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SEC Turns up the Heat on Climate and ESG Disclosures

Today, the SEC announced (press release available here) the creation of a Climate and ESG Task Force in its Division of Enforcement (the "Enforcement Task Force"). The Enforcement Task Force, which will be led by the Acting Deputy Director of Enforcement, will oversee a Division-wide effort to develop initiatives to proactively identify ESG-related misconduct. The formation of the Enforcement Task Force is but one of a number of examples of how quickly the SEC is moving to address climate and ESG matters in the context, in the words of the SEC, of "increasing investor focus and reliance on climate and ESG-related disclosure and investment."

The Enforcement Task Force

The initial focus of the Enforcement Task Force will be to "identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules." The ESG Task Force will not only scrutinize public disclosure by registrants; it will also focus on disclosure and compliance issues relating to ESG strategies of investment advisers and funds. While in recent months there has been significant public criticism of the failure of the SEC to enhance its ESG disclosure requirements, including by Acting SEC Chair Allison Herren Lee and Commissioner Caroline Crenshaw, it is important to note that today's announcement focuses on enforcement of the rules as they exist today.

The Existing Climate and ESG Disclosure Regime

Growing demands from asset owners, asset managers, investors, insurance companies, lenders and others for consistent, uniform and decision-useful disclosure have led the European Union (as part of the EU Action Plan on Financing Sustainable Growth and its European Green Deal) and the United Kingdom to move ahead with multi-pronged climate-related disclosure initiatives that apply to a range of market participants, including issuers, investment advisers, investment funds and financial institutions. Indeed, in November, the United Kingdom went so far as to announce that it would move towards mandatory climate-related disclosures across all sectors of the economy by 2025. In contrast, the SEC has not adopted line-item disclosure requirements related to climate or other ESG matters. For an overview of the existing U.S. regulatory framework for ESG disclosures, including the SEC's 2010 interpretive guidance on climate-related disclosures, see our prior alert here.

While it is not unreasonable to expect that the SEC will move in the coming months to embrace enhanced climate-related disclosure, perhaps including recognition of global standards such as the recommendations of the Task Force on Climate-related Financial Disclosures, that is tomorrow's story. Today's story is about compliance with existing disclosure requirements, as applied to climate and other ESG themes.

Until now, the Staff of the SEC's Division of Corporation Finance (the "CorpFin Staff") has given minimal attention to climate disclosures in its comment letters. A 2018 report from the Government Accountability Office report (the "GAO Report") (available here) cited a Ceres report finding only 25 letters relating to climate-related disclosures to 23 companies in the period between the release date of 2010 guidance (as to how existing disclosure requirements could apply to climate-related issues) (available here) to December 31, 2013 (out of the more than 45,000 comment letters sent during this period) and its own finding of only 14 comment letters to 14 companies between January 1, 2014 and August 11, 2017 (out of the over 41,000 comment letters issued).

Growing Attention to Climate Disclosures

Attention to climate disclosures has accelerated in recent weeks. It is worth noting that the title given to the Enforcement Task Force refers to "Climate *and* ESG" (emphasis added), as does the title given to the SEC's first senior policy adviser for climate and ESG in early February, suggesting that climate is a priority separate and apart from more general ESG themes.

On February 24, Acting SEC Chair Allison Herren Lee issued a statement (available here) that she has directed the CorpFin Staff to "enhance its focus on climate-related disclosure in public company filings." As noted in our prior alert (available here), this is the first significant step the SEC has made regarding climate-related disclosure since it issued its interpretative guidance in 2010. With a view to updating the 2010 guidance, the CorpFin Staff will:

- review the extent to which registrants are addressing the topics identified in the 2010 guidance;
- assess the compliance of companies with disclosure obligations under federal securities laws;
- engage with registrants on these issues; and
- understand how the market is managing climate-related risks.

This trend is likely to continue. Gary Gensler, President Biden's SEC Chair nominee, in his nomination hearing on March 2, noted "materiality is defined as what reasonable investors are seeking to have to make decisions . . . . In 2021, there's tens of trillions of dollars of invested assets that are looking for more information about climate risk, and I think then the SEC has a role to play to help bring some consistency and comparability to those guidelines."

Moreover, John Coates, acting director of the SEC's Division of Corporation Finance, recently said that the SEC "should help lead" the creation of a disclosure system for ESG issues for corporations in widely publicized remarks at a webcast conference. Coates served as Chair of the Investor-as-Owner Subcommittee to the SEC's Investor Advisory Committee when it presented its formal recommendations in May 2020 that the SEC begin in earnest an effort to update issuer reporting requirements to specifically include ESG factors (see our prior discussion of these recommendations here).

In addition, just yesterday, the SEC's Division of Examinations announced its 2021 examination priorities, including a greater focus on climate-related risks.

Some voices within the SEC take a more cautious approach to the SEC's recent climate-related announcements. In a joint public statement also issued today (available here), Commissioner Hester Peirce and Commissioner Elad Roisman stated that the enhanced focus on climate-related matters set out in recent announcements "raise more questions than they answer." They state that they assume the SEC's new initiative is a continuation of the work the SEC staff has been doing for years and not a "a program to assess public filers' disclosure against any *new* standards or expectations."

While it is clear that any enforcement actions that arise from today's announcement will be based on existing standards, the voices of caution as to future action may now be in the minority.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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