Chapter 15

SEC Disclosure Obligations: Increasing Scrutiny on Environmental Liabilities and Climate Change Impacts

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I. Introduction

For years, the Securities and Exchange Commission (SEC) has faced growing pressure to strengthen its rules regarding corporate disclosure of environmental liabilities. Critics charge that the legally mandated disclosure framework relied upon by the SEC, based on the Securities Act of 1933 and the Securities Exchange Act of 1934, no longer is effective in providing full and fair disclosure to investors on topics addressing environmental, social, and governance issues.

Given the significance of environmental compliance and liability concerns to most U.S. businesses, it is somewhat remarkable that current disclosure obligations do not even have a specific line item dedicated to environmental matters or, ever more troubling to many, climate change considerations. It is generally understood that other existing disclosure requirements may take into account environmental factors subject to a materiality threshold.

The push for better defined and more detailed disclosures related to environmental, social, and governance concerns is the primary objective of investor advocacy groups such as the Coalition for Environmentally Responsible Economics (Ceres) and the Global Reporting Initiative (GRI). Proponents of increased disclosures addressing these interests, often referred to as "sustainability reporting," "corporate responsibility reporting," or "triple bottom line," contend that these concerns may present material risks for companies or otherwise be material to an investment or voting decision and, therefore, should be reported.

The SEC's recent attempt to respond to allegations of inappropriate and inadequate disclosure requirements was the creation of the Investor Advisory Committee in June 2009.[1] While the Investor Advisory Committee's charter covers a broad scope of varying interests, there is a significant focus on environmental disclosures as indicated in the SEC's briefing materials prepared for the inaugural July 27, 2009, meeting, including identification of the following discussion questions:

1. Do investors consider environmental compliance, climate change, and sustainability issues important in making investment or voting decisions?
2. Are current disclosure practices with respect to environmental compliance, climate change, and sustainability issues sufficient for investors to make informed investment and voting decisions, or do investors need expanded disclosure in any of the areas?
3. If additional disclosure in these areas would be useful to investors, should the SEC require additional disclosure on these matters by revising its forms and regulations? Alternatively, should the SEC highlight how its current forms and regulations may require disclosure in these areas?[2]

The nature of these inquiries reflects the conflicts confronting the SEC over the appropriate nature and scope of environmental or climate change disclosure requirements and whether or not current securities laws provide the best possible information to investors and shareholders. The ongoing evaluation of such issues resulted in the SEC's decision on January 27, 2010, to issue an interpretative release to provide guidance on existing climate change disclosure obligations. The SEC issued this guidance, titled *Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release*,[3] on February 2, 2010. While the guidance does not

1. U.S. Securities and Exchange Commission Press Release 2009-126 "SEC Announces Creation of Investor Committee," dated June 3, 2009.

2. U.S. Securities and Exchange Commission Investor Advisory Committee Paper "Possible Refinements to Disclosure Regime," dated July 27, 2009.

3. SEC Open Meeting Webcast for Wednesday, January 27, 2010, available at http://www.sec.gov/news/openmeetings.shtml; Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release, Nos. 33-9106, 34-61469 (Feb. 2, 2010).

create new legal requirements or modify existing ones, the SEC's action provides some preliminary insight on how the Agency may respond to allegations of inadequate disclosure requirements in these areas.

This chapter will examine and analyze the current environmental disclosure requirements and underlying policy considerations. It also will evaluate recent case law and administrative decisions regarding disclosure obligations and discuss other possible disclosures to address climate change risks. Lastly, it will highlight what businesses can expect moving forward and offer recommendations for managing disclosure and shareholder/investment demands overall.

II. SEC's Disclosure Framework

The SEC's primary mission is to protect investors and the integrity of the securities market. In general, the SEC's work seeks to promote full and fair disclosure and to prevent or suppress any potential fraud. In seeking to accomplish this mission, the SEC requires public companies to disclose material financial and nonfinancial information so that the public can make educated determinations about their investment decisions. To ensure investors have access to basic relevant information prior to trading, federal securities laws require certain companies to register with the SEC and make public certain financial and management information. Each year, public companies generally must file, at a minimum, one annual report, called a 10-K, and three quarterly reports, known as 10-Qs.[4]

A. Federal Securities Law

U.S. securities laws were enacted during the Great Depression to restore the public's faith in capital markets. The Securities Act of 1933, together with the Securities Exchange Act of 1934, created the legal framework for securities regulation that continues today. Congress established the SEC in 1934 to enforce the newly passed securities laws, to promote stability in the markets, and, most important, to protect investors.

The Securities Act of 1933, often referred to as the "truth in securities" law, has two basic objectives. First, the law requires that investors receive financial and other significant information concerning securities being offered for public sale. Second, the law prohibits deceit, misrepresentations, and other fraud in the sale of securities. As a result of this law, securities sold in the United States generally must be registered. Through this process,

4. U.S. Government Accountability Office Report "Environmental Disclosures— SEC Should Explore Ways to Improve Tracking and Transparency of Information," GAO-04-808 (July 2004).

important financial information is disclosed to the SEC, thereby making it available to the public.

The Securities Exchange Act of 1934 not only created the SEC but also empowered this Agency with broad authority over all aspects of the securities industry. This includes the authority to manage and regulate U.S. securities self-regulatory organizations such as the New York Stock Exchange, the American Stock Exchange and the Financial Industry Regulations Authority. The law also empowers the SEC to oversee brokerage firms, regulate market conduct, and require periodic reporting of information by companies with publicly traded securities. The SEC is a law enforcement agency charged with investigating securities law violations and recommending appropriate legal action due in large part to the legal authority provided by the Securities Exchange law.

While the Securities Act of 1933 and the Securities Exchange Act of 1934 form the basis of the SEC's legal authority, other laws have been passed through the years that address different aspects of the capital market industry and provide the SEC with further authority to regulate the securities marketplace. Most notable of these laws is the Sarbanes-Oxley Act of 2002, also known as the Public Company Accounting Reform and Investor Protection Act of 2002.[5] Passed in response to a number of major corporate and accounting scandals, this reform law imposes more stringent corporate responsibility obligations, directs enhanced financial disclosures, establishes the Public Company Accounting Oversight Board and generally strengthens the SEC's authority to regulate the capital market and publicly held companies overall.

