



SEC and Insurance Response to Climate Change Presentation NYSBA 2011 Annual Meeting — Environmental Law Section



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Tab I: Presentation

SEC Guidance

- **Commission Guidance Regarding Disclosure Related to Climate Change – February 8, 2010**
- **Guidance does not create new disclosure requirements**
- **Provides guidance to public companies regarding the SEC's existing disclosure requirements as they apply to climate change matters**
- **Influenced by voluntary disclosure guidelines prepared by – Climate Registry, Carbon Disclosure Project and Global Reporting Initiative**

Review of Existing Disclosure Obligations under Regulation S-K

- **Item 101 – Description of Business**
- **Item 103 – Legal Proceedings**
- **Item 303 – Management Discussion and Analysis of Financial Condition and Results of Operation (MD&A)**
- **Item 503 – Risk Factor Disclosure**

Item 101 – Description of Registrant’s Business

- **Disclosure of the material effects of compliance with environmental laws – on capital expenditures, earnings and competitive position**
- **Disclosure of material estimated capital expenditures for environmental control facilities**
- **Environmental control facilities – designed to abate, reduce or prevent environmental pollution, contamination or other releases**
- **Examples – (i) material costs of remediation of sites with historic environmental conditions; (ii) cost of installing equipment to reduce GHG emissions in connection with a regional cap and trade program**

Item 103 – Material Pending Legal Proceedings

- **Includes lawsuits, administrative actions, enforcement actions and orders**
- **Specific guidance as to when environmental proceedings must be disclosed:**
 - (i) material
 - (ii) involve amounts exceeding 10% of consolidated assets
 - (iii) involve a governmental party and sanctions that will reasonably exceed \$100K
- **Example – private or government lawsuit seeking to compel reduction in GHG emissions**

Item 303 – MD&A

- **Management's view of the company's financial condition and prospects**
- **Requires discussion of known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on the company's financial condition or operating performance**
- **Examples – (i) legislation or regulation imposing GHG emissions limits or cap and trade; (ii) green or sustainable product marketing**

Item 503 – Risk Factor Disclosure

- **Rules regarding risk factors that must be disclosed in a prospectus**
- **May require disclosure of risks related to climate change or regulation of GHG emissions**
- **Describe how the risk factor specifically impacts the company**
- **Example – increased cost of raw materials due to demand for sustainable products**

SEC Guidance Highlights

- **Impact of Legislation and Regulation**
- **International Accords**
- **Indirect Consequences of Regulations and Business Trends**
- **Physical Impacts of Climate Change**

Impact of Legislation and Regulation

- **Companies must proceed on the assumption that pending regulations/legislation will be enacted unless management determines it is not reasonably likely**
- **Potential consequences:**
 - (i) costs to purchase/profits from sales of allowance/credits under a cap and trade system;
 - (ii) costs required to improve facilities and equipment to reduce emissions
 - (iii) profit or loss from increased or decreased demand for goods and services arising from legislation/regulation (and related increases/decreases to costs of goods)

International Accords

- **Kyoto Protocol (UNFCCC)**
- **Copenhagen (COP15), Cancun (COP 16)**
- **To be evaluated/disclosed in the same manner as U.S. legislation/regulation**
- **Impacts on companies with global operations**

Indirect Consequences of Regulations and Business Trends

- (i) Decreased demand for goods that produce significant GHG emissions**
- (ii) Increased demand for goods that result in lower emissions**
- (iii) Increased competition to develop innovative products**
- (iv) Increased demand for generation and transmission of energy from alternative energy sources**
- (v) Decreased demand for services related to carbon based energy sources, such as drilling services**
- (vi) Changing prices for goods or services purchased from companies directly affected by climate change**

Physical Impacts – Severe Weather or Climate-Related Events

- **Coastline Operations – potential property damage and disruption to operations, including manufacturing and transport of products**
- **Disruptions to the operations of major customers or suppliers from severe weather**
- **Other material impacts on personnel, physical assets, supply chain or distribution chain, availability or quality of natural resources, damages to facilities or decreased efficiency of equipment**
- **Decrease in demand for products or services**
- **Decreased agricultural production capacity in areas affected by drought or other weather-related changes**
- **Financial risk arising from physical risks to other companies**

Impacts of SEC Guidance So Far

- **2009 Annual Reports (10Ks) Published in 2010 after Guidance**
- **Increase in quantity – discussion about climate change issues**
- **Little in the way of conclusions or definitive statements**
- **Example – discussions of uncertainties surrounding potential federal climate change legislation**

