Concerns misplaced:
Will compliance with the TCFD recommendations really expose companies and directors to liability risk?

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COMMONWEALTH
Climate and Law Initiative

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About the Commonwealth Climate and Law Initiative

The Commonwealth Climate and Law Initiative (CCLI) is a research, education, and outreach project focused on four Commonwealth countries: Australia, Canada, South Africa, and the United Kingdom. CCLI examines the legal basis for directors and trustees to take account of physical climate change risk and societal responses to climate change, under prevailing statutory and common (judge-made) laws. In addition to the legal theory, it also aims to undertake a practical assessment of the materiality of these considerations, in terms of liability, and the scale, timing, probability of this and the potential implications for company and investor decision-making.

Australia, Canada, South Africa, and the UK, despite only producing 6% of current annual global GHG emissions, account for 13% of global coal reserves and 11% of global oil reserves. Their stock exchanges also have 27% of all listed fossil fuel reserves and 36% of listed fossil fuel resources. They each have large and highly developed financial systems and account for 23% of the global pension assets and contain within the G20 the 8th, 5th, 14th, and 4th largest stock markets by market capitalisation respectively.

The significant commonalities in the laws and legal systems of each of the four countries makes the initiative's work and outcomes readily transferable. They each operate a common law legal system. Their corporate governance laws are based on common fiduciary principles. Whilst their laws may differ at the margins, legal developments and judicial precedents are influential in each others' jurisdictions.

In the upcoming months we will proceed with the release of national legal papers for the four jurisdictions. These will be complemented by conferences in Canada (October 2017) and South Africa (January 2018). The national legal papers are organised by jurisdiction and will follow a uniform structure to facilitate the creation of a subsequent comparative paper, which will aim to identify the strengths, weaknesses, opportunities and threats in each jurisdiction.

These papers represent a lead up to the creation of a White Paper that identifies policy recommendations for directors' associations and financial regulators in relation to the proper implementation and enforcement of directors' fiduciary laws in each of the observed jurisdictions. Moreover, the comparative work will be used to design an actionable framework for directors to integrate climate change issues into governance practice. This paper will be made available to the public at large and aim at creating a broad discussion among all targeted stakeholders.

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Legal Disclaimer

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Summary

- Since the release of the final recommendations of the G20 Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD), investors have faced resistance from some investee companies to the request for disclosure of forward-looking climate-related risks. Company directors commonly cite legal barriers to TCFD-compliance, including liability exposure arising from future uncertainty and lack of assurance.

- This concern misunderstands the nature of the TCFD recommendations and potentially misrepresents the application of securities disclosure laws in many jurisdictions.

- Rather, companies and their directors are likely to face *greater* liability exposure in many jurisdictions if they fail to assess and (where material) meaningfully disclose the financial risks associated with climate change and their impact on company performance and prospects.

- In light of increasing market demand for robust climate risk disclosures, there are also significant commercial benefits associated with making such disclosures.

- This briefing provides an overview of relevant mandatory disclosure laws, and offers a concise response to each commonly-cited argument against TCFD-compliant disclosure.

- Comprehensive research papers examining the legal issues outlined in this briefing will be published by the Commonwealth Climate and Law Initiative over the coming months.

Introduction

Whilst jurisdictional specificities prevail, corporate reporting and securities law frameworks generally require listed companies to disclose information that is materially relevant to their financial performance and prospects. 'Materiality' is rarely determinable by bare quantitative equation: rather, it requires an assessment of whether a reasonable investor would consider the information relevant to its decision whether to invest in the company. That assessment may require consideration of both quantitative and qualitative factors.

Within this general disclosure framework, a seismic shift in the approach to climate-related risks is underway. Corporate reporting on climate-related information is not a new concept. However, it has traditionally focused on reporting company impacts on climate change. Over the past few years this focus has flipped, and the emphasis now is increasingly on disclosing the impacts of climate change on the company. Climate change has evolved from a purely ethical or environmental issue to today's awareness that it poses a material financial risk not only to many companies and investors but to the entire financial system – and often within mainstream investment horizons. In light of this concern, the G20 Financial Stability Board (FSB) established the Task Force on Climate-related Financial Disclosures (TCFD). In June 2017, the TCFD released its final recommendations, which provide a framework for voluntary disclosures of climate-related financial risks for all corporate entities. The intention is that clear, consistent and reliable disclosures in line with the TCFD recommendations will improve market participants' economic decision-making, thereby ensuring a more efficient allocation of capital – for example, by identifying potentially stranded assets.

