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The SEC's Recent and Planned Activity on Climate Change Disclosures: What Companies Can Do To Prepare

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Among independent federal agencies, the U.S. Securities and Exchange Commission (the "SEC") stands out for its response to President Biden's government-wide mandate to advance climate policy, as articulated in a series of executive orders.[1]

In February and March 2021, the SEC hired its first-ever Senior Policy Advisor for Climate and ESG, directed the Division of Corporation Finance to enhance its focus on climate-related disclosures in public company filings, created a Climate and ESG Task Force in the Division of Enforcement, and solicited public input on climate change disclosures. The SEC's Spring 2021 regulatory agenda, published in June, includes proposed rule amendments slated for October 2021 "to enhance registrant disclosures regarding issuers' climate-related risks and opportunities." SEC Chair Gary Gensler has also said that he has requested SEC staff "to develop a mandatory climate risk disclosure rule proposal for the Commission's consideration by the end of the year," but suggested that it may be early 2022 before the rule is released to the public.[2] In the meantime, recent comment letters sent to public companies from the SEC's Division of Corporation Finance suggest the SEC is already taking a more proactive approach to the review of climate disclosures than it has in prior years.

This *Alert* provides background on the SEC's actions and statements relating to climate change disclosures, including recent comment letters, and discusses takeaways from the responses to its request for public input on climate change disclosures. It concludes by identifying actions public companies can take now to prepare for potential increased enforcement and disclosure obligations.

SEC's Existing Climate Disclosure Guidance and Recent Comment Letters

In 2010, the SEC published interpretive guidance (the "2010 Guidance") for public companies regarding existing disclosure requirements as they apply to climate change matters. The 2010 Guidance came after several years of mounting pressure from state attorneys general, environmental groups, institutional investors and others to clarify climate change disclosure requirements under existing SEC rules.[3] The 2010 Guidance provides that the direct and indirect consequences of climate-related regulations, legislation, international accords and business trends, as well as the physical effects of climate change, could have a material effect on a registrant's business and operations. Where that materiality threshold has been met, the SEC stated that companies would be required to make climate change disclosures under Regulation S-K in the description of the business, discussion of legal proceedings, risk factors, and/or management's discussion and analysis.

The 2010 Guidance's immediate impact on public company climate change disclosure practices was limited. In a 2012 report prepared at the direction of the Senate Committee on Appropriations, SEC staff indicated that they did not find any notable year-to-year changes in the disclosures reviewed from the year before the 2010 Guidance to the year after. Further, in an analysis of 10-K annual reports filed by S&P 500 companies between 2009 and 2013, Ceres, a sustainability non-profit organization, concluded that while the percentage of companies making any climate-related disclosures increased from 45% to 59% over this period, most of the disclosures "are very brief, provide little discussion of material issues, and do not quantify impacts or risks." This conclusion has been cited by Chair Gensler. Ceres also found in the same study that between 2010 and 2013, only 25 of the more than 45,000 comment letters sent by SEC staff to companies related to climate change disclosures. More recently, Ceres identified only six SEC comment letters that mentioned climate change between 2016 and 2020.[4]

This trend appears likely to be reversing. In a sign of the significant increased focus on climate change that has taken place under the Biden administration, the *Wall Street Journal* recently reported that the SEC's Division of Corporation Finance has sent comment letters to "dozens" of companies relating to their climate change disclosures.[5] A sample comment letter posted on the SEC's website in September 2021 (the "Sample Comment Letter") requests information on material climate change transition risks (e.g., policy and regulatory changes, market and business trends, credit risks), litigation risks and physical risks with respect to the business; purchases or

sales of carbon offsets; and why certain information disclosed in the company's corporate social responsibility report was not included in its SEC filings.

