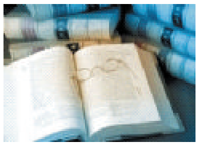
The Climate Report
Summer 2018

JONES DAY

THE CLIMATE REPORT
Summer 2018

View PDF | Related Information

Climate Change Regulatory Issues & Updates



UK Government Adopts Zero Emission Road Transport Strategy

On July 9, 2018, the UK Government published "The Road to Zero," a strategy to implement measures to transition the United Kingdom toward zero-emission road transport. The Secretary of State for Transport has reaffirmed the long-term ambition to put the United Kingdom at the forefront of the design and manufacturing of zero-emission vehicles. The Government expects the transition to be industry and consumer led, supported by Government measures. A progress review will take place by 2025.
[Details]

European Commission Consults Stakeholders on the Regulatory Fitness of the Ozone Regulation

The European Commission is currently organizing a Public Consultation on the evaluation of Regulation (EC) No 1005/2009 on substances that deplete the ozone layer. This follows on and is part of the July 2017 launch of the Commission Regulatory Fitness and Performance Programme evaluation of the Ozone Regulation.
[Details]

Climate Change Litigation Issues & Updates

Industry Wins in Three Climate Change Tort Suits, but Other Governmental Entities Continue Filing Suits

Two federal courts, one in California (involving two suits) and the other in New York, recently sided with energy industry defendants by agreeing with them that the climate change suits filed against them by governmental plaintiffs lacked merit and should be dismissed. Nonetheless, the wave of climate change suits filed by governmental plaintiffs continues, with suits recently filed by King County, Washington, the State of Rhode Island, and the City of Baltimore.
[Details]

First EU-Wide Climate Change Litigation

Building on a rise in climate change litigation in Europe, applicants representing 10 families from EU and non-EU States, as well as an association of young Sami people, have brought an action against the European Parliament and the Council before the EU General Court to urge EU institutions to adopt more stringent greenhouse gas reduction targets.
[Details]

IN THIS EDITION

EDITORIAL BOARD

REGIONAL CONTACTS

United States: Kevin P. Holewinski

Europe: Françoise S. Labrousse

Asia: Sushma Jobanputra

Australia: John Emmerig

Latin America: Mauricio Llamas

View Related Climate Change Publications by Jones Day

D.C. District Court Orders EPA to Respond to Climate Change FOIA Request

On June 1, 2018, the United States District Court for the District of Columbia issued a memorandum opinion ordering the United States Environmental Protection Agency to respond to a Freedom of Information Act ("FOIA") request seeking: (i) all agency records relied upon by former Administrator Scott Pruitt in statements expressing skepticism about the impact of human activity on global warming; and (ii) any agency documents supporting the position that human activity is not the principal factor in promoting climate change.
[Details]

Climate Change Transactional Issues & Updates

FERC Finds that State-Supported Generation Resources Suppress PJM Capacity Market Prices, Establishes Proceeding to Design and Implement Broad Market Reforms

In a June 29, 2018, order, *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, the Federal Energy Regulatory Commission held that out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources—such as those associated with renewable portfolio standard programs—depress capacity market prices in the PJM market.
[Details]

All Eyes on Offshore Wind—Will It Become a Reality in the United States?

Notwithstanding a variety of challenges to development of offshore wind projects in the United States, multiple East Coast states including Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Maryland have set ambitious goals for offshore wind generation capacity and are at the bidding or state approval process for a variety of offshore wind projects.
[Details]

Insuring Against Climate Change Risk: Emergent Disclosure Challenges

Most global companies currently engage in sustainability reporting, an exercise that is most often mandatory and is becoming increasingly quantitative. Simultaneously, there is an emerging question about the insurability of climate change risk. The intersection of climate change reporting and insurability gaps raises the question of whether the scope and sufficiency of existing property and casualty insurance coverage adequately addresses climate change risk, and the disclosure implications if it does not.
[Details]

THE CLIMATE REPORT
Summer 2018

Climate Change Regulatory Issues and Updates

UK Government Adopts Zero Emission Road Transport Strategy

On July 9, 2018, the UK Government published "The Road to Zero," a strategy to implement measures to transition the United Kingdom toward zero-emission road transport. The Secretary of State for Transport has reaffirmed the long-term ambition to put the United Kingdom at the forefront of the design and manufacturing of zero-emission vehicles. The Government expects the transition to be industry and consumer led, supported by Government measures. A progress review will take place by 2025.