The TCFD recommendations purport to provide a universal touchstone of the information that companies in general, and in 16 'high-risk' sectors, are likely to need to disclose in order to present a true and fair view of material climate-related risks on financial performance and prospects (in addition to the governance structures, strategic assessments and risk analyses that should underlie the information ultimately disclosed). A key recommendation of the TCFD framework relates to forward-looking risk disclosures. In particular, the recommendations propose that the significant, yet manifestly uncertain, risks associated with climate change should be managed and disclosed by applying stress-testing and scenario analysis across a range of plausible climate futures. For those sectors with material exposures to the *economic transition risks* associated with climate change, the 'adverse scenarios' should include one aligned with the economic transformation contemplated under the goals agreed by the 195 countries signatory to the Paris Agreement in December 2015 (*viz*, limiting global warming to well below 2˚C above pre-industrial era average temperatures, and a net zero global economic emissions platform in the second half of this century). For those sectors at risk from the *physical impacts* of climate change, the 'adverse scenarios' may include the consequences of warming associated with 'business as usual' emissions trajectories, at 4˚C+.

Despite widespread industry support for the TCFD recommendations, some commentators have expressed concern that complying with the TCFD recommendations will expose companies to legal liability where investors or clients rely on companies' forward-looking statements and then suffer loss if they fail to eventuate. This paper directly responds to that concern. It first explains how this concern potentially misrepresents securities laws in a number of jurisdictions and overstates the liability risk associated with forward-looking statements, including those made in line with the TCFD

recommendations. It then explains how companies and their directors are likely to face far greater liability exposure in many jurisdictions if they fail to assess and (where material) meaningfully disclose the financial risks associated with climate change for the company. Finally, the paper outlines the significant commercial benefits of complying with the TCFD recommendations.

Liability risk for TCFD forward-looking statements – overstated?

Since the release of the TCFD recommendations, investors have faced resistance from some investee companies to the request for disclosure of forward-looking climate-related risks. Company directors commonly cite legal barriers to TCFD-compliance, including liability exposure arising from the vast uncertainty associated with future climate risk impacts – their timing, range and magnitude. In particular, some directors have expressed concern that this uncertainty prevents them from reasonably assessing, assuring and accurately disclosing the material implications of climate risks for business performance and prospects – and in turn exposes them to liability for misleading disclosure, or securities fraud, if their forward-looking risk assessments prove inaccurate with the passage of time.

It is true that under some disclosure regimes, directors may be primarily liable where they are involved in misleading disclosures by their company. In others, liability may be accessorial (i.e. to that of the company), or as an adjunct of the directors' duties to exercise due care and diligence in the best interests of their company. However, this concern about liability exposure both misunderstands the nature of the TCFD recommendations and potentially misrepresents the application of securities disclosure laws in many jurisdictions.

(a) The nature of stress-testing and scenario analysis

As Scott McClurg of HSBC Corporate Banking recently stated, '[p]roper risk management … almost inevitably requires making some assumptions about the future'. This is the case for any risk that a company has to manage, not just climate risk – the very concept of risk involves uncertainties and contingencies because a risk is something that has not yet eventuated.

This is what stress-testing and scenario-planning is all about – rather than requiring certainty of future outcomes, these processes test business resilience against a range of plausible climate futures in the face of broad uncertainty. Indeed, claims that the future impacts of climate change on the company are 'too uncertain' to enable scenario-planning may suggest that directors: (a) think business-as-usual is the most likely scenario; (b) have failed to consider and address a foreseeable financial risk, even if the precise future scenario cannot be predicted; and/or (c) have misrepresented an internal analysis – for example, ExxonMobil was investigated for alleged fraud after reporting that climate risks are inherently uncertain, despite having conducted internal assessments which produced clear scientific conclusions.

(b) Reporting obligations

Many companies are already required under national laws to report material risks and uncertainties facing the company and how these will be managed. For many companies, this will include an obligation to disclose climate risk. As Philippe Désfosses, CEO of French pension scheme ERAFP and vice chair of the Institutional Investors Group on Climate Change, has stated: 'There should be no resistance to the widespread adoption of the TCFD's recommendations given how – in most G20 countries – companies already have legal obligations to disclose material risks in their

routine financial filings, including those that relate to climate change.' As the Bank of England recently stated, climate change doesn't necessarily create a new category of risk but will 'translate into existing categories, such as credit and market risk for banks and investors, or risks to underwriting and reserving for insurance firms.'

