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CONSIDERATIONS FOR CLIMATE CHANGE DISCLOSURES IN SEC REPORTS

To Our Clients and Friends:

On February 24, 2021, Allison Herren Lee, Acting Chair of the Securities and Exchange Commission ("SEC"), issued a statement titled "Statement on the Review of Climate-Related Disclosure" that "direct[s] the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings" (the "Climate Change Statement").[1] The Climate Change Statement expressly builds on the interpretive guidance that the SEC previously issued in 2010 regarding how the SEC's existing principles-based disclosure requirements apply to climate change matters (the "2010 Climate Change Guidance").[2] This alert reviews the Climate Change Statement, the SEC's 2010 Climate Change Guidance, and other recent developments regarding climate change disclosures, and it addresses what public companies should consider going forward.

Overview of the Climate Change Statement

The Climate Change Statement explains that "[n]ow more than ever, investors are considering climate-related issues when making their investment decisions" and that it is the SEC's "responsibility to ensure that they have access to material information when planning for their financial future." To that end, the Climate Change Statement announces that the SEC and its staff will take "immediate steps" to "[e]nsur[e] compliance with the rules on the books, and updat[e] existing guidance" as part of "the path to developing a more comprehensive framework that produces consistent, comparable, and reliable climate-related disclosures." Specifically, as part of their "enhanced focus in this area," the SEC staff "will review the extent to which public companies address the topics identified in the [2010 Climate Change Guidance], assess compliance with disclosure obligations under the federal securities laws, engage with public companies on these issues, and absorb critical lessons on how the market is currently managing climate-related risks." The Climate Change Statement also notes that the SEC staff "will use insights from this work to begin updating the [2010 Climate Change Guidance] to take into account developments in the last decade."

Overview of the 2010 Climate Change Guidance

The 2010 Climate Change Guidance referenced in the Climate Change Statement is an interpretative release issued by the SEC clarifying how existing SEC disclosure rules[3] may require public companies to describe climate change matters.[4] The 2010 Climate Change Guidance notes four topics in particular that may trigger climate change disclosure under the SEC's rules:

1. The impact of climate change legislation and regulation. The 2010 Climate Change Guidance notes that companies should consider the impact of existing (and in some circumstances, pending) legislation and regulation related to climate change both in the United States and globally.

2. The impact of international climate change accords. The 2010 Climate Change Guidance advises companies to consider, and disclose under existing SEC rules where material, the impact of international accords relating to climate change.

3. Indirect consequences of climate change regulation or business trends. The 2010 Climate Change Guidance indicates that companies should consider actual and potential indirect consequences of climate change-related regulation and business trends.

4. The physical impacts of climate change. The 2010 Climate Change Guidance also states that companies should consider actual or potential impacts of the physical effects of climate change on their business.

The 2010 Climate Change Guidance appeared to have dramatically impacted public company disclosures regarding climate change: the number of S&P 500 companies mentioning climate change and/or greenhouse gas(es) in their Annual Reports on Form 10-K approximately doubled from the one year prior to the one year after the release of the 2010 Climate Change Guidance.[5] However, the 2010 Climate Change Guidance was not a focus of SEC staff comments in the years that followed. According to a 2018 Government Accountability Office report (the "GAO Report"), the SEC staff issued a limited number of climate change comments to public companies and often without citing the 2010 Climate Change Guidance.[6] For example, the GAO Report noted that based on a review of SEC filings by companies in five industries particularly "affected by climate change-related matters" (oil and gas, mining, insurance, electric and gas utilities, and food and beverage), the SEC staff issued only 14 comment letters relating to climate-related disclosures to 14 companies, out of the over 41,000 comment letters issued from January 1, 2014, through August 11, 2017.[7]

What Companies Should Do Now

In light of Acting Chair Lee's Climate Change Statement and its emphasis on compliance with existing SEC regulation, including the 2010 Climate Change Guidance, public companies should:

1. As part of the company's disclosure controls and procedures, review the existing process for assessing the materiality of climate change matters to the company and determine whether any additional climate change disclosures should be included in their SEC filings. The process should include discussions among the company's securities law counsel, environment/safety/health, sustainability and government relations personnel and members of the company's disclosure committee. Companies that will file their Annual Reports on Form 10-K in the coming weeks should in particular review their disclosures in light of the Statement and the 2010 Climate Change Guidance. However, it is important to note that the Statement was released after many large accelerated filers had already filed their 2020 Annual Reports on Form 10-Ks. That said, the number of S&P 500 companies now mentioning climate change and/or greenhouse gas(es) in their Annual Reports on Form 10-K has approximately doubled when compared to the one year after the release of the 2010 Climate Change

Guidance.[8] In addition, as disclosures become more granular and science-based, it is important to avoid unintentionally including statements that would need to be "expertized" under the Securities Act without following appropriate related procedures.

