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ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

# In-House Counsel Committee Newsletter

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## MESSAGE FROM THE CHAIR

**James M. Stuhltrager**
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Welcome to the Summer 2009 issue of the In-House Counsel Committee Newsletter. As the committee chair, I invite you to join us for an exciting year. To facilitate your involvement in the committee, please feel free to contact me or any of the following vice chairs:

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We hope you will begin your planning to attend the 17th Fall Section Meeting in Baltimore, Maryland. The dates are September 23-26, 2009. There are at least three sessions at the meeting that should be of interest to most in-house counsel. The first is a session on alternative strategies for remediating contaminated sediment sites that was proposed by the In-House Counsel Committee. The second is a session on hot topics in environmental disclosure with emphasis on recent proposals by the Financial Accounting Standards Board. Finally, Peter Wright—former chair of the In-House Counsel Committee—is coordinating a plenary session on environmental issues created or exacerbated by the recent financial meltdown.

If you would like to take an active role in the committee, please contact me or any of the vice chairs. Consider serving in a leadership role or contributing to our newsletters, teleconferences, or programs. We look forward to hearing from you!

## JOIN SECTION EFFORTS TO PLANT ONE MILLION TREES BY 2014

The Section of Environment, Energy, and Resources announced at the Keystone Conference its ambitious nationwide public service "One Million Trees Project." This project calls on ABA members to contribute to the goal of planting one million trees across the United States in the next five years. In addition to planting of trees, the Section also intends, through public outreach and partnering efforts, to raise the nation's awareness of the multiple benefits of trees. A key component of

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***Gary P. Gengel, Editor***

***In this issue:***





This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60654.

the project is the Section's partnerships with tree-planting organizations, including Alliance for Community Trees (ACT), The Arbor Day Foundation, Tree Link/Tree Bank, American Forest, and the Institute for Environmental Solutions. Members are encouraged to get involved in hands-on tree planting activities in their communities, but the partnerships will allow participation by simply purchasing a tree or trees through a dedicated Web page. To participate in the One Million Trees Project, please visit any of the information pages at our partners' Web sites linked from:http://www.abanet.org/environ/projects/million_trees/home.shtml.

## WHY CONTEST OSHA CITATIONS? AVOIDING LATER "REPEAT" CITATIONS IS ONE GOOD REASON

**Shell J. Bleiweiss**

In June 2001, this In-House Counsel Committee Newsletter featured my article entitled "Dealing with OSHA—The Most Common Mistakes Companies Make," which discussed how to handle an OSHA inspection at your facility. This article addresses the next step in the process: what to do if you receive citations from OSHA following an inspection.

Within six months following the initiation of an OSHA inspection, OSHA will decide whether to issue citations to your company. If OSHA citations are issued, they will usually be sent to your company by certified mail. You will have 15 business days from receipt of the citation(s) to formally contest the citation(s). **No extension of this time period is available for any reason.** Citations will have three components: the OSHA standard allegedly violated, the penalty, and the required abatement date. Any or all components can be contested. If not contested, the citations will become final on your company's record, just as if a judge had found your company "guilty" of the violations.

The penalty amounts that OSHA is allowed to seek are set by law, but vary widely. Occasionally we hear of

some Fortune 500 company being hit with a multimillion dollar penalty by OSHA. These penalties make the news and grab a lot of attention. From OSHA's perspective, there is great fright value, or as OSHA calls it, "deterrent value," in such news. In other words, if the regulated community sees General Motors, or Proctor & Gamble, or whomever, receiving a seven-figure penalty for non-compliance with OSHA rules, OSHA hopes that other companies will work harder to comply.

However, the vast majority of OSHA penalties are typically in the $1,000-$30,000 range. In these cases, the question invariably comes up: why spend the money to pay lawyers to contest the citations when it may cost as much or more in legal fees as the penalty? On this basis, many companies do not contest and simply pay OSHA. This economic reasoning may be short-sighted. Here's why.

OSHA calculates its penalty amounts based on several factors, one of which is severity of the violations. The most common severity levels of citations are called: "Other Than Serious," "Serious," and "Repeat." (There are also Willful and Criminal levels; they are used infrequently and are beyond the scope of this article.) "Other Than Serious" citations often carry no monetary penalty. In OSHA's view, however, if the violation has the potential to cause serious injury or death, the level cited is at least "Serious." By law, Serious citations carry a maximum of $7,000 per citation. So, for example, if a company is cited for three "Other Than Serious" violations and four "Serious" violations, the most they likely will be penalized is $28,000.