For example, UK reporting laws already integrate climate risk into the broader financial risk analysis and disclosure framework. The UK Corporate Governance Code, which applies on a 'comply or explain' basis, requires companies to produce a 'viability statement' to 'explain in the annual report how they have assessed the prospects of the company' over a certain period and whether directors 'have a reasonable expectation that the company will be able to continue in operation and meet its liabilities'. For many companies, producing this viability statement will require scenario analysis of climate risk. In addition, directors of UK traded companies, banks and insurance firms (that are not SMEs) must prepare an annual strategic report outlining the 'main trends and factors likely to affect the future development, performance and position of the company's business' and 'principal risks regarding environmental and social matters … and how [the company] manages those risks'. The board must approve the strategic report and if directors knowingly or recklessly sign off on a non-compliant report (or fail to take reasonable steps to prevent non-compliance) each director commits a criminal offence. This could foreseeably occur where directors fail to take reasonable steps to consider and report climate-related risks, particularly where the company is highly exposed to such risks.

Similar laws exist in other jurisdictions. For example, in the US, listed companies have a duty to report on material risks to the business, including discussing the potential effects of 'known trends, events, or uncertainties' on the company's assets or future financial prospects. Where climate risk is material but the company fails to report it, the Securities and Exchange Commission has a right of action against the company. In Canada, in the jurisdictions in which most trading takes place, securities rules require issuers to disclose information relating to climate change if the information is a 'material fact' or a 'material change' – National Instrument 51-102 defines the latter as a change in business, operations or capital that 'would reasonably be expected to have a significant effect on the market price or value of the securities'.

(c) Disclosure laws – forward-looking risks

As outlined above, it is a common feature of mandatory corporate reporting and disclosure regimes that companies disclose information materially relevant to their financial performance *and prospects*. The latter inherently requires disclosure of foreseeable material risks which is, in turn, inherently forward-looking. Accordingly, compliance with prevailing disclosure laws implicitly *requires* companies to make certain assumptions and forward-looking statements. Companies who do so in good faith and on reasonable grounds will not generally be vulnerable to liability – if this were the case, the very purpose of these disclosure laws would be undermined.

As such, legal carve-outs exist in a number of jurisdictions to protect companies and directors from liability for forward-looking statements made in good faith, including in the US and the UK. Under US federal law, companies can be liable for misstating or omitting a material fact in connection with the purchase or sale of securities. However, liability requires fraudulent or reckless conduct – i.e. ***an intention to deceive or recklessness about the capacity of a statement to deceive investors***. In addition, under statutory 'safe harbour' provisions and judicial interpretations, companies are protected

from liability where forward-looking statements are qualified with meaningful cautionary language identifying important factors that could cause actual results to materially differ from those stated. Similarly in the UK, liability for forward-looking statements only attaches where the company ***fraudulently*** or ***recklessly*** makes untrue or misleading statements (or omissions). Liability for misleading statements may arise in the absence of fraud or recklessness under Australian law (including under the *Corporations Act 2001* and *ASIC Act 2001*) and various US state laws, including New York's *Martin Act* (which notably prohibits deception or misrepresentation, or omission of material facts, in respect of securities traded in that state).

However, directors are unlikely to face liability exposure where their disclosures accurately represent a robust, good-faith process of assessment that applies the best evidence reasonably available at the relevant time: and where those disclosures are appropriately caveated or qualified, and do not merely 'cherry-pick' optimistic scenarios. Key cases to date brought against companies for misleading statements have involved allegations of fraud and/or cherry-picking of information reported – for example, where Peabody Coal 'cherry picked' favourable International Energy Agency projections to support its own coal demand growth projections, and the claim against ExxonMobil for misleading the public on climate change risks.

This means that if a company carries out a robust risk assessment in line with the TCFD recommendations, comes to an honestly held view about how the business will fare in a lower carbon future and reports that view (and any contingencies and/or uncertainties), there will be negligible risk of disclosure-related liability where the company's assessment turns out to be incorrect. Directors can be ***wrong*** – they just cannot be ***reckless*** or ***fraudulent***.

Finally, if a company is unsure how to make climate risk disclosures, additional guidance is available. For example, in July 2017, the Bank of England and others published a report on 'Enhancing Environmental Risk Assessment in Financial Decision-Making' and the International Integrated Reporting Council is considering how to integrate financial and non-financial issues in reports and accounts. Professional advisers can also assist companies to comply with the recommendations – for example, PwC has outlined how auditors can assist companies to translate climate-related disclosures into financial ones.