B. Regulation S-K

In order to implement its laws, the SEC promulgates regulations and issues guidance on what information public companies must disclose in their filings. Beginning in 1982, the SEC integrated all of the required disclosures into one omnibus regulation, Regulation S-K. Environmental disclosures, if and when required under existing federal securities laws, typically arise under one of three sections of Regulation S-K:

1. Item 101: Material Environmental Disclosure. Companies must disclose the material effects of compliance with federal, state, and local environmental laws on their capital expenditures, earnings, and competitive position. This disclosure is applicable to Form 10-K but not Form 10-Q. Specifically, Regulation S-K Item 101(c)(xii) provides as follows:

   > "[a]ppropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local

5. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, enacted July 30, 2002.

> provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material."

The Item 101 disclosure obligation is forward looking and is intended to advise investors of future financial risks related to environmental compliance. Item 101(c)(xii) also has been interpreted to require disclosure of the potential costs for violations of environmental laws, where material.[6]

Item 101 disclosure obligations are qualified by the concept of materiality. In determining whether information is material, the SEC relies upon the U.S. Supreme Court's statement that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[7]

2. Item 103: Material Pending Legal Proceedings. Companies must describe certain administrative or judicial legal proceedings arising from federal, state, or local environmental laws. This disclosure is required in Form 10-K and Form 10-Q. Item 103 provides as follows:

> "Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities."

Instruction 5 to Item 103, which focuses on environmental matters, provides as follows:

6. *See Levine v. NL Industries*, 926 F.2d 199, 203 (2nd. Cir. 1991).
7. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) citing *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

> "[n]otwithstanding the foregoing, an administrative or judicial proceeding (including, for purposes of A and B of this Instruction, proceedings which present in large degree the same issues) arising under any Federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary [sic] for the purpose of protecting the environment shall not be deemed 'ordinary routine litigation incidental to the business' and shall be described if:
>
> A. Such proceeding is material to the business or financial condition of the registrant;
> B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges, or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or
> C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically."

Item 103 requires the disclosure of legal proceedings of all types with the exception of ordinary routine litigation incidental to the registrant's business or proceedings that are not material. The disclosures in Instructions 5(A) and 5(B) apply to all environmental proceedings, including cases involving the government, as well as private parties. As to Instruction in 5(C), it is important to note the relatively modest disclosure trigger of $100,000. Disclosure may be required if the registrant and any governmental authority are parties to an environmental legal proceeding and the potential sanctions at issue are reasonably expected to equal or exceed $100,000.

3. Item 303: Management Discussion and Analysis of Financial Conditions and Results of Operations (MD&A). Companies must disclose, in the MD&A, known trends, events, or uncertainties that may have a material effect on the company's financial condition. This disclosure is required in Form 10-K and Form 10-Q. Item 303 does not expressly reference environmental matters, but such disclosure can be triggered by environmental-related events. Item 303 requires disclosure of, among other things, known trends or uncertainties that have had or are reasonably expected to have a material favorable or unfavorable impact on net sales or revenues

or income from continuing operations; known material trends, favorable or unfavorable, in capital resources; and known trends or any known demands, commitments, events, or uncertainties that will result in or that are reasonably likely to result in liquidity increasing or decreasing in any material way.

III. Update on SEC's Disclosure Litigation and Administrative Decisions

Recent SEC enforcement has focused on investigations related to the current market crisis, such as (1) subprime lending and large financial institution wrongdoing; (2) rumors and market manipulation and the spreading of false rumors in order to impact short selling; and (3) hedge fund-related investigations.[8] Additionally, the SEC, often collaborating with the Department of Justice, continues to lend significant efforts to the enforcement of the Foreign Corrupt Practice Act, for which cases arise from either self-reporting by companies or the United Nations Oil for Food Program.[9] Finally, the SEC continues to give high priority to investigations of insider trading allegations.[10]

When the new SEC chairperson, Mary Schapiro, took office in early 2009, she announced her intent to reform the SEC and "rejuvenate the enforcement program."[11] She has already made significant changes within the enforcement division at the SEC, put out new rule proposals that would regulate short sales, and promised even more proposals. In light of the large number of pending investigations and enforcement actions, Ms. Schapiro's promises to step up enforcement, and the general public's increasing interest in environmental responsibility, it is likely that the SEC's enforcement of incomplete environmental disclosures will only increase in the coming years.

Without specific and clear directives from the SEC regarding the duty to disclose climate change matters in SEC filings or line item requirements for environmental disclosures, we are left to rely on situations wherein the SEC has chosen to enforce the securities laws against companies and corporations that have failed to disclose environmental matters as our best method of evaluating requirements.

8. *See* "Trends in SEC Enforcement 2009," Thomas O. Gorman, Securities Regulation & Law Report, 21 SRLR 1255 (BNA July 6, 2009).
9. *Id.*
10. *Id.*
11. *Id.*

SEC's enforcement efforts with respect to incomplete or inaccurate environmental disclosures often have been based on the general antifraud provisions (Sections 11 and 12 of the Securities Act and Section 10 of the Exchange Act). Early SEC litigation focused on the impact a company's activities had on the environment, the potential costs associated with those impacts, and whether or not a company had disclosed those impacts to its investors.[12] More recently, the SEC's enforcement actions have been based on a company's improper reduction of environmental remediation reserves and the related impacts that reduction has on projected earnings and other financial benchmarks.[13] These cases are discussed further below.