Insurance Company Disclosure

- **Two potential impacts on insurance companies expressly recognized in SEC Guidance**
 - 1. Increased insurance claims and liabilities for insurance and reinsurance companies**
 - 2. Increased insurance premiums and deductibles or a decrease in the availability of coverage for companies with operations in areas subject to severe weather**

Cravath Analysis

- **Comparison of 2008 and 2009 10Ks filed by U.S. power companies**
- **“While it was intended to create clarity, in the short term the [SEC Guidance] has had the opposite effect – compelling companies to highlight the ongoing uncertainties both in their own position and in the legislative and regulatory picture relating to climate change”**
- **Other findings: (i) increase in number of companies making climate change disclosures (particularly litigation and physical risks); (ii) less discussion of federal climate change legislation; and (iii) more focus on commercial consequences and competitiveness**

Insurance Company Climate Change Survey

- **National Association of Insurance Commissioners (“NAIC”)**
- **Insurance Risk Climate Disclosure Survey – adopted March 28, 2010**
- **Impacts of Climate Change on Insurance Companies: (i) Insurer Solvency; (ii) Insurance Availability; (iii) Insurance Affordability**

Impacts To Existing Insurance Products

- **Property and Casualty Policies**
- **Environmental Policies**
- **Business Interruption Coverage**
- **D&O Insurance**
- **Development of new products?**
 - **Green Building products or endorsements**
 - **Discounts or incentives for Green certified insureds**
 - **Carbon Risk Management – i.e. carbon sequestration**

NAIC Survey Questions

- 1. Does the company have a plan to assess, reduce or mitigate its emissions in its operations or organizations?**
- 2. Does the company have a climate change policy with respect to risk management and investment management?**

NAIC Survey Responses

- **Insurers with annual premium over \$300m**
- **Voluntary unless adopted by State**
- **Information confidential**
- **“Participating states shall coordinate w/NAIC to develop a public report giving information in the aggregate regarding survey response”**
- **Survey questions influenced by voluntary disclosure to Carbon Disclosure Project**

NAIC Survey Questions

- 3. Describe your company's process for identifying climate-change related risks and assessing the degree that they could affect your business, including financial implications.**
- 4. Summarize the current or anticipated risks that climate change poses to your company. Explain the ways that these risks could affect your business. Include identification of the geographical areas affected by these risks.**

NAIC Survey Questions

- 5. Has the company considered the impact of climate change on its investment portfolio? Has it altered its investment strategy in response to these considerations?**
- 6. Summarize the steps the company has taken to encourage policyholders to reduce the losses caused by climate-change influenced events.**

NAIC Survey Questions

- 7. Discuss steps, if any, the company has taken to engage key constituencies on the topic of climate change.**
- 8. Describe the actions your company is taking to manage the risks climate change poses to your business including, in general terms, the use of computer modeling.**

ASTM Guidance

- **Standard Guide for Financial Disclosures Attributed to Climate Change – published March 26, 2010**
- **Encourage consistent and comprehensive disclosure of financial impacts attributed to climate change**
- **Guidelines for (i) sources of information that should be reviewed: (ii) determining whether disclosure is warranted and (iii) content of the disclosure**

ASTM Guidance

- **Examples of potentially significant financial impacts attributable to climate change:**
 - (i) Risks associated with regulation or legislation
 - (ii) Trends in resource costs or availability
 - (iii) Impacts to company's assets
 - (iv) Contractual risk assumption
 - (v) Litigation risks
 - (vi) Internal information (audits, consultant reports)

ASTM Guidance

- **Determining whether to disclose**
 - (i) does impact have a likelihood that is more than remote
 - (ii) could the impact disrupt the company's financial position, cash flow or operations
 - (iii) are the impacts anticipated within the next year
- **Content of Disclosure – management's assessment of climate change related risks and opportunities (including discussion of methodology used)**



Tab II: About the Speaker



Theodore A. Keyes

Theodore A. Keyes is a special counsel in the New York office, where he practices in the areas of litigation, environmental law and insurance law as a member of the Environmental Group and the Litigation Department. Ted's litigation practice covers a wide range of matters involving environmental issues and insurance coverage disputes concerning a variety of insurance products. Ted's insurance practice also includes counseling of clients concerning the terms of various specialty insurance policies. He is the author of the *New York Law Journal's* Corporate Insurance Law column.

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Selected Representations

Representation of insurance carrier in connection with coverage dispute concerning Clean Air Act enforcement action. *Cinergy Corp. v. St. Paul Surplus Lines Ins. Co.*, 915 N.E.2d 524 (Ind. Ct. App. 2009); *Cinergy Corp. v. St. Paul Surplus Lines Ins. Co.*, 873 N.E.2d 105 (Ind. Ct. App. 2007); *Cinergy Corp. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571 (Ind. 2007).

