CHEAT SHEET

- *Ready, aim, fire.* New enforcement trends have given environmental officials the authority to issue civil and criminal subpoenas to ensure company compliance with climate risk disclosure.
- *Evaluate the damage.* The best defense against disclosure complaints is to ensure consistency between all environmental, social, and governance (ESG) platforms.
- *Sticks and stones.* When faced with a climate disclosure investigation, in-house counsel should carefully review the scope of the requests, and assemble an internal corporate team to better understand how to narrow the scope of the subpoena.
- *Thinking ahead.* In the long term, adopting a collaborative approach with both legal and non-legal personnel is an effective way to mitigate potential disclosure risks before they escalate.

CLIMATE CHANGE RISK AND SUSTAINABILITY DISCLOSURES:

A NEW ENFORCEMENT REGIME

By Raymond L. Coss, Leah A. Dundon, and Peter C. Anderson Institutional investors, investor advocacy groups, shareholders, and regulators around the world are increasingly urging — and in some cases mandating — that corporations from around the world analyze and disclose their sustainability commitments and climate change related risks. In an attempt to accelerate this process in the United States, numerous state attorneys general have formed a coalition to take immediate enforcement action against companies they argue are failing to appropriately disclose environmental risks. Borrowing a page from the anti-tobacco campaign, these attorneys general are taking unprecedented actions by using broad state anti-fraud laws to issue subpoenas (or related civil investigative demands) to investigate whether company statements about climate risks have misled investors. Meanwhile in France, the Energy Transition for Green Growth Law recently enhanced its mandatory climate risk and GHG reporting requirements for companies, and is the first law to extend environmental risk reporting to institutional investors. In response to the stark increase in disclosure regulations, corporate counsel should become engaged if they are not already, and ensure consistency across the many forums where environmental, social, and governance (ESG) information is now available to investors.

This article explains current global trends in climate change risk reporting; provides practical advice for companies considering ESG statements made across many contexts; reviews the use of the subpoena power in this new forum (and the controversy and reactions it triggered); and revisits the basic options and risks involved in responding to subpoenas seeking climate-related information.

How is climate change risk a business issue?

Given the potentially high stakes involved, climate change occupies a unique place among scientific issues in spawning a massive, international effort to study and understand it. Despite this, or maybe because of it, there is a plethora of misinformation and misunderstandings regarding what climate science can tell us. Accordingly, it is not surprising that the average person — even a sophisticated investor or company — has difficulty obtaining meaningful climate data when attempting to better understand what risks a company may face related to climate change. Some risks posed by climate change, or laws addressing climate change, can, and will, affect the bottom line of many companies. However, other climate risks are lesser understood. Assessing and evaluating those risks in a way that is meaningful to investors, in the context of time scales that are linked to quarterly financial statements, can pose significant challenges.

Climate change is one of those rare issues that has the potential to affect all companies, large or small, and regardless of industry sector. Companies may face regulatory, economic, and competitive risks as a result of climate change. Regulatory risks include new laws aimed at mitigating the impact of climate change, such as those that seek to curb greenhouse gas (GHG) emissions and are likely to impose new costs or compliance obligations on companies. Laws that target GHG emissions are likely to have the largest impact on GHG emitters or those dependent on them. Regulations may also place indirect pressure on a company through increased fuel or electricity costs, shifts in product demands, or impacts on the supply chain.

In the wake of the 2015 Paris climate change agreement, momentum toward additional laws aimed at emission reductions is likely to increase worldwide. The US EPA Clean Power Plan (CPP) — which was slated to be the Obama administration's tool to combat climate change and meet US targets for emission reductions — was recently stayed by the US Supreme Court pending outcomes in the lower court. This, however, is a good example of a climate-related law that could have substantial impacts — both risks and opportunities — for many companies.