A. Early SEC Litigation: Discharging of Contaminants into the Environment Exposes Corporations to Material Liabilities that Must Be Disclosed

In its early environmental enforcement activities, the SEC emphasized how a company's environmental activities affected its potential to face future liability. In light of the changing landscape of new environmental laws and environmental interests, activities which caused environmental harm may have been more likely than in years past to trigger material liability. For example, in 1977, Allied Chemical Corporation ("Allied") did not disclose its practice of "directly and indirectly discharging toxic chemicals . . . into the environment from its own facilities and from the facilities of others."[14] This failure to disclose environmental wrong-doing, the SEC alleged, exposed Allied to "material financial liabilities from companies, individuals, and state and local governments."[15] Allied did not admit or deny the allegations, but agreed to discontinue further violations of the antifraud and reporting provisions of the securities laws and indicated that it had "undertaken an independent investigation of the material environmental risk areas and uncertainties in connection with its business."[16] Finally, Allied "undertook to disclose all material environmental risk areas and uncertainties known to its Board of Directors, officers, and division presidents."[17]

Similarly, because environmental laws "restrict[] the discharge of waste into the environment," they can have a "significant financial impact" on a

12. *See, e.g., In re Occidental Petroleum Corp.*, Admin. Proc. File No. 3-5936, 47 SEC 330, 330-332 (July 2, 1980); *SEC v. Allied Chemical Corp*., Litigation Release No. 7811, 1977 SEC Lexis 7811 (Mar. 4, 1977).

13. *See, e.g.*, *SEC v. James P. O'Donnell*, No. 07-CV-01373 (D. Colo. June 29, 2007), Litigation Release No. 20176, Accounting and Auditing Release No. 2629; *In re Ashland Inc.*, Exchange Act Release No. 54830, Accounting and Auditing Release No. 2518, Administrative Proceeding File No. 3-12487 (Nov. 29, 2006); *SEC v. Safety-Kleen Corp*., No. 02-CV-9791 (CSH) (S.D.N.Y. Dec. 12, 2002), Litigation Release No. 17891.

14. *SEC v. Allied Chemical Corp.*, Litigation Release No. 7811, 1977 SEC Lexis 7811 (Mar. 4, 1977).

15. *Id*.

16. *Id.*

17. *Id*.

company, resulting in a duty to disclose increased costs of environmental compliance or the risks of potential liability caused by noncompliance with the environmental laws.[18]

For example, in 1977, the SEC alleged that Occidental Petroleum Corporation ("Oxy") failed to disclose certain environmental matters, including the fact that Oxy's wholly owned subsidiary, Hooker Chemical, faced $680 million in potential damages for Love Canal contamination near Niagara Falls, New York.[19] Additionally, the SEC alleged that Oxy had failed to disclose required information and details regarding approximately 90 "pending or contemplated administrative or judicial proceedings . . . arising under federal, state, or local law relating to the protection of the environment"[20] and failed to disclose the effects that environmental compliance, particularly costs associated with complying with various agency-issued consent orders, would have "upon its capital expenditures and earnings."[21]

Despite these significant environmental matters, Oxy's only disclosure of these liabilities was a statement: "[i]n light of the expansion of corporate liability in the environmental area in recent years . . ., there can be no assurance that Occidental will not incur material liabilities in the future as a consequence of the impact of its operations upon the environment."[22] The SEC remarked that Oxy did not disclose the amount, nature, or extent of any of these potential liabilities in its SEC filings for 1977 and, accordingly, had not fulfilled its responsibilities under the securities laws.[23]

Ultimately, in order to settle this matter with the SEC, Oxy was required to designate an environmental director tasked with preparing an environmental report to (1) address timely, complete, and accurate disclosures of all information relating to environmental matters; (2) determine potential costs that Oxy would incur over the next three years in order to bring Oxy's facilities into compliance with environmental laws; (3) determine the maximum civil penalties that Oxy is likely to face as a result of its noncompliance with environmental laws; and (4) "describe third party claims, proceedings, or litigations regarding the impact of Oxy's operations on the environment and the amount sought thereunder."[24] Additionally, the environmental director would be responsible for identifying all potential liabilities regarding the impact of Oxy's operations on the environment and ensuring that the appropriate disclosures are made in SEC filings.[25]

18. *In re Occidental Petroleum Corp.*, Admin. Proc. File No. 3-5936, 47 SEC 330, 330-332 (July 2, 1980).
19. *Id.* at 339-340.
20. *Id*.
21. *Id*. at 332-333.
22. *Id*. at 338 (quoting Occidental Petroleum's Annual Report on form 10-K for period ending December 31, 1977).
23. *Id*. at 339.
24. *Id*. at 347.
25. *Id.* at 348.

Similarly today, we are on the cusp of developing new climate change laws without any real guidance regarding how the SEC will require companies to disclose or otherwise address the impacts of climate change. Both the *Allied* case and the *Oxy* case provide insight in that these two cases helped to develop environmental disclosure requirements during the early stages of environmental regulation as we know it today. Together, the *Allied* case and the *Oxy* case demonstrated the degree of specificity that the SEC would require in environmental disclosures and the settlements further defined the lengths companies are expected to take to ensure complete disclosure.[26]

B. Recent SEC Litigation

Subsequent to earlier public financial scandals, and in light of the SEC's continued focus on such matters, the SEC has increased its focus on accounting practices when asserting its ability to regulate corporate disclosure. Similarly, the SEC seems to have specifically increased its attention on environmental financial reporting.[27]

In 2002, the former chief financial officer of Safety-Kleen, Paul Humphreys, was indicted for improperly reducing Safety-Kleen's environmental remediation reserve accounts in order to create fictitious income for Safety-Kleen. The SEC alleged that Humphreys made the false reports so that Safety-Kleen would meet target earnings. Humphreys eventually surrendered and pled guilty to the charges against him on June 22, 2007, and was sentenced to 70 months in prison later that year.[28] One of Humphreys' alleged coconspirators, William Ridings, Safety-Kleen's vice president and controller during the misconduct, had also pled guilty to related fraud charges in 2002.

Similarly, in 2007, the SEC filed civil actions against several ConAgra executives related to environmental financial reporting. The SEC alleged that ConAgra's officials improperly reduced the company's legal and environmental reserves in order to account for unplanned losses in the fiscal years 2000 and 2001. This allegedly resulted in ConAgra filing financial statements which materially misreported ConAgra's earnings and reserves. The executives settled the civil charges by agreeing to restrain from future

26. *See also*, Environmental Disclosures in SEC Filings 2009, Davis Polk & Wardwell at 35 (Jan. 21, 2009), *available at* http://www.davispolk.com/1485409/clientmemos/01.21.09.env.disclosure.sec.filings.pdf (last visited August 28, 2009).