The strategy's main ambitions include: investment of £1.5 billion in ultra-low-emission vehicles by 2020; achieving at least 50 percent, and as many as 70 percent, of new car sales and up to 40 percent of new van sales being ultra-low emission by 2030; ending the sale of new conventional petrol and diesel cars and vans by 2040; and for almost every car and van to be zero emission by 2050.

Leading by example, the Government will aim to ensure that 25 percent of its own car fleet will be ultra-low emission by 2022. All new Government car purchases will be ultra-low emission by default, with 100 percent of the Government car fleet being ultra-low emission by 2030.

To facilitate in this transition, updating charging infrastructure is key. Among the measures proposed will be a commitment to ensure that there is a charge point every 20 miles along the UK strategic road network by 2020 and that all new homes, where appropriate, will be required to have a charge point available, while all new street lighting columns will be required to include charging points where appropriately located in residential areas with current on-street parking provisions. What is "appropriate" will be a subject of further consultation.

In addition, the Government will ensure that local planning policies incorporate facilities for charging electric vehicles through the National Planning Policy Framework. The Automated and Electric Vehicles Act, which received royal assent on July 19, 2018, makes provision for rolling out charging infrastructure for electric vehicles throughout the United Kingdom. Once regulations are issued under the Act, a core package of vehicle and charge point grants applicable across the United Kingdom are expected to be rolled out.

The proposals are ambitious and will effectively lead to fundamental changes to the United Kingdom, and likely global, automotive markets.

— Chris Papanicolaou (+44.020.7039.5321, cpapanicolaou@jonesday.com)

European Commission Consults Stakeholders on Regulatory Fitness of the Ozone Regulation

The European Commission ("Commission") is currently organizing a Public Consultation on the evaluation of Regulation (EC) No 1005/2009 on substances that deplete the ozone layer ("Ozone Regulation" or "Regulation"). This follows on and is part of the July 2017 launch of the Commission Regulatory Fitness and Performance Programme evaluation of the Ozone Regulation.

The Ozone Regulation is the commitment of the European Union to the 1987 United Nations Montreal Protocol on substances that deplete the ozone layer. The Regulation is far more ambitious than the Protocol, since it imposes further requirements, such as quicker phase-out schedules and regulatory control over more ozone-depleting substances ("ODS") (over 90 chemicals, plus their isomers) and restricts not only bulk, but also ODS contained in equipment and products.

The Consultation will serve as an evidence base for obtaining information on the general support for the

Regulation—i.e., public awareness of regulating ODS and whether regulating the issue is better performed at the EU or national level.

The fitness check will examine the reference period from the Ozone Regulation's entry into force in 2010 until 2017. It also covers three implementing acts: (i) Commission Regulation (EU) No 291/2011 (on laboratory and analytical uses of ODS); (ii) Commission Regulation (EU) 537/2011 (on quota allocation procedures); and (iii) Commission Decision 2010/372/EU (on process agents).

The evaluation is aimed at establishing whether the Ozone Regulation is still:

- **Relevant and Valid:** As assessed against the availability of new alternatives to the use of ODS.
- **Efficient:** Considering costs and benefits of the implementation of the Regulation, in particular whether Member States and EU institutions have been faced with burdensome and unnecessary requirements.
- **Effective:** Focusing on the factors that have influenced achieving the objectives of the Regulation, specifically how much it has contributed to the actual decrease in the consumption and emissions of ODS.
- **Coherent**: Investigating to what extent and how the Ozone Regulation interacts with other relevant EU legislation. Notably, the evaluation will examine any inconsistencies or gaps by comparing the Regulation with EU acts in the areas of chemicals, waste, industrial, and customs legislation. Coherence will also be verified in light of the framework set out under the Montreal Protocol.
- **Added Value to the European Union:** Reflecting on the measures under the Regulation at an EU level vis-à-vis what could have been expected from Member States at a local level.

Stakeholders have until *August 24, 2018*, to comment. Companies should seize that opportunity in order to share their concerns and suggestions on the overall efficiency of the Ozone Regulation—e.g., whether it has imposed excessive regulatory measures on business and how this can be improved by EU institutions.