Climate Science and Policy Advancements and New Investor Pressures

Concerns over the pace and impacts of climate change have escalated in the years since the 2010 Guidance, with experts and political leaders increasingly calling for bold action. This year, the Intergovernmental Panel on Climate Change found that meeting the Paris Agreement goal of limiting warming to 1.5°C will require "immediate, rapid, and large-scale reductions in greenhouse gas emissions." An International Energy Agency report issued in May concluded that achieving net zero greenhouse gas emissions by 2050, which scientists say is necessary to achieve the Paris Agreement goal, will require immediately stopping all new oil and gas exploration projects and more than doubling spending on low carbon technologies. At a Leaders Summit on Climate in April,[6] President Biden announced that the U.S. will target a reduction in net greenhouse gas emissions of 50%–52% by 2030 from 2005 levels. Other countries also set new emissions targets, and further commitments are expected at the UN Climate Change Conference (COP26) in Glasgow in November.

As a result of these developments, investor pressure on companies to take climate action and enhance their climate disclosures has increased significantly. For example, Larry Fink, CEO of BlackRock, the world's largest asset manager, has called on companies "to disclose a plan for how their business model will be compatible with a net zero economy" by 2050. Additionally, 2021 saw an increase in the number of climate-related shareholder proposals as well as record levels of support for such proposals. Some of the proposals requested additional climate action (e.g., successful proposals at ConocoPhillips and Chevron seeking Scope 3 emission reduction targets), while others focused on disclosure (e.g., successful proposals at Phillips 66 and Delta seeking reporting on how the companies' climate lobbying aligns with the Paris Agreement).[7] At least 12 shareholder proposals relating to climate have passed so far this year,[8] a record number, largely due to support from large asset managers such as BlackRock, who are motivated both by a desire to push companies to address climate-related risks as well as a need for data to help determine what companies to include in energy-transition and climate-themed funds.

Responses to the SEC's Request for Public Comment on Climate Change Disclosures

In March 2021, then-Acting SEC Chair Allison Herren Lee issued a statement requesting public input on climate change disclosures. The request raised 15 multi-part questions, covering topics such as the potential form and content of the disclosure, the feasibility of quantification and measurement of climate risks (including Scope 1, 2, and 3 greenhouse gas emissions[9]), the benefits of establishing industry specific requirements, and the advantages and disadvantages of drawing on existing voluntary reporting frameworks.

According to Chair Gensler, the SEC received roughly 550 unique comment letters in response to its request for input, with three out of every four supporting mandatory climate disclosure rules. The majority of the comment letters came from investment, banking/financial organization and corporate entities, as well as trade associations; others came from NGOs (including standard-setting organizations), government officials, academics, and other interested firms and individuals.

Many of the comment letters, including those from BlackRock, Chevron, Walmart and Uber, recommend the SEC rely in some way on the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD"),[10] a framework for assessing and reporting on climate risks and opportunities that is increasingly endorsed by market participants and governments.[11] Chair Gensler recently remarked that he has asked staff to learn from the TCFD in formulating a proposed rule.

Beyond support for enhanced climate disclosures based on the TCFD recommendations, the comment letters also highlight a number of difficult questions that SEC staff are likely grappling with in drafting a proposed rule. For example, a group of legal scholars noted that the SEC could designate the TCFD or another standard setter as authoritative, but congressional authorization would be needed to provide public funding to the standard setter for ongoing review of and updates to its standards. According to the scholars, such funding would make the standard-setter "more independent, objective, and accountable." Commenters such as United Airlines, the U.S. Chamber of Commerce and Enbridge suggested that any new rules should be flexible and allow for variation depending on the materiality of climate change to a particular industry or company. Many commenters, including Vanguard and the Business Roundtable, supported mandatory disclosure of Scope 1 and 2 greenhouse gas emissions in their letters, but fewer advocated for mandatory disclosure of Scope 3 emissions, given the challenges of data collection and the lack of methodological

consensus around accounting. Other points raised in comment letters include whether climate disclosures should be furnished to or filed with the SEC (furnishing results in a lower liability risk), whether they should be included in existing filings or a separate filing, what liability protections should be available around such disclosures, and whether private companies should also be subject to climate disclosure requirements.[12]

A handful of comment letters suggest the SEC lacks authority to enact climate disclosure regulations (e.g., the Western Energy Alliance and US Oil & Gas Association) or that a proposed rule could violate the First Amendment (e.g., the Missouri and West Virginia Attorneys General). More common among the critical responses, however, is a concern about straying from the materiality standard that underpins current regulations, a concern echoed by Commissioner Elad Roisman.