27. For a related discussion of these matters, see E. Lynn Grayson, *Recent SEC Enforcement of Environmental Financial Disclosure*, Jenner & Block Air Land and Water News (Jul. 26, 2007) (addressing contemporary SEC environmental reserves use and reporting enforcement), *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1772%5CRecent_SEC_Enforcement_of_Environmental_Financial_Disclosure_0707.pdf.

28. *Securities and Exchange Commission v. Safety-Kleen Corp., Kenneth W. Winger, Paul R. Humphreys, William D. Ridings, and Thomas W. Ritter, Jr.*, Civil Action No. 02-CV-9791 (CSH) (S.D.N.Y.) (December 12, 2002); Litigation Release No. 17891; Press Release, U.S. Attorney S.D.N.Y., Former Safety-Kleen Chief Financial Officer Sentenced to 5 Years and 10 Months for $267 Million Accounting Fraud (Nov. 8, 2207) (discussing sentence), available at http://newyork.fbi.gov/dojpressrel/pressrel07/accountingfraud110807.htm.

misconduct and by paying monetary penalties. In particular, to settle the charges specifically against ConAgra's former CFO, James O'Donnell, (1) he paid $425,531 in disgorgement plus $174,151 in prejudgment interest on that amount and a civil penalty of $100,000 and (2) he was required to divest 17,648 unexercised stock options.[29] Finally, O'Donnell and the other executives also were suspended from appearing or practicing before the SEC as accountants for at least one year.

Lastly, on November 29, 2006, the SEC issued a cease-and-desist order against Ashland, Inc., and its former Director of Environmental Remediation, William Olasin. The SEC found that Ashland had materially understated its environmental reserves from 1999 through 2001. In particular, Ashland used Olasin's environmental remediation cost estimates in order to determine its reserves. However, Olasin had improperly reduced these estimates—he had instructed his accountant to decrease the actual cost calculations by as much as 25 percent ($12 million) each year without documenting any reason for doing so. As a result of these inexplicable reductions, Ashland's total reserve estimates showed illusory decreases of almost 7 percent (around $160 million) in both 1999 and 2000. Without appropriate documentation to support these decreases, the SEC concluded that Ashland's internal controls were insufficient.[30] In response, the SEC required that Ashland address these shortfalls by making a number of potentially costly changes to its policies and procedures, such as requiring additional documentation, implementing annual reviews, reviewing records retention, and improving its reporting. The SEC also prohibited Olasin from future participation in Ashland's financial reporting.[31]

In light of the SEC's increased interest in environmental disclosures and the shift in administration, corporations and corporate executives ought to take special note of the heightened emphasis now being placed on conducting all environmental financial reporting in full compliance with SEC requirements. Although the SEC has not announced any new guidelines, corporate executives should be aware that the SEC seems to have increased its scrutiny and oversight of corporations and officials who fail to observe existing environmental reporting requirements. In doing so, it is clear the SEC plans to aggressively pursue civil, and as appropriate, criminal action, against individuals and corporations where circumstances warrant such enforcement. Furthermore, as discussed in more detail below, as the public and government focus more and more on climate change, the SEC could begin similar enforcement trends on that front as well.

29. *Securities and Exchange Commission v. James P. O'Donnell et al.*, United States District Court for the District of Colorado, Civil Action, No. 07-CV-01373; Litigation Release No. 20176, Accounting and Auditing Release No. 2629 (June 29, 2007); *see also* Grayson, *supra* n.27.

30. *In re Ashland Inc. and William C. Olasin*, Exchange Act Release No. 54830, Accounting and Auditing Release No. 2518, Administrative Proceeding File No. 3-12487 (Nov. 29, 2006). *See also* Grayson, *supra* n.27.

31. *See* Grayson, *supra* n.27.

IV. Climate Change Disclosure Efforts and Other Emerging Concerns

Climate change issues have come to the forefront of environmental concerns. Several initiatives creating voluntary greenhouse gas inventories have been developed, states have won litigation against the U.S. Environmental Protection Agency (EPA) leading to the apparent future EPA regulation of greenhouse gas emissions,[32] California has led the way for regulation of greenhouse gas emissions from cars, and EPA Administrator Lisa Jackson has promised "aggressive action to reduce our impact on the climate while strengthening our economy."[33]

Despite the increase in focus on climate change at the industry level[34] and the apparent shift toward increased federal action, only a limited number of companies have disclosed climate change issues in their annual filings with the SEC. For example, a June 2009 report commissioned by Ceres and the Environmental Defense Fund reported that of the 100 companies' 10-Ks evaluated for their report, "28 had no discussion of risk assessment, 52 described no actions to address climate change, and 59 made no mention of emissions or a climate change position."[35] Accordingly, despite the increased focus on climate change, it does not appear that disclosures regarding climate change are increasing. The SEC's issuance in early 2010 of new guidance focused specifically on climate change, however, may result in a growing number of disclosures moving forward.

A. Impact of Climate Change Initiatives

Several initiatives by states and regions are creating regulatory obligations for companies to either report greenhouse gas emissions, or more significantly, reduce greenhouse gas emissions. Currently 17 states[36] have or are developing mandatory greenhouse gas reporting requirements while others have agreed

32. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

33. Statement of Lisa P. Jackson, Administrator, U.S. EPA, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, Hearing on Greener Communities, Greater Opportunities: New Ideas for Sustainable Development and Economic Growth (June 16, 2009) *available at* http://www.epa.gov/ocir/hearings/testimony/111_2009_2010/2009_0616_lpj.pdf (last visited August 28, 2009).

34. In 2008, over 1,550 companies responded to the Carbon Disclosure Project's questionnaire regarding the risks of climate change, how management intends to address climate change, and how the company accounts for greenhouse gas emissions. *See* Carbon Disclosure Project, FAQs *available at* http://www.cdproject.net/FAQs.asp (last visited Aug. 28, 2009).