— Ursula Schliessner (+32.2.645.14.60, uschliessner@jonesday.com) and Preslava Dilkova (+32.2.645.14.53, pdilkova@jonesday.com)

[Return to Homepage]

THE CLIMATE REPORT
Summer 2018

Climate Change Litigation Issues & Updates

Industry Wins in Three Climate Change Tort Suits, but Other Governmental Entities Continue Filing Suits

Two federal courts, one in California (involving two suits) and the other in New York, recently sided with energy industry defendants by agreeing with them that the climate change suits filed against them by governmental plaintiffs lacked merit and should be dismissed.

The suits in California were filed by the cities of Oakland and San Francisco against five of the top producers of fossil fuels worldwide, which had claimed that the defendants marketed and produced fossil fuels with knowledge that combustion of those fuels would and did create a public nuisance by causing various environmental impacts, including sea-level rise. In February 2018, the court denied the plaintiffs' motions to remand the cases back to state court. *See* "Federal Court in California Denies Remand of Climate Change Litigation." The defendants then moved to dismiss the cases for failure to state a claim. In *The People of the State of California v. BP P.L.C.* (N.D. Cal.), the court granted the motions to dismiss.

As a preliminary matter, the court noted that the dispute in these cases is not over the science of climate change. Based on presentations made by both sides during a science tutorial, all of the parties agree that fossil fuels have and will continue to lead to global warming and sea level rise that will impact Oakland and San Francisco. Instead, the court framed the issue as a "legal" one—namely whether these defendants should be held responsible and pay for the anticipated harm.

The court explained the public nuisance standard under federal common law but noted that it need not go through the steps to analyze the claims because there was a more direct resolution to the matter, holding that the claims were foreclosed because they interfere with the separation of powers and involve foreign policy. In these cases, plaintiffs seek to impose liability on the defendants for the production and sale of fossil fuels globally. According to the court, these types of issues are best left to the executive or legislative branches. Nuisance suits trying to address worldwide conduct are not likely to solve the problem and may in fact interfere with foreign policy discussions and solutions. Ultimately, the court concluded that the problem requires a broader solution than an order by a district court judge or jury verdict on a public nuisance claim.

Less than a month later, the court in New York dismissed New York City's suit that sought to hold industry accountable for alleged climate change impacts but with slightly different reasoning than the California court. The New York court reasoned that because the claims sought damages for injuries and damages allegedly resulting from climate change, they were ultimately based on the "transboundary" emission of greenhouse gases that arose, if at all, under the federal common law, as the claims were not related to the production of fossil fuels in New York but instead related to the production of fossil fuels "worldwide." They thus were "interstate pollution" claims that could arise only under federal law and were barred under *American Electric Power v. Connecticut* (U.S. 2011) and *Native Village of Kivalina v. Exxon Mobil Corp.* (9th Cir. 2012).

The court also found that, to the extent the claims sought to hold the defendants liable for "foreign" greenhouse gas emissions, they were barred by the presumption against the extraterritoriality. Further, because the claims implicated countless foreign governments, including their laws, policies, and international agreements, allowing those claims would interfere with foreign policy and run afoul of the Political Question Doctrine.

Despite these recent industry wins, however, the wave of climate change suits filed by governmental plaintiffs continues. In May 2018, King County, Washington, filed suit seeking to hold energy-producing companies liable for climate change-related infrastructure damage under state law. That suit asserts public nuisance and trespass claims and alleges that the plaintiff's property has been and will be damaged by various climate change-related impacts for which they have spent, and will continue to be required to spend, substantial dollars to mitigate those impacts. The relief sought includes an abatement fund remedy, i.e., a court order requiring the defendants to pay money to fund costs to be incurred by the county to remedy climate change impacts.

In early July 2018, the State of Rhode Island followed suit, filing a case in state court against numerous energy producers for various alleged climate change impacts in the state and seeking compensatory damages, equitable relief, disgorgement of profits, and punitive damages under various state common law theories. Finally, on July 18, 2018, the City of Baltimore became the latest governmental unit to sue industry for alleged climate change impacts by filing suit against more than 20 energy companies. That suit asserts seven state common law causes of action and one consumer protection state statutory claim and seeks damages and other equitable relief similar to those sought by King County and Rhode Island in their suits.

Whether the wave of these suits will continue will likely depend on the final outcome of similar pending suits, including how the appellate courts decide these issues, as the recent cases in California and New York are likely to be appealed.

