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Securities Law ADVISORY ■

OCTOBER 1, 2021

SEC Issues Sample Comment Letter to Companies Regarding Climate Change Disclosures

On September 22, 2021, the staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (SEC) released a letter containing sample comments about climate-related disclosures, or the absence of such disclosures, that the staff may issue in the future to companies pursuant to the 2010 Climate Change Guidance. Disclosures covered in the 2010 guidance relate to the impact of climate-related legislation and regulations, business trends, and the direct impact of climate change itself. [1]

As the SEC sharpens its focus on climate change issues, there has been an uptick in the number of comment letters relating to climate change disclosures. Although the SEC is still expected to propose comprehensive climate-related disclosure rules by the end of the year, it appears the sample comment letter is an interim step to encourage companies to focus on these issues now.

The sample comment letter exemplifies what the SEC sees as common gaps in disclosures and highlights topics that may warrant particular attention in SEC filings. While precise responses will vary based on each company and industry, the letter provides comments on what the staff may typically look for in its review.

Comment on Consistency with Corporate Social Responsibility Reports

The letter includes a comment comparing the extent of information given in a corporate social responsibility (CSR) report to that given in an SEC filing.

Companies should be prepared to explain any difference in the depth or substance of disclosures between annual filings and sustainability reports. This is significant since some companies' CSR reports may be as lengthy as their annual reports.

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[1] For information about the 2010 guidance and prior SEC statements, please see our advisories: "SEC Filers Can Expect a New Climate from the Biden Administration" (March 5, 2021) and "The Longer Term Does Arrive over Time – Financial Services Regulators and Investors Gearing Up for Climate Change Reforms" (December 1, 2020).

Comments on Risk Factors

Two of the comments focus on the systemic risks posed by potential policy or regulatory changes or material litigation risks. Companies should be forward-looking in anticipating future burdens imposed directly or indirectly by climate change. We believe that the next few years are likely to be just as eventful, if not more so, than the past few in terms of climate change policy and litigation.

Comments on Financial Conditions and Results of Operations

The remaining comments in the letter relate to the present implications of climate change and climate-related legislative and policy changes.

These comments include requests to:

- Identify consequential pending or existing climate-related legislation, regulations, and international accords, and describe any material effects on business.
- Identify any material past and/or future capital expenditures for climate-related projects.
- Discuss material indirect consequences of climate-related regulation or business trends.
- Discuss material physical effects of climate on operations and results.
- Quantify any important increased compliance costs related to climate change.
- Disclose any important purchase or sale of carbon credits or offsets and its effects.

In light of this letter and the trend toward a heightened interest on climate change, companies should evaluate their process for assessing the materiality of climate change matters and review past disclosures for potential gaps. The letter does not give explicit guidelines explaining which companies will be required to provide climate change disclosures, or in what context, but it is likely that the SEC will continue to broadly mandate more extensive climate change disclosures throughout industries. The letter, together with the 2010 guidance, should be used as a framework from which to anticipate possible SEC comments and tailor future disclosures.

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