

2008

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Recommended Citation

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ARTICLE

CLIMATE CHANGE, FIDUCIARY DUTY, AND CORPORATE DISCLOSURE: ARE THINGS HEATING UP IN THE BOARDROOM?

Perry E. Wallace

INTRODUCTION

What should American corporations and their fiduciaries do in the face of the rapidly emerging but still incomplete science, policy, and law on climate change? Considering the imposing global “carbon footprint”¹ that they collectively leave,² what duties apply to American corporations and their managers under U.S. corporate and securities laws?

As the state of knowledge about climate change evolves, so do the related discourse, debate, and responses. A dialogue about fundamental regulatory issues such as “standard setting,” “convergence,” monitoring, and enforcement has begun in earnest.³ These developments are all the more remarkable because consequential leaders and policymakers direct significant opposition towards proactive climate change policies.⁴ Further, this opposition (which appears to be diminishing almost daily) renders knowledge and consensus about the ultimate nature and reach of a full-blown global regulatory system both less discernible and less certain.

While most businesses’ greenhouse gas (GHG) emissions are not regulated under any formal regime, the approaching climate change regulatory environment is considerably more discernable and certain than in the past. These two realities, taken together,

¹ See Carbon Footprint Ltd., What is a Carbon Footprint?, http://www.carbonfootprint.com/carbon_footprint.html (last visited Dec. 28, 2007) (describing a carbon footprint as “a measure of the impact human activities have on the environment in terms of the amount of greenhouse gases produced, measured in units of carbon dioxide.”).

² See Perry E. Wallace, *Global Climate Change and the Challenge to Modern American Corporate Governance*, 55 SMU L. REV. 493, 494 (2002).

³ See discussion *infra* Section I(B).

⁴ See discussion *infra* Section I(A) (describing emerging trends in climate change science and the opposition to the emerging consensus on the subject).

raise certain significant questions for corporations and their managers: Do U.S. corporate and securities laws impose any duties on American corporations and their fiduciaries with respect to climate change? Or are there no such duties, since most corporate operations are not affected at present by any specific climate change regulations? Alternately, do duties exist requiring such actions as public disclosure, inventory assessment, risk assessment, and cost-benefit analysis? What if the pace of either scientific discovery or regulatory expansion continues, or even accelerates? To what degree would a failure to act promptly subject a company and its fiduciaries to liabilities or to other expressions of opprobrium by the capital markets and market actors? Do corporate and securities laws even matter, given that economic and political pressures drive corporate action and that the prospect of GHG regulation continues to emerge?

This Article takes up certain questions about climate change that are gaining attention in some boardrooms and, certainly should be in all others. Part I describes the current discourse and debate of climate change issues in the United States. Here, the American corporation is introduced as a principal actor. Part II views current and emerging climate change science, law, and policy through the prism of American corporate and securities law, the primary legal framework defining the duties and liabilities of corporations, directors, and officers to shareholders and other market actors.

The principal focus of this Article is on the corporate and securities law obligations, if any, of such actors during a period in which no comprehensive system of specific positive legal duties to control GHGs is present, and in which events and discoveries yield increasingly concerning evidence of climate change's potential negative effects. Further, this Article takes into account that such evidence may soon lead to an overall regulatory structure imposing significant legal duties. Put in the admittedly provocative language of environmental policy, is there anything approaching a "precautionary principle"⁵ effect in post-Enron era corporate and securities law?

⁵ See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 23 (2004):

[A] significant aspect of environmental protection law that derives from the nature of ecological injury is its primary focus on the prevention, rather than redress, of environmental harms. Redress is rarely a viable option because of the sheer impossibility or at least limited effectiveness of cleaning up environmental harm once it takes place.

See also CASS R. SUNSTEIN, *RISK AND REASON*, 102-05 (2002) (critiquing the principle emphasizing its limits). ANDREW J. HOFFMAN, *GETTING AHEAD OF THE CURVE: CORPO-*

I. CLIMATE CHANGE AND THE AMERICAN CORPORATION: DEVELOPMENT AND CURRENT STATUS

The following discussion briefly describes some notable developments in the science and law of climate change as a prelude to a discussion of the corporation and its fiduciaries as key actors in the climate change discourse.

A. *Science: Trends and Uncertainties*

Although scientists have known of and studied global warming and climate change for years, it was the work of the Intergovernmental Panel on Climate Change (IPCC), created in 1988,⁶ that helped bring knowledge of climate change to policymakers, environmental advocates, and the broader public. Compiling and studying the work of experts from around the world, the IPCC began to provide Assessment Reports of existing, reliable knowledge about all aspects of climate change.

The 2001 Third Assessment Report, which “builds upon . . . past assessments and incorporates new results from the past five years of climate research,”⁷ concluded that a pattern of global warming and climate change is developing that can only be addressed through a global climate change programmatic effort. IPCC communications and news reports observe that the 2007 Fourth Assessment Report (not yet issued at the time this Article was written) will confirm more forcefully than ever the reality and the urgency surrounding climate change.⁸

RATE STRATEGIES THAT ADDRESS CLIMATE CHANGE (2006), http://www.pewclimate.org/global-warming-in-depth/all_reports/corporate_strategies. This Pew Center on Global Climate Change report provides guidance on how to convert early action, a principal by-product of the precautionary principle, into a positive corporate benefit. The report emphasizes strategic timing, an appropriate level of commitment, influence in public policy development and creation of business opportunities.

⁶ Intergovernmental Panel on Climate Change, About the IPCC, <http://www.ipcc.ch/about/index.htm> (last visited Dec. 29, 2007).

⁷ D.L. Albritton et al., *Technical Summary*, in CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS 23 (J.T. Houghton et al. eds. 2001) available at http://www.ipcc.ch/ipccreports/tar/wg1/pdf/WG1_TAR-FRONT.PDF (providing the contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change).

⁸ See Richard Alley et al., *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg1.htm> (providing preliminary summary of work by Working Group I of the IPCC); Neil Adger et al., *Summary for Policymakers*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY (2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg2.htm> (providing preliminary summary of work by Working Group II of the IPCC); Terry Barker et al., *Summary for Policymakers*, in CLIMATE CHANGE 2007: MITIGATION (2007) available at <http://www.ipcc.ch/ipccreports/ar4-wg3.htm> (providing preliminary summary of work by

In addition to the IPCC reports, other reports and studies continue to appear, with scientists at influential organizations such as the NASA Goddard Institute of Space Studies, the Potsdam Institute for Climate Impact Research,⁹ and the Max Planck Institute for Meteorology¹⁰ all setting forth the case for action with respect to climate change.

While there is a general consensus around climate change science, debate and uncertainty still exist. At one level, questions remain regarding scientific certainty, thus making it important that socio-economic impacts be analyzed through continued professional inquiry on both sides.¹¹ At yet another level, however, opposing political, economic, and social interests infuse the debate with a considerable amount of partisanship that often confuses and confounds overall progress in the area.¹²

Even with the debate, however, climate change policy developments and practices in both the governmental and corporate arenas

Working Group III of the IPCC); Fiona Harvey, *Damage from Global Warming 'to worsen'*, FIN. TIMES, Mar. 31, 2007, at 9.

⁹ See Juliet Eilperin, *Debate on Climate Shifts to Issue of Irreparable Change; Some Experts on Global Warming Foresee 'Tipping Point' When It Is Too Late to Act*, WASH. POST, Jan. 29, 2006, at A01.

¹⁰ See Press Release, Max Planck Soc'y, *Climate Change More Rapid than Ever* (Sept. 30, 2005), available at <http://www.mpg.de/english/illustrations/Documentation/documentation/pressReleases/2005/pressRelease200509301/genPDF.pdf>

¹¹ See, e.g., *Perspectives on Climate Change: Joint Hearing with Energy & Commerce Subcommittee on Energy & Air Quality*, 110th Cong. (2007) (testimony of Bjorn Lomborg), available at <http://democrats.science.house.gov/>; *Perspectives on Climate Change: Joint Hearing with Energy & Commerce Subcommittee on Energy & Air Quality*, 110th Cong. (2007) (testimony of James M. Inhofe, Member, Senate Comm. On Env't and Pub. Works), available at <http://epw.senate.gov/>; BJORN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD* (2001).

¹² Env'tl. Def., See What's At Stake? Tell Exxon's New CEO—End the Disinformation Campaign, <http://action.environmentaldefense.org/campaign/exxonmobil2/explanation> (last visited Dec. 28, 2007). Here, the organization Environmental Defense accuses the oil giant ExxonMobil of carrying on a "multi-million dollar campaign to spread—through 'think' tanks, quasi-journalists and misleading public advertisements—propaganda dressed up like science, all to convince the public that global warming is a hoax and to keep America at a standstill." Environmentalists have directed the accusation at ExxonMobil in particular, naming organizations such as the Competitive Enterprise Institute, The American Enterprise Institute and the George C. Marshall Institute as recipients of corporate funding for studies about climate change. See also Letter from Bob Ward, Senior Manager of The Royal Soc'y, to Nick Thomas, Dir. of Corporate Affairs of Esso UK Ltd. (Sept. 4, 2006), available at <http://image.guardian.co.uk/sys-files/Guardian/documents/2006/09/19/LettertoNick.pdf> (accusing ExxonMobil of promoting an "inaccurate and misleading view of the science of climate change" and of providing financial support to various organizations that have been "misinforming the public" on the same subject).

progress.¹³ And although some of this progress is based on voluntary programs, legal methods are playing an increasing role.

B. Law: Trends and Uncertainties

1. International Law

The United Nations Conference on Environment and Development Framework Convention on Climate Change¹⁴ (UNFCCC) seeks to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁵ The UNFCCC was signed at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil (Earth Summit).¹⁶

Acting through “Conference[s] of the Parties” to the UNFCCC, the parties signatory to the convention continued to meet and further develop this initial body of law of climate change. On December 11, 1997, they signed the Kyoto Protocol,¹⁷ in which the countries agreed to meet specific, binding targets and timetables. Although the Protocol was signed, tensions on many levels persisted, with the United States ultimately deciding not to be a party.¹⁸ Continuing the progress toward establishment of a full-blown global climate change regulatory framework, from November 28 to December 10, 2005, delegates to the U.N. Climate Change Conference in Montreal concluded a decade-long round of negotiations that “launched the Kyoto Protocol and opened a new round of talks to begin considering the future of the international

¹³ See, e.g., SIR NICHOLAS STERN, *THE STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE* (2007). In this highly-regarded work, Sir Nicholas Stern, an advisor to British Prime Minister Tony Blair, provides a comprehensive analysis of the economic aspects of climate change, with conclusions that basically underscore and follow from the basic findings of mainstream scientific trends.

¹⁴ U.N. Conference on Env't and Dev't, U.N. Framework Convention on Climate Change, Preamble, New York, May 9, 1992, art. 2, 31 I.L.M. 849, 854, available at <http://www.unfccc.int/resource/docs/convkp/conveng.pdf>.

¹⁵ *Id.* at art. 2.

¹⁶ U.N. Framework Convention on Climate Change, Status of Ratification, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Dec. 28, 2007).

¹⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998), available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

¹⁸ See Wallace, *supra* note 2, at 504-08 (describing the dynamics, tensions, and politics around the Protocol).

climate effort.”¹⁹ The conference “was a historic first—it served both as the 11th Session of the Conference of the Parties to the [UNFCCC] (COP 11), and, following Kyoto’s entry into force in February [2005], as the 1st Meeting of the Parties to the Kyoto Protocol (COP/MOP 1).”²⁰ But the complex dynamics continued, as before, with the United States expressing considerable resistance to the emerging international climate change regime.²¹

2. *The United States: The States and Cities Take the Lead*

In the absence of U.S. adoption of the Kyoto Protocol, and with no significant or effective federal legislation specifically addressing climate change, other U.S. actors, both governmental and non-governmental, contribute to the legal and policy infrastructure regarding climate change. Encouraged by a number of different factors, several states and municipalities recently proposed or adopted legal measures to address climate change:

State leaders and their constituents are concerned about the projected toll of climate change on their states. In the coastal states, the main worry is the impact of rising sea levels. In agricultural states, it is lost farm productivity. An in the dry Western states, it is the prospect of worsening droughts. . . . Many states view policies that address climate change not as a burden on commerce but as an economic opportunity. These states are trying to position themselves as leaders in new markets related to climate action: producing and selling alternative fuels, ramping up renewable energy exports, attracting high-tech business, and selling greenhouse gas emission reduction credits.²²

¹⁹ Pewclimate.org, Summary of COP 11 and COP/MOP 1, http://www.pewclimate.org/press_room/newsletter/dec05.cfm (last visited Dec. 28, 2007) (commenting on the Kyoto Protocol).

