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Securities and Exchange Commission Issues Interpretive Guidance Document on Disclosure Obligations Related to Climate Change

Author: Travis Ritchie

On February 2, 2010, the Securities and Exchange Commission ("SEC") published new interpretive guidance ("Climate Change Guidance") relating to the disclosure requirements that public companies face with respect to climate change issues.[1]

The SEC voted to approve the publication the prior week, stating that it intended to provide guidance that could help public companies in determining what does and does not need to be disclosed under existing reporting requirements. Chairman Mary Schapiro stressed, however, that the Climate Change Guidance "does not create any new legal requirements or modify existing ones – it is merely intended to provide clarity and enhance consistency."[2]

Other commissioners opposed the decision to publish the Climate Change Guidance, citing concerns that such information was unnecessary under existing reporting requirements and potentially confusing given the uncertain outcome of the climate change regulatory debate. Commissioner Troy Paredes specifically criticized the Climate Change Guidance's discussion of disclosure requirements related to the risk of "reputational damage" and "physical effects," noting that information on such speculative risk assessment would not assist investor decision making.[3]

The Climate Change Guidance published on Tuesday acknowledged the increasing trend of climate change related regulations adopted or considered in recent years by local, state, and federal governments. In particular, the document noted the recent EPA rule that, for the first time, requires large emitters of greenhouse gases to collect and report data on their greenhouse gas emissions.[4] The Climate Change Guidance also addressed the pending legislation before Congress that proposes to implement a carbon cap-and-trade system[5] and various international regulations that could affect SEC registrants with operations outside of the United States. The overall message conveyed

Newsletter Editors

Craig S. Bloomgarden
Partner
cbloomgarden@manatt.com
310.312.4240

Ted Wolff
Partner
twolff@manatt.com
212.790.4575

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the point that climate change, whether real or perceived, has prompted substantial regulatory action at all levels of government. The Climate Change Guidance concluded that those regulations could have significant impacts on the operating and financial decisions of some companies.

The Climate Change Guidance went on to highlight specific, existing rules that could potentially require disclosure of climate change related issues for some companies:

Item 101 of Regulation S-K requires a registrant to describe its business, which could include disclosure of material estimated capital expenditures for environmental control facilities.
Item 103 of Regulation S-K requires disclosure of any material legal proceedings or similar actions contemplated by the government, which could include suits arising out of climate related issues.
Item 503(c) of Regulation S-K requires disclosure of the registrant's most significant risk factors, which could include disclosure of existing or pending regulation that relates to climate change or perceived risk associated with reputational damage or physical changes.
Item 303 of Regulation S-K requires disclosure known as Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"). In the case of a known uncertainty - such as the impact of pending climate change regulations - the registrant must evaluate its MD&A disclosure to determine first whether pending legislation or regulation is likely, and second whether such legislation or regulation, if enacted, is likely to have a material effect on the registrant.

The SEC and the Climate Change Guidance explained that each of these requirements already exists, and companies should already be considering all relevant issues that would affect disclosure requirements, including those issues related to climate change. The Climate Change Guidance also noted that disclosures should consider the potential indirect consequences of regulation or business trends related to climate change, such as an increased demand for alternative energy related products and a decreased demand for goods that produce significant greenhouse gas emissions.

The Climate Change Guidance concluded with suggestions that companies consider that risk factor disclosure may require inclusion of the impact on the registrant's reputation as it relates to climate change. In addition, the Climate Change Guidance noted that companies should consider the physical effects of climate change – such as severe weather or arability of farmland – that could potentially impact their business. "Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents."[6]

The SEC's actions related to the publication of the Climate Change Guidance does not create any new regulations or modify existing regulations. Nevertheless, the Climate Change Guidance clearly indicates that publicly held companies must consider and disclose the broader impacts that climate change and related regulations will have on their overall business.

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[1] Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106.

[2] Chairman Mary Schapiro, *Statement Before the Open Commission Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change*, January 27, 2010.

[3]Commissioner Troy Paredes, *Statement Regarding Commission Guidance Regarding Disclosure Related to Climate Chang*e, January 27, 2010.

[4] *See*, EPA Issues Final Rule on Greenhouse Gas Reporting Requirements, Manatt Newsletter, Sept. 23, 2009.

[5] *See,* Cap-and-Trade Bill Passed by U.S. House: A Summary, Manatt Newsletter, July 9, 2009.

[6] Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106, p.27.

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For additional information on this issue, contact:

Travis Ritchie Mr. Ritchie is an Associate in the firm's Energy, Environment & Natural Resources Practice Group. His practice focuses on environmental and regulatory issues including water law, energy law, and administrative law.