Representation of insurance carrier in environmental coverage litigation. *Handy & Harman v. American International Group Inc. et al.*, Index No. 115666/07 (New York County).

Challenge to New York City project adjacent to parkland under public trust doctrine. *New York State Assemblyman Adam Clayton Powell, IV, et al. v. City of New York, et al.*, Index No. 108220/2006 (New York County).

Defense of insurance carrier in lawsuit concerning environmental claims. *Allegheny Energy, Inc., et al. v. Certain Underwriters at Lloyd's, London*, Case No. 21-C-03-16733 (Cir. Court, Washington County, Md.).

Representation of insurance carrier in connection with disputed claim under pollution insurance policy. *AIU Insurance Company, et al. v. Louis Dreyfus Natural Gas Corp.*, No. 02CV3277 (S.D.N.Y.).

Representation of insurance carrier in connection with settlement and arbitration of underlying complex case concerning contamination from chemical plant in Houston. *Port of Houston v. GB Biosciences Corporation et al.*, Cause No. 2001-07795, (Harris County Texas).

Representation of parkland group in lawsuit to prevent alienation of parkland without legislative approval. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623 (N.Y. 2001).

Defense of insurance carrier in connection with lawsuit seeking coverage for environmental cleanup due to gasoline spill in Alaska. *Wyoming Alaska Company, Inc., et al. v. Commerce and Industry Insurance Company*, Civ. No. 2:00-CV-0499 (D.Ct. Utah).

Defense of insured in connection with declaratory judgment action to rescind directors and officers' liability insurance policy. *Genesis Insurance Company v. Physician Computer Network, Inc.*, Civ. No. 99-CV-103 (D.N.J.).

Representation of mortgagee seeking to intervene in lawsuit to prevent entry of Consent Decree governing CERLA remediation of mortgaged property. *United States v. Pitney Bowes, Inc., et al.*, 25 F.3d 66 (2d Cir. 1993).

Defense of lender in private cost recovery lawsuit under CERCLA. *EDO Corporation, et al. v. Elinco Associates Limited Partnership, et al.*, Civ. No. 393-CV-00504 (D. Conn.).

Prosecution of fourth-party contribution action concerning responsibility for remediation of oxide box waste from former MGP. *RMT, Inc. v. Giddings & Lewis, et al.*, 95 CV 00173 (Wis. Cir. Court, Fond du Lac County).

Defense of insurance carrier in multi-site declaratory judgment action concerning former MGPs in New Jersey. *Jersey Central Power & Light Company v. American Casualty, et al.*, C-299-94 (N.J. Super. Ct. Middlesex County).

Defense of insurance carrier in multi-site declaratory judgment action concerning former MGPs in New Jersey. *New Jersey Natural Gas Company v. St. Paul Fire & Marine Ins. Co., et al.*, OCN-L-859-95 (N.J. Super. Ct., Ocean County).

Defense of insurance carrier in coverage lawsuit concerning hydrogen sulfide release. *Edwards Oil Service, Inc. v. National Union, et al.*, No. 93-305190-CK (Mich. Cir. Court, Wayne County).

Selected Publications

"Courts Differ on Insurer's Right to Recoupment of Defense Costs," *New York Law Journal*, Nov. 2, 2010 (co-author)

"BP Oil Spill: An Insurance Perspective," *New York Law Journal*, Aug. 18, 2010 (co-author)

"Green Building and Insurance," *New York Law Journal*, June 2, 2010 (co-author)

"Existing SEC Requirements Serve as the Baseline for Climate Change Risk Disclosure," *ABA Environmental Disclosure Committee Newsletter*, April 2010

"Things to Know About Your D&O Insurance Before Investigation Begins," *New York Law Journal*, March 16, 2010 (co-author)

"SEC Issues Guidance on Climate Change-Related Disclosure by Public Companies," *SRZ Client Alert*, Feb. 8, 2010

"Continuing Influence of Repealed Statutory Pollution Exclusion," *New York Law Journal*, Jan. 5, 2010

"SEC Mandatory Climate Change Risk Disclosure is on the Horizon," *Securities Regulation & Law Report*, Nov. 16, 2009 (co-author)

"Scope of Prior Knowledge Exclusions in Professional Liability Policies," *New York Law Journal*, Nov. 9, 2009 (co-author)

"Allocation of Defense Costs Among Overlapping Insurance," *New York Law Journal*, Sept. 4, 2009 (co-author)

"Court Finds Laches Defense Bars Coverage for Asbestos Claimants," *New York Law Journal*, July 1, 2009 (co-author)

