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SEC Votes to Issue Interpretive Guidance on Climate Change Disclosure

At an open meeting on Wednesday January 27, the U.S. Securities and Exchange Commission ("SEC") voted to issue interpretive guidance concerning climate change-related disclosure by SEC-reporting companies. While the SEC has not yet published the guidance, the agency laid out the principal areas that companies will need to consider when evaluating whether business or legal developments related to climate change could have a material impact on their business. The SEC stressed that its climate change disclosure guidance will not change existing SEC disclosure requirements, nor is it intended to change long-standing interpretations of materiality. Nonetheless, the mere fact that the SEC is issuing guidance indicates that climate change disclosure is a growing area of focus for the SEC and an area where many companies may need to expand their disclosure.

The SEC highlighted four areas where climate change may trigger disclosure requirements under the existing framework for evaluating materiality for purposes of disclosures related to the company's business, risk factors, legal proceedings and management's discussion and analysis. These include:

- The impact of any existing or pending climate change legislation or regulation.
- The risks or effects of climate change-related international accords or treaties.
- The actual and potential indirect consequences of climate change-related regulation or business trends. As an illustration, the SEC indicated that legal, technical, political and scientific developments may create new risks or opportunities for a company, such as decreased demand for goods that produce, or whose production requires, significant greenhouse gas emissions or increased demand for goods that produce low emissions.
- The actual and potential physical impacts of climate change, such as increased droughts or storms, other changes in weather or rising sea levels.

The SEC stated that the guidance does not require disclosure of a company's overall "carbon footprint" or how a company intends to reduce greenhouse gas emissions from its operations.

Over the past several years, institutional investors, environmental groups and state agencies, primarily led by a coalition called Ceres, have petitioned the SEC to provide standards for climate change risk disclosure. Some members of Congress have also asked the SEC to issue such guidance. Initiatives on climate change-related disclosure, however, have been no less controversial than legislative initiatives to curb greenhouse gas emissions or the science of global warming itself, and other members of Congress have opposed any such SEC initiative. Still, the last few years have seen increasing numbers of shareholder resolutions seeking information on companies' contributions and responses to climate change.

Due in part to the absence of SEC and other federal guidance on climate change disclosure, U.S. state regulators have been pursuing efforts to promote greater disclosure of environmental risks in public filings. In 2008 and 2009, the New York State

Attorney General entered into settlements with three power companies that required the companies to enhance their disclosure on risks and opportunities presented by climate change.[1]

Similarly, voluntary climate change disclosure standards have proliferated and certain non-U.S. initiatives have been established or are gathering momentum. ASTM, the voluntary standards organization, is developing a guide for disclosure of climate change risk. The Climate Disclosure Standards Board, an organization representing the interests of the big four and other accounting firms, also released a framework calling for disclosure of greenhouse gas emissions and analysis of climate change, regulatory risks and physical risks in public companies' financial reports.[2] In the United Kingdom, the government is required under the recently enacted Climate Change Act to introduce mandatory greenhouse gas emissions reporting by April 2012 for companies under the Companies Act.[3] The U.K. Department for Environment, Food and Rural Affairs published guidance on how to measure and report greenhouse gas emissions in September 2009.[4] Meanwhile, the European Union has regulated greenhouse gas emissions from a number of industries since 2005 and operates the world's largest program for the trading of carbon emission credits.

As a result of these requirements and voluntary initiatives, a number of companies, particularly those with multi-national operations, have been reporting the impacts of climate change on operations for a number of years. In 2009, 409 of the world's 500 largest companies responded to the Carbon Disclosure Project's survey concerning emissions and climate change impacts. Many companies also report their greenhouse gas emissions consistent with the Global Framework for Climate Risk Disclosure.[5] In voting in favor of the guidance, the SEC acknowledged the already-developed field of climate change disclosure outside reports filed with the SEC, such as in companies' reports on environmental and social matters.

Public companies' experience with reporting under these schemes, along with the U.S. Environmental Protection Agency's recent rule[6] mandating the reporting of certain greenhouse gas emissions data, will likely make it easier for companies to comply with the new SEC guidance. At the open meeting, the SEC announced plans to expand its focus on climate change disclosure in the future, and to hold a roundtable discussion on climate change disclosure in 2010.

The SEC indicated that its interpretive release will be posted on the SEC Web site as soon as possible.

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1 See, e,g, http://www.ag.ny.gov/media_center/2009/nov/nov19a_09.html

2 See http://www.cdsb-global.org/uploads/pdf/CDSB_Reporting_Framework.pdf

3 See http://www.opsi.gov.uk/acts/acts2008/ukpga_20080027_en_1

4 See http://www.defra.gov.uk/environment/business/reporting/pdf/ghg-guidance.pdf

5 See http://www.unepfi.org/fileadmin/documents/global_framework.pdf

6 EPA's rule, issued on September 22, 2009, will require certain entities to track greenhouse gas emissions beginning on January 1, 2010 and to disclose emissions data to the federal government beginning on March 31, 2011. The entities covered by the rule are (1) facilities that emit 25,000 metric tons or more of carbon dioxide equivalent ("mtCO2e"), (2) certain categories of "source" facilities even if they emit less than 25,000 mtCO2e, (3) certain suppliers of fossil fuels and industrial greenhouse gases and (4) manufacturers of vehicles and engines outside of the "light-duty" sector. For further information, you may see our previous client alert on this topic: http://www.shearman.com/epa-issues-final-rule-mandating-the-reporting-of-greenhouse-gas-emissions-09-25-2009/ or http://www.epa.gov/climatechange/emissions/ghgrulemaking.html

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For more information on the topics covered in this issue, please contact:

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