



February 26, 2010

THE SEC ISSUES INTERPRETIVE GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE**ENERGY/ENVIRONMENTAL AND SECURITIES LAW ALERT**

On February 2, 2010 the Securities and Exchange Commission (“SEC”) issued an interpretive release (SEC Release No. 33-9106; 34-61469; FR-82, “the Release”) to provide public reporting companies (“Registrants”) guidance regarding the application of the SEC’s existing disclosure requirements under the federal securities laws and regulations as they apply to climate change matters. The Release has been issued at a time when there have been regulatory and legislative developments regarding climate change matters, as well as increased shareholder activism by investors seeking greater disclosure of the effects of climate change on the business and operations of Registrants. Although the Release only represents interpretive guidance, climate change related disclosure is expected to be a key issue for the SEC on a going-forward basis.

Notwithstanding the fact that the Release applies to all Registrants, the guidance provided will be particularly relevant to Registrants whose business and operations are impacted by climate change matters, including manufacturing companies, energy production companies or other companies whose business and operations depend on natural resources.

Registrants should incorporate into their disclosure and internal controls and procedures a system to identify and determine the materiality of the impact of climate change on their business and operations to properly and timely disclose such information in SEC filed periodic reports and registration statements.

I. Current SEC Disclosure Obligations Related to Climate Change

The Release provides guidance regarding the application of the existing disclosure obligations that Registrants are required to make in their periodic reports or registration statements as they relate to climate change. Set forth below are the key disclosure requirements under Regulation S-K that the Release focuses upon for a Registrant to consider when determining its disclosure obligations related to the business and legal impact of climate change.

Description of Business. Item 101 (Description of Business) generally requires Registrants to disclose the business performed and intended to be performed by the Registrant and its subsidiaries. This item also requires Registrants to disclose “the material effects that compliance with Federal, State and local 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.”

Legal Proceedings. Item 103 (Legal Proceedings) requires a Registrant to briefly describe any material pending legal proceeding to which it or any of its subsidiaries is a party, as well as material pending legal actions in which its property is the subject of the litigation. The Release reminds Registrants that although Item 103 generally provides that Registrants need not disclose ordinary routine litigation incidental to its business, Instruction 5 to Item 103 provides that proceedings that arise “under any Federal, State or local

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provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment shall not be deemed ‘ordinary routine litigation incidental to the business’” if (i) the proceedings are material; (ii) the proceedings involve a claim for damages in excess of ten percent of the Registrant’s and its subsidiaries current assets on a consolidated basis; or (iii) a governmental authority is a party to the proceedings and such proceedings involve potential monetary sanctions of greater than \$100,000.

Risk Factors. Item 503(c) (Risk Factors) requires Registrants to specify the most significant factors that make an investment in the Registrant speculative or risky. The Release encourages Registrants to (i) consider the specific risks they face as a result of climate change legislation or regulation, and (ii) avoid generic risk factor disclosure that could apply to any company.

MD&A Disclosure. Item 303 (MD&A Disclosure) compels Registrants to disclose Management’s Discussion and Analysis of Financial Condition and Results of Operations. MD&A Disclosure is intended to enable investors to see the Registrant through the eyes of management, and this disclosure should include known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on a Registrant’s financial condition or operating performance, including potential climate change legislation or regulation.

II. Climate Related Disclosures.

In light of the mandated SEC disclosure requirements described above, the Release notes that a Registrant may have specific disclosure obligations regarding climate change regulations and legislation. Described below are four areas identified by the Release where climate change regulations may impact Registrant disclosure. These areas were offered in the Release as examples and are not intended to be a comprehensive list of climate change considerations for Registrants. If the disclosure threshold of materiality is satisfied, Registrants will be required to disclose positive and negative impacts from climate change, as well as the physical impacts that climate change may have on Registrants’ facilities and operations.