However, penalties for citations deemed by OSHA to be "Repeat" carry maximum penalties of ten times as much, or $70,000 each. So merely by being cited as Repeat instead of Serious, the $28,000 example above could become $280,000, or if all seven violations are at the repeat level, $490,000. As is readily apparent, the penalty costs go up significantly when OSHA can cite your company for Repeat violations.

An employer can be charged with a "Repeat" violation when that employer has been previously cited for a substantially similar condition, and the citation has become a final order of the Occupational Safety and Health Review Commission. As a matter of policy, OSHA looks to your company's record during the most recent three-year period in determining whether to cite at the Repeat level.

If your company did not contest a citation a couple of years ago because it was cheaper to pay OSHA than to hire an OSHA lawyer to contest the citation, and now you are being cited for violations of the same or similar OSHA standards (e.g.,you were cited for fall protection before and now you are being cited for fall protection again) OSHA could choose to cite you for "Repeat" rather than "Serious" violations. As discussed above, it gets expensive fast when you are cited at the "Repeat" level.

While there is no guarantee that by contesting citations you will win or settle them away, it is important to consider, with the input of a knowledgeable OSHA attorney, just what the prospects of prevailing are. If there is a reasonable chance to eliminate some or all of the citations, it is worth the effort, if for no other reason than to minimize your company's exposure to "Repeat" citations later. If nothing else, during the period of the pending matter, the citations will not be available to OSHA as the basis for a Repeat citation.

***Shell J. Bleiweiss*** *practices environmental and OSHA law from his own small firm after many years as a partner at very large law firms. He can be reached at the Law Offices of Shell J. Bleiweiss, (847) 487-7095 or at sbleiweiss@shell-bleiweiss.com. His Web site can be found at www.shell-bleiweiss.com.*

**IN-HOUSE COUNSEL COMMITTEE LIST SERVE**

***Communicate with your colleagues using the In-House Counsel Committee list serve at environ-inhsecounsel@mail.abanet.org***

## *THE YEAR IN REVIEW* AND *NATURAL RESOURCES & ENVIRONMENT*

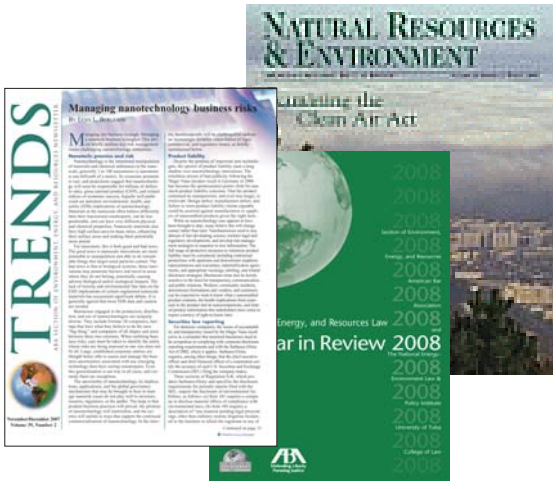
## AVAILABLE ONLINE AT *www.abanet.org/environ/*

Section members are able to view *The Year in Review 2008* and *Natural Resources & Environment* in the Section Members Only portion of the Section Web site.

The online version of *The Year in Review 2008* contains all chapters found in the paper copy, each in .pdf format. Past editions dating back to 2003 can be found in the archives page.

*NR&E* online contains all articles found in the paper copy, created in .pdf format. Past issues dating back to 2002 can be found in the archives page.

As a member of the Section, you have access to view both *The Year in Review 2008* and *NR&E* after logging onto the Web site with your ABA Member ID number and password.




## THE VALUE OF HISTORICAL RESEARCH TO IN-HOUSE COUNSEL

**Stephen G. Swisdak**

In-house counsel are often confronted with a need to locate and interpret critical records about their company's past in order to respond to legal and corporate crises, mitigate their company's risk exposure to future litigation, and leverage knowledge of their company's past to plan for its future. Beyond mere historical curiosity, there are myriad legal reasons for in-house counsel to research their company's past, including:

- **Litigation Matters**. Historical research is frequently required for successful defense of toxic torts, NRD cost allocation, historical land use, and CERCLA-related cases.

- **Real Estate Transactions**. Targeted historical research is a required component of environmental due diligence (all appropriate inquiries) for real estate transactions.

