

SEC Demanding Expanded Climate and ESG Disclosures

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The Securities and Exchange Commission (SEC) acknowledged last week that it has stepped up review and investigation of public company climate-related financial and environmental, social, and governance (ESG) disclosures. While the SEC generally keeps matters under investigation confidential, on Wednesday, September 22, the SEC explained on its website that staff are sending letters to public companies. These seek more information about how climate change might affect their financial earnings or business operations.^[1] The SEC sent these letters to dozens of companies, including in the agriculture, oil and gas, banking, real estate, and transportation industries.^[2]

As discussed in prior alerts,^[3] the SEC is drafting proposed regulations that would mandate enhanced climate-related and other ESG disclosures. The letters currently being sent instead enforce current law. The letters explore compliance with the SEC's 2010 Guidance Regarding Disclosure Related to Climate Change, and also cite to Rule 408 under the Securities Act of 1933 ("Securities Act") and Rule 12b-20 under the Securities Exchange Act of 1934 (Exchange Act). These require companies to disclose *in addition to the information expressly requested by the Commission* "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."

The SEC included an anonymized sample letter on their website. The sample letter asks the company to advise why they "provided more expansive disclosure in [their] corporate social responsibility report (CSR report) than [they] provided in [their] SEC filings."^[4] Of particular interest, the letter asks the company to revise their disclosures to address the "significant developments in federal and state legislation and regulations and international accords regarding climate change that [they] have not discussed in [their] filing."^[5] In other words, the letters seek more than disclosure about how climate change may physically impact companies and their operations; the SEC is asking companies to disclose how putative changes in climate change *policies* may impact financial performance.

The SEC's announcement further confirms the agency's enhanced focus on climate-related financial risk. In March 2021, the SEC announced the formation of a Climate and ESG Task Force. In April 2021, the SEC's Division of Examinations published a risk alert. This explained, "the staff observed some instances of potentially misleading statements regarding ESG investing processes and representations."^[6]

Risk-management and compliance personnel should continue to be diligent. Consider reviewing current procedures for making and substantiating climate-related and ESG claims.

For further information or questions on climate-related financial, sustainability, and ESG disclosures and their implications, contact [Jonathan D. Brightbill](#) (Partner, White Collar, Regulatory Defense & Investigations, Environmental Litigation), members of Winston's ESG Advisory Team, including co-chairmen [Mike Blankenship](#) and [Eric Johnson](#), or your Winston relationship contact.

^[1] U.S. Securities and Exchange Commission, *Sample Letter to Companies Regarding Climate Change Disclosures* (Sept. 22, 2021), <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>.

^[2] Paul Kiernan, *SEC Asks Dozens of Companies for More Climate Disclosures*, The Wall Street Journal (Sept. 22, 2021) <https://www.wsj.com/articles/regulators-ask-dozens-of-companies-for-more-climate-disclosures-11632341672>.

^[3] Jonathan Brightbill and Jennie Porter, *An Early Look at What Stage AGs Want From ESG Disclosures*, Law360 (July 8, 2021), <https://www.law360.com/articles/1401457>; Jonathan Brightbill and Jennie Porter, *Evaluating Challenges To SEC's ESG Disclosure Proposal*, Law360 (Aug. 23, 2021), <https://www.law360.com/articles/1414167/evaluating-challenges-to-sec-s-esg-disclosure-proposal>.

^[4] U.S. Securities and Exchange Commission, *Sample Letter to Companies Regarding Climate Change Disclosures* (Sept. 22, 2021), <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>.

^[5] *Id.*

^[6] The Division of Examinations' Review of ESG Investing, Risk Alert (Apr. 9, 2021), <https://www.sec.gov/files/esg-risk-alert.pdf>.

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