2. Assess the company's other public climate change disclosures (e.g., state- and EPA-mandated disclosures, voluntary disclosures in sustainability reports and to third-party organizations like the CDP, and disclosures on websites and in investor presentations). Companies have increased the scope and quantity of voluntary ESG disclosures over the last decade, often in response to stakeholders and in an attempt to address the many surveys and other data requests from entities that rate companies' ESG practices. While many of these disclosures may not be material under the federal securities laws, the increasing focus on ESG matters may lead to SEC staff comments regarding their absence from issuers' SEC filings.[9] For example, in 2016, the SEC staff issued a comment letter that quoted text from a company's CDP Report[10] and a different comment letter that referenced disclosures in a company's sustainability report.[11]

3. Evaluate whether additional disclosure controls are needed around the company's other public climate change disclosures, particularly with respect to voluntary disclosures. Companies should carefully evaluate their disclosure controls and procedures that are in place for reviewing and approving public disclosures regarding climate change. This is important both because the SEC staff may now review such disclosures and comment on whether they should be included in SEC filings, but also because—whether presented on an investor relations website or not—it may now be more likely that investors will review and potentially even rely on such statement (or at least that plaintiffs' lawyers may claim so in hindsight). Among other things, companies should evaluate whether each of their statements are verifiable, make sure that goals and aspirations are clearly stated as such as opposed to being stated as accomplished facts, and remove any materially misleading statements or omissions. Companies should consider including forward-looking statement disclaimers with any statement of goals or intentions.[12]

4. Monitor regulatory and legislative developments on greenhouse gas and climate change matters at the international, Federal, state and regional levels, and assess the potential impact of such developments on the company's business. Public policy responses to climate change are rapidly developing internationally and in the United States. This is especially the case given recent actions by President Joseph Biden related to the United States rejoining the Paris Agreement (an agreement within the United Nations Framework Convention on Climate Change) and promised additional actions in his January executive orders[13] addressing climate change.[14] Companies will need to stay informed of these developments and continue to assess their impact on the risks and opportunities presented by climate change.

5. Prepare for additional SEC disclosure requirements related to climate change and ESG matters. In their dissenting statement issued in connection with the adoption of Regulation S-K amendments in November 2020, Acting Chair Lee and the other Democratic Commissioner Caroline Crenshaw noted that "[w]e have an opportunity going forward to address climate, human capital, and other ESG risks, in a comprehensive fashion with new rulemaking specific to these topics," possibly providing a glimpse of what to expect from a new Democratic-controlled SEC.[15] Commissioners Lee and Crenshaw also suggested an internal task force and ESG Advisory Committee dedicated to building upon the recommendations of leading organizations, such as the Task Force on Climate-Related Financial Disclosures, and to defining a clear plan to address sustainable investing.

Recent senior SEC appointments already signal that climate and other ESG matters will be priorities at the SEC during the Biden Administration—including Acting Chairman Lee's appointment of the SEC's first-ever senior policy adviser on "climate and ESG" matters earlier this month.[16] Another recent appointee, Acting Director of the Division of Corporation Finance John Coates, was a member of the SEC's Investor Advisory Committee when it urged the SEC to update its disclosure requirements to include "material, decision-useful, ESG factors" in May 2020.[17] More recently, Acting Director Coates told financial industry members at a conference on climate how the SEC can help create "a cost-effective and flexible disclosure system," adding that "[s]omething like that is clearly increasingly necessary to the capital markets at the center of our global economy to adequately price climate and other ESG risks and opportunities."[18] In a recent interview about ESG disclosure and related rulemaking, Acting Director Coates said that, "[i]f I were to pick a single new thing that I'm hoping the SEC can help on, it would be this area."[19]

Public companies should also note that legislation in the U.S. Congress would mandate additional climate change-related disclosures. For example, the House Financial Services Committee's Subcommittee on Investor Protection, Entrepreneurship and Capital Markets last week held a hearing[20] on several bills that would require additional climate change disclosures in SEC filings, including:

- the "Climate Risk Disclosure Act of 2021,"[21] which would amend the Exchange Act to require issuers to disclose in SEC filings various climate change-related risks and require the SEC to adopt rules mandating certain other climate change-related disclosures such as "input parameters, assumptions and analytical choices to be used in climate scenario analyses"; and

- the "Paris Climate Agreement Disclosure Act,"[22] which would amend the Exchange Act to require disclosures related to the Paris Climate Agreement, including "[w]hether the issuer has set, or has committed to achieve, targets that are a balance between greenhouse gas emissions and removals, at a pace consistent with limiting global warming to well below 2 degrees Celsius and pursuing efforts to limit it to 1.5 degrees Celsius" (or if it is committed to setting such targets in the future or, if it is not, a statement to that effect and a detailed explanation as to why and whether it supports the Paris Agreement's temperature goals).

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[1] Allison Herren Lee, *Statement on the Review of Climate-Related Disclosure* (February 24, 2021), available at https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.