Economic risks include the physical risks from climate change, such as impacts from climate-induced extreme weather events to operations, major assets, support infrastructure, or critical labor. Companies may face new risks from changing precipitation or temperature patterns that directly or indirectly impact supply chains or critical inputs, such as fresh water, crop viability, or a range of disease vectors. Melting permafrost is a particular challenge to energy companies with pipelines in some areas of the Northern Hemisphere. Nevertheless, weather events associated with climate change may be one of the most difficult aspects about which companies may increasingly be called upon to make threshold determinations of risk and materiality.

Despite popular press reports suggesting that most extreme weather events are increasing, the reports of the Intergovernmental Panel on Climate Change (IPCC), which represents the best consensus science available, indicates that there is substantial uncertainty with respect to weather trends in the most extreme events, excluding heat waves, extreme precipitation, and high water impacts from sea level rise, which are already expected to increase. Additionally, the more one downscales climate data to regions or geographical areas that might be relevant to a particular company, the less accurate climate projections become. Although largely ignored in the dialogue surrounding climate risk disclosure, substantial questions remain about whether statements made by the company regarding the physical risks of climate change are really that useful to investors. Reviewing peer disclosures to identify what other similarly situated companies are identifying as material risks, and carefully evaluating potential disclosures with counsel, may keep you ahead of the curve on this difficult issue.

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Climate change risk disclosure

In the United States, obligations to disclose "material" environmental risks and liabilities in annual and quarterly reporting forms submitted to the SEC (notably annual reports on form 10-K and quarterly reports on form 10-Q), are not new, and can be found primarily in Regulation S-K (17 C.F.R. § 229). Although these rules do not require any explicit sustainability reporting or climate change risk disclosures, the rules have required companies to report on numerous environmental risk factors since the late 1970s and early 1980s. These include the cost of complying with environmental laws, certain pending legal proceedings, significant risk factors or prospects for the future, and any trends or uncertainties that are likely to have a material effect on a company. The US Supreme Court has held that this information is "material" to investors, and therefore must be disclosed, "if there is a substantial likelihood that a reasonable shareholder would consider it important" to an investment decision.[1]

SEC interpretative guidance

Since approximately 2005, Ceres, a nonprofit investor advocacy group for sustainable businesses, has spearheaded an effort to increase the disclosure of climate-related risks in SEC filings. In 2010, after pressure from Ceres and a coalition of 22 major investor groups, pension fund managers, various state treasurers and comptrollers, NGOs, the New York attorney general, and the US Senate Appropriations Committee, the SEC issued Commission Guidance Regarding Disclosure Related to Climate Change "to provide clarity and enhance consistency" on disclosure requirements related to climate change risks.[2] Although the 2010 guidance did not amend or modify any existing rules, it identified four areas of climate change risk that may trigger reporting under the current law. These are:

The impact of legislation or regulation

The SEC advised registrants to consider specific risks faced as a result of climate change legislation or regulations and to avoid generic risks.

The impact of international accords

These include treaties, such as the European Union's Emissions Trading System (EUETS), the Kyoto Protocol, and "other international activities" (the guidance was written before the recent historic Paris Agreement on climate change). Companies "reasonably likely" to be affected by international accords "should" monitor international law developments and assess possible impacts.

The indirect consequences of regulation of business trends

This includes changes in demand for existing or new products, such as products that produce significant GHG emissions, increased demand for renewable resources, and decreased demand for fossil fuel support services (such as drilling equipment).

The physical impacts of climate change

These risks include extreme weather events with the "potential to affect" a company's operations and bottom line. The SEC advised that companies with operations in vulnerable areas (such as in floodplains or on coasts), or companies whose insurance premiums may see a material increase as a result of climate change, need to consider whether such risks are material.