- **Government Contract and Insurance Searches**. Diligent research can uncover copies of historical federal contracts with specific companies, as well as historical insurance policies. Locating copies of historical contracts and contract correspondence can be particularly useful to in-house counsel serving current and former military and atomic energy contractors, as these records can contain valuable government indemnifications (under Public Law 85-804, 10 U.S.C. § 2354, or the Price-Andersen Act) against unusually hazardous risks.

In some cases, historical research is a prerequisite to a company doing business. For example, companies that want to do business with several American cities, including Chicago, Detroit, Los Angeles, Milwaukee, Oakland, Philadelphia, Richmond, and San Francisco, must disclose whether they or their predecessors historically profited from slavery. These slavery-era disclosure ordinances require companies with deep

and complex corporate histories (e.g., many financial institutions) to trace their corporate lineage, research their and their predecessors' historical ties to slavery, and disclose their findings in order to do business in these jurisdictions.

Corporate historical research, though, need not be solely reactive, that is, in response to outside legal drivers. Proactive historical research—researching a company's past before being compelled to do so by a legal or corporate mandate—can help in-house counsel advise senior management in a variety of business decisions, including their company's potential exposure to certain liabilities and the monetary level of their company's environmental reserve fund. Indeed, historical research can uncover a wealth of potentially valuable records about companies, including copies of historical contracts and insurance policies, photographs and maps depicting the historical uses of certain corporate facilities, records describing the federal government's wartime oversight of corporate facilities, and historical corporate records such as annual reports and board minutes that can provide key information about corporate governance matters. Of course, proactive historical research *may* unearth proverbial skeletons in a company's closet. However, I would argue that companies would prefer to learn about these skeletons themselves rather than from an outside party.

In researching their company's history, in-house counsel should first assess their company's current knowledge of its past. Are there existing histories of the company and/or its predecessors? Can the company trace its complete corporate lineage, including all predecessor companies? What products did the company (and its predecessors) historically manufacture and for whom did they manufacture them? Does the company maintain a corporate archives?

This latter question is especially significant—by definition, a corporate archives contains historically significant records on a company's past, which makes such facilities the logical place to begin researching a company's history. However, if (as is often the case) a company's "archives" is scattered across various boxes, file cabinets, and offices, or even stored at an off-site records management facility, in-house counsel should first insist that their company gain institutional control of their corporate records. Professional archivists and historians can aid companies in this process by assessing a company's record management needs, processing and cataloging existing corporate records, and developing record management policies for future use.

In-house counsel should also be sure to interview select former employees about the company's history and inquire if they maintain their own archives of corporate records (e.g., company newsletters, photograph collections, annual reports, etc.). In identifying former employees to interview, do not solely focus on members of senior management, as file clerks, engineers, inspectors, and other employees may also possess valuable historical knowledge about the company.

If their company's corporate "memory" (e.g., published histories, corporate archives, former employees, etc.) is sufficiently broad and deep, in-house counsel may be able to answer their historical research questions simply by reviewing available in-house records. Most companies, though, can benefit from conducting targeted historical research into public archives and records collections to learn more about their and their predecessors' history. What follows is a brief, thumbnail guide to some of the electronic and print sources and records repositories that professional historians typically target when conducting company-specific research.

- **Business Directories**. Researchers can locate basic corporate information in readily available electronic and print business directories such as *Moody's Manuals* (now *Mergent's*), which provides a basic overview of individual companies, and *Dun & Bradstreet*'s series of industry-specific business directories.

- **Corporate Filings**. Following the 1933 Truth in Securities Act, publicly traded companies doing business in the United States had to file certain reports, including corporate annual reports, with the U.S. Securities and Exchange

Commission (SEC). While recent corporate filings are available on-line through the SEC's EDGAR database, there is no single records repository for historical corporate filings. Most of these filings, though, can be located at the SEC library, the Library of Congress, the National Archives, or through the *ProQuest Historical Annual Reports* electronic database.

- **Newspapers**. The *ProQuest Historical Newspapers* electronic database offers searchable, full-text access to historical "newspapers of record," including the *New York Times*, *Wall Street Journal*, and *Washington Post*. Targeted searches of these newspapers can uncover articles on historical business transactions and profiles of select companies and industries.

- **Trade and Professional Literature**. Another key source for company-specific information is historical trade and professional literature, which can shed light on historical business, manufacturing, and marketing activities. Researchers can find indices to this sometimes-obscure literature through various print and electronic sources, such as the *Applied Science and Technology Index*, *Business Periodicals Index*, and *Industrial Arts Index*.