²⁰ *Id.*

²¹ See *Washington Furious over Martin’s Climate Change Comments*, CBC NEWS, Dec. 9, 2005, available at <http://www.cbc.ca/story/canadavotes2006/national/2005/12/09/katrina-global-warming-bush-martin.html> (reporting that the “White House has officially complained about Prime Minister Paul Martin’s comments this week at the climate change conference in Montreal.”); Paul Martin, Prime Minister, Can., Address at the U.N. Conference on Climate Change (Dec. 7, 2005) (commenting that “[t]he time is past to seek comfort in denial. The time is past to pretend that any nation can stand alone, isolated from the global community. . . .” were seen by some as a criticism of the U.S. position on climate change).

²² PEW CTR. ON GLOBAL CLIMATE CHANGE, CLIMATE CHANGE 101: UNDERSTANDING AND RESPONDING TO GLOBAL CLIMATE CHANGE 42 (2007), available at http://www.pewclimate.org/docUploads/Climate101-FULL_121406_065519.pdf. See also GLOBAL CLIMATE CHANGE AND U.S. LAW 313-449 (Michael B. Gerrard, ed., 2007).

Cognizant of the shortcomings of “piecemeal” or “patchwork” policies, many states participate in regional initiatives, seeking greater efficiency, effectiveness, and uniformity in the implementation of climate solutions. For example, in December, 2005, the governors of seven Northeastern and Mid-Atlantic states entered into the “Regional Greenhouse Gas Initiative” (RGGI), a cap-and-trade system for carbon dioxide at power plants.²³ In addition, Pennsylvania, Massachusetts, and Rhode Island are cooperating with the RGGI to develop a GHG registry called the Regional Greenhouse Gas Registry.²⁴

On the West Coast, the “Western Governors’ Association Clean and Diversified Energy Initiative” includes eighteen western states.²⁵ Six New England states began in 2001 cooperating with the Eastern Canadian Premiers (NEG-ECP) climate action plan to achieve emissions-reduction goals.²⁶ “Powering the Plains” is a regional project that includes the Dakotas, Minnesota, Iowa, Wisconsin, and the Canadian Province of Manitoba; it focuses on alternative energy and technology and climate-friendly agricultural development.²⁷

Litigation over climate change now makes it necessary for public companies and their fiduciaries to become familiar with the legal implications of climate change. In July 2004, the states of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, along with the City of New York, filed suit against the five largest GHG-emitting companies in the United States: the American Electric Power Company, the Southern Company, the Tennessee Valley Authority, Xcel Energy, Inc. and Cinergy Corporation. Collectively, these companies are the owners or operators of “174 fossil fuel burning power plants in 20 states that emit some 650 million tons of carbon dioxide each year—almost a quarter of the U.S. utility industry’s annual carbon dioxide emissions and about 10 percent of the nation’s total.”²⁸

²³ PEW CTR. ON GLOBAL CLIMATE CHANGE, *supra* note 22, at 43.

²⁴ *Id.*

²⁵ *Id.* at 43-44.

²⁶ *Id.*

²⁷ *Id.* See also Pew Ctr. on Global Climate Change, Early 2007 States News Archives, http://www.pewclimate.org/what_s_being_done/in_the_states/late06early07.cfm (last visited Dec. 28 2007).

²⁸ Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (dismissing on “political question” grounds).; Press Release, Office of N.Y. State Attorney General Andrew M. Cuomo, *Eight States & NYC Sue Top Five U.S. Global Warming Polluters* (July 21, 2004), available at http://www.oag.state.ny.us/press/2004/jul/jul21a_04.html.

This suit reflects the view that “[t]he debate over global warming is gaining a new dimension: litigation.”²⁹ At present, a flurry of lawsuits are pending against companies and governmental entities seeking a variety of forms of relief, including damages and injunctive relief in the form of climate change regulation.³⁰ Perhaps the most important case is *Massachusetts et al. v. Environmental Protection Agency*.³¹ In that case, the Supreme Court agreed with twelve states, several other political subdivisions, and numerous non-profit organizations that the U.S. Environmental Protection Agency (EPA) has authority under the Clean Air Act to regulate GHG emissions from new motor vehicles.³² The decision is expected “to affect industry and the economy in a big way.”³³

II. CORPORATE AND SECURITIES LAW DUTIES IMPLICATED BY THE EMERGING SCIENCE, LAW, AND POLICY OF CLIMATE CHANGE

In the corporate arena, companies and their shareholders are increasingly addressing climate change by performing research and adopting specific policies and practices. Institutional shareholders, including environmental groups, pension funds, and socially-responsible investment organizations, are especially active.³⁴ Events and activities in and around the corporate sector continue

²⁹ *Suing Over Climate Change*, BBC NEWS, Apr. 3, 2003, available at <http://news.bbc.co.uk/2/hi/science/nature/2910017.stm>. See also Press Release, Office of the N.Y. State Attorney General Andrew M. Cuomo, *States, Cities, Environmental Groups Sue Bush Administration On Global Warming, Challenge EPA's Refusal To Reduce Greenhouse Gas Pollution* (Oct. 23, 2003), available at http://www.oag.state.ny.us/press/2003/oct/oct23a_03.html; James C. Chen & Joanne Rotondl, *Raising the Heat: Climate Change Litigation in the United States*, SUSTAINABLE DEV., ECOSYSTEMS AND CLIMATE CHANGE COMM. NEWSLETTER (Am. Bar Ass'n, Chi., I.L.), Apr. 2005, at 2-7, available at <http://www.abanet.org/environment/committees/climatechange/newsletter/archiveslist.html> (describing a number of major cases).

³⁰ See generally JUSTIN R. PIDOT, *GLOBAL WARMING IN THE COURTS* (2006), available at http://www.law.georgetown.edu/gelphi/current_research/documents/GWL_Report.pdf.

³¹ *Massachusetts v. Env't. Prot. Agency*, 127 S.Ct. 1438 (2007).

³² *Id.* at 1463.

³³ Jeffrey Ball & Mike Spector, *Industries Show Uncertainty Over Ruling's Impact*, WALL ST. J., Apr. 3, 2007, at A10.

³⁴ See, e.g., CERES, *CAPITAL TO THE CAPITOL: INVESTORS AND BUSINESS FOR U.S. CLIMATE ACTION* (2007), www.ceres.org/pub/docs/Call_to_action.pdf (a statement by “CEOs, senior officers and trustees of institutional investors, asset managers and corporations who recognize the risks and opportunities of global climate change, which we have begun to address voluntarily.” The group called on the government “to create national policies to establish regulatory certainty and provide strong incentives”). See also *Petition for Interpretive Guidance on Climate Risk Disclosure*, Sept. 18, 2007, <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf> (a broad coalition of investors, state officials with regulatory and fiscal management responsibilities, and environmental groups petitioned the Securities and

to mount, and shareholder action plays a major role in focusing corporations and their fiduciaries on the subject of climate change.

The growth of environmental regulation in the United States triggered the application of numerous other areas of law,³⁵ including corporate and securities laws.³⁶ In the latter instance, this effect occurred because of the extensive compliance requirements and the aggressive enforcement activities of modern environmental regulation. These essential “drivers” of progress and growth in American environmental law impose substantial economic and financial impacts on regulated companies. Accordingly, these impacts are just the type of “material” matters affecting companies, their shareholders, and the financial markets that are the concern of the corporate and securities laws.

The following discussion addresses the implications of emerging climate change science, law, and policy—first under federal securities law, and second, under state corporate fiduciary duty law. The discussion takes up issues that are the focus of advocacy and dispute, and it also addresses potential future areas of engagement.

A. Federal Securities Law and Climate Change

Investor protection and market integrity are fundamental objectives of the federal securities laws. “[F]ull and fair disclosure” of “material” matters, the principal vehicle for achievement of these objectives, is thus a substantial and pervasive duty of regulated “public” companies.³⁷ Further, this regulatory approach has some degree of impact on corporate governance. Some are even of the

Exchange Commission to require publicly-traded companies to assess and fully disclose their financial risks from climate change).

³⁵ See ELIZABETH GLASS GELTMAN, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS (1994) (dealing with environmental issues as they affect a wide range of business problems and necessarily bringing into play areas of law such as real property, trust, banking, corporate, securities, bankruptcy, franchise, insurance, and criminal law).

³⁶ See *id.* at 235-322, 853-919; Perry E. Wallace, *Disclosure of Environmental Liabilities Under the Securities Laws: The Potential of Securities-Market-Based Incentives for Pollution Control*, 50 WASH. & LEE L. REV. 1093 (1993) [hereinafter Wallace, *Environmental Disclosure*]; Perry E. Wallace, *Liability of Corporations and Corporate Officers, Directors and Shareholders Under Superfund: Should Corporate and Agency Law Concepts Apply?* 14 J. CORP. L. 839 (1989) [hereinafter Wallace, *Liability Under Superfund*].

³⁷ See JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION 1 (2004):

The securities laws exist because of the unique informational needs of investors. Unlike cars and other tangible products, securities are not inherently valuable . . . Deciding whether to buy or sell a security . . . requires reliable information about such matters as the issuer's financial condition, products and markets, management, and competitive and regulatory climate.

view that "[t]he . . . [SEC] has aspired to regulate corporate governance since its inception and, from time to time, has exploited scandals in the public securities markets to achieve this purpose."³⁸ In any event, this body of law is necessarily part of any contemporary discussion of corporate behavior, especially in the wake of the Enron scandals and the passage of the Sarbanes-Oxley Act.

Discussions of the potential applicability of securities law to climate change issues reflect much about the history and development of the SEC disclosure regulations applicable to environmental matters generally. During the 1970s, the SEC's interest in disclosures of environmental liabilities began after Congress and environmental regulators began responding to public concern about environmental problems.³⁹ Beginning with the SEC Release *Disclosures Pertaining to Matters Involving the Environment and Civil Rights*,⁴⁰ the SEC continually found its pronouncements to be inadequate—the public sentiment about the importance of environmental protection was growing, which pushed the SEC towards more expansive and demanding environmental disclosure requirements.⁴¹

In the present SEC regulatory structure, well-established regulatory provisions require that security holders and the securities markets be supplied with material information about environmental liabilities and obligations.⁴² The following discussion centers, first, on the basic SEC provisions for environmental disclosure; second, on the potential effect of the Sarbanes-Oxley Act; and, third, on final observations about future prospects for applicability.

1. Basic SEC Environmental Disclosure Provisions With Potential Relevance to Climate Change Issues

In large part, the basic SEC environmental disclosure requirements turn on the existence of laws creating substantial environmental liabilities and obligations. This inquiry will probe not only that domain, but also (to the extent they exist) disclosure require-

³⁸ Roberta S. Karmel, *Realizing the Dream of William O. Douglas - The Securities and Exchange Commission takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 80 (2005).

³⁹ See Wallace, *Environmental Disclosure*, *supra* note 36, at 1102, 1102-05 (describing the evolution of SEC environmental disclosure).

⁴⁰ *Disclosures Pertaining to Matters Involving the Environment and Civil Rights*, Exchange Act Release No. 9252, 3 Fed. Sec. L. Rep. (CCH) ¶ 23, 507 (July 19, 1971).

⁴¹ Wallace, *Environmental Disclosure*, *supra* note 36, at 1103.