2016: SEC may revise ESG and climate change risk disclosure guidelines

Since issuing the guidance in 2010, the SEC has not taken substantial action with respect to climate change risk reporting until this year. On April 13, 2016, the SEC issued a concept release — which stands as a broad solicitation for comments to assist the SEC in determining whether additional rulemaking is necessary — seeking public comment on the effectiveness of many SEC disclosure rules. These include whether revisions are needed with respect to ESG reporting, and in particular with respect to climate change risk reporting practices. Major advocacy and investor groups, such as the Carbon Disclosure Project, the Sustainability Accounting Standards Board, Ceres, and the SEC Investor Advisory Committee, among others, filed comments seeking increased mandatory disclosure and enforcement by the SEC. There are differences in these commenters' views regarding whether the SEC should require companies to make more line-item disclosures or apply specified disclosure metrics to allow investors to better assess and compare climate change and sustainability risks reported by companies. However, these groups are generally asking the SEC to modernize

Company disclosures related to climate change risks are now being communicated across many forums. Where such disclosures are being made by non-legal personnel, such as marketing or sustainability teams, consider adopting a collaborative approach with legal counsel to spot potential risks. US-based in-house counsel of international corporations should pay particular attention to relevant ESG-related communications being produced by foreign HQ-functions, which may have different cultures regarding product claims or lack expertise in SEC or FTC regulations.

Climate change risk disclosure frameworks and standards*

FRAMEWORK OR STANDARD SETTING ORGANIZATIONS	DESCRIPTION OF STANDARD OR FRAMEWORK
Financial Standard's Board Task Force on Climate-Related Financial Disclosures (TCFD)	Chaired by Michael Bloomberg, the TCFD's mission is to develop "voluntary, consistent climate-related financial risk disclosure" standards that enable meaningful comparisons between companies. TCFD issued its Phase I report in March 2016 (high-level, objective oriented) and the Phase II report (which will include specific disclosure guidelines and metrics) is expected in December 2016 for public comment.
Climate Disclosure Standards Board (CDSB) and the Carbon Disclosure Project	CDSB's Framework for Reporting Environmental Information and Natural Capital and its Climate Change Reporting Framework Edition 1.1 focuses on material risks posed by climate change and provides direction for incorporating those risks into mainstream reports. CDSB's mission is the development of a global framework for climate risk reporting. CDSB operates through the Carbon Disclosure Project, which provides a standardized way to collect and report climate risk information. Over 5,000 companies participated last year in CDP surveys regarding sustainability and climate related risks.
Sustainability Accounting Standards Board (SASB)	SASB issues industry-specific sustainability accounting standards aimed at consistency with US SEC reporting requirements, and is advocating that the SEC adopt industry specific disclosure metrics. SASB has developed standards for 79 industries.
International Integrated Reporting Council (IIRC)	IIRC's International Framework is aimed at reporting companies worldwide and takes a broad, principles-based approached to disclosure, seeking an "integrated report" that links value prospects to a company's management across many areas. IIRC supports the SEC's approach to climate change risk disclosure as set forth in the SEC's 2010 Guidance.
Global Reporting Initiative (GRI)	GRI's Sustainability Reporting Guidelines are one of the more widely used frameworks. The fourth set of reporting guidelines, known as G4, is based on the concept of materiality, and is aimed at all companies, large or small, operating anywhere in the world. The guidelines contain general frameworks for reporting GHG emissions and financial risks and opportunities associated with climate change.
ASTM, International, Committee E50	ASTM E2718 provides standards for both US and international reporting companies to disclose the financial impacts of climate change. ASTM E2725 provides a "uniform set of options" and a framework for communicating and managing greenhouse gas issues.
National Association of Insurance Companies (NAIC) Insurer Climate Risk Disclosure Survey	NAIC adopted a climate risk survey, modeled on the CDP surveys, to assess insurer's level of risk associated with climate change. NAIC has also revised its examiners handbook to assist insurance examiners in identifying risks to solvency associated with climate change. Several US states (CA, CT, IL, MD, MN, NM, NY, and WA) have required certain large insurance companies to participate in this survey and disclose such risks.

*This list includes some of the major framework and standard setting organizations, but is by no means a comprehensive list; some have suggested that hundreds of such organizations may exist.

its disclosure rules to reflect what they argue is a major shift in the market: That the typical, reasonable investor now places great importance on ESG issues. Because the definition of materiality relies on what a "reasonable investor" would view as important to an investment or proxy voting decision, this could lead to significant changes in what ESG information must be disclosed.

