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Transitioning Energy: Risks and Opportunities for Navigating the Changing Climate

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Introduction. Climate change and board governance attorneys Maggie Peloso and Sarah Fortt will lead a discussion on the key challenges and opportunities created for the energy industry by climate change developments and investors' changing views on corporate value in the energy industry. The discussion will include an update on the scientific and legal implications of climate change, details on the movement of large investors towards a broader concept of materiality and implications for the duties directors owe investors and all stakeholders.

1. **Climate Change and Investors**. BlackRock CEO Larry Fink's annual letter to U.S. CEOs has become a tradition. In his 2020 letter, Fink stated that he "believe[s] we are on the edge of a fundamental reshaping of finance" and indicated that, given the complex questions posed by climate change, going forward, BlackRock will view climate risk as investment risk and will: (1) make sustainability integral to portfolio construction and risk management; (2) exit investments that present a high sustainability-related risk, such as thermal coal producers; (3) launch new investment products that screen fossil fuels; and (3) strengthen its commitment to sustainability and transparency in its investment stewardship activities. Given that the energy industry is absolutely integral to any conversation regarding climate change risk and the future of energy, how will effective energy industry directors (1) educate themselves on recent developments that may influence their companies' access to capital, (2) determine whether to participate in investor engagement efforts, and (3) navigate crucial conversations with investors who may have sustainability-related concerns?

2. **Climate Change and Risk**. PG&E is preparing to file for bankruptcy in the face potential liabilities of $30 billion or more resulting from wildfires that swept its service area in 2017 and 2018. The extensive damage was due in large part to extremely hot, dry conditions that spawned more frequent and intense fires. Those conditions, PG&E's (recently departed) CEO argued, were the result of global warming and climate change. Many experts agree, but argue that PG&E will not be the last company to declare bankruptcy as a result of climate-related events. And yet no one takes the position that PG&E was directly responsible for the weather conditions that made the fires so devastating. In a world in which the sentiments of some have turned against companies in the energy industry, how should effective energy industry directors think about their role in oversee the risks created by climate change and about their companies' disclosures regarding those risks?

3. **Climate Change and Disclosure**. In early December 2019, ExxonMobil got good news in the climate change disclosure lawsuit brought against it by the New York Attorney General. The case was dismissed on the basis that the NY AG had not demonstrated that Exxon's alleged misrepresentations regarding climate risks "would have been viewed by a reasonable investor as having significantly altered the total mix of information made available." While the *ExxonMobil* opinion was certainly significant for ExxonMobil, the opinion leaves more questions unanswered than it resolves, and also fails to give much comfort to other companies that have or are considering undertaking the sometimes thankless task of issuing voluntary disclosures. In a climate in which investors and many in the public are demanding enhanced corporate disclosures on climate change and other ESG matters, how involved should effective energy industry directors be in their companies' ESG strategies and the creation of voluntary ESG disclosures?

4. **ESG and Director Duties and Liability**. In their November 2019 Harvard Business School white paper, Jean Rogers, the founder and former CEO of the SASB, and George Serafeim, the Charles M. Williams Professor of Business Administration at Harvard Business School, argue that when it comes to sustainability issues, materiality should not be perceived as a "state of being" but as a "process of becoming." In light of the mounting pressure for regulators and companies to explore "integrated reporting," how likely is it that "integrated reporting" will become a regulatory reality for U.S. companies in the near future and what are its implications for directors' duties and liability exposure?