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CLIMATE-RELATED DISCLOSURE IN THE HOT SEAT

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SEC Commissioners: Are Recent Announcements Changes from Status Quo or New PR Twist?

SEC Commissioners Hester M. Peirce and Elad L. Roisman today issued a statement providing their perspectives on the recent wave of climate-related announcements by the Divisions of Enforcement, Examinations and Corporation Finance. Emphasizing that in their view the recent announcements raise more questions than they answer, the commissioners note their impact is not yet clear and query whether the announcements "represent a change from current Commission practices or a continuation of the status quo with a new public relations twist." Recent SEC ESG developments include:

- On March 4, 2021, the SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement to, among other things, develop initiatives to proactively identify ESG-related misconduct.
- On March 3, 2021, the SEC's Division of Examinations announced its 2021 examination priorities, which include a greater focus on climate-related risks.
- On March 2, 2021, Gary Gensler, President Biden's nominee to serve as SEC Chair, noted in a Senate confirmation hearing that investors increasingly want to see climate risk disclosures. He indicated that, if confirmed, he would support the SEC's focus on more climate-related disclosures.
- On March 2, 2021, the House Committee on Energy & Commerce announced the Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act which, if adopted as proposed, would direct the SEC to adopt climate risk disclosure rules within two years.
- On February 24, 2021, Allison Herren Lee, Acting Chair of the SEC, issued a "Statement on the Review of Climate-Related Disclosure" directing the SEC's Division of Corporation Finance, effective immediately, to enhance its focus on climate-related disclosures in public company SEC filings. Lee instructed the Division to implement this enhanced focus by:

- Reviewing the extent to which public companies address the topics identified in the SEC's "Guidance Regarding Disclosure Related to Climate Change" dated February 8, 2010 (the "2010 Guidance");
- Assessing companies' compliance with climate-related disclosure obligations under the federal securities laws;
- Engaging with public companies on these issues; and
- Learning how the market is currently managing climate-related risks.

Ms. Herren indicated that the SEC will use the results of this exercise to update the 2010 Guidance and to help move toward a "more comprehensive framework that produces consistent, comparable, and reliable climate-related disclosures." She further commented that it is the SEC's responsibility to ensure that investors have access to "material climate-related information, and that "[n]ow more than ever, investors are considering climate-related issues when making their investment decisions."

2010 Guidance

The stated purpose of the 2010 Guidance was to remind companies to consider climate change and its consequences in fulfilling their disclosure obligations under the federal securities laws. The 2010 Guidance provided that, moving forward, the SEC would monitor the impact of the 2010 Guidance as part of its ongoing disclosure review program. The SEC would thereafter determine whether additional climate change-related guidance or rule-making is necessary or appropriate in the public interest or to protect investors. Now, a decade later, the SEC appears to be doing just that. Highlights of the 2010 Guidance include the following:

Rules Potentially Requiring Disclosure of Climate Change Issues. The 2010 Guidance identified the following four non-financial statement disclosure rules that, among others, could require disclosure related to climate change:

- Description of business (Item 101 of Regulation S-K);
- Risk factors (Item 105 of Regulation S-K);
- Legal proceedings (Item 103 of Regulation S-K); and
- MD&A (Item 303 of Regulation S-K).

Climate Change-Related Impacts that Might Trigger Disclosure. The 2010 Guidance, as well as the SEC's January 2010 press release announcing its adoption, highlighted the following as examples of climate change-related impacts that might trigger disclosure under the federal securities laws:

- *Impact of Climate Change Legislation and Regulation*. When assessing potential disclosure obligations, companies should consider whether the impact of existing, or the potential impact of pending, climate change-related laws and regulations is material.

- *Impact of International Accords*. Companies should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change (e.g., any material impact of international treaties focused on remedying environmental damage caused by greenhouse gas emissions).

- *Indirect Consequences of Climate-Related Regulations or Business Trends*. Legal, technological, political and scientific climate change-related developments may create new opportunities or risks for companies. For disclosure purposes, companies should consider, and disclose when material, the actual or potential indirect consequences they face (or may face) due to such developments. Examples of such consequences include, as a result of regulations governing greenhouse gas emissions, increased demand for goods that result in lower emissions than competing products; decreased demand for goods that produce significant greenhouse gas emissions; and damage to reputation resulting from the public's negative perception of publicly available data relating to its greenhouse gas emissions.

- *Physical Impacts of Climate Change*. Companies should evaluate for disclosure purposes the actual and potential material impacts of environmental matters on their businesses and operations. For example, companies may be materially impacted by the physical effects of (1) weather patterns, (2) changes in the availability or quality of water and/or other natural resources, and/or (3) weather-related damage to facilities or equipment. These impacts may affect, among other things, a company's personnel, physical assets, supply chain and/or distribution chain.

The Road Ahead

As the SEC enhances its focus, companies should similarly enhance their own focus on the impact and potential impact of climate related-changes and on ensuring that they meet the current climate-related disclosure requirements of the federal securities laws. Be on the lookout for updated SEC climate change-related guidance and/or rule-making, which is likely to emerge given current trends and announcements.

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