[2] Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change* (17 CFR PARTS 211, 231 and 241; Release Nos. 33-9106; 34-61469; FR-82), available at http://www.sec.gov./rules/interp/2010/33-9106.pdf.

[3] The key rules addressed are in Regulation S-K: Item 101 (Description of Business); Item 103 (Legal Proceedings); Item 303 (Management's Discussion of Financial Condition and Results of Operations (MD&A)); and Item 503(c) (Risk Factors).

[4] For additional information, see Gibson Dunn, *SEC Issues Interpretive Guidance on Climate Change Disclosures* (February 4, 2010), available at https://www.gibsondunn.com/sec-issues-interpretive-guidance-on-climate-change-disclosures/.

[5] Based on an Intelligize search of S&P 500 companies' Forms 10-K filed between February 1, 2009 and February 1, 2010 (82 filings) compared to February 2, 2010 to February 1, 2011 (167 filings).

[6] United States Government Accountability Office, *Climate-Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements* (February 2018) (the "GAO Report"), available at https://www.gao.gov/assets/700/690197.pdf.

[7] *Id.* at 14.

[8] Based on an Intelligize search of S&P 500 companies' Forms 10-K filed between February 2, 2010 to February 1, 2011 (167 filings) compared to February 1, 2020 to February 1, 2021 (329 filings).

[9] As noted in the GAO Report, one of the challenges the SEC staff faces in reviewing climate change-related and other disclosure in companies' SEC filings is that the "SEC relies primarily on information that companies determine is material [and] may not have details of the information companies used to support their determination of material climate-related risks." GAO Report, *supra* note 6, at 16.

[10] See comment letter to Anadarko Petroleum dated September 16, 2016 stating "Please reconcile this assertion in your proxy statement with your description of the climate change risks from your CDP Report as having a 'high' impact on your business and provide your analysis as to why you believe such 'uncertain[ies]' do not constitute 'known trends or . . . uncertainties' requiring disclosure pursuant to Item 303(a) of Regulation S-K,'" available at https://www.sec.gov/Archives/edgar/data/773910/000000000016093302/filename1.pdf.

[11] See comment letter to Mettler Toledo International dated March 23, 2016 inquiring about operations in Sudan and Syria and noting "[t]he 2014 Sustainability Report posted on your website states that you have largely ceased business in Sudan," available at https://www.sec.gov/Archives/edgar/data/1037646/000000000016069396/filename1.pdf.

[12] For additional information, see Gibson Dunn and the Society for Corporate Governance, *ESG Legal Update: What Corporate Governance and ESG Professionals Need to Know* (June 2020), available at https://www.gibsondunn.com/wp-content/uploads/2020/10/Ising-Meltzer-McPhee-Percopo-Assaf-Holmes-ESG-Legal-Update-What-Corporate-Governance-and-ESG-Professionals-Need-to-Know-Society-for-Corporate-Governance-06-2020.pdf

[13] The White House, *FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government* (January 27, 2021), available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/.

[14] For additional information, see Gibson Dunn, *President Biden Issues Executive Orders on Climate Change Policy* (February 9, 2021) (the "Climate Change Alert), available at https://www.gibsondunn.com/president-biden-issues-executive-orders-on-climate-change-policy/.

[15] Allison Herren Lee and Caroline A. Crenshaw, *Joint Statement on Amendments to Regulation S-K: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information* (November 19, 2020), available at https://www.sec.gov/news/public-statement/lee-crenshaw-statement-amendments-regulation-s-k.

[16] Securities and Exchange Commission, *Satyam Khanna Named Senior Policy Advisor for Climate and ESG* (February 1, 2021), available at https://www.sec.gov/news/press-release/2021-20.

[17] Al Barbarino, *SEC To Drill Down On Co[mpanies'] Climate-Related Risk Disclosures* (Law360, February 25, 2021), available at https://www.law360.com/articles/1358615/sec-to-drill-down-on-cos-climate-related-risk-disclosures.

[18] Bloomberg Law Staff, *ESG Reporting Top Priority for SEC Director on Leave From Harvard* (February 24, 2021), available at https://news.bloomberglaw.com/environment-and-energy/esg-reporting-top-priority-for-sec-director-on-leave-from-harvard.

[19] *Id.* (quoting Acting Director Coates).

[20] U.S. House Committee on Financial Services, *Virtual Hearing: Climate Change and Social Responsibility: Helping Corporate Boards and Investors Make Decisions for a Sustainable World*, (accessed February 24, 2021), available at https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407109.

[21] See *Climate Risk Disclosure Act of 2021 (Discussion Draft)* (January 26, 2021), available at https://financialservices.house.gov/uploadedfiles/02.25_bills-1173ih.pdf.

[22] See *Paris Climate Agreement Disclosure Act (Discussion Draft)* (February 17, 2021), available at https://financialservices.house.gov/uploadedfiles/02.25_bills-1176ih.pdf.

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