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Securities Law ADVISORY

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SEC Filers Can Expect a New Climate from the Biden Administration

The Securities and Exchange Commission (SEC) recently indicated that it plans to assess climate-related disclosure requirements in an effort to provide investors with more information about companies' exposure to the effects of climate change.

This is part of a larger trend of the Biden Administration focusing on climate change across the Administration. Significantly, this makes clear that the SEC is proceeding with enhanced focus on climate change now and is not waiting for the confirmation of President Biden's nominee Gary Gensler as chair of the SEC. It also comes in an environment in which investors are increasingly looking to environmental, social, and governance (ESG) issues when making investment decisions. Other SEC disclosure requirements have noted that they will often drive behavior and that enhanced disclosure obligations will likely force public companies to further evaluate their impact on climate change and other sustainability issues.

SEC Studying Climate-Related Risk Disclosures to Adopt More Comprehensive Disclosure

On February 24, 2021, acting chair Allison Herren Lee directed the Division of Corporate Finance to enhance its focus on climate-related disclosures. The SEC believes that compliance with existing guidance is the first step to developing a more comprehensive climate change disclosure framework. The SEC will then update the 2010 climate change guidance to create a framework that provides investors with comparable information about the risks that companies face because of climate change.

The update process will involve the SEC staff assessing compliance with disclosure obligations under the federal securities laws. The SEC will be reviewing compliance with already-in-place guidance on climate change and conferring with companies about the disclosures. Additionally, the staff will look to understand how the market is currently managing climate-related risk.

The 2010 guidance refers to, among other things, business and market impacts related to climate change on registrants' business and operations, including personnel, physical assets, supply chains, and delivery chains. The existing guidance also considers the business impact of potential legislative changes and international agreements addressing climate change. Over recent years, climate-related disclosure has not been a priority for the SEC, and company disclosures have been limited.

In explaining the update, the SEC points to ever-increasing investor focus on climate-related issues in making investment decisions. Currently, disclosures related to climate are not standardized across companies, which can make comparing companies on this metric difficult for investors. The standardization of climate-related disclosures may enable investors to better compare companies. Enhanced disclosure requirements will allow investors to have better information about the long-term effects of climate change on the value and operation of companies and make more informed investment decisions.

Additionally, Lee also recently stated at a CERAWeek by IHS Markit virtual conference that the SEC is working with the International Organization of Securities Commissions and Financial Stability Board to develop climate disclosure standards in order to craft a "global solution" for more effective and transparent climate related disclosures. Lee believes that the standards will be "relevant, standardized, comparable, and reliable disclosure of business risks and opportunities."

The SEC Announces an Enforcement Task Force Targeting Climate and ESG Issues

Additionally, on March 4, 2021, the SEC announced a new Climate and ESG Task Force in the Division of Enforcement to identify climate- and ESG-related misconduct. The initial focus of the task force will be to evaluate disclosures required by existing rules focused on climate risk and issuer ESG disclosures and strategies.

What Should Companies Do Now?

As the SEC updates the climate-related disclosure guidance, public companies could be required to disclose more information about the effect of climate change on their business. It is unclear which areas or topics the SEC will prioritize in its update because this will be informed by its research.

To be prepared for upcoming changes, companies can compare their current disclosures with the 2010 guidance and consider how they can proactively enhance these disclosures to ensure they are compliant. Companies should prepare for enhanced disclosure requirements as the SEC continues to increase requirements related to climate change. Moving forward, the SEC plans to engage with companies creating their climate-related disclosures and create new guidance for filers.

Announcement of the SEC's task force is further evidence of the SEC's ongoing effort to close gaps in current disclosures and compel companies to go through the same steps for climate- and ESG-related disclosures as they go through for other disclosures. The SEC may use the task force to make examples of a few public companies not living up to their ESG-related disclosures. Public companies should take specific steps to ensure that their ESG-related disclosures on their websites and sustainability reports go through the same disclosure controls and procedures as financial information and MD&A.

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