— Kevin Holewinski (+1.202.879.3797, kpholewinski@jonesday.com) and Daniella Einik (+1.202.879.3775, deinik@jonesday.com)

First EU-Wide Climate Change Litigation

Building on a rise in climate change litigation in Europe, applicants representing 10 families from EU and non-EU States, as well as an association of young Sami people, have brought an action against the European Parliament and the Council before the EU General Court ("EGC") to urge EU institutions to adopt more stringent greenhouse gas reduction targets.

On May 23, 2018, applicants filed an application to the EGC (Case T-330/18) to seek the annulment of the emissions targets set out in three legislative acts ("Legislative Acts") that are part of the 2030 climate and energy framework, the EU framework to reduce by 2030 overall greenhouse gas emissions by at least 40 percent compared to 1990 levels: (i) Directive (EU) 2018/410 (on cost-effective emission reductions and low-carbon investments); (ii) Regulation (EU) 2018/842 (on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030); and (iii) Regulation EU 2018/841 (on the inclusion of greenhouse gas emissions and removals from land use, land use change, and forestry into the 2030 climate and energy framework).

In substance, the applicants argue that the Legislative Acts violate their fundamental rights as guaranteed by the Charter of Fundamental Rights of the EU (e.g., right to life and health, right to property, right to equal treatment), as well as international agreements, insofar as the Legislative Acts set inadequate targets to reduce GHG emissions. In addition to annulment, the applicants seek injunctive relief from the EGC to require the EU institutions to enact a more ambitious greenhouse gas emissions target of a reduction by 2030 of at least 50–60 percent from 1990 levels. The applicants do not, however, seek monetary compensation for their individual losses.

This matter is expected to take at least a couple of years to fully litigate. If the applicants are successful, the Parliament and the Council may have to reconsider the targets set out in the Legislative Acts, which could eventually result in more stringent standards for industry.

— Armelle Sandrin-Deforge (+33.1.56.59.39.47, asandrindeforge@jonesday.com) and Pierre Chevillard (+33.1.56.59.38.16, pchevillard@jonesday.com)

D.C. District Court Orders EPA to Respond to Climate Change FOIA Request

On June 1, 2018, the United States District Court for the District of Columbia issued a memorandum opinion ordering the United States Environmental Protection Agency ("EPA") to respond to a Freedom of Information Act ("FOIA") request received from the Public Employees for Environmental Responsibility ("PEER"). *Public Employees for Envtl. Responsibility v. U.S. Envtl. Prot. Agency*, No. 17-652 (D.D.C.). The request related to March 9, 2017, public statements made by then-Administrator Scott Pruitt expressing skepticism about the impact of human activity on global warming and stating that there is "tremendous disagreement" about whether the carbon dioxide produced by human activity is a primary factor in global warming. The day after Pruitt's comments, PEER filed a FOIA request with EPA seeking: (i) all agency records relied upon by the Administrator in making his statements; and (ii) any agency documents supporting the position that human activity is not the principal factor in promoting climate change. PEER filed a complaint when EPA did not respond within the statutory deadline, and as of the time of the decision, more than one year after the initial request, EPA had not conducted a search for responsive documents.

The district court rejected EPA's arguments that the requests were vague and unclear, overly broad and unduly burdensome, and improper for FOIA requests. The court noted that the agency may not rely on the statutory requirement that a request "reasonably describe" the records sought to deny access to responsive records, and that once the agency was "reasonably clear as to the materials desired," it has an "obligation to bring them forth." Regarding the agency's claim of undue burden, the court found that

EPA did not meet its burden to "provide sufficient explanation as to why such a search would be unreasonably burdensome." The court further noted that PEER's requests were not an improper subject of a FOIA request, noting that the request sought only those documents relied on by Pruitt or supporting his statements, and did not require the agency to conduct its own scientific analysis or exercise its own judgment. Finally, the court noted that even if Pruitt's public statements reflected a personal opinion rather than an agency decision, agency documents supporting those opinions were proper grounds for a FOIA request.

The case offers several key takeaways that could shape future FOIA requests directed to EPA and the agency's responses thereto. First, the D.C. District Court made it clear that EPA can be called upon to produce documents supporting or relied on to formulate public positions taken by the agency, even if such statements are not official agency actions. Second, EPA's reliance on blanket statements that a specific request is overbroad, unduly burdensome, or otherwise inappropriate for a FOIA request will not be given great deference by the courts. Rather, EPA will be required to meet its burden of demonstrating the reasons and support for such positions. In other words, faced with an agency resisting the disclosure of certain records, the court issued a ruling that was strongly guided by FOIA principles favoring disclosure.