In August 2016, the director of the National Economic Council (an economic advisory body to the President) and one of US President Barack Obama's senior advisors publicly called for "more aggressive action" on these issues, including the SEC adoption of industry specific climate risk disclosure standards and increased enforcement practices. Although the SEC's concept release is the first step in a long and complex process regarding disclosure rules, many believe it will likely to lead to a change in the SEC's rules regarding sustainability reporting.

International initiatives

Initiatives around the globe portend a strong trend in the direction of increased mandatory ESG, especially pertaining to climate risk reporting. Both should be carefully watched by companies as they continue to develop. This trend may be most apparent in the insurance industry, where disclosure by insurance companies of the risks that climate change presents to their insured assets is becoming increasingly mandated. For example, the EU's Solvency II Directive (2009/138/EC), which became effective January 1, 2016, requires insurance companies to identify risks associated with climate change. Insurance companies doing business in California have been directed to "divest from thermal coal" and "disclose their investments in the carbon economy."

Also effective January 1, 2016, in France, the Energy Transition for Green Growth Law enhances mandatory climate risk and GHG emissions reporting by certain companies. It is also the first law to extend environmental risk reporting to investors, requiring certain asset owners such as financial institutions, pension funds, and insurance companies to report on how ESG criteria factor into investment decisions and risk management. The French law operates on a "comply or explain" basis, but some believe the European Union may adopt similar mandatory requirements. Certain stock exchanges around the globe are adopting their own rules: the Singapore Exchange (SGX) recently announced that effective July 20, 2016, every listed issuer must prepare a detailed sustainability report, and should rely on globally recognized sustainability reporting frameworks to do so. In the United Kingdom, amendments to the Companies Act took effect in 2013 that now require covered companies to report GHG emissions. Since 2007, Australia has required certain companies to report GHG emissions annually. The European Parliament adopted a directive in 2014 (2014/95/EU) aimed at increasing ESG reporting by certain large companies. The directive is expected to be finalized by member states in 2016 and initial company reports are expected in 2017.

A patchwork of voluntary climate risk and ESG reporting frameworks

While requirements to report on climate change risks increase, how companies assess and report those risks is much less clear. In the absence of an internationally recognized prescriptive rule regarding how to quantitatively or qualitatively assess and report such risk, a confusing patchwork of voluntary reporting and climate risk disclosure standard-setting organizations has evolved. These include the Sustainability Accounting Standards Board (SASB), the Climate Disclosures Standards Board (CDSB) (which operates through the Carbon Disclosure Project or CDP), the Global Reporting Initiative (GRI), and ASTM International, to name a few. The SASB in particular has been working to develop industry specific disclosure requirements that fit within the United States' framework focused on materiality. However, the SEC has not adopted SASB requirements, as compliance with its disclosure framework is currently entirely voluntary. This presents a serious conundrum for companies attempting to enhance or standardize their ESG and climate change risk reporting. The Financial Stability Board, an international financial system advising body, hopes to address this problem through its recently created task force. The task force will make recommendations on climate risk reporting "for consistent, comparable, reliable, clear, and efficient climate-related disclosures by companies," expected by the end of 2016. Presumably these FSB standards will add yet another set of reporting standards to the already numerous mix. Given the lack of universal standards, companies should understand both the major players, risks, and benefits to your company of participation in any of the frameworks, as well as understanding which, if any, organizations your competitors are participating in or adopting.

Settlements reached with the New York attorney general require that the reporting company use specific language in future SEC filings with respect to climate risk. Thus, using a broad state anti-fraud law, the New York attorney general has reached into a federal reporting scheme, directed regulated companies to make certain disclosures, and specified the precise language for the disclosure.

The increasing power of shareholder proposals and customer questionnaires

Publicly traded companies should also watch for an uptick in shareholder proposals on climate related resolutions, in particular those related to climate risk disclosure. These proposals are increasing, and garnering much wider margins of support than ever before, although still not meeting the threshold requirements for adoption. At the May 2016 annual meeting of two separate energy companies, shareholder resolutions related to increased climate risk disclosures received the support of approximately 40 percent of the shareholders. In a move that surprised some analysts, two other major energy companies recommended the approval of shareholder proposals for increased climate risk disclosure, including an analysis of how resilient the company is to low carbon future scenarios.