35. Beth Young, et al.; *Climate Risk Disclosure in SEC Filings*: *An Analysis of 10-K Reporting by Oil and Gas, Insurance, Coal, Transportation and Electric Power Companies*, at 34 (The Corporate Library June 2009).

36. California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, North Carolina, Oregon, Virginia, Washington, West Virginia, and Wisconsin.

to reduce greenhouse gas emissions over a period of time.[37] On January 1, 2009, the Regional Greenhouse Gas Initiative's (RGGI) mandatory cap on greenhouse gas emissions went into effect. For the 10 northeast states[38] that have joined RGGI and are bound by RGGI's memorandum of understanding, a cap-and-trade system has been implemented such that greenhouse gas emissions from power plants will be capped for a period of time, ultimately being reduced to 10 percent below 2009 levels by 2018.[39]

On the federal level, on April 10, 2009, the EPA published a draft rule which would mandate annual reporting of greenhouse gas emissions by certain sources.[40] EPA estimates that this proposed rule will cover 85-90 percent of all U.S. greenhouse gas emissions. As proposed, all covered entities would be required to report 2010 emissions by March 31, 2011.

Additionally, consistent with the Supreme Court's holding in *Massachusetts v. EPA*, the EPA's Endangerment Finding will trigger (1) Clean Air Act requirements for EPA regulation of greenhouse gas emissions from motor vehicles, as well as (2) regulation of greenhouse gas emissions from stationary sources under the Clean Air Act's prevention of significant deterioration program.[41] To the extent greenhouse gases are regulated under the Clean Air Act, industry would likely face additional costs and potential liabilities in order to comply with these regulations which, as discussed below, could trigger additional disclosure requirements.

Finally, on June 30, 2009, EPA granted California's request for waiver under the Clean Air Act, allowing it to enforce its own vehicle greenhouse gas emissions standards for 2009 and later model years.[42] As written, the California standards call for a 30 percent cut in automobile greenhouse gas emissions by 2016.[43] To date, 13 states and the District of Columbia have adopted the California standards.[44] Therefore, any company impacted by

37. *See* Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 16460 (Apr. 10, 2009) (to be codified at 40 CFR pt. 86, *et al*.).

38. Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

39. Mandatory Reporting of Greenhouse Gases, Proposed Rule 74 Fed. Reg. 16448. *RGGI Fact Sheet*, April 2, 2009 *available at* http://www.rggi.org/docs/RGGI_Executive%20Summary_4.22.09.pdf (last visited Aug. 29, 2009).

40. *Securities and Exchange Commission v. Safety-Kleen Corp., Kenneth W. Winger, Paul R. Humphreys, William D. Ridings, and Thomas W. Ritter, Jr.*, Civil Action No. 02-CV-9791 (CSH) (S.D.N.Y.) (December 12, 2002); Litigation Release No. 17891.

41. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (Apr. 24, 2009).

42. California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emissions Standards for New Motor Vehicles, 74 Fed. Reg. 32744 (Jul. 8, 2009) For further information regarding the California waiver, *see* Patricia Boye-Williams and Allison Sapsford "After Federal Court Ruling, What's Next for States' Rights to Control Vehicle Emissions?" *Law.com*, October 31, 2007 *reprint available at* http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/1889/Boye-Williams-Sapsford_10.31.07.pdf (last visited Aug. 29, 2009).

43. *See* 13 CCR § 1961.1 *et al*. (2009).

44. Boye-Williams and Sapsford, *supra*, n. 43.

the required reductions in auto emissions would need to evaluate if any disclosures are required.

In addition to these mandatory reporting and/or reduction requirements, several companies have undertaken voluntary reporting and/or reductions of greenhouse gas emissions by responding to questionnaires from the Carbon Disclosure Project, joining EPA's climate leaders program, or otherwise committing to report or reduce greenhouse gases through statements on company websites or other materials.

In light of mandated and voluntary disclosures by companies, as well as the probable future regulation of greenhouse gas emissions, any voluntary, non-SEC disclosures made by a company demonstrate that it has considered how climate change may impact its operations and may show that climate change (or the regulation of greenhouse gas emissions) could have a material effect on a company, therefore triggering a duty to disclose.

In this regard, in 2007, New York Attorney General Andrew Cuomo subpoenaed five energy companies as part of an effort to increase climate-change-related disclosures by industry. New York alleged that these companies had failed to disclose the anticipated impacts of climate change and greenhouse gas regulation on operations, financial conditions, and future plans. In 2008, New York entered into binding and enforceable agreements with two of these energy companies: Xcel Energy and Dynegy, Inc.[45] These agreements require the energy companies to disclose (1) an analysis of the financial risks arising from climate change as they relate to current and probable climate change regulation and legislation; (2) climate-change-related litigation; and (3) the physical impacts of climate change, e.g., the impacts of sea level rise on operations.[46] Further, the companies are required to disclose current carbon emissions, projected increases in carbon emissions from planned coal-fired power plants, company strategies to manage greenhouse gas emissions, and corporate governance actions as they may relate to climate change, including disclosing whether environmental performance is accounted for when determining officer compensation.[47]

B. Climate Change Disclosure Proposals Advanced by Environmental Organizations and Shareholder/ Investor Groups

In 1990, the shareholders of ExxonMobil were the only shareholders to propose a climate change resolution, asking the company to report greenhouse gas

45. *In re Xcel Energy, Inc.*, Assurance of Discontinuance (AOD) Pursuant to Executive Law § 63(15), No. 08-012, *available at* http://www.oag.state.ny.us/bureaus/environmental/pdfs/Attachment%20E%20--%20Xcel%20AOD.pdf; *In re Dynegy Inc*., AOD Pursuant to Executive Law § 63(15), No. 08-132, *available at* http://www.oag.state.ny.us/bureaus/environmental/pdfs/Attachment%20E-1.pdf (last visited Aug. 29, 2009).

46. *Id*.

