



Responding to Climate Change

BY DAVID J. VAN HOOGST RATEN

DEBATE OVER WHETHER climate change is occurring has given way to a new debate over what the proper regulatory response should be. The resolution of this debate will have major consequences for many companies and particularly those in heavy greenhouse gas-emitting sectors. In Congress, where Democrats control both houses for the first time in a dozen years, a number of bills have been introduced that will shape the debate over not whether but how greenhouse gas emissions will be regulated at the federal level. Companies and their boards of directors must take into account and seek to minimize the substantial risks that climate change poses.

Increasingly, shareholders and institutional investors want companies to address emissions and disclose their efforts to do so. An explosion in shareholder resolutions has occurred that asks companies to report information and indicate how they expect to respond to climate risks.

This can be addressed through environmental reporting. A new set of voluntary, corporate social-responsibility guidelines has been launched by global business and environmental leaders, and it calls for climate change as a measurable disclosure topic in reports to shareholders. These so-called "G-3 Guidelines" are reportedly used by some 1,000 companies in developing their sustainability reports. Major stockholding entities such as the California Public Employees Retirement System and the New York City comptroller, which together control over \$300 billion, have announced that they will ask the S&P 500 CEOs to employ the new guidelines.

Securities and Exchange Commission filings are another avenue for disclosure. SEC rules require that "specific known trends, events, or uncertainties that are reasonably likely to have a material effect on a company's financial condition or operating performance" must be discussed in

a company's filings. The SEC still does not specifically require reporting on climate change, but a significant percentage of the largest publicly traded utilities have addressed the issue in recent SEC filings.

Pressure comes also from the insurance industry, which is evaluating the long-term risks from climate change, partly in response to devastating losses from hurricanes during 2004 and 2005. Insurers are allying themselves with institutional investors, banks and rating agencies to pressure companies



to consider climate change and greenhouse gas emissions as they would any other form of material financial risk.

Perhaps of greatest concern is the use of the courts to attempt to hold companies liable for the purported effects of climate change. These cases are growing in number and boards of companies with possible exposure need to pay attention. In one suit, several northeastern states, New York City and others have sued five electric utilities under tort law theories and seek to compel them to cap their CO₂ emissions and reduce them over 10 years. A federal district court in New York dismissed the case but it has been appealed. A similar challenge against automobile manufacturers was filed in federal court in California in 2006 by the state attorney general and is being carried forward by the newly elected attorney general. In yet another federal tort suit, a class action in Mississippi, it is alleged that greenhouse gas emissions from various sectors including electric utilities, oil, coal, and chemicals contributed to global warming which, in turn, increased the severity of Hurricane Katrina resulting in greater damage than would otherwise have occurred.

Companies and their boards must also monitor and decide how to face the prospect of a growing patchwork of local, state and regional initiatives for the regulation of greenhouse gas emission – which have added to the pressure for a federal regulatory response.

As they advise and guide the corporation, boards now recognize that risks of inaction likely outweigh risks of action. Companies need to act strategically as they carefully follow burgeoning litigation and legislative developments and consider how their industry and their companies will be affected. As Congress moves rapidly in the direction of national controls on greenhouse gas emission, they will want to identify regulatory regimes with which they can live, and be proactive.

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NewsFLASH

OREGON'S GREEN DAM

The Pelton Round Butte dam has gone green, winning an environmental designation shared with 25 other hydroelectric plants in the country.

The dam was honored by the Low Impact Hydropower Institute for its special features, such as a new fish migration path to be constructed starting in the fall. The 465 million watt capacity Oregon dam is owned by Portland General Electric and the Confederated Tribes of Warm Springs.

The new system will reopen 226 miles of streams above the dam for fish migration for the first time since 1968.