Corporate purchasing departments use questionnaires issued to supply chain companies in order to fulfill their information-gathering obligations for disclosures. These reports may require

The "AG's United for Clean Power" continue to use the subpoena power against major companies to address climate change. These traditional legal investigative tools were designed for retrospective enforcement actions — not novel, policy-development contexts. It remains to be seen whether this new use of such tools is ultimately countenanced by the courts, and companies should continue to monitor new developments.

extra attention by counsel to ensure consistency and avoid misleading statements or material omissions. In the United States, the federal securities anti-fraud law, known as Rule 10b-5, prohibits material misstatements or omissions in connection with the purchase or sale of any security. As a result, private issuers should carefully evaluate its ESG statements in response to these types of questionnaires.

New enforcement trends

While the SEC and other countries begin to adopt or consider frameworks for climate change risk reporting, some states in the United States have taken matters into their own hands. In an effort to "defend climate change progress," and "fill the legislative breach," attorneys general (AGs) from 15 states, including the District of Columbia and the US Virgin Islands, have formed a coalition, the "AGs United for Clean Power," with a stated goal to "use all the tools at our disposal to fight for climate progress."

One such traditional legal tool is the criminal subpoena (and its civil counterpart — the "civil investigative demand" (CID)), which gives state law enforcement officers broad authority to compel the production of documents as part of an investigation. Historically, the threshold of proof required before using subpoenas to initiate an investigation has always been very low, sometimes only requiring "mere suspicion that a crime (or civil violation) has occurred." Some state AGs have issued subpoenas and CIDs with an alleged law enforcement objective to obtain documents to determine whether, and to what extent, companies may have mislead investors with false or misleading information about the climate change risks that are present to their business. Through the use of subpoenas and CIDs, the attorneys general can cast a wide net and request that companies produce all communications over as many as 40 years that relate to research, advocacy, strategy, reports, studies, reviews, or public opinions regarding climate change. Ironically, these time frames far exceed the relevant statutes of limitation for any of the alleged crimes being investigated.

The New York attorney general has taken a leading role in this endeavor, using the subpoena and investigative powers conferred on him by a broad state anti-fraud law (known as the Martin Act) that has put New York in the driver's seat among state efforts to act on climate risk disclosure. The Martin Act provides for limited judicial oversight of the attorney general's discretion or opportunity to challenge ongoing investigations and does not require a showing of intent to defraud.

Given the companies that have been targets of these subpoenas thus far, the New York attorney general appears to take the position that it has jurisdiction to investigate any company that is traded on the New York Stock Exchange or in which the New York comptroller has invested funds. Since 2007, the New York attorney general has issued six subpoenas to major companies in the energy sector to investigate the adequacy of their climate risk disclosures in SEC filings. Five subpoenas were issued in 2007 and one at the end of 2015. Settlements were reached with all but two of the companies to date, requiring the companies to modify disclosures but imposing no fines or other penalties.

Remarkably, some of the settlements reached with the New York attorney general require that the company use specific language in future SEC filings with respect to climate risk. Thus, using a broad state anti-fraud law, the New York attorney general has reached into a federal reporting scheme, directed regulated companies to make certain disclosures, and specified the precise language for the disclosure.

Strategically, the state AGs appear to be "leap-frogging" the complexity of evaluating climate change risks by focusing on whether anyone "lied." One method of attempting to prove such "lies" is relatively straightforward: Obtain historical internal documents through subpoenas, and compare the contents with what the companies disclosed in public (through mandatory filings or voluntary disclosures). Some have compared the AGs efforts here with the campaign against "Big Tobacco," where many agree that the turning point came when government investigators discovered "smoking gun" documents and used them in a variety of legal contexts. Broad document subpoenas, or CIDs, can quickly yield such smoking guns. However, the comparison to the tobacco subpoenas is misplaced. While the tobacco industry was accused of failing to disclose facts that were then little-known to the public about tobacco use, it is difficult to imagine what companies may have known about climate change that the world at large did not already know, given the massive international scientific effort and a solid understanding of how greenhouse gases trap heat.

