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Client Alert

SEC Issues Interpretative Guidance on Climate Change Disclosures

02/04/2010

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On February 2, 2010, the SEC issued an interpretative release providing guidance to public companies on their disclosure obligations relating to climate change (Release Nos. 33-9106; 34-61469). The release focuses on recent business and legal developments regarding climate change and advises companies to evaluate the impact these developments may have on their business and whether such impact should be disclosed.

An interpretive release does not create new legal requirements or modify existing regulations. Instead, it clarifies the applicability of current SEC rules. In this case, the relevant rules require the disclosure of material items and cover a company's risk factors, business description, legal proceedings, and management discussion and analysis. The SEC's Chairman, Mary Schapiro, was careful to note that the release should not be construed as the SEC making a statement about the facts surrounding climate change or global warming.

The release does acknowledge an increase in climate-related legislation and international accords, as well as changing business trends where environmental issues have the potential to create new risks or opportunities for companies. The SEC provided the following examples of areas where climate change may trigger disclosure requirements:

- **Impact of Legislation and Regulation: When assessing potential disclosure obligations, a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. In certain circumstances, a company should also evaluate the potential impact of pending legislation and regulation related to this topic.**
- **Impact of International Accords: A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change.**
- **Indirect Consequences of Regulation or Business Trends: Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies. For instance, a company may face decreased demand for goods that produce significant greenhouse gas emissions or increased demand for goods that result in lower emissions than competing products. As such, a company should consider, for disclosure purposes, the actual or potential indirect consequences it may face due to climate change related regulatory or business trends.**
- **Physical Impacts of Climate Change: Companies should also evaluate for disclosure purposes the actual and potential material impacts of environmental matters on their business.[1]**

The SEC Commissioner, Luis Aguilar, in a speech discussing this release, provided practical guidance. He cautioned that each company "should ensure that it has sufficient information regarding [its] greenhouse gas emissions and other operational matters to evaluate the likelihood of a material effect arising from the subject legislation or regulation."[2] Additionally, the SEC reminds companies that in determining whether certain information is material, the company should err on the side of disclosure.

Since interpretive releases do not represent a change in current rules, the guidance provided is effective immediately and should be considered during the preparation of annual reports and SEC filings for the year ended December 31, 2009.

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[1] Interpretative Release "Commission Guidance Regarding Disclosure Related to Climate Change," dated February 2, 2010, is available at: http://www.sec.gov/rules/interp/2010/33-9106.pdf.

[2] "Speech by SEC Commissioner Luis A. Aguilar: Responding to Investors' Requests for SEC Guidance on Disclosures of Risks Related to Climate Change," dated January 27, 2010, available at: http://www.sec.gov/news/speech/2010/spch012710laa-climate.htm.