Climate Change and the Environment – Legal Service Providers

The Challenges And Opportunities Of Climate Change And Sustainability Part I – Legal Obligations And The Potential For Competitive Advantage

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This is the first part of a two-part series addressing Climate Change and Sustainability. This month, in Part I, the authors address two issues: (1) determining legal obligations associated with Climate Change (i.e., what does the law require); and (2) evaluating the possibility of competitive advantage associated with a corporate effort to address Climate Change and Sustainability. In Part II, to be published next month, the authors will discuss the tools that can be implemented to embark on such a corporate program.

Introduction

Corporations face business challenges, ranging in severity from a simple client concern to a significant market collapse. Some corporations merely address these challenges as problems to be solved; innovative and forward-looking corporations embrace these challenges as opportunities for differentiation and growth. Of the many market impacts to the world economy in the 21st century, few pose as much challenge, and simultaneously offer as much opportunity, as does the world wide concern regarding global Climate Change. Regardless of opinion concerning the validity of the science, it is beyond question that the world economy is shifting to accommodate this challenge. Thus, there is significant opportunity available to those corporations that embrace it.

So … *What does it mean to "embrace" this challenge*? That depends upon the corporation, its business locations, and the business sector(s) in which it operates. In order to develop an answer to this question, a business must make a reasoned corporate assessment to determine: (1) What MUST be done? (2) Is there really a competitive advantage to doing anything more than adopt standard current industry practices as they evolve and that which is expressly required by law? (3) What are the tools and methodologies available for first movers and early adopters?

Legal Obligations – What MUST Be Done?

A good lawyer, well versed in environmental law, can tell you what MUST be done by your company. It will require a little work. A comprehensive review of the myriad U.S. state and regional initiatives (not to mention worldwide initiatives that can impact your overseas operations) addressing Climate Change and green house gas (GHG) emissions is beyond the scope of this article. Given the infancy of the laws in the United States, such a summary would be both too general and premature. Moreover, such a summary would be dated before publication, as the scope and reach of such initiatives are changing at such a rapid pace. The best word to describe the state of U.S. law addressing global Climate Change and GHG emissions would be – dynamic.

Of course, there are federal laws impacting Climate Change issues that were established for purposes other than Climate Change mitigation and GHG emission measurement/reduction. (*See generally*, Global Climate Change and U.S. Law, Michael Gerrard, Ed., American Bar Association Section of Environment, Energy and Resources Book Publication Committee 2006-2007). Moreover, in the absence of a comprehensive federal program, states and regions are driving various Climate Change initiatives in the United States. Many believe that these state and regional initiatives will form the basis of the ultimate federal scheme. Therefore, keeping current on state and regional programs, whether or not such programs apply directly to a business or business sector, may be a good indicator of what may be to come. (*See e.g.*, *Federal Climate Change Legislation as If the States Matter*, McKinstry, Dernach and Peterson, Natural Resources & Environmental, Volume 22, Number 3, Winter 2008, Widener Law School Legal Studies Research Paper Series no. 08-04). Finally, corporations competing in the international market also will have to review that body of law, which, depending upon the market, may be codified and operational.

Why Do IT ? – Are There Competitive Benefits To Be Gained?

A casual examination of corporate sustainability and Climate Change initiatives suggests two broad and obvious business drivers suggesting the potential for opportunity and profit. The first clear, and easily measured, benefit of a corporate commitment to sustainability and Climate Change programs is the potential for increased efficiency. Efficiency for business is the ultimate end goal (efficiency of production, operations, materials use, and energy use). The second clear business driver involves the ability to profit from GHG emissions trading or market mechanisms (a discussion of which is not addressed in this paper). However, there are other, less obvious business drivers as well:

I. Good Business

Just ask the General Electric Company (GE) whether there are competitive benefits to a proactive approach to environmental issues and specifically, to Climate Change. Investing in everything from wind farm technology to Earth Rewards MasterCards, GE embarked on a significant paradigm shift after the 2001 retirement of former CEO, Jack Welch.

> [GE]'s seizing a blossoming opportunity: Green is where the green is. Eyeing the hot market for eco-friendly technologies like wind turbines, [GE CEO] Immelt says he aims to double revenues in green products from $10 billion to $20 billion by 2010.

