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# THE CUBICAL

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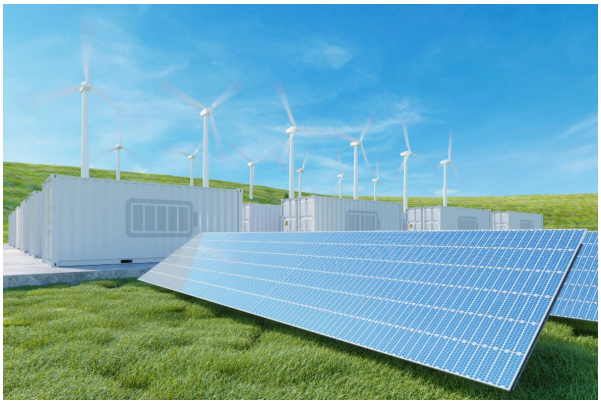
## Achieving Stability in an Unstable World: ESG Disclosures and the Role of the In-house Environmental Attorney



One of the key responsibilities of an in-house environmental attorney serving in the legal department of a publicly traded manufacturing company is to participate actively in the internal processes for the drafting, review, and final editing of the company's quarterly and annual financial disclosures. The in-house environmental attorney's input is critical to ensure that the sections of these disclosures pertaining to environmental matters, such as contingent environmental liabilities or environmentally-related business risks, accurately reflect available relevant and material information.

These internal processes are quite detailed and methodical. An initial draft (typically designated as "Draft A" or "Draft No. 1") is circulated not long after the end of a fiscal quarter or year. Timelines are tight. Mark-ups and comments are typically expected within days. After the initial round of review, more rounds of drafts follow (Drafts B, C, D, etc.) - all with similarly tight timelines for review and comment. With each successive round of review, the final disclosure to be submitted to the Securities and Exchange Commission (SEC) continues to take shape. The submitted disclosure is the product of multiple review processes involving dozens of internal and external employees and stakeholders.

There are a number of reasons why these internal processes are so thorough and rigorous. One particularly important reason is the desire among investors for a consistent and stable narrative over multiple reporting periods. Significant numbers of the shares for a manufacturing company are typically owned by institutional investors with long-term investment objectives. These investors closely scrutinize the 10-Qs and 10-Ks of the companies in which they invest. They tend to see a consistent narrative woven together across multiple quarterly and annual reporting periods as a sign of stability and competency. Changes in these disclosures that cannot be tied to particular events or developments can give the impression of a lack of such consistency or stability.

For this reason, one quickly learns that Draft C, Draft B, or even Draft A of a 10-Q or 10-K is not the place to experiment with new ways of saying the same thing. No one is looking for, nor is anyone interested in, more elegant ways of presenting the same information. Suggested changes are expected to be substantive, timely, and based on information that has been thoroughly vetted.

With all of this in mind, the nature and pace of recent developments in the area of ESG and climate disclosures pose a challenge to a company's desire to achieve consistency and stability in its disclosures. The SEC has been quite active and aggressive in the area of such disclosures since the early days of the Biden Administration. In addition, while there have been recent efforts by international standards organizations to harmonize the vast array of ESG-related standards and metrics, such efforts are still very much in flux. Finally, institutional investors such as Blackrock continue to apply pressure on the companies in which they invest to develop, commit to, and execute aggressive ESG and climate goals and objectives.

The challenge for the in-house environmental attorney will be to seamlessly integrate new disclosure obligations that are continually developing and changing into existing internal review processes that are designed to achieve consistency and stability. This challenge will be formidable. Nonetheless, an in-house environmental attorney faced with such a challenge can prepare to tackle it by doing the following:

- Recognize the fact that the current state of climate and ESG disclosures is still in a state of flux, and that as a result, the degree of consistency and stability of the narrative to which the company has become accustomed may not be achievable when it comes to such disclosures, at least in the near term.
- Discuss this challenge with appropriate personnel and seek to achieve an understanding of management's expectations with respect to the development and evolution of ESG and climate disclosures over time.
- Keep your eye on the ball! Don't forget the importance of accurately reporting the company's contingent environmental liabilities, environmentally related business risks, and other environmentally related matters. Avoid getting too caught up in the novelty and cachet of addressing ESG and climate risks at the expense of doing the regular blocking and tackling associated with these other environmentally related disclosures.

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## PFAS, TRI Reporting, and Defense Authorization: Round 2

It has been almost two years since the National Defense Authorization Act for Fiscal

Year 2020 was signed into law. The FY2020 Authorization was like most other defense appropriation legislation in that its primary purpose was to authorize appropriations for the military for the upcoming fiscal year. However, the FY2020 Authorization also addressed a number of issues related to the presence and persistence of per- and polyfluoroalkyl substances - or PFAS - in the environment. For the first time, the FY2020 Authorization established TRI reporting requirements for PFAS for the first time. Currently, 172 PFAS are covered by these reporting requirements. The reporting threshold for these PFAS is 100 pounds.

For FY 2022, Congress may once again resort to defense authorization as a means of expanding the scope of TRI reporting for PFAS. The defense authorization for Fiscal Year 2022, which was passed by the House of Representatives on September 23rd, would not add any new PFAS to the TRI reporting list. However, it would eliminate a number of TRI reporting exemptions, including the so-called *de minimis* exemption. These exemptions set forth the circumstances and conditions under which a reportable chemical need not be counted for the purpose of determining whether the applicable threshold for manufacture, processing, or use for that chemical has been exceeded. Under the *de minimis* exemption, the amount of a non-carcinogenic TRI chemical in a mixture at a concentration below 1 percent, or a carcinogenic TRI chemical in a mixture at a concentration below 0.1 percent need not be counted. Under the FY2022 Authorization bill, a reportable PFAS in a mixture *at any level* would be required to be counted.

While the impact of this legislation on the*de minimis* exemption has garnered the most attention, it is important to note that this is not the only exemption that would be impacted. The legislation would amend the TRI reporting requirements by adding a provision stating that the regulatory provision establishing the TRI reporting exemptions shall not apply with respect to reportable PFAS. In addition to the *de minimis* exemption, this provision - 40 C.F.R. § 372.38 - contains exemptions for use as an article or structural component, use for routine maintenance, personal use by employees (such as food or cosmetics), and use for motor vehicle maintenance.

For facilities concerned about a significant increase in the reporting burden associated with these provisions, the silver lining is twofold. First, while this bill has passed in the House of Representatives, it has yet to be debated and considered in the Senate. It is entirely possible that these provisions will either not survive, or at least be considerably watered down prior to final passage of defense authorization legislation. Second, under the FY2022 Authorization bill, these exemptions would be restored for any PFAS for which EPA increases the reporting threshold to 10,000 pounds.

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