

Disclosure of Climate-Related Risks in Public Market Transactions

March 6, 2023 Martin Pugsley, Michael Byrne

PRACTICES Climate Change and Corporate Sustainability, Capital Markets and Securities, Corporate Governance, Environmental, Social and Governance, Corporate, Financial Regulatory, Energy, Power and Natural Resources

ClientEarth, the climate change pressure group, is seeking a judicial review of the Financial Conduct Authority's (the "FCA") decision to approve the prospectus of Ithaca Energy Plc (the "Company").

ClientEarth allege that the prospectus approved by the FCA failed to adequately describe the climate-related risks associated with investing in the Company, given the sector (oil and gas) and locations (the North Sea) in which the Company operates. It is alleged that, although it acknowledges that climate change presents risks to the oil and gas industry, the prospectus does not explain how these risks specifically affect the business of the Company or how significant they are and, therefore, that investors have not been given the level of disclosure required by section 80 of the Finance Services and Markets Act 2000 ("FSMA").

Section 80 of FSMA makes it a requirement that a prospectus contains all information as would be reasonably required to make an informed assessment of, among other things, "*...the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities...*". Current and reasonably foreseeable regulation of the oil and gas industry, on the basis of its impact on the environment and the climate, could be a factor which affects the financial position of a company, and the court is being asked in the judicial review to consider whether or not there is any requirement to look again at the disclosures made in the prospectus and whether they meet the section 80 requirement.

Section 90 of FSMA makes those responsible for drafting a prospectus potentially liable to pay compensation to any person who suffers a loss as a result of, among other things, non-compliance with section 80, so issuers and potential issuers operating in sectors where there is clear climate-related risk should watch carefully the outcome of this application and the potential judicial review. If granted, the FCA could be required to look again at the disclosures made in the Company's prospectus and to require an increased level of specificity as regards the disclosures relating to the Company's climate-related risks. This would no doubt then become the standard required by the FCA during their review of future prospectuses issued by companies operating businesses with climate-related risks.

Even if the application is rejected, the application could serve as a timely reminder to the FCA that it is likely to be required to play an increasing role in the pursuit of the climate goals set out in the Climate Change Act 2008 on the basis that the Financial Services and Markets Bill 2023 (currently making its way through the UK Parliament) introduces a new regulatory principle requiring the FCA to have regard to the need to contribute towards achieving compliance with the Climate Change Act 2008 when discharging its functions.

The UK Capital Markets team at Haynes Boone represents UK and foreign issuers, underwriters, trustees and other service providers in a full range of public and private debt and equity capital markets transactions.