(*See, GE's Green Awakening*, Time Magazine, July 7, 2005). GE rightfully realized that there was profit and market differentiation to be enjoyed by adopting a proactive environmental business model. Of course, GE is not alone. Prologis, a Denver-based warehouse and storage facility REIT, has established a green building ethos within their development organization that has become SOP (*See*, "A global player – Denver-based ProLogis is expanding worldwide, building green," Denver Post, February 17, 2008.)

In fact, a number of multinational corporations have embarked on a green marketing approach. It has turned out to be a form of enlightened self interest. Similarly, some of the world's largest U.S.-based corporations have formed partnerships with environmental groups in an attempt to structure and positively influence federal Climate Change legislation. One diverse group includes Alcoa, American International Group (AIG), Boston Scientific, BP America, Caterpillar Inc., Duke Energy, DuPont, General Electric, Lehman Brothers, and PG&E Corporation, calling themselves the U.S. Climate Action Partnership (USCAP). The USCAP believe that " … a regulated economy-wide, market-driven approach to climate protection would **encourage innovation, enhance America's energy security, foster economic growth**, improve our balance of trade and provide critically needed U.S. leadership on this vital global challenge." (*See generally*, www.us-cap.org).

II. The Markets

The issue of Climate Change and environmental sustainability do now affect, and will increasingly impact, basic corporate and project finance and therefore, project development. Corporate and project finance are increasingly tied to appropriate environmental and GHG analysis and reporting. As the basis of stock market investment is the principle of complete disclosure of verified/audited information on which investors may rely for a fair and accurate description of the financial state of the company, investor pressure for information on companies' efforts to achieve sustainability and improve their environmental performance is growing. For example, a group of 22 state pension funds, environmental groups and other investors (including the California Public Employees' Retirement Fund, F&C Asset Management plc, Florida Chief Financial Officer and New York City Comptroller) sent a petition to the Securities and Exchange Commission (SEC) asking for clarification on the disclosure and accounting rules for "climate risk" in public companies' earnings and operations statements as well as scrutiny by the SEC Division of Corporate Finance as to the adequacy of the registrants' climate disclosures. (*See*, *A Convenient Opportunity*, Donna Block, The Deal Newsweekly, Oct. 19, 2007.)

Similarly, a number of coalitions are organizing to collect and publicize data about corporations' efforts to address environmental issues and reduce GHG emissions, including:

- Ceres is a national network of investment funds and public interest groups which issues annual reports describing and scoring the performance of 100 companies in addressing climate change. The Ceres coalition of investor groups, environmental organizations and investment funds engages directly with companies on environmental and social issues. Ceres companies seek to attain long-term business value and to improve management quality through stakeholder engagement, public disclosure and performance improvements. (*See generally*, www.ceres.org)
- The Global Reporting Initiative has devised a set of principles for corporations to use in standardizing environmental or "sustainability" reporting. The Global Reporting Initiative (GRI) has pioneered the development of the world's most widely used sustainability reporting framework and is committed to its continuous improvement and application worldwide. This framework sets out the principles and indicators that organizations can use to measure and report their economic, environmental, and social performance (the so called "Triple-Bottom-Line"). (*See generally*, www.globalreporting.org)
- The Carbon Disclosure Project (CDP) is an independent not-for-profit organization aiming to create a lasting relationship between shareholders and corporations regarding the implications for shareholder value and commercial operations presented by climate change. Its goal is to facilitate a dialogue, supported by quality information, from which a rational response to climate change will emerge. (*See generally*, www.cdproject.net)

Such enhanced reporting can result in a number of business impacts, for example:

1. Corporate and project finance will be affected as banks respond to the threat of Climate Change and Climate Change regulation by requiring comprehensive reporting and analysis of GHG impacts.
2. Permitting decisions will be impacted. (*See* discussion of rejection by the Florida Public Service Commission of a 960-watt coal-fired power plant based upon global warming impacts, *Changing Course Toward an Energy-Efficient Future*, David Hodas, Trends Newsletter of the Section of Environment, Energy and Resources, Volume 39, Number 2, November/December 2007.)
3. Investor decisions will be influenced. For example, mutual funds that specialize in socially responsible investing have increased from $12 billion to $178 billion since 1995. (*See, Beyond the Green Corporation*, Business Week, Jan. 29, 2007).

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