A. Impact of Legislation and Regulation

There are several areas of international, national and local climate change legislation and regulation that may affect a Registrant’s disclosure obligations. The Release indicates that climate change regulation may trigger additional disclosure under Regulation S-K, including the following:

- Item 101 (Description of Business) may require Registrants to disclose any material estimated capital expenditures for environmental control facilities for the remainder of a Registrant’s current fiscal year and its succeeding fiscal year, and for such further periods as the Registrant may deem material with respect to existing federal, state and local provisions which relate to greenhouse gas emissions.
- Item 503 (Risk Factors) may require Registrants to specify existing or pending legislation or regulation, whether international, federal or local, that relates to climate change. Proper risk factor disclosure may also require Registrants to evaluate the significant physical effects that climate change could have on a Registrant’s operations and results.
- Item 303 (MD&A Disclosure) may require Registrants to assess whether any enacted climate change legislation or regulation is reasonably likely to have a

material effect on the Registrant's financial condition or results of operation.

The Release also indicates that a Registrant should not limit its evaluation of disclosure of a proposed climate change law only to negative consequences. For example, the Release states "if a 'cap and trade' type system is put in place, Registrants may be able to profit from the sale of allowances if their emissions levels end up being below their emissions allotment. Likewise, those who are not covered by statutory emissions caps may be able to profit by selling offset credits they may qualify for under new legislation." The Release identifies the following examples of possible consequences of pending legislation and regulation related to climate change:

- Costs to purchase, or profits from sales of, allowances or credits under a "cap and trade" system;
- Costs required to improve facilities and equipment to reduce emissions in order to comply with regulatory limits or to mitigate the financial consequences of a "cap and trade" regime; and
- Changes to profit or loss arising from increased or decreased demand for goods and services produced by the Registrant arising directly from legislation or regulation, and indirectly from changes in costs of goods sold.

B. International Accords and Treaties

The Release recommends that Registrants continue to monitor, and disclose when material, the impact that treaties and/or international accords on climate change will have on their businesses. The Release indicates that the potential sources of disclosure obligations related to international accords are the same as the disclosure obligations set forth in Regulation S-K regarding climate change regulation, and Registrants whose businesses are reasonably likely to be affected by such agreements should monitor the progress of any potential agreements, and consider whether the existence and possible adoption of such agreements will need to be disclosed pursuant to the disclosure requirements of Regulation S-K.

C. Indirect Consequences of Regulation or Business Trends

The Release identifies several indirect consequences that may result from climate change regulation and legislation in the future. Developments in legal, technological, political and scientific arenas related to climate change may create new opportunities and risks for Registrants, and these developments may create demand for new products or services, or decrease demand for existing products or services. For example, some of the possible indirect consequences or opportunities, which Registrants may need to disclose after evaluating the materiality of such events, may include:

- Decreased demand for goods that produce significant greenhouse gas emissions;
- Increased demand for goods that result in lower emissions than competing products;
- Increased competition to develop innovative new products;
- Increased demand for generation and transmission of energy from alternative energy sources; and
- Decreased demand for services related to carbon based energy sources, such as drilling services or equipment maintenance services.

In addition, the Release recommends that Registrants consider the need to disclose their exposure to reputational risk as a result of the impact of climate change legislation. Depending on the nature of a Registrant's business and its sensitivity to public opinion, a Registrant may have to consider whether the public's perception of any publicly available data relating to its greenhouse gas emissions and climate change policies could expose it to potential adverse publicity that could impact its operations or financial condition.

D. Physical Impacts of Climate Change

The Release reminds Registrants that they may need to disclose the physical effects of climate change, such as the effects of the severity of weather (for example, floods or hurricanes), sea levels, the arability of farmland, and water availability and quality, on a Registrant's operations and results. For example, severe weather can cause substantial harm to a Registrant's physical plants and facilities, and can disrupt manufacturing and distribution processes. As a result, the Release recommends that Registrants whose business may be vulnerable to severe weather or other climate related events consider disclosing the material risks of, or consequences from, such events.

III. Future SEC Activity

The Release became effective on February 8, 2010, and the SEC will monitor the impact of the Release on Registrants' SEC filings as part of its ongoing disclosure review program. In addition, the SEC indicated that its Investor Advisory Committee is considering climate change disclosure issues as part of its overall mandate to provide advice and recommendations to the SEC Commissioners, and the SEC is planning to hold a public roundtable on climate change disclosure matters in Spring 2010.

The Release is available online at <http://www.sec.gov/rules/interp/2010/33-9106fr.pdf>.

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