climate law passed.

In the meantime, businesses cannot afford to sit back and wait for definitive law in this area, since a new federal Executive Order, EPA regulations, SEC guidance and private sector programs have gone into effect which apply to a wide variety of companies and public agencies. All organizations that are subject to these new requirements should be incorporating them into their planning and taking steps to ensure compliance.

I. Executive Order 13514

On October 5, 2009, President Obama signed Executive Order 13514, titled Federal Leadership in Environmental, Energy, and Economic Performance. This Executive Order requires all federal agencies to inventory their GHG emissions, set targets to reduce their emissions by 2020, and develop a plan for meeting a wide range of goals for improving sustainability, such as increasing energy and water efficiency, reducing waste, reducing fleet petroleum consumption, supporting sustainable communities, developing and maintaining high performance buildings, and leveraging Federal purchasing power to promote environmentally-responsible products and technologies.

Other environmental targets in the order include a 30% reduction in fleet gasoline use and 26% boost in water efficiency by 2020, and a 50% waste recycling and diversion rate by 2015. The 2030 net-zero-energy building requirement must also be implemented under the order. Each agency must appoint a senior sustainability officer responsible for complying with the order. The Chair of the Council on Environment will report agency goals and results directly to the President.

"As the largest consumer of energy in the U.S. economy, the Federal government can and should lead by example when it comes to creating innovative ways to reduce greenhouse gas emissions, increase energy efficiency, conserve water, reduce waste, and use environmentally-responsible products and technologies," President Obama said in a statement.

The Executive Order was intended to jumpstart a transition to a clean energy economy as climate change legislation works its way through Congress, saving taxpayers money in the process. The order will have a significant impact based on the Federal government's sheer size: it occupies nearly 500,000 buildings and operates more than 600,000 vehicles.

Another key component of the Executive Order is a green procurement policy requiring 95% of new federal contracts and acquisitions to meet sustainability requirements which promote environmentally responsible products and technologies. This also carries a lot of weight due to the government's huge buying power, which exceeds more than $500 billion spent on goods and services annually. The Executive Order charges the General Services Administration ("GSA") with exploring the feasibility of tracking vendor GHG emissions. Recommendations could include requiring vendors to register with a voluntary GHG emissions registry and disclose their efforts to reduce emissions. Preferences or other incentives could be given for "products manufactured using processes that minimize greenhouse gas emissions."

For the purchase of electronic products and services, the Executive Order requires the GSA to ensure that 95% of new contract actions, task orders, and delivery orders for products and services (excluding weapon systems) are energy efficient (ENERGY STAR® or FEMP-designated), water efficient, bio-based, environmentally preferable (Electronic Product Environmental Assessment Tool (EPEAT) certified), non-ozone depleting, contain recycled content, or are non-toxic or less-toxic alternatives where such products and services meet agency performance requirements.

The GSA announced in late January 2010 that it had already drafted energy service agreements with 18 companies to reduce its consumption through energy audits, monitoring and use of renewable energy. The GSA also took steps to make the federal fleet more efficient with the purchase of thousands of new vehicles last year using $210 million in stimulus funds. Roughly 6,500 of the vehicles -- a mix of hybrids, flex-fuel and four-cylinders -- are earmarked for the U.S. Postal Service, which operates the country's largest fleet of alternative fuel vehicles. In 2008, the GSA estimated its purchase of 15,000 seats of power management software would save up to $750,000 annually.

Eventually, all federal purchasing will incorporate the measurement of GHG emissions as a contract requirement. The first step, which is part of Executive Order 13514, is the creation of a voluntary GHG emissions reporting system for government contractors and vendors. Contractors' (and subcontractors') ability to measure and minimize their GHG emissions and provide energy efficient products and services will become an important factor in winning government contracts.

II. SEC Guidance on Climate Change Disclosures

The U.S. Securities and Exchange Commission ("SEC") issued Interpretive Release No. 33-9106 on February 2, 2010 in order to provide guidance to public companies of the agency's disclosure requirements regarding climate change issues. The guidance, which became effective immediately, applies to all public companies.

The release doesn't create new disclosure requirements or modify existing disclosure requirements, but rather, was issued for clarification purposes. Specifically, the guidance addresses four areas that may trigger disclosure obligations under existing SEC requirements:

1. whether the impact of proposed or existing climate change laws and regulations in the U.S. and other countries may materially affect the company's financial condition or operations;
2. whether international climate change accords or treaties will impact its business;
3. whether a company is likely to face indirect opportunities or risks arising out of legal, technological, political and scientific developments regarding climate change (such as changes in demand for the company's goods/services, increased competition, or reputational damage); and
4. whether a company faces potential physical impacts of climate change on its business (such as disruption to operations caused by weather or supply interruptions, increased insurance, or water availability and quality).

The SEC guidance provides that these climate change disclosures may be required under the Description of Business (Item 101), Legal Proceedings (103), Management's Discussion and Analysis (303), and Risk Factors (503(c)) sections of companies' filings under Regulation S-K.