"Agency Opinion Seeks to Impose Duty to Defend on D&O Insurer," *New York Law Journal*, March 6, 2009 (co-author)

"New Late Notice Law Requires Insurers to Show Prejudice," *New York Law Journal*, Jan. 2, 2009 (co-author)

- "Narrow View of Prior Knowledge Exclusion Adopted," *New York Law Journal*, Nov. 3, 2008 (co-author)
- "Consequential Damages: Only if Foreseen at Time of Pact," *New York Law Journal*, May 8, 2008 (co-author)
- "World Trade Center Debris: Meaning of 'Contamination'," *New York Law Journal*, March 6, 2008 (co-author)
- "Choice of Law Can Be the Key to an Insurance Case," *New York Law Journal*, Jan. 4, 2008 (co-author)
- "Key Issues Directors and Officers Insurance Should Address," *New York Law Journal*, Nov. 5, 2007 (co-author)
- "Repudiation vs. Ordinary Breach: Insured's Policy Duties," *New York Law Journal*, July 2, 2007 (co-author)
- "Duty to Defend: Four Corners Rule, Duty to Look Beyond," *New York Law Journal*, May 9, 2007 (co-author)
- "Impact of reservation of Rights on Contesting Settlement," *New York Law Journal*, March 2, 2007 (co-author)
- "NFL Goes Back to Basics to Win 'Clarett' on Extra Point," *New York Law Journal*, Jan. 5, 2007 (co-author)
- "Late Notice: Insured's Implied Waiver of Privilege," *New York Law Journal*, Nov. 29, 2006 (co-author)
- "Contra Proferentum: Sophisticated Entities Negotiating," *New York Law Journal*, Aug. 30, 2006 (co-author)
- "Insurers, Tort Declaratory Judgment Actions, Bad Faith Liability," *New York Law Journal*, July 10, 2006 (co-author)
- "Identifying Late Notice as Defense in Specific Reservation of Rights," *New York Law Journal*, April 17, 2006 (co-author)
- "State and Federal Courts of Appeal Enforce Noncumulation Clauses," *New York Law Journal*, Feb. 28, 2006 (co-author)
- "Wind vs. Water: Insurance Coverage for Storm Damage," *New York Law Journal*, Nov. 29, 2005 (co-author)
- "Public Policy Ruled Not a Mandate for Extended Reporting Periods," *New York Law Journal*, Aug. 24, 2005 (co-author)
- "Misrepresentations in Insurance Application Can Void the Policy," *New York Law Journal*, June 30, 2005 (co-author)
- "Late Notice Law: Does the Insurer Need to Show Prejudice?," *New York Law Journal*, Feb. 22, 2005 (co-author)
- "Beware of Deemer Clauses Treating Related Claims as Single Claim," *New York Law Journal*, Nov. 8, 2004 (co-author)
- "Directors' and Officers' Insurance: Allocation of Defense Costs," *New York Law Journal*, Aug. 24, 2004 (co-author)
- "New Transactional and Government Investigation Insurance," *New York Law Journal*, July 1, 2004 (co-author)
- "Pollution Insurance in Business and Real Estate," *New York Law Journal*, April 21, 2004 (co-author)

“Late Notice Law: Does the Insurer Need to Show Prejudice?,” *New York Law Journal*, Feb. 20, 2004 (co-author)

“Proceeds of D&O Liability Insurance Property of Debtor’s Estate?,” *New York Law Journal*, Nov. 12, 2003 (co-author)

“The Terrorism Risk Insurance Act of 2002: Analysis and Review,” *New York Law Journal*, Sept. 8, 2003 (co-author)

“Limits of No-Assignment Clause: Assigning Rights in Asset Purchase,” *New York Law Journal*, July 9, 2003 (co-author)

“New York State Court of Appeals Reaffirms the Rule of State Legislative as Gatekeeper of Public Parklands,” *The New York State Environmental Lawyer*, Vol. 21, No. 4, Fall 2001

Selected Speaking Engagements

“SEC and Insurance Response to Climate Change,” NYSBA Annual Meeting, January 2011

Things to Know About Your D&O Insurance Before an SEC Investigation Begins Webinar, May 2010

Recent Developments in New York Corporate Insurance Law Webcast, December 2009

Bronx Talk Prime Time, Television Appearance, Discussion of Proposed Croton Water Filtration Plant Siting Issue, March 2001

Memberships

American Bar Association (Environmental Section)

New York State Bar Association (Environmental Section)

Bar Admissions

New York

Education

Fordham University School of Law, J.D., 1991

The George Washington University, B.A., 1987

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