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# ESG Disclosures and Litigation Concerns

The publication of the World Economic Forum's (WEF) proposed core metrics and recommended disclosures under the auspices of the International Business Council, while seeking to align mainstream ESG reporting, has prompted concern about litigation risks. One specific area of concern stems from the proposed framework's recommended disclosure of scenario analysis.

Scenario analysis is a key recommendation of the Task Force on Climate-related Financial Disclosures and is incorporated into the WEF's proposed framework. The purpose of scenario analysis is to consider and better understand how a business might perform under different future states by evaluating a range of hypothetical outcomes under a variety of plausible future climate-related scenarios. Many companies already conduct scenario analysis and an increasing number of companies already make disclosures concerning such analyses.

Some companies have expressed concern over whether scenario analysis and disclosure of underlying analyses, assumptions and parameters or the failure to consider other plausible climate-related scenarios may lead to heightened securities litigation risks or enforcement actions. A related concern is whether work papers generated by scenario analysis may be used as a basis to commence or bolster litigation or whether ESG-related statements that are later alleged to be materially inaccurate or misleading could become the basis for securities litigation.

We believe that companies that make accurate disclosures and take advantage of the protections available under existing statutory and common law safe harbors are unlikely to face significant litigation risks from scenario analysis disclosures. Companies disclosing ESG metrics should take necessary precautions to ensure that their disclosures are not materially misleading or inaccurate, including issuing cautionary statements, such as the examples set forth in Annex A. If companies make use of existing safe harbors and exert the same degree of care when making ESG scenario analysis disclosures as their other public disclosures, they should not face new or heightened litigation risks.

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# Annex A

Cautionary Statement from BP plc's 2019 Energy Outlook:

"The Outlook considers a number of different scenarios. These scenarios are not predictions of what is likely to happen or what BP would like to happen. Rather, they explore the possible implications of different judgements and assumptions by considering a series of "what if" experiments. The scenarios consider only a tiny sub-set of the uncertainty surrounding energy markets out to 2040; they do not provide a comprehensive description of all possible future outcomes.

For ease of explanation, much of the Outlook is described with reference to the 'Evolving transition' scenario. But that does not imply that the probability of this scenario is higher than the others. Indeed, the multitude of uncertainties means the probability of any one of these scenarios materializing exactly as described is negligible.

The Energy Outlook is produced to aid BP's analysis and decision-making, and is published as a contribution to the wider debate. But the Outlook is only one source among many when considering the future of global energy markets. BP considers the scenarios in the Outlook, together with a range of other analysis and information, when forming its long-term strategy."

Cautionary Statement from AES Corporation's 2018 Climate Scenario Report:

"The scenarios modeled in this report are largely derived from assumptions contained in the International Energy Agency's (IEA) 2017 World Energy Outlook (WEO) and the Representative Concentration Pathways (RCPs) established by the Intergovernmental Panel on Climate Change's (IPCC) Fifth Assessment Report (AR5). These scenarios should not be mistaken for forecasts or predictions. Accordingly, there can be no assurance that the scenario modeling or assessments presented in this report are a reliable indicator of the actual impact of climate change on AES' portfolio or businesses."

Cautionary Statement from Ford Motor Company's 2019 Climate Change Scenario Report:

"Scenario planning is a disciplined method of imagining possible future environments that companies might face over a set time period. By engaging in scenario analysis, we are able to explore and examine a wider range of economic, regulatory and societal conditions and consider how Ford's businesses and strategies might fare under varying operating environments. Scenario analysis is a good way to consider the business risks associated with climate change because it allows for a multi-pronged approach to the wide range of factors that may influence the mobility sector under a global climate accord. Scenario analysis allows us to capture a wider possible range of future influences on our business, including new regulations and policies, unexpected technological innovation, and changing societal values and priorities that could lead to new patterns of behavior.

We cannot list every influence that we believe might affect the automobile industry in the coming decades. To help our stakeholders understand how we consider the changes that are coming, we focus on four alternative long-term transportation scenarios, all of which are plausible and all of which could influence Ford's operating environment in markedly different ways. The scenarios are broadly constrained by their position in the climate and technology scopes. Two scenarios experience low climate impacts, while the other two face significant global changes due to climate. On the technology side, the high-technology scenarios undergo revolutionary advances, while the low-technology cases have evolutionary change. We believe that sharing these scenarios will give our shareholders and other stakeholders confidence that Ford is preparing for reductions in $CO_2$ consistent with the Paris Climate Accord and will be able to build resilient strategies that reflect our changing transportation landscape. We categorize these scenarios as: (1) Too Little, Too Late (high climate change, low technology), (2) Speed of Adaptation Wins (high climate change, high technology), (3) One Size Does Not Fit All (low climate change, low technology) and (4) Life is Good, Speed is Key (low climate change, high technology)."