⁴² See generally MARK A. STACH, *DISCLOSING ENVIRONMENTAL LIABILITY UNDER THE SECURITIES LAWS* 4-1 – 4-22 (1995).

ments based on the potential impact of climate change phenomena *per se* on a public company's economic and financial position. Also, perhaps as a sub-category, consideration is given to any potential impact on disclosure that might flow from the "trends," "uncertainties," and "probabilities" relative to future enactment of regulatory measures addressing climate change.

The basic areas of SEC environmental disclosure regulation are the following:

- Legal Proceedings;
- Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A);
- Description of Business;
- Accounting Contingent Liabilities; and
- Anti-Fraud liability for Material Misstatements and Omissions.

As the discussion below will show, perhaps the most pertinent provisions are the requirements to disclose certain legal proceedings and the MD&A requirement.

a. Legal Proceedings

As will be discussed below, a considerable amount of already-commenced litigation seeks to press governments and companies to implement GHG reduction practices, and to obtain damages and other remedies from companies. The trend towards increasing litigation and the growing evidence of materially consequential global warming accordingly renders the question of applicability of securities law disclosure rules on legal proceedings increasingly relevant.

Item 103 of Regulation S-K requires affected companies to describe "any material pending legal proceedings, other than ordinary routine litigation incidental to the business."⁴³ Importantly, Instruction 5 to Item 103 states that environmental proceedings are not "ordinary routine litigation incidental to the business" and provides further guidance regarding disclosure.⁴⁴ That is, disclosure is required if the proceeding (1) is "material," (2) involves claims, sanctions, capital expenditures, or charges in an amount exceeding ten percent of the company's assets on a consolidated basis, or (3) a governmental authority is a party to material proceedings "pending" or "known to be contemplated" and there are potential mone-

⁴³ Regulation S-K, 17 C.F.R. § 229.103 (2006).

⁴⁴ *Id.* at Instruction 5.

tary sanctions (unless the company reasonably believes there will be no sanctions, or they will be less than \$100,000).⁴⁵

The pertinent issues for climate change litigation have to do with the particulars of the rule. One key requirement for Item 103 disclosure is the “materiality” of the proceeding, which is defined as a proceeding in which “there is a substantial likelihood that a reasonable investor would attach importance” to it.⁴⁶ Further, to qualify for SEC disclosure, cases brought under creative “toxic tort” and other common law theories must be such that “the gravamen of the complaint alleges violations of environmental statutes as well as alleging traditional torts such as strict product liability and negligence.”⁴⁷ As will be discussed below, these and other requirements, including the influence of SEC Staff Accounting Bulletin Number 92 on the “disaggregated disclosure of individually material claims,”⁴⁸ often provide a basis for companies to avoid disclosure, at least according to environmental advocates. Of course, one possible alternative basis of a disclosure obligation is the broadest, most general one—that the proceeding qualifies as “material” under the general provisions of Item 103 so long as it is not “ordinary” and exceeds ten percent of the companies consolidated current assets.⁴⁹

Several major legal actions could affect public companies, either directly or indirectly, and trigger a disclosure requirement. One prominent example is *Connecticut v. American Electric Power*,⁵⁰ in which eight states, the city of New York, and three land trusts filed nuisance suits against the five largest carbon dioxide emitters in the United States. Also, in *California v. General Motors*,⁵¹ the state of California filed suit on a public nuisance theory against six manufacturers of motor vehicles for contributing to global warming. The

⁴⁵ *Id.* at Instruction 5 (A), (B) & (C).

⁴⁶ See *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *Wielgos v. Commonwealth Edison Co.*, 688 F. Supp. 331 (N.D. Ill. 1989) (expressing approval of the “magnitude [of effect]/probability [of occurrence]” test of materiality in relation to “contingent or speculative information or events.”); 17 C.F.R. §§203.405, 240.12b-2 (2006).

⁴⁷ STACH, *supra* note 42, at 3-21 (discussing SEC Staff Accounting Bulletin No. 92, 58 Fed. Reg. 32,843, 32,845 (July 14, 1993) [hereinafter SAB No. 92])

⁴⁸ STACH, *supra* note 42. See also SAB No. 92, *supra* note 47.

⁴⁹ 17 C.F.R. § 229.103 (2006), generally and Instructions 1, 2.

⁵⁰ See *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (dismissing on “political question” grounds). See also PIDOT, *supra* note 30 at 15 (discussing climate change litigation).

⁵¹ See *California v. Gen. Motors Corp.*, 2007 U.S. Dist. LEXIS 68547 (N.D.Cal. Sept. 17, 2007) (order granting defendants’ motion to dismiss on “political question” grounds). See also PIDOT, *supra* note 30, at 16.

suit seeks damages in compensation for California's expenditures for planning, monitoring, and infrastructure changes tied to climate change. In *Comer v. Nationwide Mutual Insurance*,⁵² fourteen individuals filed a class action suit against eight named oil companies, one hundred unnamed oil and refining entities, and thirty-one coal companies seeking damages based on a nuisance theory. Specifically, they alleged that defendant companies' GHG emissions increased the ferocity of Hurricane Katrina and thus increased damage to the plaintiffs' property.

Actions grounded in nuisance theory are filed directly against companies; however, a growing number of companies and trade associations are intervening in cases that have major implications for GHG-emitting companies and industries. Some of these cases are actions against federal, state or local governments, of which the recent decision in *Massachusetts v. EPA*⁵³ (described in Section I(B) of this Article) is the most prominent. Another notable category of cases are those filed by corporate interests against state or local governments on the ground that GHG measures instituted at their respective levels are preempted by the Clean Air Act.⁵⁴ What makes these lawsuits "material" for purposes of SEC disclosure is that victories could ultimately entail emissions control requirements, including major capital investments, monitoring, and other expenditures. Considering the growing number of new filings, it would appear that disclosure about legal proceedings concerning climate change will be increasingly difficult to avoid in the future. At the same time, however, victory on the merits in these cases is far from certain.

Generally, materiality, causation, and damages issues are key in the climate change area. Their proof is directly dependent on the evolution and the established consensus concerning climate change and its effects. In this regard, some major physical manifestations of its effects probably must be present to support the clear, substantial, and present evidence that will be required for success on the merits. On the one hand, some would argue that this has already come to pass. One professional states that "there is no doubt at all now that the [2001 IPCC's] third assessment report has

⁵² 2006 U.S. Dist. LEXIS 33123 (S.D. Miss. Feb. 23, 2006). See also *PIDOT*, *supra* note 30, at 16.

⁵³ *PIDOT*, *supra* note 30, at 1.

⁵⁴ *Id.* at 2.

taken forward the legal significance of the science”⁵⁵ in terms of levels of proof. Others are not convinced, citing questions regarding the specific identification of polluters and victims, as well as pleading and proof of materiality, causation, and damages and other relief.⁵⁶

In any event, the litigation is ongoing. A number of the cases are of a rather high-profile nature, with requests for relief potentially entailing very large economic impacts for companies with sizeable GHG emissions.⁵⁷ Accordingly, the related questions about securities law disclosure are bound to become increasingly prominent.

b. Management's Discussion and Analysis of Financial Condition and Results of Operations

The central objective of the disclosure requirement entitled “Management’s Discussion and Analysis of Financial Condition and Results of Operations” (MD&A) is to “give investors an opportunity to look at the [company] through the eyes of management by providing a historical and prospective analysis of the . . . [company’s] financial condition and results of operations.”⁵⁸ There is a “particular emphasis on the registrant’s prospects for the future.”⁵⁹ The MD&A requires disclosure of the following: known trends or demands, commitments, events, or uncertainties that will result or are reasonably likely to result in material changes in a company’s liquidity; material commitments for capital expenditures or known material trends, favorable or unfavorable, in the company’s capital resources; known trends or uncertainties that have or are reasonably expected to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations; and off-balance-sheet arrangements that have or are reasonably likely to have a current or future effect on the company’s financial condition, results of operations, liquidity, or capital resources.⁶⁰

⁵⁵ *Suing Over Climate Change*, BBC News, Apr. 3, 2003, available at <http://news.bbc.co.uk/2/hi/science/nature/2910017.stm> (quoting Peter Roderick, Attorney, Friends of the Earth International).

⁵⁶ *Id.* (quoting Julian Morris, Environmental Policy Specialist, International Policy Network).

⁵⁷ *See id.*

⁵⁸ Management’s Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 6835, Exchange Act Release No. 26,831, Investment Company Act Release No. 16,961, 54 Fed. Reg. 22,227, 22,436 (May 18, 1989) [hereinafter MD&A Release].

⁵⁹ *Id.*

⁶⁰ 17 C.F.R. § 229.303 (2006).

A key requirement in the MD&A is materiality. Using a rather different formulation than the well-known one articulated in cases like *Basic, Inc. v. Levinson*,⁶¹ the MD&A requires that a company that knows of a trend, demand, commitment, event, or uncertainty that will have an arguably important economic or financial impact on the company must determine whether it is likely to come to fruition. If such a determination is not reasonably likely, then no disclosure is necessary.⁶² If the company cannot make such a determination, however, then it must objectively evaluate the consequences of the trend, demand, commitment, event, or uncertainty on the assumption it will come to fruition. Therefore, disclosure is required unless the company affirmatively determines that a material effect on the company's financial condition or results of operations is not reasonably likely to occur.⁶³

The MD&A reflects a shift in the SEC's policies toward favoring disclosure of prospective and forward-looking information and away from a stricter policy that limits disclosure to historical "hard" facts.⁶⁴ This policy choice is thought to be a more realistic reflection of what investors and the markets really want.⁶⁵ Nevertheless, that new approach, combined with companies' reluctance to increase their vulnerability to both litigation and competitors, frequently produces less than desirable disclosures. For this reason, the SEC from time to time takes steps to encourage improved MD&A compliance.

In *In re Caterpillar Inc.*, a much-commented-upon administrative case, the SEC determined that the company violated MD&A requirements.⁶⁶ Specifically, in what was widely regarded as a "test case"⁶⁷ to send a message that lax compliance would no longer be accepted, the SEC held:

[B]oth the Annual Report on form 10-K for 1989 and the Quarterly Report on Form 10-Q for the first quarter of 1990 should have discussed the future uncertainties regarding . . .

⁶¹ 485 U.S. 224 (1988).

⁶² MD&A Release, *supra* note 58, at 22,430.

⁶³ *Id.*

⁶⁴ See Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 799-816 (1995).

⁶⁵ *Id.*

⁶⁶ See Caterpillar Inc., Exchange Act Release No. 30532, 50 S.E.C. 903 (Mar. 31, 1992) [hereinafter Caterpillar Report].

⁶⁷ See Kitch, *supra* note 64, at 803 (stating "[a]s it turned out the Commission had had enough of preaching. It was time for a test case, and the object of the test case turned out to be the Caterpillar Corporation.").

[the very real prospect of a changed operating environment for its previously productive Brazilian subsidiary], the possible risk of Caterpillar having materially lower earnings as a result of that risk and, to the extent reasonably practicable, quantified the impact of such risk.⁶⁸

In December 2003, well into the post-Enron, Sarbanes-Oxley period, after a review of MD&A past filing practices (and apparently with some important concerns), the SEC issued an Interpretive Release seeking to improve MD&A disclosures.⁶⁹ Throughout this missive, one sees a constant emphasis on the need for improved clarity, readability, thoroughness, and overall quality of disclosure in management's discussion and analysis. Pertinent to this discussion, the Interpretive Release emphasized certain points regarding "focus and content":

[Companies] should identify and discuss key performance indicators, including *non-financial performance indicators*, that their management uses to manage the business and that would be material to investors; companies *must identify and disclose known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect* on financial condition or operating performance.⁷⁰

Whether or not this latest guidance is merely an interpretation of the existing disclosure rule or a Sarbanes-Oxley-induced heightening of MD&A requirements is less important than the central message that the SEC appears more serious than ever about full and fair disclosure in this arena. For example, the Interpretive Release observes (in a sort of "no excuses" vein) that today, as compared to when the MD&A requirement was introduced, companies "have access to and use substantially more detailed and timely information about their financial condition and operating performance."⁷¹ Further, it states that "in identifying, discussing and analyzing known material trends and uncertainties, companies are expected to consider *all relevant information, even if that information is not required to be disclosed.*"⁷² These statements are based on the SEC's view that "[o]ne of the most important elements necessary

⁶⁸ Caterpillar Inc., *supra* note 66, at 912.

