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Practices

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Distressed Real Estate

Real Estate Investment
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Industries

Food, Agriculture and
Biofuels

New Energy, Clean
Technology and Climate

Retail

Education

University of Iowa

College of Law

J.D., with distinction, Law
Review (associate editor)
(1994)

Amherst College

Experience

Andrea Carruthers joined the Faegre & Benson real estate group in 1998. She has been involved in all aspects of transactional real estate practice, including sale and acquisition, investment, development, finance, leasing for office, retail, industrial, multifamily and hotel assets.

Recent highlights of Andrea's experience include:

- Representation of General Mills on real estate transactions in the United States and abroad, ranging from build-to-suit distribution center leases to disposition of excess property to regional headquarters office leases.
- Representing the owner of the Fifty South Sixth building in Minneapolis in the simultaneous early termination of its lease with Fallon Group and re-leasing of Fallon's space to Deloitte & Touche—the largest deal of its kind in the Twin Cities market in several years. The *Minneapolis-St. Paul Business Journal* called it "one of the most significant and complicated real estate deals this year."
- Borrower representation in loan workouts.
- Representation of building owners and tenants in "green" leases, including several where LEED accreditation was sought.

Andrea's practice also includes:

- Representation of Piper Jaffray Companies, Life Time Fitness, HNI Corporation, Ellerbe Becket, Hutchinson Technology and

- **Media Mentions**

- Quoted in "Smarter to lease? Buy?"

- Minnesota Real Estate Journal* (April 2008)

- Featured in "Mover: Andrea Carruthers"

- St. Paul Pioneer Press* (March 9, 2008)

- **Civic Associations**

- CaringBridge, board secretary

Preparing for Climate Change Regulation

7 Questions Companies Need to Consider

Andrea Carruthers, Jon Dettmann, Ben Fernandez, Dan Herber & Jim Spaanstra, Faegre & Benson LLP

Few areas of the law are more daunting, fluid and increasingly complex than the emerging field of climate change law. At the federal level, the climate change bill that passed the House totals 1,428 pages in length and calls for literally dozens of rule-makings by federal agencies.¹ And the several bills circulating in the Senate are on a similar path.²

At the same time, the U.S. Environmental Protection Agency (EPA) is moving towards its own form of regulation, having finalized a mandatory greenhouse gas (GHG) emissions reporting rule and endeavoring to directly regulate these emissions under the Clean Air Act.³ Courts too have jumped into the fray, with two federal appellate decisions allowing plaintiffs to pursue nuisance claims against large GHG emitters.⁴

In sum, all three branches of federal government are moving toward their own forms of GHG regulation. Even beyond that, there is gathering momentum for regulation at local, state, regional, and international levels. In fact, one regional cap and trade system is already up and running in the northeastern states, and two others in the Midwest and West are well along in the planning stages.⁵

These numerous and multi-faceted solutions are making for one of the most dynamic and uncertain regulatory environments in decades. While the end result is anything but clear, it is nevertheless reasonable to conclude that—absent a significant shift in policy or a scientific breakthrough—at least *some* form of GHG regulation is likely. If solutions are tied to mitigating the impacts of climate change and transitioning toward energy independence, the resulting regulation will likely be significant in scope and could transform the U.S. economy.

Attempting to anticipate and fully prepare for the onslaught of regulation that may be coming—along with the host of legal issues such regulation will bring—is difficult if not impossible for most U.S. companies. Yet there are several fundamental questions that companies need to be considering now, so that they are prepared for what comes next.

1. Do You Understand Your Direct and Indirect Emissions?

Increasingly, companies are taking steps to determine their "carbon footprint," and many are participating in voluntary GHG reporting registries such as the Carbon Disclosure Project (CDP). In fact, a recent PricewaterhouseCoopers report found that

Climate change regulation in the form of federal legislation—as opposed to direct regulation by the EPA or judicial relief—is likely to consist of a package of carrots and sticks: sticks to require lower emissions, and carrots to mitigate or reward the costs of doing so. Current legislative proposals contain several opportunities companies should be considering now.

Federal Funding May Be Available. Based on EPA estimates of the value of allowances, the Waxman-Markey bill invests roughly \$190 billion through 2025 in clean energy and energy efficiency programs, including \$90 billion in state programs to promote renewable energy and energy efficiency; \$60 billion in carbon capture and sequestration technologies; \$20 billion in electric and other advanced technology vehicles; and \$20 billion in research and development into clean energy and energy efficiency.¹² The Senate bill is also expected to contain significant funding opportunities, although may focus on different sectors, including nuclear power and natural gas.¹³ The federal stimulus package passed in February 2009 likewise includes billions of dollars in funding for clean technology and energy efficiency projects.¹⁴

Companies May Have Opportunities for Early Action and Offset Programs. The federal cap and trade programs proposed in the congressional bills contain several measures intended to reduce compliance costs. In particular, companies may be able to obtain credit toward future compliance obligations for actions they are taking now to reduce their emissions.¹⁵ In addition, both the House and Senate bills contain huge programs for "offsets"—reductions that occur outside of the cap that can count as an emissions allowance within the cap. These offset programs could account for up to 2 billion mt CO₂e/yr, approximating 35 percent of the entire program.¹⁶

While requirements for these programs can be strict, companies of many different types, whether they are covered by regulation or not, should be positioned to take advantage of them.

