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BLOG

SEC Sets Date for Proposed Climate-Related Disclosure Rule

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On March 21, the U.S. Securities and Exchange Commission ("SEC") is set to vote on its long-anticipated climate-related disclosure framework for SEC-registered companies. The SEC has been discussing this proposal for more than a year. There has been wide speculation about what it will require. Now the date is set for the disclosure.

Last week, the SEC released its Open Meeting Agenda for March 21, 2022.[1] At the meeting, the agency will consider "whether to propose amendments that would enhance and standardize registrants' climate-related disclosures for investors." After the proposal is announced, a majority of four of the commissioners must vote in favor of the proposal to move it forward into a comment period. It is expected the proposal will receive the requisite votes. The commission currently has three Democrats who have previously publicly supported such a proposal.

The SEC is not, however, awaiting new regulations to begin taking action on climate-related disclosures. The SEC released letters of inquiry on its website. These show that its staff is closely looking at companies across a wide variety of industries, including **retail, technology, sports apparel, and financial institutions**. These letters are to enforce *current* law, under which companies can still have liability. 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 and Rule 12b-20 under the Securities Exchange Act of 1934. 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." This is part of the SEC's effort to identify and investigate ESG-related violations. Last year, to help with this effort, the SEC created a Climate and ESG Task Force in the Division of Enforcement.[2]

The SEC generally keeps matters under investigation confidential. In September, the SEC nevertheless publicly explained that staff was sending letters to public companies. These letters request information about how climate change might affect a company's financial earnings or business operations.[3] The SEC included an anonymized sample letter on its website.[4] According to the firm Audit Analytics, the SEC sent at least 43 letters to U.S. public companies, compared to none the year before.[5] Many of these letters referenced the companies' CSR reports. Some even mentioned statements on their websites, which are not included in any filing with the SEC. This reflects that the SEC is looking at all public information released by a company relating to sustainability and climate change, not just the filings it requires.

After public companies responded to the SEC's questions, some received follow-up letters requesting even more information or clarification on what was previously reported. On November 12, 2021, Meta Platforms Incorporated ("Meta"—Facebook's parent company) received a follow-up letter. The letter said the SEC had comments to Meta's response. One stated that Meta's analysis of climate-related transitional risks "appears to be conclusory without providing adequate detail," and asked for more information on how Meta assessed the materiality of these risks. Meta responded in a letter on November 29, 2021. Meta explained in greater detail how it runs periodic analyses to assess transition risks. The SEC responded with another letter on January 27, 2022, letting Meta know the SEC had completed review of its filing.

These letters give some insight into what the SEC is looking for from adequate climate-risk disclosures. Notably, SEC letters are going to companies outside of the traditional sectors that are usually thought of when climate-change risks are considered, like energy or agriculture. The release of the proposed rule will finally give some certainty to companies about what the SEC will ultimately seek to require.

For further information or answers to questions on ESG disclosures, and their implications, contact Jonathan D. Brightbill (Partner, White Collar, Regulatory Defense, and Investigations, Environmental Litigation) or Jennie Roualet (Associate, White Collar, Regulatory Defense, and Investigations).

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[1] SEC, *Open Meeting Agenda – March 21, 2022* (March 11, 2022), https://www.sec.gov/os/agenda-open-032122.

[2] *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (March 4, 2021), available at https://www.sec.gov/news/press-release/2021-42.

[3] Jonathan Brightbill & Jennie Roualet, *SEC Demanding Expanded Climate and ESG Disclosures*, Winston's Environmental Blog (Sept. 28, 2021), https://www.winston.com/en/winston-and-the-legal-environment/sec-demanding-expanded-climate-and-esg-disclosures.html.

[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] Derryck Coleman, *The SEC Focuses on Climate Change in Latest Round of Comment Letters*, Audit Analytics (Feb. 24, 2022), https://blog.auditanalytics.com/the-sec-focuses-on-climate-change-in-latest-round-of-comment-letters/.

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Author

Jonathan D. Brightbill

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