⁶⁹ Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 8350, Exchange Act Release No. 48,960, 81 S.E.C. Docket 2905 (Dec. 19, 2003) [hereinafter Interpretive Release].

⁷⁰ *Id.* at § I(B) (emphasis added).

⁷¹ *Id.* at § I(C).

⁷² *Id.* (emphasis added).

to an understanding of a company's performance, and the extent to which reported financial information is indicative of future results, is the discussion and analysis of known trends, demands, commitments, events and uncertainties."⁷³

Based on the previous discussion, MD&A disclosure appears to be worthy of real attention in the realm of climate change. The requirement to disclose "trends" and "uncertainties" appears to match up perfectly with the essential state of emerging developments around the science, law, and policy of climate change. Notable here is the SEC's emphasis on a prospective focus and its continuing determination to require a high level of quality in the discussion and analysis. Also, even certain technical requirements seem to work in favor of more, rather than less, disclosure. For example, in the "materiality" analysis, the "reasonably likely" determinations of steps one and two that, frankly, could provide a basis for avoidance of disclosure, must be "objectively" reasonable and not the product of "intuition and 'gut feel.'"⁷⁴ SEC guidance on making assessments of potential environmental liabilities and costs urges companies to base their measurements "on currently available facts, existing technology, and presently enacted laws and regulations . . . [and] consider available evidence including . . . prior experience . . . other companies' . . . experience, and data released by the Environmental Protection Agency or other organizations."⁷⁵

Further supporting the potential applicability of the MD&A to climate change is the fact that its focus is on the driving force of evident or looming economic and financial impacts of importance as the basis for required disclosure (as opposed to a singular focus on the existence of legal duties⁷⁶) and the fact that the phenomenon of climate change itself could have direct impacts of that nature on companies. To the extent there is a trend towards enactment of relevant laws at various levels, or, to the extent there is

⁷³ *Id.* at III(B)(3).

⁷⁴ James G. Archer et al., *SEC Reporting of Environmental Liabilities*, 20 ENVTL. L. REP. 10,105, 10,107 (1990), available at <http://www.elr.info/articles/vol20/20.10105.cfm>.

⁷⁵ SAB No. 92, *supra* note 42, at 32,844.

⁷⁶ See, e.g., MD&A Release, *supra* note 58 at 22,429 (clarifying that legal obligations do not define the scope of the disclosure requirement:

[R]egistrants should focus on . . . known data. For example, Item 303(a)(2)(i) requires a description of the registrant's material "commitments" for capital expenditures However, even where no legal commitments, contractual or otherwise, have been made, disclosure is required Similarly, if the same registrant determines not to incur such expenditures, a known uncertainty would exist regarding continuation of the current growth trend. (Emphasis added)).

uncertainty about the eventual nature and reach of the ultimate regulatory framework, emerging law can also provide the basis for a disclosure requirement where material effects are involved.

Finally, on the specific subject of uncertainties with respect to law, the challenge posed to companies after the 1990 Amendments to the Clean Air Act, but before promulgation of the implementing regulations, is instructive. One commentator observed:

Applying the MD&A standards to the disclosure of information relating to compliance with, or other effects of, the 1990 Amendments will typically result in disclosure by the affected company in the MD&A. Given the enormity of the costs associated with bringing facilities into compliance, a registrant will not typically be able to conclude that a material effect on its financial condition is not reasonably likely to occur, notwithstanding that the specific regulations implementing the provisions of the 1990 Amendments may not yet have been promulgated.⁷⁷

Obviously, there are important differences between the problem just described and the climate change scenario. But both settings concern the prospect of necessarily sizeable dollar expenditures as a basic fact of life in environmental compliance, under circumstances of considerable uncertainty about the final specific legal requirements, all accompanied by a certain degree of likelihood, or even inevitability, of specific regulation. These various observations indicate that the MD&A requirement should become a real focus with respect to SEC disclosure in the area of climate change.

c. Description of Business

Item 101 of Regulation S-K requires that a regulated company describe their business to the SEC.⁷⁸ Item 101(c)(1)(xii) requires specific disclosure with respect to important environmental compliance: "[a]ppropriate disclosure also shall be made as to the material effects that compliance with [environmental laws and regulations] may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries."⁷⁹

Because the environmental portion of this provision is essentially driven by the need for existing environmental law, it is less susceptible to disclosure requirements than some others. It is fair

⁷⁷ STACH, *supra* note 42, at 2-33.

⁷⁸ This includes certain financial information, its principal products and services, sources of raw materials and competitive condition. 17 C.F.R. § 229.101 (2006).

⁷⁹ *Id.* at (c)(1)(xii).

to say, however, that once a company becomes included within a climate change regime, whether voluntarily or by legal compulsion, the predictably substantial compliance requirements will very likely invoke the provision. This is because compliance will require significant capital expenditures for assets such as emissions control equipment and emissions credits.⁸⁰ And these, in turn, will entail substantial, related ongoing costs of operation and management that could affect earnings and competitive position.

d. Contingent "Loss" Liabilities and Asset Impairments

Another area of potential climate change disclosure frequently mentioned in discussions and advocacy initiatives is the accounting concept of contingent liability or asset impairment, along with a related loss expense.⁸¹ Specifically, the concept would require companies that incur either certain potential liabilities that *may* become the subject of a valid claim or certain impairments (damage or reduced value) of their assets to reduce their income (a "loss" expense) by the amount of the potential liability or asset impairment. Correspondingly, the companies must add a like amount to the company's list of balance sheet liabilities or reduce the impaired asset by that like amount.⁸² Companies regulated under the securities laws must make disclosure filings, including financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP).⁸³ The SEC, which has primary authority to make accounting rules, tends to rely heavily on the expertise of "standard-setter" organizations: principally the Financial Accounting Standards Board (FASB).⁸⁴

FASB Statement of Financial Accounting Standards Number 5 (SFAS No. 5), *Accounting for Contingencies*, is the basic rule controlling accounting treatment of "loss contingencies." When there is a significant chance that future events will confirm the existence of a loss, this rule states that a company must "accrue" an appropriate liability or asset impairment and correlative expense on its

⁸⁰ See generally C. GREGORY ROGERS, FINANCIAL REPORTING OF ENVIRONMENTAL LIABILITIES AND RISKS AFTER SARBANES-OXLEY 197-202 (2005).

⁸¹ See generally *id.* at 211-30.

⁸² See *id.* at 222-28.

⁸³ *Id.* at 22-24.

⁸⁴ See Commission Statement of Policy Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, SEC Release Nos. 33-8221; 34-4774, (April 25, 2003). Here, the SEC updates Accounting Series Release No. 150, December 20, 1973, in light of the major reforms made by Sarbanes-Oxley, to reaffirm FASB's status as the "designated private-sector standard setter" for the SEC.

books "where information available . . . indicates that it is *probable* that an asset had been impaired or a liability had been incurred at the date of the financial statements . . . [and it is] *probable* that . . . future events will occur confirming the fact of the loss, and where the amount of loss can be *reasonably estimated*."⁸⁵

Much like the disclosure requirement as to legal proceedings, in the instance of asset impairments and contingent liabilities, one can observe that the pertinence of the concept will increase with further developments in climate change science and law. In other words, the more significant and clear the liability, or alternatively, the more substantial and clear the damage or devaluation of the asset, the greater the possibility that SFAS No. 5 would apply.

For example, asset impairments and some types of liabilities in certain business sectors are prominent candidates for climate change-related loss accrual. Significantly, asset impairments and contract-based liabilities do not require violation of any laws. Notable here is the phenomenon of severe weather events, which are increasingly intense and frequent in recent years and which are also increasingly attributed at least in part to climate change. As scientific consensus continues to solidify, some particular business sectors will be deemed to suffer impairment of their assets or incurrance of liabilities because of climate change. Especially pertinent here are business infrastructure (property damage and devaluation), insurance (increased payout liabilities), oil and gas (property damage and devaluation), and financial services (impairment of their often significant investments in these other sectors).⁸⁶

Finally, accruals may be required based on specific laws or prospective or actual litigation. In this regard, as discussed in section II(A)(1)(a) of this Article, the continuing surge of lawsuits in this area, combined with the trends in the science and the law, make this "moving target" worthy of the monitoring activities of corporate managers.

⁸⁵ FINANCIAL ACCOUNTING STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING STANDARDS: ACCOUNTING FOR CONTINGENCIES No. 5. ¶ 8(a)-(b) (1997) (emphasis added). "Probable" is the highest level of likelihood possible under SFAS No. 5. It refers to scenarios in which confirmation of the loss is "likely to occur." *Id.* at ¶ 3(b). Where both elements are not satisfied, disclosures in the notes of the financial statements may be required. *Id.* at ¶ 10; FINANCIAL ACCOUNTING STANDARDS BD., FASB INTERPRETATION NO. 14: REASONABLE ESTIMATION OF THE AMOUNT OF A LOSS, AN INTERPRETATION OF FASB INTERPRETATION NO. 5 ¶¶ 2-3 (1976).

⁸⁶ See generally STACH, *supra* note 42, at 31-37.

e. Fraudulent Misstatements and Omissions

The anti-fraud provisions of the securities laws generally prohibit the use of material misstatements and omissions to defraud investors and the securities markets. Whether in the purchase or sale of securities, in the exercise of the shareholder vote, or in other exercises of shareholder rights and privileges, these provisions seek to provide the fundamental protection of investors and securities markets that is the essence of the securities laws. The following discussion will be limited to Rule 10b-5—the most frequently invoked anti-fraud provision—with brief commentary on other selected anti-fraud provisions.

The most prominent of the anti-fraud provisions that may arise in the context of environmental disclosure is Rule 10b-5,⁸⁷ promulgated under the authority of Section 10(b) of the Securities Exchange Act of 1934.⁸⁸ This broad, catch-all anti-fraud provision is applied in a wide range of transactions and business activities in which complaining parties or the federal government claim a fraud occurred in the form of a “material” misstatement or omission “in connection with the purchase or sale of . . . securities.”⁸⁹

While Rule 10b-5 enjoyed expansive application during its early years, including court rulings finding implied private rights of action and its applicability to security-holders of private companies,⁹⁰ a series of United States Supreme Court opinions in the mid-1970s began to interpret the rule more strictly. These latter rulings grounded their interpretations firmly in the express wording of the statute and rule, thus defining more sharply, and arguably more narrowly, the scope and contours of Rule 10b-5.⁹¹ For example, the only non-governmental plaintiffs with standing to sue are those who purchased or sold their securities contemporaneously with a fraud committed “in connection with” those purchases or sales.⁹² Also, common law elements of fraud, including “scienter,” must be pled and proved in a Rule 10b-5 cause of action.⁹³ In

⁸⁷ 17 C.F.R. § 240.10b-5 (2006).

⁸⁸ 15 U.S.C. § 78j(b) (2000 & Supp. 2003).

⁸⁹ 17 C.F.R. § 240.10b-5 (2006).

⁹⁰ See *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798, 800 (E.D. Pa. 1947).

⁹¹ See *COX ET AL.*, *supra* note 37, at 940-51 (discussing the Supreme Court's “retrenchment” decisions).

⁹² See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731 (1975) (holding based on a reading in the statute and rule limiting their applicability to frauds “in connection with the purchase or sale” of securities).

⁹³ See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976) (holding that a private cause of action will not lie under Rule 10b-5 in the absence of an allegation of

Santa Fe Industries v. Green,⁹⁴ the Supreme Court finally clarified that in the absence of “manipulative or deceptive” behavior, claims based on fiduciary duty and other corporate governance concerns do not come within the purview of Rule 10b-5.⁹⁵

Given the pleading and proof requirements of Rule 10b-5, and considering the clearly restrictive limitations on its scope to “manipulative or deceptive” behavior imposed by the Supreme Court, it would appear that only under rather extreme circumstances would it be pertinent to the universe of scenarios being considered in this Article. Those scenarios are largely concerned with open, considered decisions not to take action with respect to climate change or failures to be informed and attentive regarding the subject. But the other anti-fraud provisions do not necessarily lead to the same conclusion.