47. *Id*.

emissions; the resolution received 6.3 percent of the shareholder vote.[48] In 2008, a similar proposal at ExxonMobil obtained 30.9 percent of the vote. *Id.* Furthermore, instead of there only being one such proposal in 2008, there were at least 50 resolutions proposed at 40 companies addressing climate change.[49] In 2009, the number of shareholder proposals on climate change increased to 68, and for the first time in history, a shareholder proposal on climate change received more than 50 percent of the vote.[50] A resolution filed with IDACORP, Inc. asking the energy company to set greenhouse gas emission reduction goals received 51.2 percent of the shareholders' votes.[51] However, as noted previously, despite shareholders' increasing efforts to require climate change disclosures, the lack of guidance or instruction from the SEC results in very few actual disclosures.[52]

In an effort to provide structure in the absence of SEC guidance, investors and nongovernmental environmental organizations have developed their own proposals regarding what companies should disclose with respect to climate change in order to be considered a complete disclosure. In October 2006, a group of international investors and others, organized by Ceres, developed and released the *Global Framework for Climate Risk Disclosure* ("Framework").[53] This Framework was designed to create a standardized climate risk disclosure format such that investors would easily be able to analyze and compare companies.[54] In particular, the Framework proposes that a climate change disclosure include:

- Total greenhouse gas emissions (historical, current, and projected) using the Corporate Accounting and Reporting Standard of the Greenhouse Gas Protocol;
- A corporate management strategic analysis of the climate risks, including implications on a company's competitiveness and addressing (as appropriate) access to resources, timing of the risk, and how the company plans to meet the challenges posed by climate risk;
- Impacts of climate change on a company's operations and business (including supply chain impacts), how the company could adapt in order to protect itself from these risks, and the costs of any adaptations; and
- The company's analysis and predictions with respect to the risks posed by new regulations limiting greenhouse gas emissions and the future costs of reducing emissions.

48. "Shareholders' Push for Corporate Action Said to Gain Strength, Effectiveness in 2008," *Daily Environment Report*, at 162 DEN B-1 (Aug. 21, 2008).

49. *Id.; see also* Ceres' Investor Network on Climate Risk, Climate Related Shareholder Resolutions as of 8-19-08 *available at* http://www.incr.com//document.doc?id=272 (last visited Aug. 29, 2009).

50. *Shareholders File 68 Resolutions Seeking Corporate Action on Climate Change in 2009*, Daily Environment Report, 162 DEN A-9 (BNA Aug. 25, 2009).

51. *Id.*

52. *See Young*, *supra* note 29.

53. *Climate Risk Disclosure in SEC Filings*, *supra*, Appendix B.

54. *Id*.

In March 2007, Ceres again organized investors and major corporations to request that the SEC provide guidance regarding an appropriate climate change disclosure policy.[55] Later that year, Ceres, Environmental Defense, and 20 copetitioners (including several state comptrollers, treasurers, and attorneys general) submitted a petition to the SEC explaining the significant risks posed by climate change and requesting that the SEC issue guidance stating that existing securities laws require disclosure of material climate risks.[56] In the petition, the group reiterated its position with respect to what the SEC guidance should require by way of climate change disclosures.[57] On June 12, 2008, the same group supplemented its petition to the SEC, reiterating the urgent need for the SEC to develop interpretive guidance regarding climate change disclosures.[58]

Investors have also contacted the Senate in an effort to request that the Senate pass legislation or otherwise encourage the SEC to issue interpretive guidance regarding climate change disclosures. Based on these widespread efforts, it is clear that there is significant pressure for the government to provide guidance regarding climate-change-disclosures.

C. SEC's 2010 Climate Change Guidance

The SEC's guidance titled *Commission Guidance Regarding Disclosure Related to Climate Change, Exchange Act Release* issued February 2, 2010, makes clear that more emphasis will be placed on climate change considerations in the context of a company's SEC filings. This guidance is consistent with SEC staff recent reminders that their review will look beyond the four corners of a company's filings taking into account other information from earnings calls, earnings releases, website, and press releases.

This guidance seeks to clarify the disclosure requirements that already apply to reporting companies in order to enhance the level of current disclosure and promote a greater understanding of those climate change concerns potentially requiring increased scrutiny as to materiality. The SEC appears to share concerns voiced by investor groups that companies need help in determining their disclosure obligations in light of changing legislative and regulatory landscape relating to climate change. It is important to note, however, that the guidance does not create any new legal requirements or seek to modify existing ones.

55. "Investors, Companies Ask SEC to Clarify Disclosure Mandates for Quarterly Reports," Daily Environment Report, at 162 DEN B-1 (March 20, 2007).

56. *Petition for Interpretive Guidance on Climate Risk Disclosure*, Before the United States Securities and Exchange Commission, September 18, 2007 available at http://www.incr.com//Document.Doc?id=187 (last visited Aug. 29, 2009).

57. *Id*. at Appendix G.

58. Letter to Nancy Morris, Secretary SEC, Re: *File No. 4-547: Request for Interpretive Guidance on Climate Risk Disclosure* (June 12, 2008) *available at* http://www.ceres.org//Document.Doc?id=358 (last visited Aug. 29, 2009).

The guidance addresses four key categories of climate change information that companies should evaluate for materiality in order to determine whether disclosure is required:

1. the impact of legislation and regulation;
2. the impact of international accords;
3. the indirect consequences of regulation or business trends; and
4. the physical impacts of climate change.

The guidance also features a discussion of the state, national, and international response to climate change, particularly through the restriction or disclosure of greenhouse gas emissions. The guidance advises companies to take note of these developments because government action can have a material impact on financial conditions and overall operations. Even companies not directly affected may incur cost increases from companies that are directly regulated.

This guidance now is effective and should be considered for current and future filings, including consideration as to Annual Reports. It serves as a reminder that for some companies, regulatory, legislative, and other developments may have a significant effect on results of operations and financial decisions and, therefore, should be considered for disclosure in SEC filings. The guidance also is a wake-up call that the SEC will focus more and more on environmental disclosures overall.