Risks associated with *non-disclosure*: TCFD as a compliance strategy

Rather than increasing liability risk, compliance with the TCFD recommendations will help reduce companies' liability risk in a number of ways. Companies and directors in most G20 jurisdictions have existing obligations under national laws to assess, manage and report on climate risk, quite separately to the TCFD recommendations (as outlined in a number of recent PRI Baker McKenzie country review papers). These legal obligations typically fall into two categories: (1) reporting obligations (as discussed above); and (2) directors' duties to act in the best interests of the company and to exercise due care and diligence when performing their functions. For many companies, climate risk assessment, management and disclosure will be necessary in order to comply with these existing legal obligations, and the TCFD recommendations provide a useful framework for doing so. Complying with the TCFD recommendations therefore *reduces* companies' liability exposure. For example, compliance with the recommendations might have avoided the recent shareholder action in the Federal Court of Australia against Commonwealth Bank for its alleged failure to properly disclose climate risk. Furthermore, the potential liability protection that the recommendations provide will likely *increase* as climate risk disclosure is increasingly adopted and courts and regulators interpret existing laws to reflect this industry practice.

Conversely, in light of the disclosure laws discussed above, the following types of non-disclosure (or inadequate disclosure) of climate risk may actually *increase* the exposure of companies and their directors to claims of misleading disclosure and/or securities fraud:

- **Silence (i.e. non-disclosure of risk).** This suggests one of the following:
  - Directors have robustly considered the financial risks associated with climate change for the company but have concluded that such risks are not material. As noted above, and in the TCFD report itself, this is unlikely to be the case for companies operating in industries (and/or geographies) that are highly exposed to the physical and/or transition risks associated with climate change. In addition, if climate risk is not a material risk for the company, it would be commercially advantageous to disclose this.
  - Directors failed to (adequately) consider the foreseeable material financial risks associated with climate change, which may in turn suggest that the directors have breached their legal duties to the company.
  - Directors have assessed climate risk but have chosen not to disclose the assessment because the results are not commercially advantageous – this would likely give rise to liability for misleading disclosure or securities fraud.

- **High level or boilerplate disclosure**. Courts are requiring company-specific, meaningful statements that are fit for purpose for the particular disclosure – including in relation to disclosures of forward-looking risks.

- **Selective disclosure of 'convenient scenarios'**. For example, Peabody Coal's filings were held to be incomplete, false and misleading under New York's *Martin Act* because they

included only favourable International Energy Agency projections to support the company's own coal demand growth projections.

- **Framing climate risk assessments as 'statements of opinion or belief' does not provide a universal defence**.

In short, disclosure of forward-looking risks associated with climate change – with adequate specificity and relevance, and with appropriate cautionary language around associated limitations or uncertainties – is the best (if not only) way to minimise liability exposure for misleading disclosure. Whilst appropriate analysis and disclosure will be company-specific, the TCFD recommendations represent an influential touchstone for the processes required to robustly assess climate risks (and opportunities), and to communicate them to the market in a true and fair manner.

Directors' duties

National directors' duties laws may also require directors to consider climate risk *in the same way as any other foreseeable financial risk issue*. While the specific wording of directors' duties varies across jurisdictions, directors generally owe a fiduciary duty of loyalty to the company to act in good faith in the company's long-term best interests, and a duty to exercise due care and diligence when performing their functions. Both these duties require directors to adequately assess and manage existing and emerging risks to the company and its prospects. Again, for many companies this will include physical and/or economic transition risks associated with climate change. In addition to potential primary and/or accessorial liability under misleading disclosure laws outlined above, directors who fail to consider and manage climate risk may therefore be vulnerable to personal liability for a breach of duty via (derivative) shareholder actions, or, in some jurisdictions, to regulatory sanctions. For example, where directors wholly fail to consider climate risk (e.g. due to being 'climate sceptics' or because they prioritise short-term profit generation over longer-term business viability); where they do not adequately assess climate risk (e.g. because they do not obtain expert advice); or where climate risk is ignored or inadequately managed due to poor oversight.

The European Commission's Expert Group on Sustainable Finance recently acknowledged in its July 2017 interim report that failure to consider climate-related risks may breach fiduciary duties and 'potentially lead to claims for damages by beneficiaries and clients of financial institutions'. Similarly, a recent legal opinion states that it is 'only a matter of time' before a claim for breach of duty of care is brought against directors under Australian law in the context of climate risk mismanagement. This legal warning is also relevant to directors in other countries, particularly common law jurisdictions.