- **Maps**. In delving into a company's past, you should not neglect historical maps, which can be used to trace the physical growth of a company's industrial plants over time. As a first step, researchers should consult historical fire insurance maps (e.g., Sanborn maps), which are available at the Library of Congress and other major libraries and depict in minute detail the commercial, industrial, and residential sections of thousands of American cities. In addition to fire insurance maps, you should also consult city and county atlases, plat maps, and local topographical and engineering maps for information about a company's physical growth over time.

- **Photographs**. Researchers can also use historical aerial and street-level photographs to trace a company's physical growth over time. You can purchase historical aerial photographs from various vendors and can research aerial photographs at several records repositories, including the U.S. Geological Survey library, the National Archives, and via the Whittier College (California) Fairchild Aerial Photography Collection. You can locate copies of street-level photographs and postcards at state and local historical societies and libraries, and even for sale on Internet sites like eBay.

Such readily available records, though, are only the tip of the records iceberg, as diligent historical research can yield caches of company-specific records currently stored at any of hundreds of federal, state, and local records repositories scattered across the country. For example, while recently researching the complex history of an Indiana-based company founded in 1907, I discovered that a Wyoming archives maintains a collection of company records. As it turns out, a former company executive deposited his personal collection of corporate records at his "hometown" records repository in Wyoming. These records provided key information about the skein of companies formerly associated with the Indiana-based company, as well as information about corporate mergers and acquisitions.

As this example suggests, a basic challenge in researching a company's past is knowing both what to search for and where to find it. Here, professional historians can help, as they can provide valuable contextual knowledge about the history of particular companies and industries, the current location of potentially relevant records, and information on how to navigate idiosyncratic record-keeping systems at the federal, state, and local levels.

When researching the history of companies, in-house counsel should not overlook federal government records, as the federal government historically had an oversight role in many American industries, especially during wartime. Researchers can learn much useful information about specific companies, industries,

products, and manufacturing processes by targeting historical federal government records at the National Archives and federal libraries (e.g., the Library of Congress and federal agency libraries such as the Department of Interior library, Department of Labor library, SEC library, etc.).

All companies have a history—a history that can inform in-house counsel as they manage modern legal and corporate crises. Through diligent historical research, in-house counsel can learn this history and leverage this knowledge to advise senior management in a variety of business decisions. Especially in these troubled economic times, companies should invest in understanding their past, as this understanding can potentially help to mitigate current and future legal liabilities.

***Stephen G. Swisdak*** *is a senior historian and deputy director of the Litigation Research Division at History Associates Incorporated, a historical and archival research and consulting firm in Rockville, Maryland, that specializes in historical research and analysis in support of litigation. Mr. Swisdak can be contacted at sswisdak@history associates.com.*


## LIKE TO WRITE?

The In-House Counsel Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Gary P. Gengel at gary.gengel@lw.com.

## PLANNING FOR THE UNEXPECTED: NON-ROUTINE ENVIRONMENTAL AND SAFETY INVESTIGATIONS

**Jeri P. Wechsler**

Non-routine environmental and safety investigations which may occur in the course of a compliance or enforcement action should be planned for, even if they are omitted from crisis preparedness plans. A "non-routine" investigation includes surprise inspections, document requests (including subpoenas), formal inquiries, or facility investigations that are not conducted annually, periodically, or as a normal part of agency oversight. The consequences of a botched response to an unannounced agency inspection or execution of a search warrant in an environmental compliance investigation can be significant. For example, in 2008, the Environmental Protection Agency's (EPA's) enforcement actions required companies to invest approximately $11 billion to reduce pollution, achieve compliance, and implement environmentally beneficial projects. *See* http://www.epa.gov/compliance/resources/reports/endofyear/eoy2008/fy2008.html.

Many lawyers, including those within EPA and the Department of Justice (DOJ), anticipate a sharp uptick in enforcement activities. In June 2008, Stacey Mitchell, chief prosecutor for the Environmental Crimes Section at the Department of Justice stated that the agency would be more aggressive with criminal prosecutions. *See* http://www.abanet.org/environ/programs/teleconference/0708/CriminalEnforcement/home.shtml. In addition, EPA's budget for 2010 seeks the largest enforcement and compliance budget in history—$600 million. *See* http://yosemite.epa.gov/opa/admpress.nsf/0/5ECCF49836DB558D852575B40051D6A9.