D. Additional Focus on Environmental Disclosures and Other New Concerns

Similarly, as environmental concerns rise, other matters are creeping to the forefront as well. For example, a report by the Investor Environmental Health Network highlights nanotechnology as a potentially hazardous technology for which companies ought to be required to make certain disclosures.[59] The report calls on the SEC to make further reforms to ensure that investors are aware of the potential risks associated with nanotechnology.

As noted previously, the SEC has since formed an Investor Advisory Committee, with the objective to transmit the concerns of investors to the SEC and influence the SEC's agenda. With investors and others groups actively seeking and requesting guidance from the SEC, it may only be a matter of time before such guidance is issued. Likewise, spokesperson for the SEC, Kevin Callahan, has indicated the SEC's intention to work through these issues and determine what recommendation, if any, to make.[60]

However, even without guidance or regulations specifically requiring climate change disclosures, as mandatory reporting and reductions of

59. *Bridging the Credibility Gap: Eight Corporate Liability Accounting Loopholes that Regulators Must Close*, Sanford Lewis, Counsel, Investor Environmental Health Network (June 2009).

60. *Push for Disclosure of Environmental Risks Expected to Lead to New SEC Requirements*, Daily Environment Report, 140 DEN B-1 (BNA Jul. 24, 2009).

greenhouse gas emissions become more widespread, companies will need to closely evaluate whether these requirements have a material impact on their capital expenditures, earnings, and competitive position such that a disclosure would be required under Regulation S-K.

V. Challenges for U.S. Businesses

U.S. businesses confront a myriad of challenges as investors seek even more information on environmental, social, and corporate governance interests and the SEC struggles to determine if existing disclosure requirements are adequate or if change is needed. These challenges generally fall into three distinct categories: 1) managing new legal disclosure obligations imposed by the SEC; 2) assessing and evaluating how best to manage other nonlegal investor and shareholder demands; and, 3) developing and maintaining data necessitated by legal as well as voluntary reporting commitments. The greater hurdle for companies will be reconciling these varying informational demands, ensuring corporate responses are consistent in all areas, and making the hard decision about when "enough is enough" in finalizing a corporate disclosure strategy.

A. Emerging Legal Disclosure Obligations

It seems a virtual certainty that one of two outcomes will be forthcoming from the SEC's evaluation of its current disclosure requirements, particularly taking into consideration the work of the Investor Advisory Committee. First, the SEC will conclude its environmental, social, and corporate governance disclosures require improvement and will move forward to develop new regulations strengthening such reporting. In the alternative, the SEC may conclude that the current disclosure framework is sufficient but nonetheless determine that updated guidance is necessary to make clear disclosures required under Item 101, Item 103, or Item 303. In either case, increased disclosure is the likely result coupled with continuing scrutiny by the SEC on corporate filings to confirm reporting of the highly sought after environmental and climate change information of a material nature.

The push for environmental, social, and governance (ESG) disclosures in large part is led by the Social Investment Forum (SIF), the U.S. nonprofit membership association for professionals, firms, and organizations dedicated to advancing the practice and growth of socially responsible investing. In January 2009, the 400-member SIF issued a letter to President Obama asking him to move swiftly on several fronts to restore shareholder rights

and to advance corporate responsibility.[61] Thereafter on July 21, 2009, SIF submitted a proposal to the SEC outlining what mandatory ESG disclosures would address in response to the Agency's request that SIF do so.[62] The SIF proposal has two key components. First, the SIF requests that the SEC require issuers to report annually on a comprehensive, uniform set of sustainability indicators comprised of both universally applicable and industry-specific components and suggests that the SEC define this as the highest level of the current version of the GRI reporting guidelines. Second, the SFI asks that the SEC issue interpretive guidance to clarify that companies are required to disclose short-and long-term sustainability risks in the MD&A section of the 10-K.[63]

The SIF and its 50-plus signatories to the disclosure proposal conclude these regulatory reforms are essential for the following reasons:

- ESG information can inform investors of potential risks and opportunities and promote market efficiency and long-term thinking.
- Corporate social and environmental performance can have a material impact on portfolio performance. Fiduciaries, including investors and corporate directors, may therefore be legally compelled to consider such information.
- U.S. regulatory requirements and voluntary efforts have failed to produce the consistent, comparable data that a rapidly growing community of retail and institutional investors seek to make investment and proxy voting decisions.
- Several governments and regulators outside the United States already require corporations to disclose various ESG factors. As a result, sustainability reports in these markets are generally more prevalent and substantive, placing U.S. companies and financial markets at a potential competitive disadvantage.

SIF is not alone in its demand for greater ESG disclosure. The Interfaith Center for Corporate Responsibility, a coalition of nearly 300 faith-based institutional investors representing over $100 billion in invested capital, also endorsed the proposal. Ceres, a longtime advocate of improved environmental and climate change disclosures, supported the proposal along with numerous other national and international organizations. The SEC has embraced the call to action by these environmental and investor organizations as demonstrated by the formation of the Investor Advisory Committee and more stringent ESG disclosures likely will be imposed on publicly held companies beginning possibly as early as 2010-2011.

61. Social Investment Forum Letter to President Obama (January 15, 2009), "New American Leadership for Environmentally and Socially Responsible Investing and Corporate Responsibility."

62. Social Investment Forum Letter and Proposal to SEC Chair Mary Schapiro (July 21, 2009); *Also see* Social Investment Forum Press Release (July 21, 2009) "More Than 50 Investor Groups, Social Investment Forum Urge SEC to Require Environmental, Social & Governance (ESG) Disclosure."

63. *Id*.

B. Other Investor/Shareholder Demands

In the absence of mandatory disclosure or other reporting obligations, many companies have concluded that voluntarily providing ESG data to shareholders, investors, and the public at large makes good business sense. Holding companies responsible for their actions or inactions is a core value under the recently popularized concept of "corporate social responsibility." This concept extends beyond compliance with legal mandates or even charitable donations and good deeds. Corporate social responsibility advocates charge a company has a duty of care to all stakeholders connected to or impacted by a company's operation. In general, this concept often has encouraged companies to be more forthcoming with ESG information.