The SEC noted its concern that some companies had already been providing climate change information on a voluntary basis to third parties, and it wanted to ensure that similar disclosures were in SEC filings as may be required under SEC regulations. Independent organizations such as The Climate Registry and The Carbon Disclosure Project maintain corporate climate change data, while the most dominant reporting regulations are those of the Global Reporting Initiative (GRI). Launched in 1997 with the goal of "enhancing the quality, rigor, and utility of sustainability reporting," the GRI develops criteria that could eventually serve as the basis for generally accepted sustainability reporting standards. As of 2008, more than 1,000 companies from more than 60 countries registered with the GRI and were issuing corporate sustainability reports using its reporting framework.

The SEC expressly indicated in the comments to the guidance that it will be focusing on climate change disclosures in its review of company filings. As a practical matter, public companies are well advised to treat this guidance as binding; if they haven't disclosed climate risks in the past, they'll need to begin establishing disclosure procedures for all future relevant filings using these measures as a roadmap.

III. EPA Mandatory Greenhouse Gas Reporting Rule

Beginning on January 1, 2010, a mandatory EPA rule went into effect, which requires that all major GHG emitters track and report their GHG emissions data under a new system.[1] The new rule applies to industries or facilities that emit over 25,000 tons of carbon dioxide equivalent per year, of which there are currently approximately 10,000 in the U.S. Most emitters are required to install new monitoring equipment or at a minimum develop new GHG measurement protocols. Recognizing that not all of the organizations would be able to comply by January 1, 2010, the rule allows them to use their "best available monitoring methods" until April 1, 2010.

Affected entities will also need to have a written GHG Monitoring Plan, which must address the methods used to collect GHG data, specify the quality assurance, maintenance, and repair procedures for the GHG monitoring equipment, and assigned roles for facility staff to gather data. In addition, the rule mandates the implementation of GHG monitoring training and documentation procedures in line with the record keeping requirements. While the facilities do not have to send their monitoring plans to the EPA, they are required to maintain the plan at their facility and make it available should the EPA request to review it.

This new EPA regulation is just one of many international, federal, state,[2] and regional programs already enacted or currently pending to address the issue of GHG emissions. While there is still a great deal of uncertainty regarding climate change matters and sustainability compliance, it's not a question of whether most companies will eventually be legally required to monitor, report and reduce their GHG emissions -- it's only a question of when, and how.

IV. Private Sector Sustainability Programs

In the business community, despite the lack of uniform laws and regulations, the last several years have seen a great deal of climate change momentum. In October 2009, major corporations including Apple, Pacific Gas & Electric and Exelon left the U.S. Chamber of Commerce over its strong position against U.S. regulation of GHG emissions. Microsoft co-founder and chairman Bill Gates has recently been calling for making climate change our number one priority, and advocates a global effort to lower carbon emissions to zero by 2050 to avoid the damaging effects of climate change.

More companies are now voluntarily launching new efforts to reduce their climate impact. The steady increase in corporate action toward energy efficiency, renewable energy investment, carbon neutrality, and technological innovation stands in stark contrast to the stalled political action on climate change.

Perhaps the most significant corporate action addressing climate change and sustainability is that of Walmart, the world's largest retailer. The company recently put into effect the "Walmart Sustainability Index," which assesses all of its suppliers

[1] 40 C.F.R. Part 98.

[2] Thirty-three U.S. states plus Washington, D.C. have implemented Renewable Portfolio Standards programs, which are intended to cut GHGs by increasing the use of alternative energy sources, such as wind and solar. The standards set a deadline by which electric utilities must generate a specified percentage of their power from renewable energy sources.

worldwide based on the lifecycle analysis and environmental impact of their products. Over 100,000 suppliers are now highly incentivized to increase their sustainability efforts in order to maintain a successful business relationship with Walmart and remain competitive in the marketplace.

Working closely with the Environmental Defense Fund ("EDF"), Walmart has also committed to reducing 20 million metric tons of carbon pollution from its products' lifecycle and supply chain by the end of 2015. This equates to the annual GHG from 3.8 million cars -- a significant impact.

Due to its sheer size, Walmart is in a unique position to cut carbon pollution across the globe. Its new commitments are bold because:

- Walmart's supply chain is huge, so these initiatives will have widespread repercussions. Walmart's new index encourages suppliers to reduce their emissions - which they might not otherwise do -- resulting in positive energy efficiency efforts by tens of thousands of companies around the world.
- Walmart is prioritizing the products that create the most carbon emissions across their lifecycles as well as top selling products, and focusing on those first.
- The results are immediate, and not dependent on any particular governmental body to act, or any specific laws or regulations, which may be appealed or changed.
- In conjunction with the Sustainability Index and other measures, it clearly communicates a strong message from Walmart to its international network of suppliers that they must reduce carbon pollution.

Other major global companies taking aggressive action in the area of sustainability and climate change include Hewlett Packard, IBM, Ikea, Johnson & Johnson, Nike, Intel, Dell and Weyerhaeuser. Given their hundreds of thousands of employees, suppliers and customers around the world, these companies have the ability to be very influential in the development of green business practices.