3. Are You Ready to Disclose Your Climate Risk?

Until recently, corporate disclosure of GHG emissions and business risks associated with climate change has been perceived as essentially voluntary in the United States. Any such disclosures, if provided, are typically made in annual reports, corporate social responsibility reports, or through participation in voluntary registries such as CDP.

In 2009, however, regulators have begun to shift toward mandatory disclosure. In addition to the EPA's final rule on reporting gas emissions, the SEC reversed a longstanding policy that prevented investors from asking companies about climate change risks. In addition, institutional investors publicly pressured the SEC to compel companies to disclose climate risk in their securities filings.¹⁷ In response to these developments, the agency has signaled it is considering new rules which would require greater carbon disclosure in corporate filings.¹⁸

"substantiation"—in other words, a reasonable basis for the claim. In the environmental area, that often means scientific or technical support.

- *Be specific about the subject of the claim.* Claims should specify whether they relate to a product, its packaging, or both. If the claims are limited to components of product or its packaging, that should be clearly stated. Qualifying statements must be clear, prominent and understandable.
- *Don't make misleading claims.* The FTC evaluates claims from the perspective of the average consumer, which means that claims that are technically true may still be misleading — and illegal. A claim that recycled content in a product's packaging has doubled might be true, but if the recycled content has merely gone from 1 percent to 2 percent, the FTC would likely consider that claim misleading.
- *Know that certification is not a panacea.* Advertisers using certification logos or green seals of approval are obligated to ensure that the claims made through the certification are substantiated. If a seal suggests that it was awarded by an independent organization, then the certifying party must be independent from the advertiser, with professional experience in the subject matter.
- *Take extra care with key words.* The *Green Guide* includes specific guidance on many commonly-used green marketing terms, including "biodegradable," "compostable," "recyclable" and many others. Consult the guide before using these key words.
- *Avoid ambiguous comparisons.* Ambiguity is a common pitfall of many claims touting reduction in a product's weight, volume or toxicity (for example, "50 percent less plastic" on a package of baby wipes). To avoid being misleading, the claim must state the basis on which the comparison is being made.

5. Are You Properly Insured?

The physical impacts of climate change may implicate property, commercial general liability (CGL), and director and officer (D&O) policies. These policies should be analyzed carefully to determine if coverage is adequate.

Type of Injury, Occurrence Triggers Will Influence CGL Coverage Determinations. CGL policy disputes include the scope of the "occurrence" and coverage triggers, fortuity versus known loss of the harm alleged, scope of the pollution exclusion (for example, whether CO₂ is a "pollutant" under the policy language), and the application of the loss-in-progress (or pre-existing damage) exclusion. Coverage may vary depending on whether the injury is sudden (for example, caused by a storm) versus gradual (for example, caused by subsidence, invasive species or pest increase, long-term drought, or increased wild fire susceptibility).

Each state law's occurrence "trigger" (i.e., exposure, manifestation, continuous or multiple, or injury-in-fact) will be critical in determining under which policy or policies coverage may lie.

D&O Policy Exclusions Will Play Key Role in Disclosure Disputes. In disputes over climate-change-risk disclosures, D&O policy pollution exclusions will play a key role. Where an insured actively conceals known polluting activity, the pollution exclusion

Take Steps to Avoid Infringement. In addition to patents, companies should also think about trademarks, many of which currently employ some variation of the words "green," "clean," "carbon," and "eco." Businesses should ensure that their trademarks are distinctive enough to avoid consumer confusion, and different enough from existing marks in similar markets to avoid an infringement suit. Because intellectual property can be a very powerful tool, companies should take reasonable steps to investigate and avoid infringement, and to include indemnification or similar requirements in their agreements with third-party technology providers.

7. Are Your Transactions Properly Taking Climate Change Into Account?

As the assessment and management of climate risk becomes essential for companies, it only makes sense to extend that analysis to transactional due diligence.

In doing so, obtaining emissions measurements may be the easy part. Assessing the risks may be more complicated, particularly since any analysis will need to be done within contractually specified deadlines—and participation of the other party to the transaction may be required.

In evaluating any new transaction, companies should keep in mind the following:

- Allow enough time to conduct proper due diligence
- Evaluate the assets with the same—or greater—rigor as if you already owned them
- Try to get the other party to the transaction to agree to cooperate, particularly with the carbon-related diligence activities

Risk Types Include Regulatory Issues, Zoning—and Climate Change Itself. The first type of risk to evaluate is climate change itself: does the transaction involve facilities located in areas vulnerable to extreme weather events, or does it involve a business that is dependent on a supply of materials that could be interrupted by climate events?

