

# Protecting Against D&O Liability for Climate Change-Related Disclosures

by William G. Passannante and Alex Hardiman

As the number of climate change-related lawsuits against public companies grows, and climate change issues become the subject of increasing state, federal and international regulatory efforts, the risk that directors and officers may become the targets of governmental and private lawsuits based on their companies' climate change-related disclosures is becoming more likely. Perhaps the clearest indication of this emerging risk is the SEC's first-ever issuance of climate change-related financial disclosure guidelines.

These guidelines, issued on February 8, 2010, indicate that the SEC has recognized that climate change-related regulations and liabilities increasingly may trigger potential corporate reporting requirements under a variety of SEC rules and regulations. The guidance to public companies, entitled "Commission Guidance Regarding Disclosure Related to Climate Change" focuses on the SEC's "existing disclosure requirements as they apply to climate change matters." It identifies a variety of climate change-related issues that might trigger corporate disclosure requirements, including:

\* Enacted or proposed state, federal or international legislation that may have a material effect on a public company

\* Legal, technological, political and scientific developments regarding climate change that may create risks for companies, such as decreases in demand for existing products or services, or adverse effects on a company's reputation

\* The potential physical effects of climate change on weather sensitive business operations, such as the financial effects on companies with operations on coastlines or effects from disruptions to the operations of major customers or suppliers from severe weather.

Although we have yet to see any significant number of governmental actions or shareholder suits against corporations or their directors and officers in relation to climate change-related disclosure failures, the seeds for the future growth of such actions are being sown.

## Is D&O Insurance Adequate Protection?

Lawsuits against directors and officers alleging damages arising out of climate change-related issues likely will trigger the coverage provided by D&O insurance policies for claims alleging "losses" as a result of a director's or officer's "wrongful acts." Insurance companies, however, have already indicated that they will likely take the position - improperly in

our view -- that a so-called "pollution exclusion" contained in many D&O policies would eliminate coverage for such lawsuits.

"Pollution" exclusions typically purport to exclude claims "based on, arising out of, or in any way involving" "pollution."

It is far from clear, however, whether the courts will agree that such exclusions apply to D&O claims stemming from alleged disclosure failures. In an analogous case, at least one court in recent years has rejected the insurance companies' position. In *Sealed Air Corp. v. Royal Indem. Co.*, the court held that a pollution exclusion in a D&O policy did not bar coverage for a lawsuit against directors and officers based upon their alleged misleading financial statements with respect to asbestos environmental liabilities.

Since the law on this issue is far from settled, companies should also take note that with the rise of climate change related D&O litigation, it may be possible to purchase D&O policies with clauses specifically carving out climate change-related securities lawsuits from a policy's "pollution exclusion." A similar carve-out may also be possible for claims against directors and officers for which they are not being indemnified by their corporate employer.

## An Uncertain Future

The increased regulatory activity and private litigation activity surrounding the climate change issue suggests future increased liabilities. While the treatment of liability for climate change related issues by the courts and governmental entities is in an early stage of evolution, the liability and regulatory machinery are grinding forward. Ensuring that corporate indemnities and insurance are in place to respond is an important step.

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