Complying with the TCFD recommendations may help directors prevent or defend claims alleging breach of directors' duties for climate risk mismanagement. Considering how the transition to a lower carbon economy will impact the company will help directors to fulfil their duty to pursue the company's long-term best interests and may provide strong evidence to defend a shareholder claim alleging they have failed to do so. Complying with the recommendations may also reduce the risk of regulatory investigations or NGO actions, such as the complaints made by ClientEarth to the UK Financial Reporting Council regarding the inadequate reporting of climate risk by Cairn Energy plc and SOCO International plc.

Future legal developments

The potential liability protection provided by the TCFD recommendations (or indeed, active disclosure of climate risks generally) is likely to increase in the future. This is because the law is not static and continues to evolve with changing business norms and market expectations. Given the industry support they have received, the TCFD recommendations are may well become influential standards that will affect the interpretation of existing reporting obligations and directors' duties laws. For example, if stress-testing and scenario analysis – as recommended by the TCFD – are widely adopted across the market, investors and other stakeholders will start to expect such information. National laws will then be interpreted accordingly. For example, under UK law, an objective test applies to determine whether a director has exercised 'reasonable care, skill and diligence' in performing his or her duties. Courts might interpret this as positively requiring stress-testing and scenario modelling if this becomes the industry norm.

The TCFD recommendations may also become mandatory in certain jurisdictions. Early compliance with the TCFD recommendations will help companies prepare for and comply with any such laws. Russell Picot, special adviser to the TCFD and former chief accounting officer at HSBC recently stated that '[t]hree or four years down the road we could potentially be assessing what is useful in the voluntary disclosures, and see it codified by institutions through, for example, stock exchange guidelines.' The Sustainable Investment Forum has suggested that '[c]ertain jurisdictions may wish to make aspects of the TCFD recommendations mandatory for insurance firms'. In addition, the EU High-Level Expert Group on Sustainable Finance recently recommended integrating the TCFD recommendations into EU regulation and enshrining directors' and investors' responsibility to manage long-term sustainability risks in their relevant legal duties. A July 2017 report by UK Investor Forum and other groups – including bankers, investors and civil society – makes similar recommendations.

Other legislative developments may also require increased disclosure of climate risk, quite separately from the TCFD recommendations. For example, the EU Non-financial Reporting Directive (once implemented into domestic law) will require certain large companies to disclose information regarding policies, risks and outcomes on environmental and social matters. Article 173 of the French Energy Transition Law already requires financial institutions to report on how they manage climate risk and other jurisdictions may follow – for example, the EU High-Level Expert Group on Sustainable Finance has suggested introducing an equivalent law at EU level. In addition, the Canadian Securities Administrators recently started a review to examine the disclosure of climate-related risks and financial impacts. Developments such as these provide further impetus for early compliance with the TCFD recommendations.

Commercial benefits associated with compliance

The TCFD recommendations have received widespread support across the corporate and financial sectors – from banks, to insurers, to investors and companies themselves. In light of this clear trend, it is increasingly *commercially risky* for companies to ignore the recommendations and strategically beneficial to embrace them. Laggard companies that fail to disclose climate risk in line with the TCFD recommendations may be less attractive to investors and struggle to secure loans or insurance. As noted above, failure to disclose may suggest that a company has not considered climate risk, or that it has something to hide in relation to its exposure – either way, silence can send a warning signal to the market. Conversely, companies that embrace climate risk reporting will appear ahead of the curve and be well positioned to take full advantage of the commercial opportunities presented by the transition to a low carbon economy.

Many major investors are making a strong push for robust climate risk disclosure and see the TCFD recommendations as the strongest framework for this. For example, Aviva Investors has warned more than 1,000 companies globally that it will vote against their annual reports and accounts if they fail to comply with the recommendations. Similarly, in March 2017, BlackRock published its 2017-18 Engagement Priorities, which includes climate risk disclosure and a warning that BlackRock will vote against management – and the re-election of directors – if they do not constructively engage with the issue of climate risk. European institutional investors have also urged companies to adopt the recommendations, as have sovereign wealth funds. For example, Yngve Slyngstad, chief executive of Norway's SWF, the world's largest sovereign investor, has stated: '[w]e want to have more transparency on investment plans and how they are affected [by climate risk]'.