No company, regardless of its compliance history or efforts to comply, is immune to non-compliance or investigation. However, few companies may be properly prepared to respond to aggressive enforcement activities. Environmental non-compliance and enforcement are not typically included in "crisis" management, and a recent survey of companies identified "environmental damage" as the cause of only

7 percent of legal crises and only 3 percent of total fines, settlements, and damage awards. *See Avoiding Legal Crisis*, Corporate Executive Board at 9-10 (2007).

Facility-specific, or "local" environmental noncompliance arising, for example, from a single manufacturing plant's air or water permit requirements or related reporting obligations, do not fit within the usual definition of "crisis" and do not even neatly fit into a typical definition of "significance" that would cause them to be included in a risk matrix and related preparedness plan. Since these "local" environmental noncompliance issues are not included in most crises preparedness plans, it is not surprising that such plans simply do not contemplate "non-routine" regulatory investigations (including raids and the execution of search warrants). *See id.* at 9.

However, the potential consequences of failing to prepare a plant's security gate operator, receptionist, or nighttime operations manger for a group of government agents with a search warrant should not be overlooked. Those employees, perhaps considered in crisis management plans for access control, may not be recognized as the company's first point of contact for local, state, or federal environmental enforcement agents. But any inappropriate responses by these employees could unknowingly create significant legal issues for the company.

Fortunately, two cheap and easy steps can be taken independently or incorporated into a crisis preparedness plan to prepare a first point of contact for an unexpected investigation or search warrant: (1) A simple step by step instruction sheet with relevant phone numbers for real time use ("checklist"); and (2) practice finding and using the checklist ("rehearsal"). A checklist and rehearsal are among the lowest cost, lowest drag elements in a crisis preparedness plan, with some of the highest return on investment in crisis preparedness. *Id.* at 15. These are also two of the three elements most correlated to reductions in damages, settlements, and fines resulting from a legal crisis. *Id.* at 16. However, less than 40 percent of companies include them. *Id.* at 8.

The checklist, a sample of which follows this article, should be a simple form that has been thought out in advance and reviewed within the company so that it accurately reflects the company's desired response to the situation.It should be customized for each relevant company location and kept current. It should include a short step by step list of instructions, addressed to the reader, that are easily understood and can be followed in a stressful situation. The key items that must be included are clear, simple instructions about (1) how to contact legal counsel, (2) how to respond to the investigators, (3) how to document the search, and (4) what is expected of the employees.

Although evidence tampering has always had clear criminal repercussions under 18 U.S.C. § 1512(c) (2009), the 2006 amendments to the Federal Rules of Civil Procedure also require preservation of relevant evidence, and specifically electronic data. *See* Fed. R. Civ. P. 26 (2009). Any checklist should include an evidence tampering warning and instruction to preserve electronic and physical evidence of any kind related to the subject matter of the investigation. A follow-up evidence preservation memorandum should be transmitted to everyone who could possibly have relevant information as soon as possible after the site investigation or search warrant is executed.

To confirm the clarity and effectiveness of the checklist instructions, "rehearsal" activities should include unanticipated practice. An example is a mock subpoena service with a follow up discussion of the subject employees' adherence to the plan and successful use of the checklist. A mock subpoena should look like a subpoena from the jurisdiction where the facility is located. It should request two to four specific items of information. For example, it could include a copy of the facility's air or water permit and most recent compliance certification. The condition and organization of documents requested should be observed—as well as the length of time it takes for the responder to locate them. The observer should also note any difficulties the responder has in following or understanding the checklist and contacting the persons listed. This exercise can take as little as an hour and yet yield valuable information, not only to the company, but to the first responder.

Practice in following the checklist in a mock situation provides a cheap (in terms of time and cost) and effective opportunity to gauge the effectiveness of the checklist and this element of crisis preparedness.

Now more than ever, non-routine environmental and safety investigations which may occur in the course of a compliance or enforcement scenario should be included in crisis management plans.

***Jeri P. Wechsler*** *is a senior corporate counsel for the J.M. Huber Corporation, practicing in environmental, litigation, and agency matters. She received her J.D. from South Texas College of Law and a LL.M. from the University of Houston. She can be reached at (713) 871-4435 or at j.wechsler@huber.com.*

## Sample Checklist

The following shows the types of information and example instructions that should be included in a checklist:

**Notification**

1. IMMEDIATELY NOTIFY: (NAME OF INSIDE OR OUTSIDE COUNSEL), counsel, at (PHONE NUMBER) (office), (PHONE NUMBER) (cell), (PHONE NUMBER) (home) and (PHONE NUMBER) (fax). Or E-Mail (EMAIL ADDRESS) OR: [INCLUDE BACK-UPS]).