Although the various other securities law anti-fraud provisions contain matrices of similar and dissimilar elements with considerable—but not complete—overlap, their utility in the scenarios under discussion will likely depend to some degree on the extent to which they adopt a scienter or a negligence standard. For example, Section 17(a)(1) of the Securities Act of 1933 is generally viewed as having a scienter requirement, making it less relevant here. On the other hand, Sections 17(a)(2) and (3) do not have a scienter requirement, thus making their applicability more plausible.⁹⁶ Rule 14a-9, which is under Section 14(a) of the Securities Exchange Act of 1934 and addresses misrepresentations and omissions in proxy solicitations, is generally viewed as not requiring scienter.⁹⁷

As a final note, the preceding discussion does not imply that cases proceeding under theories not requiring scienter will be easy. Elements such as materiality, causation, and damages must be proved, and until evidence of climate change’s impacts becomes sufficiently material and clear, these provisions will pose challenges.

“scienter,” “a mental state embracing intent to deceive, manipulate, or defraud”). The Court seized particularly on the language of Section 10(b), prohibiting employment of “any manipulative or deceptive device or contrivance.” *Id.* at 195-96. “Recklessness” has also been found to be included in the term. *See Aaron v. Sec. Exch. Comm.*, 446 U.S. 680, 686 n.5 (1980); *First Interstate Bank of Denver v. Pring*, 969 F.2d 891, 901 (10th Cir. 1992).

⁹⁴ 430 U.S. 462, 473-74 (1997).

⁹⁵ *Id.* at 474.

⁹⁶ *See generally COX ET AL.*, *supra* note 37, at 521-28 (citing *Aaron*, 446 U.S. 680).

⁹⁷ *Id.* at 915-23 (citing *Gould v. American-Hawaiian Steamship Co.*, 535 F.2d 761 (3d Cir. 1976) and *In re Reliance Sec. Litig.*, 135 F. Supp. 2d 480, 511 (D. Del. 2001) as cases that appear to constitute the “majority rule.”).

2. *The Potential Impact of Sarbanes-Oxley*

The “Public Company Accounting Reform and Investor Protection Act of 2002” (Sarbanes-Oxley Act or Act) passed almost unanimously in Congress and was signed into law by President George W. Bush on July 30, 2002.⁹⁸ “Enacted in response to the Enron, WorldCom, Tyco, and other recent corporate accounting scandals, the Act was described by President Bush as incorporating ‘the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt.’”⁹⁹ So great was the Act’s impact on corporate governance that there is little room to deny that corporate governance has been “federalized.”¹⁰⁰ The following discussion addresses those provisions of the Act that concern corporate governance and that are pertinent to the subject of this Article.

Several provisions of the Sarbanes-Oxley Act directly affect corporate governance as regards fiduciaries and company disclosure obligations:¹⁰¹

- Section 301 of the Act requires that the company’s audit committee be composed exclusively of independent directors and enhances the powers and responsibilities of that committee.¹⁰²
- Sections 302 and 906 of the Act require the company’s Chief Executive Officer (CEO) and Chief Financial Officer (CFO) to “certify,” in a prescribed manner, the company’s financial statements that accompany certain disclosure filings with the SEC and are made publicly available. Signifi-

⁹⁸ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). The House of Representatives approved the bill 423-3. 148 CONG. REC. H5480 (daily ed. July 25, 2002). The Senate vote was 99-0. 148 CONG. REC. 57365 (daily ed. July 25, 2002).

⁹⁹ JOHN C. COFFEE, JR. & JOEL SELIGMAN, *SECURITIES REGULATION* 1 (9th ed. Supp. 2005) (citing George W. Bush, Remarks at Signing of Corporate Corruption Bill (July 30, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020730.html>).

¹⁰⁰ See Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Director’s Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 393-94, 400 (“In an apparent effort to restore directors’ adherence to their fiduciary duty, Sarbanes-Oxley imposes responsibilities on directors similar to the responsibilities required under state corporate fiduciary law, appearing to ‘federalize’ that law.”); Karmel, *supra* note 38, at 80 (citing the former SEC Commissioner’s observation that the Act “markedly changed the boundary between the federal securities laws and state corporation law with regard to corporate governance,” but she did not attribute this change to the Enron scandals, as “the SEC has been angling to regulate [corporate governance] for some time.”).

¹⁰¹ See COFFEE & SELIGMAN, *supra* note 99, at 2-3.

¹⁰² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 301 (2002) (codified as amended at 15 U.S.C. §78j-1 (2002)).

cant penalties, including criminal sanctions, could apply for violations.¹⁰³

- Section 401 of the Act provides for enhanced disclosure of information, particularly regarding the accuracy of financial statements, “off-balance-sheet” transactions and “pro forma” figures.¹⁰⁴
- Section 404 of the Act requires companies to include in each annual report filed with the SEC an “internal control report.” The report must acknowledge management’s responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting and it must assess the effectiveness of the structure and procedures.¹⁰⁵
- Section 406 of the Act requires companies to adopt a Code of Ethics for senior financial officers, and if they do not adopt such a code, they must explain why they did not do so.¹⁰⁶
- Section 407 of the Act requires disclosure of the company’s audit committee’s “financial expert” and describes generally the qualifications for such a person.¹⁰⁷
- Section 408 of the Act seeks to enhance SEC review of company disclosures, identifying several categories of companies of particular susceptibility to problematic disclosures.¹⁰⁸
- Section 409 of the Act provides for disclosure, on a “rapid and current” basis, of information concerning material changes in the company’s financial circumstances.¹⁰⁹
- Titles VIII (Corporate and Criminal Fraud Accountability), IX (White Collar Crime Penalty Enhancements), and XI (Corporate Fraud Accountability) contain a number of provisions essentially designed to punish fraudulent and

¹⁰³ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 §§ 302, 906 (2002) (codified as amended at 15 U.S.C. §§ 7241, 1350 (2002)).

¹⁰⁴ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 401 (2002).

¹⁰⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 404 (2002), (codified as amended at 15 U.S.C. § 7262 (2002)).

¹⁰⁶ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 406, (2002), (codified as amended at 15 U.S.C. § 7264 (2002)).

¹⁰⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 407, (2002), (codified as amended at 15 U.S.C. § 7265 (2002)).

¹⁰⁸ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 408, (2002), (codified as amended at 15 U.S.C. § 7266 (2002)).

¹⁰⁹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 409 (2002).

obstructive behavior, including enhancement of certain existing penalties.¹¹⁰

Sarbanes-Oxley thus imposes on public corporations and their fiduciaries an enhanced and heightened set of responsibilities and creates significant penalties for failure to fulfill those responsibilities. In addition to its particular focus on accounting, auditing, and financial aspects of the behavior of corporate fiduciaries and other “gatekeepers,” the Act also contributes to a general atmosphere of greater transparency, awareness, and sensitivity regarding corporate behavior. Environmental advocates, moreover, are quite aware of this new climate and view it as a propitious one for promotion of their interests.

It is indeed the general effects on the business climate and the window of opportunity this presents for strategic maneuvering that make Sarbanes-Oxley useful to those seeking to press public corporations to address climate change issues. This is in contrast to the specific objectives of the Act’s particular provisions, which reflect the nature of the events generating the impetus to enact this legislation. On the latter point, the creation of the Public Company Accounting Oversight Board, the extensive treatment given to auditor independence, the particular focus on the audit committee as opposed to the entire board, the certification requirements, and the enhanced governmental authority to prosecute and impose penalties all reflect primarily a concern about financial fraud and conflicts of interest. This is rightly so, since these problems were at the heart of the series of embarrassing scandals that commenced with the Enron matter. As a consequence, the Act cannot be said to lend itself expressly to issues of a more socially sensitive nature—unless they also involve significant illegality or are of considerable economic importance. In this sense there are no surprises, as the Act is consistent with previous securities law policies.¹¹¹

¹¹⁰ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, Titles VIII, IX, XI. (2002).

¹¹¹ See, e.g., *Acito v. IMECERA Group, Inc.*, 47 F.3d 47, 52 (3d Cir. 1995) (no disclosure violation for failure to disclose that one plant of thirty that were inspected was in violation of FDA standards because that plant produced only ten of the company’s 1,000 distributed products); *In re AES Corp. Sec. Litig.*, 825 F. Supp. 578 (S.D.N.Y. 1993) (company’s claims that it had a good environmental record was a material misstatement where it had *illegally* falsified wastewater reports filed with the government); *Ballan v. Upjohn Co.*, 814 F. Supp. 1375, 1385-86 (W.D. Mich. 1992) (touting of a new drug was misleading because the company failed to disclose that it had *illegally* withheld information from the FDA regarding the drug’s side effects); *Amalgamated Clothing & Textile Workers v. J.P. Stevens & Co.* 475 F. Supp. 328 (S.D.N.Y.1979) (company proxy statement seeking election of directors

Finally, for all the fanfare about the curative effects the Act promises, it is also criticized severely. Some of these critiques imply that the Act could produce negative consequences that ultimately could undermine its effectiveness and its generally positive effect on the tone and tenor of corporate behavior. For example, Professor Karmel expresses the following concern:

The corporate governance provisions of Sarbanes-Oxley are proscriptive in an area where flexibility has long been valued. Furthermore . . . [the Act] is premised to some extent on an adversarial model of corporate governance in contrast to a consensus model which has been the prevailing norm in boardrooms. In changing the orientation of directors, Sarbanes-Oxley . . . may result in diminished entrepreneurial activity, corporate profitability and competitiveness.¹¹²

Commentators critical of the Act generally declare:

(1) that it was unnecessary, (2) that the changes it made were at best only incremental, (3) that on balance it was undesirable because it would impose significant new costs on US firms, or (4) that it was probably unnecessary because modern markets were liquid and quite capable of responding adequately to fraud on their own without additional regulation.¹¹³

Conversely, some commentators are supportive of the Act and would prefer that it were more stringent.¹¹⁴

Hence, the enactment of Sarbanes-Oxley did not end the debate over corporate governance, and indeed many in the corporate community continue to criticize the Act. Those criticisms have some potency, if for no other reasons than that the critics include highly respected members of the corporate community and the criticisms come during this trial-and-error period, where the stakeholders—corporate, judicial, regulatory, legislative, non-govern-

was not materially misleading for failing to disclose that *all* nominees knowingly and willfully acted in concert – *but not illegally* – to thwart the labor laws).

¹¹² Karmel, *supra* note 38, at 81.

¹¹³ ROBERT W. HAMILTON & JONATHAN R. MACEY, *CORPORATIONS* 595 (9th ed. 2005) (also discussing at length a 2004 survey of the costs associated with compliance with Sarbanes-Oxley requirements).

¹¹⁴ See Fairfax, *supra* note 100, at 400-07 (complimenting the Act's attempt to restore directors' fidelity to their fiduciary duties but complaining that while directors are given extensive responsibility, the Act suffers from a lack of liability for directors). See also Jill E. Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 DUKE L.J. 517, 519-20 (2003) ("Sarbanes-Oxley did not impose federal standards for director liability.").

mental, and others—have not quite found and fully assumed their roles. Altogether, the nature and outcome of the very dialogue about Sarbanes-Oxley, along with any inherent merits and failings of the Act itself, will have much to do with the overall corporate governance environment in the future. That is, whether a heightened sensitivity to the image and behavior of the corporation continues or whether it fades away in the face of criticism and disagreement depends on these considerations.¹¹⁵ And this outcome, in turn, will either enhance or limit the efforts of climate change advocates.