Beyond legally mandated disclosures, some companies voluntarily have provided ESG information on corporate websites, in newsletters, at open houses and through presentations and community outreach activities by company personnel. This trend toward voluntary disclosure supports not only corporate social responsibility aims but also plays into corporate interest in being part of the growing "green economy." While voluntary ESG disclosures can be a means of positive community outreach and provide companies an opportunity to develop a public persona of their own making, increasingly companies face growing pressure from investor groups, political forces, and even industry or trade associations to participate in voluntary disclosure initiatives such as the Carbon Disclosure Project (CDP). The CDP is an independent, not-for-profit organization that maintains the largest database of corporate climate change information in the world.[64]

The CDP is an example of a voluntary initiative that aggressively pursues new signatories to respond to its climate change information requests and seeks to expand the information it receives as well as data otherwise provided by these companies to the public. In its *Climate Risk Disclosure by S&P 500* report issued in January 2007, CDP recommended companies undertake the following activities: 1) respond to investor requests for disclosure; 2) assess the impacts of climate change on the company; 3) improve corporate governance and strategic management of climate change; 4) manage emissions better; and 5) examine regulatory impacts better.

In addition, the CDP also promotes a discussion of climate change in annual securities filings, the development of sustainability reports, and as part of ongoing dialogues with investors and other stakeholders. These recommendations provide a "wish list" of actions the CDP would like companies to undertake but each item truly needs to be evaluated on a case-by-case, company-specific basis.[65]

64. Carbon Disclosure Project received 1,550 responses in 2008 to its annual information requests about climate change. *See* http://www.cdproject.net/.

65. *Id*.

More recently, Ceres and the Pacific Institute took action to promote water conservation and water footprinting efforts to companies. In the joint report, *Water Scarcity and Climate Change: Growing Risks for Businesses and Investors*, Ceres and the Pacific Institute recommended that companies undertake the following action:

1. Measure the company's water footprint (i.e., water use and water discharge);
2. Assess the principal regulatory and reputational risks associated with its water footprint and seek to align findings with the company's energy and climate risk assessments;
3. Engage key stakeholders (e.g., local communities, nongovernmental organizations, government bodies, suppliers, employees) as a part of the water risk assessment, long-term planning, and implementation activities;
4. Integrate water issues into strategic business planning and governance; and,
5. Disclose and communicate water performance and associated risks.[66]

Beyond shareholder activism, Ceres also recommended investors consider the following actions to better understand the role water-related risks may play in the long-term financial viability of a company:

1. Assess companies' exposure to water risks;
2. Demand more meaningful corporate water disclosure;
3. Encourage companies to incorporate water issues into their climate change strategies; and,
4. Emphasize the business opportunity side of the water challenge.[67]

Companies are voluntarily providing more ESG information than ever before for many differing business reasons. In addition, companies are cooperating with ESG voluntary initiatives in making even more information available to the public. As legally mandated disclosures expand, companies will need to reevaluate overall disclosure strategies and determine when "enough is enough" in sharing data with the public.

C. Developing and Maintaining Necessary Data

Whether disclosures are legally mandated or voluntary in nature, any company providing requested data has to have a regime in place to develop, monitor, track, record, and report such information. Creation of or compliance with any new reporting obligation requires establishment not only of a process

66. Water Scarcity and Climate Change: Growing Risks for Business and Investors, Ceres and Pacific Institute, Jason Morrison, Mari Morikawa, Michael Murphy, and Peter Schulte (February 2009); *see also* Water Scarcity: A Critical Climate Change Challenge for Business, E. Lynn Grayson, LexisNexis Emerging Issues Analysis, 2009 Emerging Issues 4174 (August 2009).

67. *Id*.

whereby the information is collected but also of a quality assurance and quality control system ensuring that the data is accurate, timely, and appropriate for disclosure. Depending on the nature, scope, and extent of the information at issue, this effort can be incorporated into existing programs or it may require additional resources such as the retention of a third-party vendor or contractor or possibly new company personnel.

While some environmental information collection processes are well established, like the tracking of hazardous waste manifests, others present more challenges given that reporting mechanisms are not yet uniformly established. This is the case for greenhouse gas emissions reporting which is a key source of climate change data highly sought after by numerous interested parties. While EPA has suggested an approach to emissions reporting in its proposed rule, there are many variations on how this data may be collected and in what format.[68]

In evaluating disclosure strategies, voluntary or otherwise, companies need to take into account if the data exists and if not, how it might best be collected and managed.

VI. Conclusion

In SIF's letter to SEC Chair Mary Schapiro that accompanied its ESG disclosure reform proposal, SIF stated that:

> The present global economic crisis has made it readily apparent that our existing system for corporate reporting has failed shareholders. We believe that robust sustainability reporting could have mitigated some of the impacts of the financial crisis. These types of disclosures would have promoted longer-term thinking by investors and corporations, and earlier detection of predatory lending and other destructive business practices. There is a tremendous opportunity to learn from these gaps and to construct a system of safeguards to protect investors. We are confident that mandatory sustainability reporting will contribute significantly to rebuilding public trust in corporations as well as the agencies regulating them in the wake of the present crisis.[69]

The SEC faces a tremendous burden to affirmatively respond to the concerns of the environmental and investment communities as articulated in SIF's above statement. At present, the SEC and its newly created Investor

68. EPA Mandatory Reporting of Greenhouse Gases; Proposed Rule, 74 Fed. Reg. 16447, April 10, 2009.

69. *See* SIF Letter to SEC Chair Mary Schapiro (July 21, 2009) available at www.socialinvest.org.

Advisory Committee will be evaluating ESG disclosures and soon will determine what, if any, additional disclosures may be required. Increased ESG disclosure obligations are a virtual certainty for publicly held companies but it remains to be seen if these requirements will arise from existing regulations or from new regulatory initiatives yet to be promulgated.

Once before, following the Great Depression, the SEC was called upon to restore the public's faith in U.S. securities and our capital markets overall. It appears that once again the role imposed upon the SEC will be renewing investors' confidence by ensuring that information is uniformly disclosed that presents any material risk to a company's financial viability, specifically including ESG considerations.