

Legal Update

SEC Acting Chair Directs Staff to Enhance Focus on Climate-Related Disclosure

On February 24, 2021, Acting Chair of the US Securities and Exchange Commission (SEC), Allison Herren Lee, announced that the agency will be focusing on public companies' climate change disclosures as part of an effort to both assess current compliance with federal securities laws and develop new disclosure requirements for climate change. Specifically, she stated that she has directed the SEC's Division of Corporation Finance "to enhance its focus on climate-related disclosure in public company filings." Further, SEC staff will increase its attention on how public companies follow the SEC's 2010 published interpretive guidance on climate change disclosures (the "2010 Climate Change Release" or the "Release") and whether companies' disclosures comply with the federal securities laws. Signaling that the SEC is preparing a broad reform of its disclosure rules, Acting Chair Lee also stated that the staff will use the results of these assessments to begin to update the 2010 Climate Change Release and prepare "a more comprehensive framework that produces consistent, comparable, and reliable climate-related disclosures." Acting Chair Lee's announcement follows her recent hiring of a new Acting Director of the Division of Corporation Finance and a Senior Policy Advisor for Climate and ESG.

The SEC's 2010 Climate Change Release provides guidance to public companies, explaining how the SEC's principles-based disclosure regime requires companies to provide information on climate change to investors if it is material information. The Release discusses each item of Regulation S-K that may require a company to provide climate change disclosure and why: Description of business, Legal proceedings, Risk factors, and Management's discussion and analysis. In addition, the Release reminds companies of their obligations under Rule 408 under the Securities Act of 1933 and Rule 12b-20 under the Securities Exchange Act of 1934 to disclose, in addition to information responding to specific disclosure requirements, "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading." The Release provides specific examples of regulatory, legislative, and other developments related to climate change that may have an effect on a company's business and operations, requiring disclosure to investors.

Practical Considerations

While Acting Chair Lee's announcement does not impose any new disclosure obligations on public companies or companies seeking to go public, it does signal that there will be a shift in staff practice. Specifically, it is likely that more comments will be issued than usual citing to the 2010 Climate Change

Release and asking companies to provide, or explain why they have not provided, certain climate change-related disclosures. Companies, especially in industries such as property and casualty insurance, mining, and oil and gas, should be prepared to receive comments on their fiscal year 2020 Form 10-Ks. In addition, all public companies should be on notice that the SEC is likely to propose new disclosure rules as early as this year that could significantly change their disclosure requirements with respect to climate change. We expect to obtain more insight on the timing of these new disclosure requirements once Gary Gensler, President Biden's nominee to be the Chair of the SEC, is confirmed (likely) in March.

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