While Pruitt is no longer Administrator of EPA, the principles of this case are broader than any one Administrator or administration and may come into play in future matters concerning EPA's public statements and responses to FOIA requests generally.

— Daniel P. Hido (+1.412.394.9558, dhido@jonesday.com)

[Return to Homepage]

THE CLIMATE REPORT
Summer 2018

Climate Change Transactional Issues & Updates

FERC Finds that State-Supported Generation Resources Suppress PJM Capacity Market Prices, Establishes Proceeding to Design and Implement Broad Market Reforms

In a June 29, 2018, order, *Calpine Corp., et al. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61, 236 (2018) ("June 29 Order"), the Federal Energy Regulatory Commission ("FERC") held that out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources—such as those associated with renewable portfolio standard ("RPS") programs—depress capacity market prices in the PJM market. FERC established "paper hearing" procedures for parties to submit comments and supporting evidence concerning potential revisions to the PJM tariff governing capacity auctions to mitigate price suppression and to address how generation resources receiving state subsidies should participate (or not) in the PJM capacity market.

The issues before FERC in the June 29 Order focused primarily on PJM's Minimum Offer Price Rule ("MOPR"), which sets a minimum offer price for capacity bids submitted by new, natural-gas fired generation as a means to protect against buyer-side market power. FERC concluded that generators receiving out-of-market payments depress capacity market prices by submitting artificially low offers in the PJM capacity auction. While FERC concluded that the MOPR should be expanded to apply to capacity offers submitted by a wider range of generation resources, including existing resources receiving subsidies (such as those available in many states for renewable resources), FERC rejected various parties' proposals and outlined two proposals of its own to be considered further.

First, FERC proposed a broad MOPR that would apply to all new and existing resources receiving subsidies, with only very limited exemptions. Notably, FERC rejected PJM's proposal that would have exempted generation subject to state RPS requirements in PJM from the MOPR. Second, FERC outlined a proposal for individual generation resources receiving subsidies to opt out of the capacity market while continuing to participate in the energy and ancillary services markets. This option, termed "FRR Alternative," is based on the current FRR option, which allows utilities (but not individual resources) to choose to opt out of the capacity markets, together with related load.

Ultimately, the paper hearing procedures will provide for interested parties to weigh in on the merits of FERC's proposals, and FERC's decision will be informed by the record that will be developed in this proceeding. Based on the record established in the paper hearing, FERC may make material changes to the framework outlined in the June 29 Order.

At this point, FERC's order raises far more questions than it answers. However, for generators receiving the types of subsidies identified in FERC's order, including renewable resources, it appears likely that they will either be subject to a MOPR or will opt out of the capacity market through the FRR Alternative, results that may increase the risk that the generator will not receive capacity market revenues. This revenue uncertainty may make it more difficult to develop projects that are eligible for state-sponsored payments. In addition, if FERC's concerns about price suppression are correct, and the expanded MOPR results in higher capacity prices, the cost to load of the subsidized resources may be higher because the cost of the subsidies will not be offset by lower capacity prices. Higher costs to consumers may undermine the state policies and programs that use subsidies to promote the development of renewable resources.

— James C. Beh (+1.202.879.3430, jcbeh@jonesday.com)

All Eyes on Offshore Wind—Will It Become a Reality in the United States?

The United States currently significantly lags behind Europe's offshore wind power generation (which totals nearly 16,000 MW), with only one offshore wind farm in operation, a 30 MW project off the shore of Block

Island, Rhode Island. The lack of offshore wind development in the United States is not due to lack of offshore wind potential, which notably is estimated by the Department of Energy to be roughly double the generating capacity of all electric power plants in the United States. It is instead due to myriad factors, including regulatory hurdles; significant transmission costs; additional cost and expertise required for construction, operation, and maintenance of offshore wind projects; and the increased exposure of offshore wind turbines to severe weather events.

While onshore wind farms require specialized human capital and equipment, offshore wind farms require an entirely different set of skills and equipment. For example, offshore wind turbines require vessels and helicopters for both maintenance and construction as well as marine engineering, and they need to be prepared to withstand variable conditions. Further, the permitting and governmental approval process for offshore wind projects is far more complex and far less tested than that required for land-based wind farms. Indeed, a multiyear environmental assessment is required before a construction plan can even be submitted, and all leases must be granted by the federal government. Leases are awarded only after being weighed against other variables such as fishing and national security.

