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BLOG

State Regulators Press SEC for Broad ESG Disclosures on Climate-Related Financial Risk

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A dozen state attorneys general—led by California and New York—are calling on the SEC to mandate broad ESG disclosures for climate-related financial risks. These comments reflect that certain state regulators believe that all SEC-regulated U.S. companies:

- Are already subject to climate-related financial risks that many companies are not presently disclosing;
- Should be disclosing financial risks regardless of industry—specifically identifying technology companies as primary targets for disclosure obligations beyond the energy and agriculture sectors; and
- Should be modeling and disclosing their direct and indirect greenhouse gas emissions, as well as modeling climate change implications for capital allocation, research and development, costs and revenues, operations, assets (including reserves), and finances.

The SEC indicates that it will not propose new regulations until October. These state regulators nevertheless warn that "[a]s companies work—or fail—to manage physical and transition risks, they also face litigation risk from consumer protection authorities, shareholders, and other economic stakeholders."[1]

Proposed Disclosure of Climate-Related Financial Risk

As detailed in a **prior alert**, on May 20, 2021, President Biden signed Executive Order 14030 (EO 14030) calling for "a comprehensive, [g]overnment-wide strategy" on climate-related financial risk.[2] EO 14030 expanded upon a SEC Subcommittee recommendation that the SEC should "require the adoption of standards by which corporate issuers disclose material ESG risks."[3] In light of this recommendation, in May, the SEC requested public comment on 15 detailed questions regarding potential changes to climate risk reporting, and on ESG disclosures more generally.[4]

On June 14, 2021, a group of attorneys general, led by California Attorney General Rob Bonta and including New York Attorney General Letitia James, submitted a letter responding to six of the SEC questions.[5] The attorneys general stated, "material physical climate-related risks are beginning to undermine financial asset valuations."[6] Recent "physical weather events" require companies "to make capital investments in new and hardened climate-resilient infrastructure or risk reducing long-term yields and creditworthiness."[7] As an example, they pointed to oil and gas companies that "have suffered billions of dollars of damage in their Gulf Coast operations as a result of severe weather events, damage that is likely to grow as climate change continues."[8]

These attorneys general are calling for climate disclosures from *all* SEC-regulated firms. "Although there are industries where the physical and transitional risks from climate change are already apparent, such as energy and agriculture sectors, many other industries also have exposure to climate risks, like technology companies."[9] "[T]he lack of substantive climate-related disclosures from a majority of U.S. companies suggests that many companies either have not studied the issue and therefore may not know what, if any, climate-related disclosures they need to make, or have not disclosed what they know."[10]

An appendix to the letter outlined its authors' "Required Climate Risk Disclosures." Companies should "make annual disclosures of their greenhouse gas emissions and any plans to address their emissions; analyze and disclose the potential impacts of climate change and climate change regulation; and disclosure corporate governance and risk management as they pertain to climate change."[11] Specifically, these state regulators want companies to:

- Model and make annual disclosures of: (1) the direct emissions by the company, (2) the indirect emissions from purchased energy, and (3) emissions indirectly impacted by the company in its value chain.[12]
- Disclose the basis for their calculations and detailed analysis of any plans to reduce their greenhouse gas emissions, including their quantitative targets and how those targets will be met.[13]
- Analyze the impact of regulations imposed to maintain global temperature increases below 1.5 degrees Celsius, and any other analysis the company has done of likely climate regulation or climate change impact, including any assumed carbon prices used in the companies' planning;
- Model and disclose the implications for the companies' capital allocation, research and development focus, costs and revenues, operations, assets (including reserves), and finances of climate change, including systemic risks to financial markets, and of climate change regulations; and[14]
- Detail the corporate governance, including the role of the boards of directors, for considering climate change in decisions on business strategy and risk management.[15]

What's Next for Disclosure of Climate-Related Financial Risks?