Between the federal government with its more than a half trillion dollar procurement budget, the many companies subject to SEC climate change disclosure rules and/or EPA GHG monitoring requirements, and the private corporate programs such as Walmart's index which in effect guarantee preferences to vendors who implement sustainable practices, businesses and organizations of all sizes, across virtually all industries, will soon be facing the need to increase sustainability efforts.

Further, these developments indicate that sustainability targets, once merely an option, will soon be mandated in both the private and public sector. Apart from the legal compliance requirements, from a corporate perspective developing sustainability policies now provides a competitive advantage in the marketplace and reduces costs.

V. Developing a Sustainability Compliance Program

Businesses should therefore carefully assess the legal threats and growth opportunities presented by sustainability initiatives. This assessment requires consideration of qualitative and quantitative information, since both strategic issues and corporate emissions levels drive the identification of climate change-related risks and opportunities. For example, certain issues mentioned in the SEC guidance, such as legal, technological, political, and scientific developments, can alter the competitive marketplace by creating new business areas or threatening existing ones, thereby triggering the need for disclosure in a company's management discussion and analysis.

Depending on the organization's specific business area and operations, companies should consider taking some or all of the following steps, with the goal of making sustainability a part of the overall culture:

- Establish a benchmark of your organization's environmental performance. This is a critical step in establishing goals and developing a comprehensive sustainability program.
- If your company manufactures or supplies products, evaluate the products' life cycle impacts. This can be done by completing or outsourcing a life cycle assessment (LCA). The LCA will be a valuable tool to help make any needed changes to the product or service and reduce environmental impacts and overall costs.
- Hire or appoint a corporate sustainability officer. Federal government agencies are now mandated to fulfill this job function, and savvy private companies are doing the same. One caveat: if you appoint a sustainability officer with little expertise in this area, they should receive training or consulting services from an experienced and credible agency (e.g., the Institute of Green Professionals).
- Establish cross-functional teams to develop sustainability programs for your organization. Pulling data from the benchmarking data should be used to assist the teams in setting realistic and achievable goals.
- Set initial sustainability goals that will achieve immediate success such as waste reduction and recycling. This will build momentum for the program and generate savings that can go towards the more difficult and long-term tasks.
- Provide sustainability training to those who need it in your organization as it relates to their specific job functions.
- Communicate information about the sustainability program to your shareholders, employees, customers and vendors.

There are a number of systems available to help companies assess their climate change related risks and opportunities, calculate their quantitative emissions information, inform them of the likelihood of potential costs from regulation, as well as highlight potential benefits, such as profits from the sale of carbon credits and opportunities for energy efficiency cost-savings. Participation in a voluntary reporting program such as the Climate Registry or the Carbon Disclosure Project is one way companies can begin gathering information on their carbon footprint and gain greater insight into where emissions are occurring in their operations. Companies may also be able to use the information they collect for these programs to assist them in creating other outputs, including 10K filings. The Carbon Disclosure Project questionnaire, or the GRI reporting system, can be used as a framework to begin internally assessing which factors within their business create climate change risks or opportunities.

Corporations can expect to see carbon management grow in importance as domestic and international regulatory activity continues in 2010. In tandem with this trend, the number of products and services developed to help organizations measure and manage their environmental impacts will expand, from startup offerings to more sophisticated enterprise solutions from industry leaders such as SAP, IBM and Microsoft. Enterprise carbon accounting software and sustainability consulting services sales will grow as companies seek detailed, real-time information about their climate impacts.

In addition, companies can obtain assistance in sustainability compliance from organizations which have been formed to share environmental technology and solutions. The Eco-Patent Commons was launched in 2008 by IBM, Nokia, Pitney-Bowes and Sony in conjunction with the World Business Council for Sustainable Development to contribute environmental patents to the public domain. The organization's mission is to protect the environment and enable collaboration between businesses that foster new innovations. There are now 100 eco-friendly patents pledged to the public domain through this venture.

The GreenXchange was created to enable companies to share intellectual property for green product design, packaging, manufacturing and other uses. Founded by Nike and other companies, the group is a Web-based marketplace where organizations can collaborate and share intellectual property, with the goal of developing new sustainability business models and innovation.

Similarly, last year the EDF launched an Innovation Exchange to encourage companies to share strategies related to energy, water, climate and a host of other issues. Like the Eco-Patent Commons and the GreenXchange, it hopes to publicize new technologies and best practices. The EDF included content in the Innovation Exchange that it developed during its 20 years of experience in working with Fortune 500 companies including Walmart, FedEx and McDonald's.

Business counsel should familiarize themselves with the new corporate sustainability compliance initiatives being implemented by many of the world's largest corporations, as well as the tools and resources available to assist businesses in developing their own environmental policies and procedures. Soon, legal departments will regularly be called upon to counsel management on how to handle the current and future mandatory corporate sustainability requirements, which will not only help their companies avoid liability but also improve their businesses and reduce environmental impact.

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