There are numerous other investor-led initiatives calling for robust climate risk disclosures, including the following:

- Investor-backed Transition Pathway Initiative, which represents 13 international asset owners and five asset managers, recently released a report which found that the world's 20 largest coal companies should do more to disclose the risk to their business from climate change.

- The UN Principles for Responsible Investment (PRI) has stated that it expects its 1,756 members (with a combined $70trn assets under management) to follow the TCFD recommendations and that it will align its reporting and assessment framework accordingly.

- In a June 2017 report, Carbon Tracker and PRI ranked the largest oil and gas companies according to their climate risk exposure, giving investors 'a sense of what proportion of the company's investment plans may fail to deliver an acceptable return in the scenario of a world limited to 2°C global warming outcome'.

- The Asset Owners Disclosure Project's 'Global Climate Index 2017' rates 500 of the world's biggest investors on their management of climate-related financial risk, based on disclosures and other publicly available information.

- Shareholder resolutions requiring assessment and disclosure of climate risk are increasing. For example, in May 2017, an ExxonMobil shareholders' resolution requiring the company to assess and disclose the financial risks and opportunities associated with climate change achieved two-thirds approval, even against management's recommendation. Similar resolutions were successfully passed in the UK for BP, Shell, Rio Tinto, Anglo American and Glencore.

Institutional investors are not the only key stakeholders voicing strong support for the TCFD recommendations. Eleven major banks representing more than $7tr in capital plan to become the first in the global financial sector to implement the TCFD recommendations. This includes ANZ, Barclays, Citi, Royal Bank of Canada, Santander and UBS. Shayne Elliott, chief executive of ANZ has stated that implementing the recommendations will not only improve the banks' own disclosure practices, but also signal to customers to expect heightened scrutiny of their climate-related risks.

Similarly, the Sustainable Insurance Forum – a network of insurance supervisors and regulators working across a variety of countries, including Australia, France, the UK and the USA – has welcomed the recommendations, acknowledging that '[c]limate change is one of the most serious long-term challenges for the insurance sector and the wider financial system'. The Bank of England also recognised the impact of climate change on the insurance sector in its seminal 2015 report. In a June 2017 report, the Bank of England expressly supported implementation of the TCFD recommendations in the UK.

Finally, many companies have embraced early adoption of the TCFD recommendations: over one hundred companies with a combined market capitalisation of $3tn (and investors responsible for assets of around $25tn, including major pension investors) have signed a letter supporting the TCFD recommendations. Signatories include fossil fuel majors such as Royal Dutch Shell, ENGIE Group and Eni. Shell CEO Ben van Beurden recently stated that '[i]t is right that it should be transparent which companies are truly on firm foundations over the long-term'. In addition, CDP's chief executive Paul Simpson has stated that CDP will 'fully adopt the FSB task force recommendations into our platform, so by 2018 nearly 6,000 of the world's companies will be disclosing in line with it'.

Quite apart from the benefits of transparency for the market, companies themselves can benefit from complying with the TCFD recommendations. As Task Force chair Michael Bloomberg has stated, the recommendations help companies evaluate not only the potential risks associated with climate change, but also the potential rewards. A thorough assessment of climate risk though best available evidence, scenario modelling and stress-testing can strengthen companies' risk management and strategic decision-making and help them avoid the pitfalls of the transition to a low carbon economy. It can also help them take full advantage of the commercial opportunities that the transition presents, including investment in renewables, sustainable agriculture, forestry, public transportation, or other diversification strategies.

Conclusion

The liability risk associated with compliance with the TCFD recommendations has been overstated. Directors will generally be protected from liability arising from forward-looking statement where those statements accurately represent a robust, good-faith process of assessment that applies the best evidence reasonably available at the relevant time, and where disclosures are appropriately caveated or qualified, and do not merely 'cherry-pick' optimistic scenarios.

Rather than increasing liability risk, complying with the TCFD recommendations will *reduce* companies' (and directors') liability exposure by helping directors assess and manage climate risk in accordance with their duties, and report that risk as required by existing disclosure laws. The commercial benefits associated with compliance are also compelling given key stakeholders' enthusiastic support for the recommendations and an ever-increasing market awareness that companies' ability to assess and manage climate risk will directly impact investment returns.

Furthermore, the direction of travel is now clear, and it is highly likely that there will be additional regulation requiring disclosure of climate risk, or, at the very least, existing laws will be interpreted as requiring robust climate risk analysis. For all these reasons, astute directors will embrace the recommendations and recognise that climate-risk disclosure as a key component of financial reporting is the 'new normal'.

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