

SEC Follows Through with Guidance Regarding Disclosure of Climate Change Risks and Opportunities

On February 8, 2010, the Securities and Exchange Commission (“SEC”) published an interpretive release to provide guidance to public companies regarding the Commission’s existing disclosure requirements as they apply to climate change. In late January, the SEC had voted 3-2 to issue such guidance. For more background on the vote, see February 1, 2010 Issue Alert, “SEC Issues Guidance for Disclosing Material Climate Change Risks.”

Longstanding SEC regulations require “material” risks or opportunities to be disclosed in various public filings. Information is “material” if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision.

This “interpretive release” is a set of guideposts for disclosure by public companies with potential climate change-related risks and opportunities, such as companies within the energy sector, companies involved with the sale or purchase of greenhouse gas control technologies, or companies whose operations or assets may be affected by climate change itself.

The SEC singles out four types of risks that may be material: (1) legislative and regulatory risk, (2) the impact of international accords, (3) the indirect consequences of regulation or business trends, and (4) the risks posed by the physical impacts of climate change.

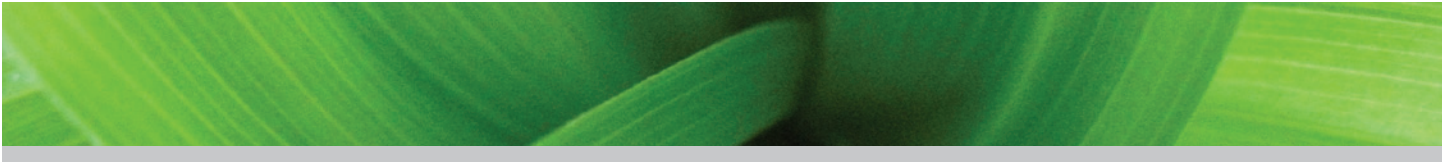
NEW OPPORTUNITIES MAY ALSO BE MATERIAL

The SEC notes that disclosure evaluations should not be limited to risks; managers should also consider “new opportunities” presented climate change and GHG regulation. For example, those companies that “may be able to profit” from the sale of allowances or offset credits under a cap-and-trade system, or that produce alternative energy or efficient technologies should consider disclosing such opportunities.

DOMESTIC AND INTERNATIONAL POLICY RISKS

While the shape and timing of federal or international GHG regulation is uncertain at this time, the SEC considers these “known uncertainties.” Accordingly, determining whether disclosure is required in a company’s “management discussion and analysis” involves two steps. First, the management must determine whether the regulation is “reasonably likely.” Unless management determined that enactment is not reasonably likely, it must assume that it will be enacted. Second, management must determine if the regulation, if enacted, is reasonably likely to have a material effect on the company.

According to the SEC guidance, material effects on a company’s financial condition or operations could come in the form of added costs of purchasing allowances under a cap-and-trade system, improving facilities and



equipment to reduce GHG emissions, and profit or loss fluctuations due to changes in demand for various goods.

INDIRECT CONSEQUENCES OF REGULATION OR BUSINESS TRENDS

The guidance calls for disclosure of the indirect impact of regulation or business trends on demand for greenhouse gas-intensive goods, innovative products, alternative energy, and carbon-based energy services like drilling or equipment maintenance; these must be considered with an eye towards the “particular facts of circumstances” of each company. SEC offers two different circumstances in which such disclosures might be appropriate: (1) where a company “plans to reposition itself” by acquiring plants or equipment to “take advantage of potential opportunities;” and (2) where a company’s GHG emissions profile could “expose it to potential adverse consequences to its business operations or financial condition resulting from reputational damage.”

PHYSICAL IMPACTS OF CLIMATE CHANGE

According to the SEC guidance, severe weather (e.g. floods or hurricanes), rising sea levels, the arability of farmland, and water availability and quality “have the potential to affect a registrant’s operations and results.” Citing a 2007 Government Accountability Office report that finds that “an overabundance of greenhouse gases” will increase the severity and frequency of weather-related property losses, the guidance suggests consideration of disclosure for companies “whose business may be vulnerable to severe weather or climate related events.”

SIGNIFICANCE OF NEW SEC GUIDANCE

With this new guidance, all public companies registered with the SEC for which climate change poses a material risk or offers an opportunity may need to disclose such information in any of various non-financial statements, including: Item 101 of Regulation S-K (business description); Item 103 of Regulation S-K (description of material pending legal proceedings); Item 503(c) of Regulation S-K (discussion of significant risk factors); Item 303 (management’s discussion and analysis of financial condition and regulations of operations) and Form 20-F (disclosure obligations of foreign private issuers of public stock).

The SEC will be monitoring the impact of its interpretive release on company filings as part of its ongoing disclosure review program. Actions on the horizon that may prompt the issuance of more detailed guidance or additional rulemakings include the SEC Investor Advisory Committee’s consideration of climate change disclosure issues, and an SEC “public roundtable” on these matters slated for Spring 2010.

FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors international, federal, and state developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information about these climate risk disclosure guidelines or assistance with assessing such risks, please contact Kyle Danish, Stephen Fotis, Doug Smith, or any member of the firm’s Climate Change and Emissions Trading practice at (202) 298-1800. Those interested in on-going coverage of climate change policy developments may wish to subscribe to Van Ness Feldman’s weekly Climate Change Policy Update at <http://www.vnf.com/news-signup.html>.

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