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SEC Publishes Sample Comment Letter Highlighting the Need to Consider Climate Change Disclosures in SEC Filings

In late September, the staff of the SEC's Division of Corporation Finance published a sample comment letter relating to climate change disclosures. While the sample letter does not break new ground substantively, it underscores the SEC's increasing focus on climate disclosures and its views more generally on the relevance to investors of climate-related risks. In this Alert, we discuss the sample comment letter and take-aways for public companies.

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A Bit of Background – the SEC Turns up the Heat on Climate Disclosure

Since the change in administration, the SEC's focus on climate disclosure has been increasing. In early February, Satyam Khanna was named Senior Policy Advisor for Climate and ESG to then- Acting Chair Allison Herren Lee. Later that month, Acting Chair Lee issued a Statement indicating she was directing the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings. The Statement indicated that, as part of its enhanced focus in this area, the staff would (1) review the extent to which public companies are addressing the topics identified in the SEC's 2010 climate risk guidance, (2) assess compliance with disclosure obligations under the federal securities laws, (3) engage with public companies on these issues and (4) absorb critical lessons on how the market is currently managing climate-related risks.

A few weeks later, in March, the SEC announced the establishment of an enforcement task force focused on climate and ESG issues. At inception, the task force had 22 members drawn from the SEC's headquarters, regional offices and Division of Enforcement specialized units. In the announcement, the SEC indicated the Climate and ESG Task Force would develop initiatives to proactively identify ESG-related misconduct, with the initial focus on identifying any material gaps or misstatements in issuers' disclosure of climate risks under existing rules.

In March, the SEC also launched a public consultation requesting input from investors, registrants and other market participants about whether current disclosures adequately inform investors about climate change. In the request, the SEC presented 15 questions, with sub-parts (approximately 50 questions in total). In the launch announcement, Acting Chair Lee indicated she was asking the staff to evaluate the SEC's disclosure rules with an eye toward facilitating the disclosure of consistent, comparable and reliable information on climate change. Approximately 600 unique comment letters were submitted to the SEC by leading issuers, institutional investors, trade associations, NGOs and others. Ropes & Gray advised several clients on their comment letters.

Climate disclosure also is a priority area for Gary Gensler, since taking over as SEC Chair in April. In numerous speeches, he has discussed the need for a more robust climate disclosure regime. The SEC is working on proposed climate disclosure rules, which are expected to be released for comment later in 2021 or in early 2022.

The Sample Comment Letter

The sample comment letter follows the views expressed in the interpretive release on climate change disclosure published by the SEC in 2010, that existing disclosure requirements require at least consideration of climate-related disclosure. The 2010 guidance is discussed in our earlier Article [here](#).

Risk Factors. The sample risk factor comments ask issuers to:

- Disclose the material effects of transition risks related to climate change that may affect the issuer’s business, financial condition and results of operations. Changes in policy, regulation, market trends, credit risks and technology are cited as examples of potential sources of that risk.
- Disclose any material litigation risks related to climate change and explain the potential impact to the issuer.

Management’s Discussion & Analysis. The MD&A comments included in the sample comment letter focus on the following areas:

- *Regulation.* Disclosure of material pending or existing changes in climate-change related legislation, regulation and international accords, and their effect on the issuer’s business, financial condition and results of operations.
- *Capital expenditures.* The staff asks for disclosure regarding material past and/or future capital expenditures for climate-related projects, including the amount of the expenditures if material.
- *Indirect consequences of climate-related regulation or business trends.* The sample comments asks issuers to discuss, to the extent material, the indirect consequences of climate-related regulation or business trends, such as the following:
 - Changes in demand (both negative and positive) due to greenhouse gas emissions. This includes decreased demand for goods or services that produce significant GHG emissions or are related to carbon-based energy sources and increased demand for goods that result in lower emissions than competing products.
 - Increased competition to develop new lower emission products.
 - Increased demand for generation and transmission of energy from alternative sources.
 - Reputational risks resulting from operations or products that produce material GHG emissions.
- *Impacts of physical effects of climate change.* The sample MD&A comments include requests for disclosure concerning the physical impacts of climate change on the issuer’s operations and results, if material. These disclosures may include the following:
 - Weather severity, such as floods, hurricanes, sea levels, arability of farmland, extreme fires and water availability and quantity.
 - Quantification of material weather-related damages to the issuer’s properties and operations.
 - The potential for indirect weather-related impacts that have affected or may affect major customers or suppliers.
 - Decreased agricultural production capacity in areas affected by drought or other weather-related changes.
 - Weather-related impacts on the cost or availability of insurance.
- *Other compliance costs.* If material, increased compliance costs related to climate change.
- *Carbon credits/offsets.* If material, disclosure about the issuer’s purchase or sale of carbon credits or offsets and any material effects on its business, financial condition and results of operations.

Interplay with CSR Report. The SEC staff has taken note of the increasingly common issuer practice of publishing a separate corporate social responsibility report. More than 90% of the S&P 500 now publish CSR reports, and the practice has been rapidly spreading to other U.S. public companies.

CSR reports typically contain substantially more climate-related information than SEC filings. For example, these reports often contain qualitative discussions of environmental initiatives and climate change challenges as well as quantitative disclosures relating to energy and water usage, GHG emissions (often broken out into scope 1, scope 2 and/or scope 3 emissions) and waste. Many companies also include environmental targets in their CSR reports, including increasingly science-based targets. Climate disclosures in CSR reports often are aligned with the SASB (Sustainability Accounting Standards Board), TCFD (Task Force on Climate-related Financial Disclosures), GRI (Global Reporting Initiative) and/or WEF (World Economic Forum) standards, frameworks and metrics.

- The sample comment letter asks that issuers advise the staff what consideration was given to providing the same type of climate-related disclosure in SEC filings as is provided in their CSR report.

Taking the Sample Comment Letter into Account

The sample comment letter does not create new disclosure requirements. However, issuers should use the letter as an additional guide in thinking about their climate-related disclosures under existing SEC rules. Given the continuing evolution of climate regulation and business models in response to both climate-related risks and opportunities, climate disclosures by many companies have an inherently short shelf life.

At a minimum, proactive consideration of climate disclosures will reduce SEC comments on '33 Act and '34 Act filings or expedite clearing comments. On the other end of the spectrum, it will mitigate the risk of a potential material misstatement or omission in an SEC filing.

Keep in mind that neither current SEC disclosure requirements nor the sample comment letter take a prescriptive approach to climate disclosure. Both the 2010 guidance and the comment letter are grounded in materiality as that concept has been articulated by courts over several decades. Said another way, not all climate disclosures by issuers belong in SEC filings. Issuers should continue to be thoughtful about where their climate disclosures sit. But, also keep in mind that the balance is likely to shift, since the SEC is widely expected to ultimately adopt new climate disclosure rules that at least in part take a prescriptive approach by requiring issuers to disclose specific metrics in SEC filings.

Turning to other CSR disclosures, although the only disclosures mentioned in the sample comment letter are CSR reports, issuers should take an expansive read of that comment. Issuers also should consider other climate disclosures on their websites. Many issuers also complete annual CDP climate, water and/or forests questionnaires. These disclosures should be taken into account as well.

In addition, other CSR disclosures should be subject to the same disclosure controls and procedures, including relating to data collection and verification, as apply to information in SEC filings. CSR disclosures also should be appropriately explained and qualified, especially quantitative disclosures. With the continuing merging of CSR and SEC climate disclosures (as well as enhanced scrutiny of and potential liability based on CSR disclosures), it is becoming increasingly important that these disclosures undergo the same level of review and rigor.

About Our Practice

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For further information on the practice, click [here](#).