SEC Staff Provides Sample Comment Letter about Expected Climate Change Disclosures

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Securities and Capital Markets

On September 22, 2021 the staff of the SEC's Division of Corporation Finance (the "Staff") posted a sample comment letter that should put public companies on notice regarding the Staff's increased scrutiny of companies' climate change disclosures. The sample comment letter illustrates the increased focus on such disclosures in SEC filings and voluntary sustainability reports and the factors that public companies should consider when making disclosure determinations relating to climate change.

1 Background

In 2010, the Commission issued an interpretative release to provide public companies with guidance regarding climate change disclosures. *See Commission Guidance Regarding Disclosure Related to Climate Change*, Release No. 33-9106 (Feb. 2, 2010) (the "2010 Guidance"). Since issuing this interpretive guidance, the Commission has indicated that disclosure of information related to climate change-related risks and opportunities may be required in a company's description of business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations ("MD&A") to the extent such information is material. In particular, the 2010 Guidance noted that companies should evaluate the following topics when considering their climate-related disclosures:

- the impact of pending or existing climate change-related legislation, regulation and international accords;
- the indirect consequences of regulation or business trends; and
- the physical impacts of climate change.

2 Sample Comment Letter: An Overview

In March 2021, Acting Chair Allison Lee established a task force and directed the Staff of the Division of Corporation Finance to examine climate-related disclosures in company filings given what she noted was the significant increase since the issuance of the 2010 Guidance in investor demand for information regarding climate-change related risks, opportunities and impacts. The Division of Corporation Finance's sample comment letter reflects, in part, the results of the Staff's assessment to date.

The Staff's sample comment letter reiterates the 2010 Guidance, as well as existing SEC rules that require disclosure of additional material information, if any, as is necessary to make required disclosures, in light of the circumstances under which they are made, not misleading. The Staff's sample comment letter outlines the following comments that it may issue to companies regarding their climate-related disclosure or the absence of such disclosure:

- More expansive climate-related disclosure in corporate social responsibility reports than in SEC filings and the extent to which the company gave consideration to providing the same type of disclosure in its SEC filings;
- Risk factor disclosure of the material climate change transition risks to the business, such as policy and regulatory changes that may impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, or technological changes, as well as any material litigation risks related to climate change;
- To the extent material, enhanced MD&A disclosure relating to:
  - material pending or existing climate change-related legislation, regulations, and international accords and any material effect of such actions on the company's business, financial condition and results of operations;
  - material past and/or future capital expenditures for climate-related projects;
  - material indirect consequences of climate-related regulation or business trends (e.g., decreased demand for goods or services that produce significant greenhouse gas emissions or that are related to carbon-based energy sources);
  - increased demand for goods that result in lower emissions than competing products;
  - increased competition to develop new products that result in lower emissions;
  - increased demand for generation and transmission of energy from alternative energy sources;
  - any anticipated reputational risks resulting from operations or products that produce material greenhouse gas emissions;
  - any material physical effects of climate change on operations and results, including severe weather events and quantification of the impact of such events and the cost or availability of insurance with respect to weather-related events;
  - quantification of material increased compliance costs related to climate change; and
  - disclosure about the purchase or sale of carbon credits or offsets.

3 Company Preparation and Response

Given the content of the sample comment letter, public companies should continue to assess and consider whether enhancements to the identification and reporting of material climate-related risks and opportunities would be beneficial. In practical terms, this may consist of considering the following:

- Inventory: Does the company know where and how all climate-related information is collected, verified and what standards are used?

- Disclosure Controls and Procedures: Does the company have, and has the company engaged, experts who are qualified to assess, account for and categorize climate-related information so that such information is provided to those responsible for disclosure determinations in a timely manner? How are disclosure controls and procedures periodically "tested" to discern if or where there are gaps in how climate-related and ESG-related metrics are assessed for materiality?

- Inconsistencies: Is the company monitoring for inconsistencies between voluntary sustainability disclosures and mandated disclosures? Does the company assess its disclosures across *all* public-facing information platforms and across all reports, both voluntary and mandatory? Has the company assessed whether materiality thresholds (quantitative and qualitative) are consistently being applied, or disclosed any differences in the application of these thresholds?

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