The collective use of these subpoenas by the "AGs United for Clean Power" has sparked a political response from 13 state AGs and several US senators from states that see the coalition's actions as

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going beyond the proper role of law enforcement. These states and senators have raised concerns about the attempt to "police the global warming debate through the power of the subpoena."

One group has initiated a lawsuit against the New York attorney general to obtain any climate change "common interest agreements" with other states. This comes after a private legal institute uncovered such an agreement among 16 states and the District of Columbia. In the document, the states agreed, among other things, to share information related to climate change disclosure investigations or decisions to take legal action against companies.

Legal options for companies served with a subpoena

Putting aside the important question of whether the use of such subpoenas is appropriate in this context, most companies that operate in heavily regulated industries have adopted procedures and provided internal training in response to the service of a subpoena. Given the serious consequences arising from a failure to comply with a subpoena, and considering their expanding uses in the area of climate change risk disclosure, any company receiving one should take immediate action to protect their legal interests.

Review, preserve, and narrow

In most white collar criminal investigations, successful challenges or motions to quash a subpoena are rare. Accordingly, the focus quickly turns to figuring out how to properly narrow the scope of the subpoena. At this early stage, despite having access to cooperating witnesses, the investigators and prosecutors are "outsiders" to the company. As such, the government team often lacks knowledge about the types of documents that might be available, the volume and location of potentially responsive documents, and the cost, time, and burden required to locate, review, and produce them.

An important first response is to carefully review the scope of the requests and assemble an internal corporate team to better understand the issues and challenges posed above. Next, and perhaps most importantly, company officials need to take — and memorialize — immediate steps to preserve any and all documents that fall within the scope of the subpoena, otherwise known as a "document hold." Even inadvertent destructions of relevant documents through the company's document retention policy will be met with an aggressive response, such as accusations of obstruction of justice.

Next, engage with the government and discuss the process of compliance with the subpoena, making an effort to narrow the scope or extend the time allowed to produce the documents. Memorialize the revised scope in writing to prevent future allegations of noncompliance or contempt.

Gather, review, document, and produce

The document search and review process, while a formidable task, requires care to ensure not only that the correct documents get produced but also that the company memorializes its production process. Keeping accurate records of who was involved in the gathering and review process; what locations were searched; and where documents were found is critical to both gain credibility with the government (and avoid government efforts to issue supplemental requests or to take over the process), and prevent the need to repeat these costly efforts. This written record can also assist in rebutting any scrutiny, which often only arises months or years later.

Explore and bring legal challenges

Traditionally, challenging a subpoena on legal grounds is rarely successful, but such challenges can be brought through motions to quash the subpoena, or through other injunctive actions. In the federal system, courts may grant these motions if the recipient can generally establish that the subpoena was

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Corporate Buyers — Influencing Change in Renewable Energy (Nov. 2015). *www.accdocket.com/articles/resource.cfm?show=1413648*

Volkswagen Scandal Reveals Consumer Concern for Authentic Sustainability (Sept. 2015). *www.accdocket.com/articles/vw-emissions-scandal-consumer-values.cfm*

Top Ten

Top Ten Energy & Environmental Claims: A Mostly-Common-Law Menu (April 2014). *www.acc.com/legalresources/publications/topten/tteaecamclm.cfm*

QuickCounsel

Customs Provisions in International Business Agreements (May 2015). *www.acc.com/legalresources/quickcounsel/customs-in-international-business-agreements.cfm*

Phase I Environmental Site Assessments: What are they and why do we do them? (Oct. 2014). *www.acc.com/legalresources/quickcounsel/phase-i-environmental-site-assessments.cfm*

InfoPak

Energy and Natural Resources Multi-Jurisdictional Guide (Dec. 2014). *www.acc.com/legalresources/resource.cfm?show=1384132*

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unreasonable (for example, that it is overly burdensome or seeks privileged materials). One major energy company has already scored an early victory in its effort to challenge (through a declaratory judgment action) a subpoena issued by the Virgin Islands attorney general. Rather than litigating the company's challenges, the Virgin Islands attorney general agreed to drop the subpoena in exchange for the company's willingness to dismiss its lawsuit.