**Evidence Preservation**

2. MAKE SURE THAT YOUR FILES ARE KEPT AS THEY HAVE BEEN. This means that your ordinary filing and document (and email) retention practices should be continued. Do not destroy documents or erase electronic information. If you have any questions, please ask (NAME OF INSIDE OR OUTSIDE COUNSEL), at (PHONE NUMBER) (office), (PHONE NUMBER) (cell), (PHONE NUMBER) (home) and (PHONE NUMBER) (fax). Or E-Mail (EMAIL ADDRESS)

**Agency Identification**

3. ASK AGENTS FOR IDENTIFICATION: Ask the authorities for cards or other ID so that our lawyers can later contact them if necessary.

**Search Type**

4. DETERMINE IF AGENTS HAVE SEARCH WARRANT .

**Informal Search**

5. IF THEY DO NOT HAVE A WARRANT, obtain their contact information, tell them our attorneys will contact them, and politely ask them to leave. If you are asked a question, you may ask to answer it later when Company lawyers are present. If you choose to answer, limit your answer to the specific question.

**Search Warrant**

6. IF THE AGENTS HAVE A WARRANT:

    a. TAKE TIME TO CALMLY AND CAREFULLY READ IT. Check to see if it correctly describes the Company's facility/ site and what is to be searched and/or taken. See if there is a time limit on when the search can happen.

    b. TELL THE OFFICERS THAT YOU PROTEST THE SEARCH IF THE INFORMATION ON THE WARRANT IS INCORRECT. However, even if the search is protested, the search may proceed. The agents may direct employees to leave the office.

    c. CORDIALLY AND RESPECTFULLY ASK IF THE AGENTS ARE WILLING TO WAIT TO BEGIN THEIR SEARCH OR DOCUMENT COLLECTION UNTIL THE COMPANY LAWYERS ARE PRESENT. If the agents decline, politely step aside and let them proceed.

Do not argue or disagree. Do not interfere with the agents.

d. DO NOT "CONSENT" OR AGREE TO A SEARCH—Cooperate, but do *not* consent to the search.

e. DO NOT SIGN AN ACKNOWLEDGMENT OF CONSENT.

f. CAREFULLY OBSERVE OR MONITOR THE SEARCH—If a search starts before Company lawyers arrive, please take careful note of what the agents do, the questions they ask, and the files they examine. To the extent possible, the government agents should be observed at all times and not left unattended while they are on site.

   1. OBSERVE THE SEARCH AS IT IS CONDUCTED;

   2.. DO NOT ENGAGE IN CASUAL CONVERSATION WITH THE AGENTS; and

   3. DO NOT JOKE OR TRY TO MAKE LIGHT OF THE SITUATION.

g. DO NOT REMOVE, DISCARD, ALTER OR HIDE ANY OBJECTS THAT MIGHT BE THE SUBJECT OF THE SEARCH WARRANT.

h. OBTAIN A RECEIPT FOR ANY FILES OR PROPERTY—Before the agents leave the premises with anything, they should provide a detailed inventory and a receipt of what was taken. *Do not sign a receipt for the inventory*. Try to determine what was taken by writing your own notes.

i. ASK THE AGENTS TO PERMIT YOU TO PHOTOCOPY ANY ORIGINAL DOCUMENTS TAKEN IN THE SEARCH—The authorities may not permit this, but if documents are essential to carrying on Company business, it is reasonable to ask that the documents be copied.

j. ESCORT THE AGENTS FROM THE FACILITY—Before discussing the search with other employees or Company attorneys, ensure that all the agents have left the premises.

k. MAKE CAREFUL NOTES—As soon as the authorities have left, please make careful notes of all the offices and other areas that have been searched. For each area, list the names of the people who work there, identify what was taken, and interview each person about what items were taken.