In a recent speech discussing the materiality standard, Commissioner Allison Herren Lee addressed the "myth" that SEC disclosure requirements must be strictly limited to material information, noting that the relevant provisions of the Securities and Exchange Acts give the SEC "full rulemaking authority to require disclosures in the public interest and for the protection of investors," without reference to materiality.[13] According to Commissioner Lee, the concept of materiality instead arises under the anti-fraud rules, where it functions as a limit on anti-fraud liability.

However, other recent disclosure changes that do not hinge on materiality were congressionally mandated (e.g., the mine safety and health and conflict minerals disclosures required by the Dodd-Frank Act), and the concept of materiality could be relevant under Section 23 of the Exchange Act, which requires the SEC to make a cost-benefit analysis during the rulemaking process to ensure a new rule does not "impose a burden on competition not necessary or appropriate" to advance the purposes of securities law. The agency's cost-benefit calculus is likely to be intensely scrutinized following issuance of any proposed rule.

Preparing for Potential Increased Disclosure Obligations and Enforcement

Despite the complex considerations involved in crafting a proposed rule, the SEC appears to be moving quickly. On September 14, Chair Gensler reiterated in testimony before the Senate Committee on Banking, Housing, and Urban Affairs that SEC staff are preparing a climate change disclosure rule proposal that will be informed by

economic analysis and put out to public comment. Although the contours of any potential rule remain uncertain, and any such proposed rule may not be finalized until 2022 (meaning reporting requirements likely would not be affected until 2023), there are steps companies can take now to prepare:

- **Take inventory of existing climate disclosures.** The SEC's recent issuance of comment letters to companies regarding climate change disclosures suggests it intends to more carefully police disclosures at the same time that it moves forward with the proposed rulemaking. Companies can work with counsel in connection with the preparation of their upcoming 10-K, 20-F and proxy statement filings to carefully evaluate their disclosures in order to ensure they satisfy the 2010 Guidance, address the points set forth in the Sample Comment Letter, and are substantiated and not misleading. It would also be prudent to review any incremental disclosures made in ESG or Corporate Social Responsibility reports or other similar documents and identify any climate-related statements that could raise questions as to whether they should be included in SEC filings as responsive to the 2010 Guidance. Evaluating existing disclosures is particularly important since the SEC's Climate and ESG Task Force has been given the initial task of identifying "material gaps or misstatements in issuers' disclosure of climate risks under existing rules."
- **Work with counsel to enhance climate governance.** Companies will benefit from robust board-level oversight of climate change in order to prepare for potential increased SEC enforcement activity and disclosure requirements. Companies can work with counsel to clearly delineate climate responsibilities within their charters and enhance their disclosure controls and procedures with respect to climate information, including the process for determining what information is included in SEC filings versus voluntary disclosures.[14]
- **Analyze climate-related risks and opportunities using the TCFD framework and refine climate strategy.** Given the TCFD framework's widespread adoption, the SEC may rely on it in crafting a proposed rule. Companies can review their climate-related governance, strategy, risk management, and metrics and targets as called for by the TCFD, taking into account both physical and transition risks. With respect to metrics and targets, this would include carefully calculating Scope 1 and 2 annual emissions, and, to the extent Scope 3 emissions data is not currently collected, developing a plan for collecting it. Particularly since Chair Gensler has asked staff to recommend how companies might disclose emissions information, companies may also want to consider engaging a third-party expert or accountant to provide verification or assurance of their calculations. Such verification or assurance can provide confidence to investors and improve internal controls and reporting systems. Companies may also engage their boards to refine their climate goals, strategies and mitigation plans.

- **Coordinate with counsel to determine the company's stance on climate proposed rules.** Companies can coordinate with counsel to develop a plan for the review of and response to forthcoming proposed rules, including whether to submit a comment letter to the SEC. Companies may consider submitting comments independently or participating in submissions by industry associations.

We will continue to closely monitor SEC activity with respect to climate change disclosures and intend to cover any proposed rule or other significant developments in a future update.