In addition to the letter from the attorneys general, the SEC received thousands of comments in response to their questions. These came from groups including investors, environmental organizations, Senate Subcommittees, Fortune-500 companies, and public-interest groups.[16]

On June 11, 2021, the SEC released its Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions. This stated its plan to "propose rule amendments to enhance registrant disclosures regarding issuers' climate-related risks and opportunities" by October 2021.[17] SEC Commissioner Allison Herren Lee also recently expressed support for the disclosures saying her "view is there's comparatively little climate disclosure in periodic reports" and the SEC needs "to get something mandatory in place but provide enough flexibility to give businesses an opportunity to learn how to get it right."[18]

Additional insight into the breadth of possible federal disclosure requirements comes from Congress. On June 16, 2021, the House of Representatives approved the Corporate Governance Improvement and Investor Protection Act by a 215-214 vote.[19] If passed, this bill authorizes the SEC to require every public company to disclose climate-specific metrics in financial statements. The White House Office of Management and Budget issued a Statement of Administration Policy in support of the bill. It stated the bill will "promote transparency, accountability and equity in corporate governance."[20]

Key Takeaways

Based on the letter from state attorneys general, the SEC's Spring 2021 Agenda, and the Corporate Governance Improvement and Investor Protection Act passed by the House, companies can expect expanded federal disclosure and reporting obligations regarding climate-related risks in the next year.

And even without federal action, state regulators may proceed more quickly. Certain state attorneys general believe that companies across industry sectors are not sufficiently analyzing and disclosing the climate-related financial risks companies now face. Their disclosure proposals included the admonition that, "[a]s companies work—or fail—to manage physical and transition risks [of climate change], ***they also face litigation risk from consumer protection authorities***, shareholders, and other economic stakeholders.”[21]

For further information or answers to questions on potential environmental disclosures and their implications, including the expected creation of new obligations and other corresponding federal policy changes and related compliance and litigation risks, please contact **Jonathan D. Brightbill** (Partner, White Collar, Regulatory Defense & Investigations), **Jennie Porter** (Associate, White Collar, Regulatory Defense & Investigations), members of the Winston & Strawn ESG Advisory Team, including Co-Chairmen **Mike Blankenship** and **Eric Johnson**, or your Winston relationship attorney.

We note that government orders on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date set forth above.

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[1] *Request for Public Input on Climate Change Disclosures (“AG Letter”)* at 6 (June 14, 2021), available at https://oag.ca.gov/system/files/attachments/press-docs/Final%20SEC%20Climate%20Disclosure%20Comment%20Letter%20-%20061421.pdf.

[2] *Executive Order 14030*, 86 Fed. Reg. 27,968 (May 25, 2021), available at https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf.

[3] *Potential Recommendations of the ESG Subcommittee of the SEC Asset Management Advisory Committee* (December 1, 2020), available at https://www.sec.gov/files/potential-recommendations-of-the-esg-subcommittee-12012020.pdf.

[4] *Public Input Welcomed on Climate Change Disclosures* (March 15, 2021), available at https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[5] Attorney General Bonta was joined by the attorneys generals of Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, Vermont, and Wisconsin.

[6] AG Letter at 5.

[7] *Id.*

[8] *Id.* at 7.

[9] *Id.* at 16, fn. 82.

[10] *Id.* at 12.

[11] *Attorney General Tong Calls on SEC to Require U.S. Companies to Disclose Financial Risk from Climate Change* (June 14, 2021), available at https://portal.ct.gov/AG/Press-Releases/2021-Press-Releases/AG-Tong-Calls-on-SEC-to-Require-US-Companies-to-Disclose-Financial-Risk-from-Climate-Change.

[12] AG Letter at 23 (Appendix).

[13] *Id.*

[14] *Id.* at 23-24.

[15] *Id.* at 24.

[16] Comments on Climate Change Disclosures (June 17, 2021), available at https://www.sec.gov/comments/climate-disclosure/cll12.htm.

[17] Office of Information and Regulatory Affairs Office of Management and Budget – SEC Climate Change Disclosure (June 17, 2021), available at https://www.wsj.com/articles/climate-fight-brews-as-sec-moves-toward-mandate-for-risk-disclosure-11624267803. https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM87.

[18] Dave Michaels, *Climate Fight Brews as SEC Moves Toward Mandate for Risk Disclosure*, The Wall Street Journal (June 21, 2021), available at

[19] Laura Weiss, *House passes ESG, climate disclosure rules for public companies*, Roll Call (June 16, 2021), available at https://www.rollcall.com/2021/06/16/house-passes-esg-climate-disclosure-rules-for-public-companies/.

[20] *Id.*

[21] AG Letter at 6 (emphasis added).

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Author

Jonathan D. Brightbill

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