## SHOULD WE TELL OUR SHAREHOLDERS ABOUT CLIMATE CHANGE?

**Matthew H. Ahrens**

Climate change is an issue of public concern, and is increasingly likely to be highly regulated. Lawmakers, organizations and companies are fully engaged in a discussion of climate change at national, state, and international levels. On April 17, 2009, the U.S. Environmental Protection Agency issued a proposed finding that greenhouse gases, or GHGs, may endanger human health or welfare. 74 Fed. Reg. 18,886 (proposed Apr. 17, 2009) (to be codified at 40 C.F.R. Ch. 1). President Obama has placed a high priority on, and there are bills before Congress that would require, climate change regulation. In 2007, the U.S. Supreme Court found that the Clean Air Act authorized the regulation of GHG, and that GHGs "fit well within the Clean Air Act's capacious definition of air pollutant." *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 532 (2007).

Several states have enacted laws or entered regional initiatives to regulate GHG emissions, including the Regional Greenhouse Gas Initiative (RGGI) and the Western Climate Initiative. Although not party to the Kyoto Protocol (Kyoto), the United States is participating in discussions regarding what will replace Kyoto after expiration in 2012.

Companies throughout many industries could incur material compliance costs and liabilities, both direct and indirect, from future climate change regulation. However, until the timing and scope of regulation become known, it remains difficult for many companies to assess the timing and scope of the impact from future regulation. In spite of this uncertainty, public companies may need to inform investors of any probable future impact. While the Securities and Exchange Commission, or SEC, has not provided guidance or taken a public position regarding climate change disclosure, recent investor petitions to the SEC, actions by the State of New York, and bills before Congress provide some guidance. In-house counsel at public companies need to assess whether, when, and how to disclose climate change risks.

## Current Disclosure Requirements

Investors may want to know the likely extent of the impact from climate change matters when making their investment decisions, especially in industries likely to face material risks—both physical risks due to climate change and financial risks and opportunities from regulation. As these risks increase and become more imminent, investor interest increases and climate risk becomes increasingly important when determining share value. Nonetheless, climate change disclosure has been inconsistent. Disclosure of climate change risks and liabilities by companies within the same industry can range from non-disclosure to a passing reference to several pages of discussion.

Federal securities laws require public companies to provide investors with access to material information necessary for informed decision-making. This can require disclosure of information about a company's financial condition and business practices in a company's annual 10-K and quarterly 10-Q filings with the SEC.

Regulation S-K contains three items relevant to climate change disclosure. Item 101 requires disclosure of the material effects on a company from compliance with enacted or adopted regulations. Item 103 requires disclosure of material pending legal proceedings, including proceedings "known to be contemplated by government entities." Items 101 and 103 apply most directly to companies subject to existing climate change regulations (such as RGGI or Kyoto) or to pending climate change litigation.

Item 303 is broader, and can require disclosure of certain "known trends, events and uncertainties" related to climate change, unless not reasonably likely to occur or, if they occur, not reasonably likely to have a material effect on the company. The physical impact from climate change itself and the financial impact from future climate change regulations can both arguably be interpreted as uncertainties, and the likelihood of future climate change regulation as a trend.

As a result, when determining whether to disclose, in-house counsel will need to focus on whether this impact will be material. Of course, the impact of climate change will vary widely from industry to industry, and from company to company within each industry. SEC Rule 12b-2 defines "material" as information "to which there is a substantial likelihood that a reasonable investor would attach importance in deciding to buy or sell the securities registered." As interest by reasonable investors in the financial, as opposed to environmental, consequences from climate change increases, then climate change matters become more material.

## Requests for Action by the SEC

A coalition of twenty-two environmental advocates, institutional investors, and states filed a Petition for Interpretative Guidance on Climate Change Risk Disclosure with the SEC on Sept. 18, 2007 and supplemented the petition on June 12, 2008. *See* www.incr.com/Document.Doc?id=187 and www.ceres.org/Document.Doc?id=358. The petition describes alleged climate change-related risks to various public companies (including risks from future regulation of GHG emissions and the impact of climate change itself), and states that the petitioners believe

that disclosure of these risks is currently required. The petition requests prompt issuance of interpretive guidance by the SEC to clarify that material climate change risks "must be included in corporate disclosures under existing law." Petitioners also had requested action related to climate change disclosure, including in letters sent to the SEC on Oct. 22, 2008 and June 14, 2006 and to President Bush on March 19, 2007. *See* www.ceres.org/Document.Doc ?id=376, www.incr.com//Document.Doc?id=48, and http://216.235.201.250//Document.Doc?id=142. In addition, on Oct. 31, 2007, a Senate subcommittee held a hearing on the adequacy of the SEC's climate change disclosure requirements, and, on Dec. 6, 2007, Sens. Dodd and Reed wrote a letter urging the SEC to issue disclosure guidance. *See* http://dodd.senate.gov/ multimedia/2007/120607_CoxLetter.pdf. Neither the SEC nor President Bush publicly responded to these petitions or letters.