Another daunting factor is opposition groups seeking to halt the development of offshore wind projects. For example, Cape Wind, once hailed as America's first offshore wind project, was eventually abandoned after lawsuits by well-funded opposition groups that opposed a wind project in Nantucket Sound piled up, resulting in the termination of its power purchase agreements due to missed construction milestones.

Notwithstanding these challenges, multiple East Coast states including Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Maryland have set ambitious goals for offshore wind generation capacity and are at the bidding or state approval process for a variety of offshore wind projects. For example, to fulfill New York's goal for offshore wind generation of 2.4 GW by 2030, the State of New York will solicit approximately 800 MW of offshore wind with an award expected to be announced in the second quarter of 2019. Additionally, earlier this year, Massachusetts selected a developer for an 800 MW offshore wind project, and Rhode Island announced plans for a 400 MW offshore wind farm. The largest offshore wind commitment—3.4 GW by 2030—was set by New Jersey in January of this year via executive order.

While state officials are holding hearings and moving toward harnessing the power of offshore wind, various developers are keeping step by pursuing development of offshore wind farms ranging from 24 MW to 90 MW off the East Coast. Additionally, several wind developers hold federal leases for future offshore wind development. With these ambitious goals, industry experts are forecasting that by 2030, the United States will have 3 to 4 GW of offshore wind capacity installed. Given the challenges that offshore wind development in the United States continues to face, however, it remains to be seen whether offshore wind will finally become a real player in the U.S. power grid.

— Laura D. Sheldon (+1.202.879.4651, lsheldon@jonesday.com)

Insuring Against Climate Change Risk: Emergent Disclosure Challenges

Most global companies currently engage in sustainability reporting, an exercise that is most often mandatory and is becoming increasingly quantitative. Simultaneously, there is an emerging question about the insurability of climate change risk. The intersection of climate change reporting and insurability gaps raises the question of whether the scope and sufficiency of existing property and casualty ("P&C") insurance coverage adequately addresses climate change risk, and the disclosure implications if it does not.

Climate change reporting has become increasingly normalized in the United States and Europe through SEC and EU reporting requirements. The SEC's 2010 guidance on climate change disclosures in Regulation S-K, the "central repository for [the SEC's] non-financial disclosure requirements," clarified that *existing* SEC disclosure regulations require companies to consider the consequences of climate change and emphasized the need for "[a]ppropriate disclosure … as to the material effects…." Likewise, the 2014 Directive of the European Parliament and Council ("Directive") requires large companies to disclose relevant and useful information on specified topics, including climate change, in annual reports as of this year (2018). Associated nonbinding guidance underscores that material risk and performance impacts to corporations underpin the Directive.

The convergence of law and practice (notwithstanding reportedly lax SEC enforcement) has prompted companies to review material climate change-related effects on their business, for example, in the context of the "Management's Discussion and Analysis of Financial Condition and Results of Operations" and "Risk Factor" sections of periodic reports filed under the Securities Exchange Act of 1934. Whether the risks presented by the effects of climate change are insurable is therefore becoming an important consideration.

In 2018, the Geneva Association, a leading insurance think tank, issued a report classifying climate change-related risk as a "core business risk." Global annual average weather-related losses have multiplied. Members of the P&C sector have questioned the sufficiency of reinsurer balance sheets, as the frequency and magnitude of global catastrophic events trend higher. They have warned of a growing "protection gap" and emphasized the balance sheet implications of litigation-related losses under existing insurance policies (California litigation involving utility fires that have produced billions in insured property losses, to name one).

Because insurance decisions are business functions—the sort of decision likely to be elevated within companies to management—changes to P&C insurance coverage may, where material, rise to the level of known trends and uncertainties, putting a burden on management under SEC guidance to determine whether a material impact on the company is reasonably likely to occur. The SEC has pursued investigations, and shareholders have pursued litigation, alleging insurance shortfalls and concealment of insurance liabilities as contravening mandatory financial disclosures. Accordingly, climate change risk may be a very real consideration for corporations at senior management levels.

For all of these reasons, now may be the time to consider climate change-related insurability or liability challenges, and their disclosure ramifications.

— Elise Zoli (+1.617.449.6807, ezoli@jonesday.com); *summer associate Chapin Scraggs assisted with the drafting of this article.*

[Return to Homepage]