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1. *See* Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order on Tackling the Climate Crisis at Home and Abroad and Executive Order on Climate-Related Financial Risk.↩

2. President Biden's May 20, 2021, Executive Order on Climate-Related Financial Risk asks the Treasury and Financial Stability Oversight Council, which includes the SEC Chair, to issue a report identifying actions to reduce climate change risks to financial stability by November 16, 2021. SEC staff may wait to present a final draft proposed rule to the Commission until after this report is published, which would push the timing for a proposed rule closer to the end of the year or early next year than the October timeframe set forth in the regulatory agenda.↩

3. For example, the California Public Employees' Retirement System, Ceres, the New York State Attorney General, and other pension, NGO, and government representatives filed a 100-plus page petition with the SEC in 2007 urging it "to clarify that corporations should assess their climate risk, analyze whether that risk is likely to have a material impact on them, and if so, disclose it to the public as required under the Commission's rules."↩

4. The numbers cited by Ceres may be a slight undercount. According to Intelligize, there were 45 comment letters that mentioned "climate change" between 2010 and 2013, and 16 between 2016 and 2020.↩

5. Paul Kiernan, "SEC Asks Dozens of Companies for More Climate Disclosures," *WSJ* (September 22, 2021), available here.↩

6. We provided discussion of the Summit in a prior blog post available here.↩

7. There were also seven proposals in the U.S. this year that were part of a new "Say on Climate" campaign spearheaded by TCI, a U.K. hedge fund, and As You Sow, which sought disclosure of annual greenhouse gas emissions, a plan for reducing those emissions, and a shareholder vote on the plan. Four of these proposals failed and three were withdrawn; however, two of the three withdrawn proposals were subsequently presented as management proposals (at Moody's and S&P Global), in each case receiving support in excess of 90%.↩

8. In addition to the proposals previously noted, there were also successful proposals seeking climate action at ExxonMobil, Norfolk Southern, United Airlines, Bloomin' Brands and Bookings Holdings, and successful proposals seeking climate lobbying disclosure at Chevron and General Electric.↩

9. Scope 1 emissions are direct greenhouse gas emissions that occur from sources that are controlled or owned by an organization (e.g., emissions associated with fuel combustion in company-owned boilers, furnaces or vehicles). Scope 2 emissions are indirect greenhouse gas emissions associated with the purchase of electricity, steam, heat or cooling. Scope 3 emissions are the result of activities from assets not owned or controlled by the reporting organization, but that the organization indirectly impacts in its value chain, such as emissions associated with raw materials or use of the company's product. For more information, refer to the EPA's guidance linked here.↩

10. Many comment letters also reference the Sustainability Accounting Standards Board ("SASB") standards, which aim to identify the environmental, social and governance issues most relevant to financial performance in 77 industries. SASB has gained significant traction in the U.S. since being endorsed by BlackRock CEO Larry Fink in 2020. Some also reference the work of the IFRS Foundation, which oversees the International Accounting Standards Board, to establish an International Sustainability Standards Board (ISSB) that is expected to publish a climate disclosure standard in 2022.↩

11. For example, G7 leaders expressed support for mandatory climate disclosures based on TCFD in a June 13, 2021, Communiqué, and U.K. regulators are moving forward with mandating TCFD-aligned disclosures for a broad range of market participants, as addressed in the November 2020 publication, "A Roadmap towards mandatory climate-related disclosures."↩

12. *See*, e.g., Comment Letters from the Society for Corporate Governance, Manulife Investment Management, PIMCO and a coalition comprising Alphabet, Amazon, Autodesk, eBay, Facebook, Intel and Salesforce.↩

13. Sections 7 and 10 of the Securities Act authorize the SEC to require disclosures in registration statements and prospectuses that are "necessary or appropriate in the public interest or for the protection of investors." Further, Section 13 of the Exchange Act authorizes the SEC to require disclosures in periodic reporting as "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security."↩

14. For additional governance considerations, see our prior article, "Improving Climate Governance under the Biden Administration."↩

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Suggested Reading

- 10 February 2025 - 14 February 2025 Speaking Engagement Oxford Private Equity Programme
- 04 February 2025 Speaking Engagement Private Funds CFO Network New York Forum
- 21 January 2025 Press Release Kirkland Counsels GTCR on Acquisition of TRANZACT

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