3. *Final Observations: Past Corporate Practices*

As previously observed, the path of post-Enron reform emanating from the Sarbanes-Oxley Act, including the general environment of attitudes and policies about corporate governance fostered by the Act, will surely affect the prospects for success of climate change advocates. This is particularly true given some of the challenges to successful application by advocates of many specific securities law provisions. Unquestionably, continued and rigorous debate is potentially very useful and is a cherished feature of governance in a democratic milieu. But where the fruit of that debate is a diminution in the level of scrutiny and accountability in corporate governance, this would only contribute to what, in the view of many, is a record of less than admirable securities law enforcement of environmental disclosure.

In a July 2004 Report entitled *Environmental Disclosure: SEC Should Explore Ways to Improve Tracking and Transparency of Information* (GAO Report), the U.S. Government Accountability Office (GAO) reported to Congressional Requesters on the effectiveness of SEC environmental disclosure.¹¹⁶ As to the pertinence of Sarbanes-Oxley, the GAO Report expressed the view that “[w]hile the act does not contain provisions that specifically address environmental disclosure, some of them could lead to improved reporting of environmental liabilities.”¹¹⁷ Overall, how-

¹¹⁵ See HAMILTON & MACEY, *supra* note 113, at 595-600 (citing a number of commentaries on Sarbanes-Oxley, including many critical ones).

¹¹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL DISCLOSURE: SEC SHOULD EXPLORE WAYS TO IMPROVE TRACKING AND TRANSPARENCY OF INFORMATION (2004), available at <http://www.gao.gov/new.items/d04808.pdf>.

¹¹⁷ *Id.* at 8 (citing specifically the provisions on real-time disclosures, assessment of internal controls and financial reporting procedures, certification of financial statements, and increased funding for SEC review.) The Report notes early on that disclosure requirements turn, “[a]mong other things,” on the existence of “material” information, such as

ever, the Report was neither definitive nor conclusive on the subject of SEC environmental disclosure.

The Report admits that “[l]ittle is known about the extent to which companies are disclosing environmental information in their filings with [the] SEC, despite many efforts to study . . . [the subject] over the past 10 years.”¹¹⁸ The key stakeholders participating in the study included “representatives of the accounting and auditing profession, environmental consultants and attorneys, investment and financial services, the insurance industry, environmental interest groups, public employee pension funds, and credit rating agencies, among others.”¹¹⁹ These representatives disagreed about whether the disclosure requirements were well defined. Stakeholders critical of the SEC rules either believed they were not specific enough, especially as to environmental obligations that were uncertain in amount or in likelihood of occurrence, or they believed that the SEC’s oversight and enforcement of existing rules was lax.¹²⁰ On the other hand, stakeholders who thought the rules were acceptable emphasized the importance of flexibility in accommodating the variability among companies’ and industries’ circumstances.¹²¹ Because of the disagreement and because so little is known about actual environmental disclosure, the Report recommended that the SEC take certain steps to improve the tracking and transparency of information on environmental matters.¹²²

The Report also addressed the specific subject of company disclosure related to climate change. Discussions with SEC officials

“significant changes in accounting practices or potential risks or liabilities, such as the cost of a major environmental cleanup, that could affect future earnings.” *Id.* at 1-2.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.* at 3.

¹²⁰ Critics of SEC environmental disclosure rules and policies express their views through their own reports and publications. See, e.g., MICHELLE CHAN-FISHEL, FRIENDS OF THE EARTH, THIRD SURVEY OF CLIMATE CHANGE DISCLOSURE IN SEC FILINGS (2004), available at <http://www.foe.org/camps/intl/corpacct/wallstreet/secsurvey2004.pdf>; DOUGLAS G. COGAN, CERES/IRRC, CORPORATE GOVERNANCE AND CLIMATE CHANGE: MAKING THE CONNECTION (2003), available at http://www.earthinstitute.columbia.edu/grocc/documents/Ceres_corp_gov_and_climate_change_sr_0306.pdf; SUSANNAH BLAKE GOODMAN & TIM LITTLE, THE ROSE FOUND. FOR CMTYS AND THE ENV’T, THE GAP IN GAAP: AN EXAMINATION OF ENVIRONMENTAL ACCOUNTING LOOPHOLES (2003), available at <http://www.rosefdn.org/images/GAPinGAAP.pdf>; SANFORD LEWIS & TIM LITTLE, THE ROSE FOUND. FOR CMTYS AND THE ENV’T, FOOLING INVESTORS & FOOLING THEMSELVES: HOW AGGRESSIVE CORPORATE ACCOUNTING & ASSET MANAGEMENT TACTICS CAN LEAD TO ENVIRONMENTAL ACCOUNTING FRAUD (2004), available at <http://www.rosefdn.org/fooling.pdf>.

¹²¹ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 116, at 3-5, 9-15.

¹²² *Id.* at 36-37.

yielded the following insight about whether SEC rules require disclosure at the present time:

While various investor organizations, pension fund managers, and environmental interest groups have called on companies to make more information available on this subject, *disclosures about the impact of potential greenhouse gas controls are not necessarily required at this time*, according to officials at [the] SEC's Division of Corporation Finance, *because controls do not appear imminent at the federal level through ratification of the Kyoto Protocol or legislation*. At the same time, the officials did not rule out such disclosures, *commenting that there may be circumstances in which a company can identify a material impact and must disclose it in the filing*.¹²³

Noting that “[s]ome companies have opted to include information regarding potential controls over greenhouse gas emissions in their SEC filings, partly in response to public interest,”¹²⁴ the Report describes its findings about those filings. Overall, the filings varied greatly in type of disclosure and level of detail, tending not to estimate the dollar value of climate change impacts and expressing uncertainty about the nature of the impacts, but also tending to indicate that the impacts “could be material.”¹²⁵ One of the obvious reasons for the lack of uniformity or depth of these disclosures was the fact that they have generally been voluntary and thus viewed as “not necessarily required.”¹²⁶

The GAO Report, limited in its revelations and recommendations, still advances the state of knowledge about regulation and governance in the climate change area. The act of assembling the key stakeholders in order to discern their views, discussing the rationales for those views, and compiling their recommendations for regulatory reform was itself an important step in an area that is taking shape in slow, complicated stages. Important also was the Report's description of some corporate practices, which, for all their limitations from the perspective of the standards that would be imposed by a full-blown regulatory scheme, essentially reflect the “best practices” in the field of climate change corporate governance.

¹²³ *Id.* at 20-21 (emphasis added).

¹²⁴ *Id.* at 21.

¹²⁵ *Id.*

¹²⁶ *Id.*

B. State Corporate Fiduciary Duty Law and Climate Change: Is There, or Could There Soon Be, a Fiduciary Duty to Investigate and Monitor GHG Emissions, or Take Other Action?

In shareholder proposals submitted to major corporations in recent years, advocacy groups assert that corporate boards of directors and managers have a “fiduciary duty” to become informed, and to inform shareholders, about potential climate change risks and opportunities.¹²⁷ For example, shareholder proposals submitted to Caterpillar, Conoco Phillips, Cummins, Gillette, Nexen, Occidental Petro-Canada, Reebok, and Staples in 2003 made the following declaration:

Because scientific assessment of the human contribution to climate change is now widely accepted, and legislation, regulation, litigation, and other responses to climate change are foreseeable, we believe, *prudent management has a fiduciary duty* to carefully assess and disclose to shareholders all pertinent information on significant risks associated with climate change We believe this proposal is *consistent with the fiduciary duties of the corporation’s officers and directors, and with good environmental and risk management.*¹²⁸

Indeed, some corporations are responding affirmatively to these and other types of shareholder demands. In December 2005, Ford Motor Company, following a 2004 shareholder proposal, published “the industry’s first report dedicated to the issue of climate change and its effect on the automotive industry.”¹²⁹ In the Report, Ford asserted that “At Ford, the issue is not abstract The issue warrants precautionary, prudent and early actions to enhance our

¹²⁷ Rule 14a-8, 17 C.F.R. § 240.14a-8 (2007) (promulgated pursuant to Section 14(a) of the Securities Exchange Act of 1934, provides, under certain defined circumstances, for the submission of proposals by shareholders for consideration and vote at shareholders meetings). Such proposals have long been strategic vehicles for corporate governance and corporate social responsibility initiatives. See *Med. Comm. for Human Rights v. Sec. Exchange Comm.*, 432 F.2d 659 (D.C. Cir. 1970); Patricia R. Uhlenbrock, Note, *Roll Out the Barrel: The SEC Reverses Its Stance on Employment-Related Shareholder Proposals Under Rule 14a-8—Again*, 25 DEL. J. CORP. L. 277, 308 (2000).

¹²⁸ Interfaith Ctr. on Corp. Responsibility, Proposed Shareholder Resolution on Embedded Climate Risk (emphasis added), available at www.iccr.org/shareholder/proxy_book03/environment/climaterisk_oxy.htm. The proposal urges shareholder approval of a resolution requiring that “the Board of Directors prepare a report (at reasonable cost and omitting proprietary information), available to shareholders . . . describing the operating, financial and reputational risks to the company associated with past, present, and future greenhouse gas emissions from its operations and products.” *Id.*

¹²⁹ FORD REPORT ON THE BUSINESS IMPACT OF CLIMATE CHANGE 1 (2005), available at http://media.ford.com/downloads/05_climate.pdf.

competitiveness and protect our profitability in an increasingly carbon-constrained economy.”¹³⁰

Were the company and its fiduciaries under a legal duty to act, or did this action emanate from public relations or political considerations?¹³¹ The question is pertinent for a number of reasons, not the least being increasing institutional shareholder interest, increasingly affirmative corporate responses with those responses often characterized as “best practices,” and the recent trend toward the use of litigation as a means of forcing corporate action on climate change. As the following discussion demonstrates, attempts to describe the law of fiduciary duty as imposing obligations on directors and officers in this arena will encounter substantial obstacles, the most notable being the venerable (or infamous, depending on one’s view of it) “business judgment rule.” At the same time, certain currents and trends in the law contemplating higher standards of fiduciary conduct, (particularly in this post-Enron legal environment) as well as the apparent trajectory of climate change information toward the status of legal “materiality,” make consideration of the subject a justifiable exercise.

1. *Fiduciary Duty: Standards for Decision-making and Monitoring*

The law of fiduciary duty establishes a standard of conduct that guides directors, officers, and others in the performance of their corporate responsibilities, and it also provides a standard of review that determines when those fiduciaries should be held personally liable for inadequate performance.¹³² Fiduciary duties of directors

¹³⁰ *Id.* at 2.

¹³¹ A critical distinction here is that between (1) whether some decision to act that the fiduciaries agree upon (such as taking action on climate change) comes within their *authority*, where such coverage protects them from liability for having so acted, and (2) whether the directors have a *duty* to act—but do not—for which a breach would subject them to liability. This article focuses on the duties of fiduciaries, since the typical scenario for advocates is one in which they, in their capacities as shareholders, are seeking ways to force action by fiduciaries through claims that their fiduciary duties require action. In corporate law, the former situation is often discussed in terms of directors’ authority to address the interests of “other,” or “non-shareholder” constituencies or stakeholders, since the principal issue raised in serving interests of employees, suppliers, communities, and the like is whether directors have exceeded their authority. See, e.g., 15 PA. STAT. ANN. § 1715 (2007); AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 2.01 (Mike Greenwald, ed. 1994); James J. Hanks, Jr., *Non-Stockholder Constituency Statutes: An Idea Whose Time Should Never Have Come*, INSIGHTS, Dec. 1989, at 20.

¹³² As to the difference between standards of conduct and standards of review in fiduciary duty law, see the REVISED MODEL BUS. CORP. ACT §8.31 cmt. (2005) (“[W]hile a

flow from the fundamental mandate in corporate law that “[a]ll corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction of, and subject to the oversight, of its board of directors.”¹³³

Generally, standards of conduct require that each director act “in good faith . . . in a manner the director reasonably believes to be in the best interests of the corporation” and entire boards and committees must execute their decision-making and oversight functions “with the care that a person in a like position would reasonably believe appropriate under similar circumstances.”¹³⁴ Similarly, fiduciary duty standards of review for purposes of determining director liability provide generally that such liability shall apply, unless precluded by law,¹³⁵ when a director’s conduct:

- was not in good faith;¹³⁶ or
- resulted in a decision that the director either “did not reasonably believe to be in the [corporation’s] best interests” or “as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances;”¹³⁷ or
- was tainted by conflict of interest, other lack of independence, or receipt of an improper financial benefit;¹³⁸ or
- was the result of a “sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely

director whose performance meets the standards of [conduct of] section 8.30 should have no liability, the fact that a director’s performance fails to reach that level does not automatically establish personal liability for damages that the corporation may have suffered as a consequence.”); Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 *FORDHAM L. REV.* 437 (1993).