Despite this result, these "AG's United For Clean Power" continue to use the subpoena power against major companies. These traditional legal investigative tools were designed for retrospective enforcement actions — not novel, policy-development contexts. Accordingly, it remains to be seen whether this new and aggressive use of such tools is ultimately countenanced by the courts, and companies should continue to monitor new developments.

Moving forward

Need for consistency in reporting across many different contexts

The settlements reached with the New York attorney general (which technically are styled as an Assurance of Discontinuance (AOD)) are important because they emphasize the need for consistency between what is stated in mandatory filings and what is stated in other forums in which companies are now making voluntary disclosures related to sustainability issues. Information with respect to climate change risks and opportunities is now often available on company websites, in annual and sustainability reports, on social media, in statements to foundations, in permit applications, in marketing materials, in internal newsletters, to numerous voluntary reporting agencies that seek climate-related data from corporations (such as the CDP, Ceres, or GRI), and to satisfy other mandatory reporting requirements (such as pursuant to EPA's GHG reporting rule, the EU's Emissions Trading Scheme and Transparency Directive, or the United Kingdom's 2008 Climate Change Act). Consistency is important so that a company's statements or omissions made in its SEC filings are not materially misleading in light of its other statements, an issue that appears to have motivated investigations from the New York attorney general.

Disclosures made to the CDP are worth special note because of the risk based, line-item questions posed in the CDP survey and the large number of companies that participate in the CDP (more than 5,500 companies in 2015). For example, one of the questions companies are asked to respond to is: "Have you identified any inherent climate change risks that have the potential to generate a substantive change in your business operations, revenue, or expenditure?" It may be difficult to argue — depending on the facts — that a climate risk identified in response to a CDP survey as likely to generate a "substantive change" to the business is not material for purposes of SEC reporting.

Where non-legal personnel, such as marketing or sustainability teams, make company disclosures (voluntary or otherwise), consider adopting a collaborative approach with legal counsel to review the disclosures to spot potential risks. For example, US-based in-house counsel of international corporations should pay particular attention to relevant ESG-related global reports, press releases, and other external communications being produced by any headquarters (HQ) function located in a foreign country. Foreign HQ-functions may have differing cultures regarding product claims or may lack the expertise to track compliance with US SEC and Federal Trade Commission regulations. Close review by US based in-house counsel is also important to ensure consistency with other external and internal published information on ESG topics.

The work surrounding how to assess the risks posed by climate change and how to determine what, if any, of those risks should or must be publicly disclosed is in its infancy are likely to play out across the globe for some time to come. Careful monitoring of this emerging area will help your company avoid unintended consequences and position it to be a leader in ESG disclosures, potentially enhancing investment opportunities. **ACC**

Climate change risk case study

One example of direct GHG regulations that may impact a company's bottom line applies to the automotive industry: in the United States, between 2012 and 2025, major automakers are required to reduce their fleets' tailpipe emissions of GHGs by an unprecedented 41 percent. This requirement can only be met by adding alternative-fueled vehicles to the fleets; that is, vehicles with pure electric and hybrid powertrains. However, selling sufficient numbers of these types of vehicles to meet this regulatory requirement and to offset companies' investment costs may be difficult given the varying customer preferences in different geographical regions and the current historically low gas prices. If automakers do not sell the "right" mix of vehicles so that their fleet averages meet the regulatory emission requirement, then they must purchase emission credits from another manufacturer that exceeds the standards or pay potentially substantial fines (and still come into compliance).

NOTES

1 TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).
2 (75 Fed. Reg. No. 25, 6290-6297, February 8, 2010).