



UPDATE:
Environmental
& Utilities

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SEC Issues Guidance on Climate Change Disclosures

The Securities and Exchange Commission (SEC) voted on January 27, 2010 to provide interpretive guidance to clarify what information about business risks and opportunities associated with climate change public companies must disclose to investors. The SEC's guidance provides an overview of the potential impacts of climate change and proposed climate change legislation on public companies, and provides guidance on when climate-related disclosures may be required.

Specifically, the guidance summarizes the evolution of the SEC's climate disclosure standard and the regulations that serve as the source for those disclosure requirements (including Items 101, 103, 303 and 503 of Regulation S-K). In addition, the interpretive guidance highlights the following areas as examples of climate change potentially triggering disclosure requirements:[8](#)

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.

The SEC's decision follows a series of recent actions by government, public interest, and industry sectors concerning climate-related risks, among them:

- Petitions to the SEC by Ceres and other coalitions of social investors and environmental groups urging the agency to require full corporate disclosure of climate-related business impacts. [1](#)
- The Environmental Protection Agency's recent greenhouse gas (GHG) reporting rule, which requires a broad spectrum of carbon-intensive industries to report their emissions to

the agency.

- Recent federal appellate court rulings that have allowed plaintiffs' claims arising from the alleged impacts of defendants' GHG emissions to survive motions to dismiss. [2](#)
- A growing number of shareholder resolutions about climate-related business impacts, and the SEC's October 2009 legal bulletin that facilitates such resolutions. [3](#)

In the SEC's press release, Chairman Mary Schapiro emphasized that the interpretive guidance is not intended to create new legal requirements or modify existing obligations; rather, the guidance is intended to "to provide clarity and enhance consistency for public companies and their investors." [4](#) The SEC carefully noted that it "is not making any kind of statement regarding the facts as they relate to the topic of climate change or global warming." The SEC's comments are consistent with the agency's prior response to climate disclosure petitions: Climate risk can and should be evaluated using the same traditional materiality standards applicable to other environmental risks.

The SEC's action is timely. While more public companies are reporting their climate-related risks and the quality and consistency of climate disclosures has improved, the SEC is responding to investors who claim such risks are underreported or reported inconsistently. [5](#) The agency's guidance should assist public companies with their climate-related disclosures. Improved corporate disclosures also will assist investors and asset managers in evaluating climate risk. A January 2010 report commissioned by Ceres indicates that only a few asset managers include climate risks and opportunities in their investment analyses. [6](#)

While Chairman Schapiro emphasized that the interpretive guidance does not modify existing reporting obligations, the SEC's action was not without opposition. In a letter to the SEC just prior to the agency's vote, Representatives Joe Barton (R-Texas) and Greg Walden (R-Oregon) of the Energy and Commerce Committee challenged the SEC's legal authority to issue an interpretive release on climate change and the agency's prioritization of a "social action agenda" rather than the protection of investors from corporate fraud. Representatives Barton and Walden also asserted the lack of scientific proof of global warming. The resolution to issue the guidance was approved by a vote of 3 to 2 along party lines. Ceres and other investor groups that have long advocated for formal SEC action on climate risk praised the release. [7](#) While the SEC's interpretive guidance is not a formal agency rule and does not have the full force of law, public companies closely heed such statements.

Practical Implications

The SEC's interpretive guidance will require affected public companies to re-examine their climate-related disclosures. While disclosures concerning legal proceedings and the impact of legislation and regulation regarding climate change fall squarely within the customary "materiality" analysis and, therefore, will be largely unaffected by the SEC guidance, the agency's emphasis on indirect consequences of regulation or business trends and physical impacts of climate change are more noteworthy. These potential impacts are less concrete than routine litigation and regulatory risk and presuppose acceptance that certain phenomena result from climate change. As such, companies that previously had foregone an analysis of the physical risk and indirect consequences of climate change based on lack of consensus on global warming may be required to evaluate these potential impacts more specifically.

¹See Petition for Interpretive Guidance on Climate Risk Disclosure, *available* at http://www.edf.org/documents/6986_SECPetition_ClimateDisclosure.pdf.

²See *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855 (5th Cir. 2009); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

³For more information, please see Robinson and Cole's previous client update entitled "SEC Issues Guidance on Shareholder Proposals That May Strengthen Climate Change Resolutions," Nov. 2009.

⁴Press Release, Security Exchange Commission, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change, <http://www.sec.gov/news/press/2010/2010-15.htm> (Jan. 27, 2010).

⁵In June 2009, Ceres released a study of 100 global companies in five sectors, including coal, oil and gas, transportation and insurance. The study found that, while reporting trends and the quality of climate disclosures have improved, 59 of the 100 companies did not mention their greenhouse gas emissions or their position on climate change, 28 did not discuss climate risks, and 52 did not disclose actions to address climate change. See Corporate Law Library, Climate Risk Disclosure in SEC Filings (Jun. 2009), *available* at <http://www.ceres.org/Document.Doc?id=473>.

⁶Investors Analyze Climate Risks and Opportunities: A Survey of Asset Managers' Practices (Jan. 2010), *available* at

www.ceres.org.

7 John M. Broder, S.E.C. Adds Climate Risk to Disclosure List, N.Y.TIMES, Jan. 27, 2010,
<http://www.nytimes.com/2010/01/28/business/28sec.html>.

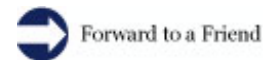
8 Press Release, Security Exchange Commission, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change, <http://www.sec.gov/news/press/2010/2010-15.htm> (Jan. 27, 2010).

For More Information

The SEC guidance was posted on February 2, and can be accessed via the following link:
<http://www.sec.gov/rules/interp/2010/33-9106.pdf>.

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