¹³³ REVISED MODEL BUS. CORP. ACT §8.01(b). See also DEL CODE ANN. tit.5 § 141(a) (2007) providing that “[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .” For a discussion of differences among corporate statutory formulations and the rationale for the approach of the Revised Model Business Corporation Act (RMBCA) approach, see REVISED MODEL BUS. CORP. ACT § 8.30 cmt. Corporate officers and other fiduciaries are appointed by or under the authority of the board of directors and are subject to fiduciary duties. See, e.g., REVISED MODEL BUS. CORP. ACT §§ 8.40, 8.41, 8.42 (setting forth pertinent officer appointment and conduct provisions).

¹³⁴ REVISED MODEL BUS. CORP. ACT § 8.30(b).

¹³⁵ See *id.* at §§ 8.31(a)(1), 8.31(a)(1) cmt. (identifying limitation of liability provisions such as those provided for in §2.04(b)(4) and conflict of interest safe harbors such as those provided for in § 8.61).

¹³⁶ *Id.* at § 8.31 (a)(2)(i).

¹³⁷ *Id.* at § 8.31(a)(2)(A), (B).

¹³⁸ *Id.* at § 8.31 (a)(2)(iii), (v).

attention, by making (or causing to be made) appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefore.”¹³⁹

At first glance, one might suppose that the directors of relevant American corporations who do not take action regarding climate change are prime candidates for fiduciary duty liability. After all, one could say that these directors, after ignoring or rejecting demands by shareholders to act, acted “not in good faith,”¹⁴⁰ or that when they made that decision they either “did not reasonably believe [it] to be in the [corporation’s] best interests” or were “not informed to an extent . . . reasonably believed to be appropriate in the circumstances.”¹⁴¹

Further, in light of the high profile of climate change issues in recent years, one might query whether it is still possible to assign fault to the directors for not being independently attentive to the subject, even where no shareholder demands are made. Specifically, does not the growing publicity and consensus about climate change, including readily available analyses of the specific threats posed, form a basis for accusing directors of a general “sustained failure . . . to devote attention to ongoing oversight of the business”?¹⁴² Or, have these same developments not revealed the existence of “particular facts and circumstances of significant concern . . . that would alert a reasonably attentive director to the need” for action,” thereby requiring that they “devote timely attention, by making (or causing to be made) appropriate inquiry”?¹⁴³

The preceding analysis, however plausible it may appear as a legal interpretation, must surmount an imposing body of corporate law and jurisprudence. Notably, several corporate law concepts reflect the law’s firm embrace of policies holding that judges are not business experts and that there should be sufficient protection of directors from liability to attract and retain talented professionals who will have the freedom to take the risks that often attend high returns on investment.

¹³⁹ *Id.* at § 8.31(a)(2)(iv).

¹⁴⁰ *Id.* at § 8.31 (a)(2)(i).

¹⁴¹ *Id.* at § 8.31(a)(2)(A), (B).

¹⁴² *Id.* at § 8.31(a)(2)(iv).

¹⁴³ *Id.* at § 8.31(a)(2)(iv).

2. Application to Climate Change

a. Traditional Fiduciary-Protective Policies

Contentions that director decisions to not take any action related to climate change violate the fiduciary duty of care must confront and survive the "business judgment rule."¹⁴⁴ The rule applies specifically to decisions made by directors, and it is described as a presumption that "in making a business decision the directors of a corporation acted on an informed basis. . . and in the honest belief that the action taken was in the best interests of the company [and its shareholders]."¹⁴⁵

Importantly, this rule of judicial self restraint addresses the *process* leading to the board's decision and not the *content* of that decision. Courts will not interfere with the decision as long as the process was "either deliberately considered. . . or was otherwise rational."¹⁴⁶ Such an approach provides considerable berth to directors to take risks, even if doing so results in losses to the corporation:

[W]hether a judge or jury considering the matter after the fact believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational," provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a *good faith* effort to advance corporate interests.¹⁴⁷

This protective policy finds broad support in the authorities, right down to interpretations given to key terms. Thus, conduct not in "good faith" by a board is described as that in which a board "lacked an actual intention to advance corporate welfare."¹⁴⁸ Requirements that directors have a "reasonable belief" that a deci-

¹⁴⁴ Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) ("[A] conscious decision to refrain from acting may nonetheless be a [decision, and in appropriate circumstances, one that is a] . . . valid exercise of business judgment.").

¹⁴⁵ *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 747 (Del. Ch. 2005) (citing Aronson v. Lewis, 473 A. 2d 805, 812 (Del. 1984)). See AM. LAW INST, *supra* note 131 §§ 4.01(c), 4.01 cmt. (a) (2005). See also MODEL BUS. CORP. ACT §8.31 cmt. note on the Business Judgment Rule (2005) ("[The MBCA] does not codify the business judgment rule as a whole . . . [I]t would not be desirable to freeze the concept in a statute [as it continues to be developed by the courts] . . . [But] its principal elements . . . are embedded in [§ 8.31 (a)(2)].).

¹⁴⁶ *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A. 2d. 959, 967 (Del. Ch. 1996) (citing Aronson v. Lewis, 473 A.2d 805 (Del. 1984); *Gagliardi v. TriFoods, Int'l Inc.*, 683 A. 2d 1049 (Del. Ch. 1996)).

¹⁴⁷ *In re Caremark*, 698 A. 2d at 967.

¹⁴⁸ *Gagliardi*, 683 A. 2d at 1051.

sion was in the corporation's best interests, or that the directors were "informed" when making a decision to an extent "reasonably believed appropriate," are similarly permissively interpreted.¹⁴⁹ Hence, "so long as it is his or her honest and good faith belief, a director has wide discretion."¹⁵⁰ Liability appears to lie only "in the rare case where a decision . . . is so removed from the realm of reason (e.g., corporate waste), or a belief as to the sufficiency of the director's preparation to make an informed judgment is so unreasonable as to fall outside the permissible bounds of sound discretion. . . ."¹⁵¹

The business judgment rule does not apply to monitoring or oversight duties in which no decision is being made. This function, in contrast to the decision-making function, "involves ongoing monitoring of the corporation's business and affairs over a period of time. This involves the duty of ongoing attention, when actual knowledge of particular facts and circumstances arouse suspicions which indicate a need to make inquiry."¹⁵² Again, however, the bar is not set exceedingly high. "Directorial management does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies."¹⁵³ The duty to inquire about suspicious matters is also articulated in restrictive terms:

[E]mbedded in the oversight function is the need to inquire when suspicions are aroused. This duty . . . does not entail proactive vigilance, but arises when, and only when, particular facts and circumstances of material concern (e.g. evidence of embezzlement at a high level or the discovery of significant inventory shortages) suddenly surface.¹⁵⁴

Notable here are the linguistic formulations (only "suspicious" matters create a specific duty of inquiry, and only a "general" duty of monitoring is imposed in normal circumstances), as well as the types of examples usually offered. Regarding both as to the business judgment rule applicable to director decisions and the law of "unconsidered inaction" in directorial oversight,¹⁵⁵ the traditional,

¹⁴⁹ MODEL BUS. CORP. ACT § 8.31 cmt. note on the Business Judgement Rule.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*; *Francis v. United Jersey Bank*, 432 A.2d 814, 822 (N.J. 1981) ("Directors are under a continuing obligation to keep informed about the activities of the corporation . . . Directors may not shut their eyes to corporate misconduct.").

¹⁵³ *Francis*, 432 A.2d at 822 (citing *Williams v. McKay*, 18 A. 824, 828 (N.J. Ch. 1889)).

¹⁵⁴ MODEL BUS. CORP. ACT § 8.31, cmt. note on the business judgment rule.

¹⁵⁵ *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A. 2d. 959, 968 (Del. Ch. 1996).

restrictive approach to fiduciary duty may not embrace a duty to address climate change developments, at least not at the present state of knowledge.

To this body of law must also be added certain other corporate law concepts that pose challenges to shareholders seeking to impose certain desirable conduct on fiduciaries. These include (1) the right of directors, in pursuit of their duties, to rely on the opinion, reports, and the like, of officers, attorneys, and other experts, and to thereby limit their exposure;¹⁵⁶ (2) procedural disadvantages facing plaintiffs in shareholder derivative suits, notably the possibility that those suits can be disposed of without trial based on the “business judgment” of the board or of a special board committee;¹⁵⁷ (3) statutory provisions allowing the limitation—or the virtual elimination—of director monetary liability for breaches of the fiduciary duty of care;¹⁵⁸ and (4) indemnifi-

¹⁵⁶ See, e.g., DEL. CODE ANN. tit. 8, §141(e) (2007):

[A director] shall, in the performance of such [director's] duties, be fully protected in relying in good faith upon the [corporate] records . . . and upon such information, opinion, reports or statements presented to the corporation by . . . officers . . . employees . . . or [an expert] . . . who has been selected with reasonable care by . . . the corporation.

See also MODEL BUS. CORP. ACT §§ 8.30 (d), 8.30 cmt. (2005). These protective provisions recognize, among other things, that directors *qua* directors are not employees of the corporation and they do not come to work each day. They meet anywhere between a few times to several times a year. Thus, the thinking goes, their ability to acquire information and investigate is accordingly limited and so, to some degree, should be their liability exposure.

¹⁵⁷ See *Gall v. Exxon Corp.*, 418 F. Supp. 508, 515-18 (S.D.N.Y. 1976); *Aronson v. Lewis*, 473 A.2d 805, 812-13 (Del. 1984); Dennis J. Block & H. Adam Prussin, *Termination of Derivative Suits Against Directors on Business Judgment Grounds: From Zapata to Aronson*, 39 BUS. LAW. 1503 (1984); Fairfax, *supra* note 100, at 408-09 (discussing the requirement in many jurisdictions that before suing, a shareholder must make a “demand” on the board to take curative action: “[W]hether demand is made or excused, the board of directors, as an entire body or through a committee, generally determines that suits against directors should not proceed.”); cf. *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) (supporting a “middle course between . . . yield[ing] to the independent business judgment of a board committee and . . . unbridled plaintiff stockholder control” over a derivative suit, *id.* at 788) (limited by *Aronson*, 473 A.2d at 805).

¹⁵⁸ See DEL. CODE ANN. tit. 8, § 102(b)(7) (2007); *Cinerama, Inc. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. 1993); MODEL BUS. CORP. ACT §§ 2.02(b)(4), 2.02 cmt.; William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1302 (2001); Fairfax, *supra* note 100, at 412-13 (“[T]hese statutes not only severely reduce the threat of director liability, but also ‘minimize the opportunity for courts to patrol and reinforce the boundaries of business judgment.’” (quoting Mae Kuykendall, *Symmetry and Dissonance in Corporate Law: Perfecting the Exoneration of Directors, Corrupting Indemnification and Straining the Framework of Corporate Law*, 1998 COLUM. BUS. L. REV. 443, 479)); Stephen A. Radin, *Director Protection Statutes After Malpiede and Emerald Partners*, BUS. AND SEC. LITIGATOR (Weil Gotshal & Manges LLP, New York, N.Y.), Feb. 2002, at 1-3.

cation provisions, as well as director and officer liability insurance.¹⁵⁹

Finally, although “best practices” standards reflect leadership in the development and application of progressive policies addressing important problems, they may not thereby become the acceptable legal standard of conduct and review. This is made clear in Delaware case law:

Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and usually help directors avoid liability. *But they are not required by the corporation law and do not define standards of liability.*¹⁶⁰

The foregoing description of the nature and structure of state corporate fiduciary law is the subject of lively debate about whether corporate law, in particular Delaware corporate law, is engaged in a “race to the bottom.”¹⁶¹ Yet, notwithstanding the foregoing, certain trends and currents in the law over recent decades suggest that courts may be interpreting fiduciary duties of directors and officers more strictly, and these developments deserve commentary.