A second concern is regulatory risk. The law in this area is in flux now, and it is difficult to predict the eventual outcome—making it all but impossible for someone considering buying a company or real estate to quantify the economic and operational impacts of a carbon-constrained regime. This uncertainty will likely be addressed in the economic elements of the deal, such as price, earn-out terms, and the like.

Another cause for concern is restrictions on what can be done with facilities in the future. Zoning review is routine in transactions involving physical assets, but what's different now is the pace of change of state and local laws. Some laws might impose emissions reductions on the target facility, some might mandate implementation of green elements into new construction, and some may instead provide incentives.

⁵ See Regional Greenhouse Gas Initiative Homepage, <http://www.rggi.org>; see also Bloomberg Law Reports - Sustainable Energy, *Midwestern GHG Reduction Accord Advisory Group Issues Draft Recommendations to Establish Regional Cap-and-Trade System* (Aug. 2009); Bloomberg Law Reports - Sustainable Energy, *Western Climate Initiative Releases Final Design Recommendations for Regional GHG Cap-and-Trade Scheme* (Oct. 2008).

⁶ PricewaterhouseCoopers, *Carbon Disclosure Project 2009: S&P 500 Report 7* (2009) (report prepared for Carbon Disclosure Project).

⁷ *Id.*

⁸ See H.R. 2454, *supra* note 1, at § 312 (adding 700(13)); S. 1733, *supra* note 2, at § 102 (adding § 700(13)).

⁹ See H.R. 2454, *supra* note 1, at § 311 (adding § 713); S. 1733, *supra* note 2, at § 101 (adding § 713).

¹⁰ See EPA Mandatory Reporting Rule, *supra* note 3, at 56,266-67.

¹¹ Climate Change Act 2008, 2009 No. 1258 (U.K. 2009).

¹² See H.R. 2454, *supra* note 1, at §§ 122-24, 131, 171-72, 321 (adding §§ 782(f)-(i), 786). See also House Committee on Energy and Commerce, Rule Summary, *The American Clean Energy and Security Act (H.R. 2454)* (June 23, 2009), http://energycommerce.house.gov/Press_111/20090623/hr2454_rulesummary.pdf.

¹³ See generally S. 1733, *supra* note 2, at Title I.

¹⁴ American Recovery and Reinvestment Act of 2009, Pub.L. No. 111-5, 123 Stat. 115, 138-40 (2009).

¹⁵ H.R. 2454, *supra* note 1, at § 321 (adding § 795); S. 1733, *supra* note 2, at § 111 (adding § 782).

¹⁶ H.R. 2454, *supra* note 1, at § 311 (adding § 722(d)); S. 1733, *supra* note 2, at § 101 (adding § 722(d)).

¹⁷ See SEC Petition for Rulemaking, *Request for Interpretive Guidance on Climate Risk Disclosure*, File No. 4-547 (Sept. 18, 2007); California Public Employees' Retirement System *et al.*, Letter to SEC Acting Secretary Florence E. Harmon (June 12, 2008); *Supplemental Petition for Interpretive Guidance on Climate Risk Disclosure* (Nov. 23, 2009).

¹⁸ Speech by SEC Commissioner Elisse B. Walter, *SEC Rulemaking—'Advancing the Law' to Protect Investors* (48th Annual Corporate Counsel Institute, Oct. 2, 2009).

¹⁹ Kevin L. Doran, Elias L. Quinn and Martha G. Roberts, *Reclaiming Transparency in a Changing Climate: Trends in Climate Risk Disclosure by the S&P 500 from 1995 to Present* (2009), <http://www.ceres.org/Document.Doc?id=474>.

²⁰ World Resources Institute, Greenhouse Gas Protocol Initiative, *Standards*, <http://www.ghgprotocol.org/standards/publications>.

²¹ Env'tl. Protection Agency, *Climate Leaders: Reporting*, <http://www.epa.gov/climateleaders/reporting/index.html> (last updated Nov. 12, 2009).

²² Int'l Org. for Standardization Homepage, <http://www.iso.org>.

²³ Climate Disclosure Stds. Bd. Homepage, <http://www.cdsb-global.org/index.php?page=reporting-framework>.

²⁴ Global Framework for Climate Risk Disclosure (2006), www.unepfi.org/fileadmin/documents/global_framework.pdf.

²⁵ 16 C.F.R. § 260 (2009)

²⁶ See, e.g., European Patent Convention, art. 54, available at <http://www.epo.org/patents/law/legal-texts/html/epc/1973/e/ar54.html> (last updated Feb. 1, 2007) (requiring absolute novelty for European patent applications).

²⁷ See 35 U.S.C. § 102(b).

²⁸ OpenEnergyInfo Homepage, <http://www.openei.org> (last visited Dec. 18, 2009).

²⁹ Press Release, U.S. Patent & Trademark Office, *The U.S. Commerce Department's Patent and Trademark Office (USPTO) Will Pilot a Program to Accelerate the Examination of Certain Green Technology Patent Applications*, ¶ 6 (Dec. 7, 2009), available at http://www.uspto.gov/news/pr/2009/09_33.jsp.

³⁰ 70 Fed. Reg. 64,666 (Dec. 8, 2009).