## Bills Seeking Climate Change Disclosure

Several bills were introduced, but not enacted, in the 110th Congress (including the Global Warming Pollution Reduction Act (S.309) and the Global Warming Reduction Act of 2007 (S. 485)) that, as one of many means to regulate climate change risks, would require the SEC to issue climate change disclosure rules. These bills would have required public companies to disclose the "financial exposure" they face as a result of their GHG emissions as well as the "potential economic impacts of global warming" on the companies themselves. Similar disclosure requirements could arise in future federal climate change bills.

In California, Senate Bill 1550, "Corporations: climate risk disclosure," would require the state controller to develop a voluntary climate change disclosure standard for listed companies doing business in California. The voluntary standard would seek disclosure similar to what might be required under federal law (i.e., the physical impact of climate change and the potential impact of governmental regulation), but would also seek disclosure of other matters unlikely to be required under federal law (such as whether a link exists between executive compensation and achievement of corporate climate objectives). The bill would also require the use of "globally accepted climate change disclosure standards."

## Settlements with the State of New York

On Sept. 14, 2007, the Office of the Attorney General for the State of New York (New York AG) issued subpoenas to five energy companies (AES Corp., Dominion Resources, Dynegy Inc., Xcel Energy Inc., and Peabody Energy Corp.) to investigate the adequacy of disclosure of climate change risks by public energy companies. *See* www.oag.state.ny.us/ media_center/2007/sep/sep17a_07.html. The New York AG did not file related complaints. All five companies had disclosed certain climate change matters in previous SEC filings.

The letters accompanying four of the subpoenas described a concern about inadequate disclosure of "increased financial, regulatory and litigation risks." The letter accompanying the fifth subpoena described a concern about inadequate disclosure of "financial risks" related to current GHG emissions. Each also stated that a company "cannot excuse its failure to provide disclosure and analysis by claiming there is insufficient information concerning known climate change trends and uncertainties."

The New York AG entered into settlements with Xcel in August 2008 and with Dynegy in October 2008. *See* www.oag.state.ny.us/media_center/2008/aug/ xcel_aod.pdf and www.oag.state.ny.us/media_center/ 2008/oct/dynegy_aod.pdf. Both settlements require increased disclosure in future SEC filings. The settling companies agreed to include an analysis and disclosure in their annual SEC filings of material financial risks from (1) existing (and future) GHG laws and regulations, (2) climate change litigation, (3) the physical impacts associated with climate change, and (4) climate change financial risks and emission management. The first two requirements are similar to Items 101 and 103 respectively, although the settlements expressly require disclosures regarding expected trends in climate change laws and judicial decisions that could impact the company. The second two requirements are similar to Item 303, but require comprehensive disclosure.

On May 4, 2009, the New York AG sent a letter to Chevron Corporation alleging material misstatements in Chevron's disclosure of environmental litigation. Although not related to climate change matters, this is an indication that there may be a higher risk of future claims from the New York AG.

## Conclusion

As the likelihood of climate change regulation increases, the need for public companies to disclose climate change risks and liabilities increases. However, unless the SEC issues climate change disclosure guidance, determining whether any specific industry or company needs to disclose may be decided on a case by case basis. Even if disclosure is not currently required and was not required for some time, many public companies should consider disclosure due to the rising level of investor interest in climate change matters and of scrutiny by large shareholders, state governmental agencies, and Congress.

Unlike many energy companies or companies with international operations, most companies have not yet incurred, or are not yet planning for future, material climate change costs or liabilities. For some, until federal climate change regulation is implemented, climate change risks arguably remain too speculative to require meaningful disclosure. Until the SEC issues guidance or climate change disclosure regulations, the recent Xcel and Dynegy settlements can serve as an example of how to proceed. The greater the likelihood that any of the risks identified in these settlements materially affect a company, the greater the need for disclosure.

When disclosing, a company needs to consider both a qualitative and, if sufficient information exists, a quantitative analysis, as well as the likelihood that investors would be interested from a financial, and not just an environmental, perspective. As the timing and scope of future federal regulation becomes clearer, companies will be able to more accurately assess, and, as a result, disclose, climate change risks and liabilities. Nonetheless, given the high level of investor interest, disclosure may be prudent by companies most likely to be directly or indirectly impacted.

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