¹⁵⁹ See DEL. CODE ANN. tit. 8, § 145 (2007); Fairfax, *supra* note 100, at 413 (“These provisions for indemnification combine with D&O insurance to solidify the virtual obliteration of director liability.”); Joseph P. Monteleone & John F. McCarrick, *Directors’ and Officers’ Liability, A D&O Policy Road Map: The Coverage Exclusions*, INSIGHTS, July 1993, at 7, 8.

¹⁶⁰ Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000) (emphasis added) (cited in *In re The Walt Disney Company Derivative Litig.*, 907 A.2d 693, 745 n.399 (Del. Ch. 2005)).

¹⁶¹ Critics over the years have accused Delaware of maintaining a director/management-friendly regime of corporate law, to the disadvantage of shareholders and others and in the interest of raising substantial revenues from incorporations. See, e.g., William L. Cary, *Federalism and the Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 683-685 (1974); William L. Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW. 1101, 1102-1103 (1975); Joel Seligman, *A Brief History of Delaware’s General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249 (1976); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969);. Others disagree with this view. See, e.g., RALPH K. WINTER, GOVERNMENT AND THE CORPORATION 9 (1978); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976); S. Samuel Arsht, *Reply to Professor Cary*, 31 BUS. LAW. 1113 (1976).

b. *Countervailing Considerations and Trends: Caremark, Sarbanes-Oxley, and Other Drivers of Higher State Law Standards for Corporations and Their Fiduciaries*

Against this background of fiduciary-protective law and jurisprudence, there are influential court decisions, legislative and regulatory enactments, and policy pronouncements that are read by some to favor an expansion of monitoring and oversight duties for directors and other fiduciaries. In the category of court decisions, none has more impact than *In re Caremark Inter'l Inc. Derivative Litigation*.¹⁶²

In *Caremark*, the plaintiffs launched shareholder derivative actions against a public corporation's board of directors, claiming that the directors breached their duty of care in connection with certain corporate criminal violations of state and federal laws applicable to health care providers. Seeking, on the company's behalf, to recover amounts paid out in civil and criminal fines and other payments, the plaintiffs claimed that the directors breached their duties of "attention or care . . . [by allowing] a situation to develop and continue which exposed the corporation to enormous legal liability." According to the plaintiffs, they had a duty "to be active monitors of corporate performance."¹⁶³

Chancellor Allen, in approving a proposed settlement, discussed that aspect of fiduciary duty involving directorial monitoring or oversight of companies. Notably, the discussion was widely viewed as setting a higher standard of conduct and review in this area than that previously established in the highly-regarded case *Graham v. Allis-Chalmers Manufacturing Co.*¹⁶⁴ *Graham*, which like *Caremark* involved a shareholder derivative claim of fiduciary duty breach for failure to monitor that was commenced in the wake of criminal prosecution, was known for its "red flag" theory of director oversight duty. There, the Delaware Supreme Court upheld the chancery court's denial of a claim that the directors, "even though they had no knowledge of any suspicion of wrongdoing on the part of the company's employees, they still should have put into effect a system of watchfulness." In doing so, the *Graham* court made the following observation:

[D]irectors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on

¹⁶² 698 A. 2d. 959 (Del. Ch. 1996).

¹⁶³ *Id.* at 966.

¹⁶⁴ 188 A. 2d 125 (Del. Ch. 1963).

suspicion that something is wrong. . . [A]bsent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.¹⁶⁵

Chancellor Allen's discussion of *Graham's* red flag theory is remarkable in that, as a chancery court, it effectively interpreted a Delaware Supreme Court ruling in a manner that would broaden the scope of the fiduciary duty of monitoring and oversight beyond what a literal (but fair) reading of the *Graham* opinion might suggest.¹⁶⁶ To support his interpretation, Chancellor Allen relied upon his own view of how the Delaware Supreme Court would interpret *Graham* at the time of his opinion and also on certain developments in the larger body of laws that affect corporate behavior. His use of his sense of how a 1996 Supreme Court would interpret the 1963 Supreme Court is noteworthy: "A broader interpretation of *Graham v. Allis Chalmers* – that it means that a corporate board has no responsibility to assure that appropriate information and reporting systems are established by management – would not . . . be accepted by the Delaware Supreme Court in 1996, *in my opinion*."¹⁶⁷

Caremark further supports its view advancing the importance of monitoring systems by noting generally that "in recent years the Delaware Supreme Court has made. . . clear. . . the seriousness with which the corporation law views the role of the corporate board."¹⁶⁸ Chancellor Allen also looked beyond state corporation law proper, to the "potential impact of the federal organizational sentencing guidelines on any business organization."¹⁶⁹ Hence, the *Caremark* court opined that "a director's obligation includes a duty to *attempt in good faith to assure* that a corporate information and reporting system . . . exists, and that failure to do *so under some circumstances may, in theory at least*, render a director lia-

¹⁶⁵ *Id.* at 129.

¹⁶⁶ The *Graham* court made its point more than once in the opinion. For example: "[W]e know of no rule of law which requires a corporate director to assume, with no justification whatsoever, that all corporate employees are incipient violators who, but for a tight check-rein, will give free vent to their unlawful propensities." 188 A.2d at 130-131.

¹⁶⁷ *In re Caremark*, 698 A.2d at 969-970 (emphasis added).

¹⁶⁸ *Id.* at 970 (citing *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) and *Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1993)). Chancellor Allen further "note[s] the elementary fact that relevant and timely *information* is an essential predicate for satisfaction of the board's supervisory and monitoring role under Section 141 of the Delaware General Corporation Law." *Id.*

¹⁶⁹ *Id.* See Sentencing Reform Act, Pub. L. 98-473, Title II, §212(a)(2) (1984), 18 U.S.C. §§3551-3656.

ble. . . ."¹⁷⁰ Although the language is very guarded and circumscribed and the court was only a court of first instance, *Caremark* certainly contributed to the currents in legal thought and policy seeking to impose higher levels of responsibility on fiduciaries of corporations.¹⁷¹ Importantly, the Delaware Supreme Court later acknowledged and adopted the *Caremark* standard in *Stone v. Ritter*.¹⁷²

Commentators identify the influence of developments in other areas of law and policy as having an influence on expansionist views of the scope of fiduciary duty in state corporate law and policy. The *Caremark* court's strong embrace of and reliance on the Sentencing Reform Act and the U.S. Sentencing Commission's Sentencing Guidelines is a prominent example. On this point, Chancellor Allen observes that "[t]he Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts."¹⁷³

Similarly, some cite the work of the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* and the American Bar Association's work on the Model Business Corporation Act and the *Corporate Director's Guidebook* as encouraging higher standards of conduct for fiduciaries.¹⁷⁴

"Corporate reform has been a recurring theme throughout the twentieth century,"¹⁷⁵ and federal securities laws, including Securities and Exchange Commission (SEC) regulations, are a constant force in this process. From the post-Great Depression "New Deal" reforms of Franklin Delano Roosevelt, through the various reforms

¹⁷⁰ *Id.* (emphasis added).

¹⁷¹ See H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 6 (2001) ("Although a definitive statement regarding a director's liability must await a decision of the Supreme Court of Delaware, the Chancellor's views in this regard finds substantial support."); Mark J. Lowenstein, *The Corporate Director's Duty of Oversight*, 27 COLO. LAW. 33 (1998) ("While a Chancery opinion is typically of lesser precedential value than a Supreme Court opinion, the age of the *Graham* decision, Chancellor Allen's prominence, and the force of his opinion all suggest otherwise."). Some commentators, however, believe that "[p]ost-*Caremark* decisions indicate that shareholder litigation against directors and officers continues to be a tough road." HAMILTON & MACEY, *supra* note 113, at 711 (citing *Salsitz v. Nasser*, 208 F.R.D. 589 (E.D. Mich 2002)).

¹⁷² *Stone v. Ritter*, 911 A.2d 362, 365 (Del. 2006).

¹⁷³ *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A. 2d. 959, 969 (Del. Ch. 1996).

¹⁷⁴ See generally Brown, *supra* note 171, at 64-70 (commenting on the ALI principles generally and their consistency with *Caremark* and commenting on the ABA's work).

¹⁷⁵ *Id.* at 32.

addressing the scandal-plagued 1970s and 1980s,¹⁷⁶ to the post-Enron reforms, these federal measures are often viewed as having both direct and indirect impacts on corporate standard setting. *Caremark* is only one of numerous examples of the impact of federal law reform on state law. Notably, commentators express the view that the Sarbanes-Oxley Act and related reforms provide the latest and most prominent example of federal activity that attracts the attention of state courts¹⁷⁷ and judges in matters of corporate governance. For example, former Delaware Chancellor Allen, now a law professor at New York University, made the observation that “[i]t would not be unreasonable to assume that the Delaware courts are responding to the Enron and WorldCom headlines and the intrusion, so to speak, of the federal government into the internal governance of corporations.”¹⁷⁸

Therefore, any analysis of the question whether fiduciary duty law requires at least initial investigatory action with respect to climate change must not only take into account the traditional fiduciary-protective approach of corporate law but also must consider recent influences that can be seen as potentially expanding those duties. Although the weight of tradition might well carry the day were the question of the applicability of fiduciary duty law to climate change issues pressed in the courts, the issue is not entirely out of the question. Moreover, this observation will become increasingly more relevant with the accelerating pace of scientific knowledge about climate change and the consequent responses to this pace.

¹⁷⁶ See *id.* at 32-63 (discussing the role of federal law in addressing problematic corporate conduct).

¹⁷⁷ See, e.g., *In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 286-87 (Del. Ch. 2003) (opining that neither the business judgment rule nor the exculpatory force of DGCL § 102(b)(7) would ward off director liability for “acts or omissions not undertaken honestly and in good faith, or which involve intentional misconduct.”); Fairfax, *supra* note 100, at 415-20 (“[T]here is evidence that Sarbanes-Oxley may play a role in increasing director liability by altering the manner in which state courts view exculpatory statutes.” *Id.* at 416 (referring to the focus on the “good faith” element by the court in *Walt Disney*)). See also Hillary A. Sale, *Delaware’s Good Faith*, 89 CORNELL L. REV. 456, 457 (2004) (analyzing the “emerging duty of good faith and its potential for curbing abuses such as those seen in the past few years,” and noting that “[d]uring the last few years . . . an important common-law change has emerged indicating that at least the Delaware judiciary is at work in this area,” presumably in part as a result of pressure from federal reforms.”); *Id.* at 459 (citing E. Norman Veasey, *State-Federal Tension in Corporate governance and the Professional Responsibilities of Advisors*, 28 J. CORP. L. 441, 443 (2003) (“[T]here are emerging federal statutory duties and SEC Rules . . . that may trump Delaware fiduciary law. . . .”).

¹⁷⁸ Marc Gunther, *Boards Beware!*, FORTUNE, Nov.10, 2003, at 171.

CONCLUSION

If anything is clear, it is that the debate and discussion about climate change will only continue to grow, and the policies and practices of governmental and corporate actors are very likely to follow suit. At the same time, while certain trends in both science and the law are undeniable, there is much that is yet to be known. Advocacy groups will use legal duties where they can, and will combine their legal strategies with political, economic, and public relations pressure. Corporate and governmental actors' positions are emerging in an increasingly complex manner, with a number of them veering away from the original tendency to resist proactive analyses and policies about climate change.

This Article attempts to set out, in as objective and clear-headed a fashion as possible, the pertinent legal concepts and their likely application to the (present and emerging) facts. The hope is that all "stakeholders" in the climate change dialogue will profit from this analysis and proceed with the development of policies and practices truly in the best interests of all involved.