

Climate Change Disclosures For Public Companies

Law360, New York (March 04, 2010) -- On Feb. 2, 2010, the U.S. Securities and Exchange Commission published a guidance document on SEC reporting obligations for public companies relating to climate change matters ("Guidance Document").

The Guidance Document was issued in response to investor and shareholder groups clamoring for the SEC to require companies to assess and disclose the impact of legislative, regulatory and market initiatives related to, and the potential physical effects of, climate change.

Background

In the last several years, a number of local, state and federal regulations have been implemented or considered to reduce greenhouse gas emissions. Similarly, international action is pending to address climate change on a global level.

Recently, the U.S. Environmental Protection Agency has taken steps to reduce GHG emissions, including implementing mandatory GHG reporting obligations and issuing an "endangerment" finding for GHGs.

On Jan. 27, the SEC voted 3-2 to issue the Guidance Document to provide clarification on when climate change risks must be disclosed under existing SEC rules.

As noted by SEC Chairman Mary Shapiro when introducing the Guidance Document, the interpretive release does not create new legal requirements or modify existing ones; rather, it is intended to provide clarity and enhance consistency.

SEC Guidance Document

Sources of Climate Change Disclosure

The Guidance Document provides a summary of the most pertinent nonfinancial statement disclosure rules that may require climate change disclosure. The specific areas of climate change disclosure that should be considered include:

Description of the Business

Material costs and effects relating to compliance with laws must be disclosed under Item 101 of Regulation S-K, including any material capital expenditure for environmental control facilities.

Legal Proceedings

In connection with Item 103 of Regulation S-K, any litigation that is material to the registrant's business or financial condition must be disclosed.

Risk Factors

Item 503(c) of Regulation S-K requires that the registrant disclose any significant factors that make an investment risky.

Management's Discussion and Analysis (MD&A)

In connection with Item 303 of Regulation S-K, the MD&A must include any known trends, events and other uncertainty that would have a material effect on the financial condition of a company. The SEC did not define what "materiality" would mean under this provision from a climate change perspective.

Climate Change-Related Disclosures

The following climate change topics are identified by the SEC as potentially triggering disclosure under the above referenced rules:

Impact of Legislation and Regulation

The SEC provides various examples of pending and existing legislation-driven circumstances that must be disclosed. For instance, any material capital expenditure that must be incurred to comply with a climate change law must be disclosed.

Additionally, registrants must assess various industry-specific risks they face as a result of climate change legislation. Not surprisingly, a registrant must assess whether climate change regulation will likely have a material impact on the financial condition of the business.

If climate change legislation is proposed, registrants must assess the likelihood that it will be enacted and whether it would have a material impact on the financial condition of their company. A registrant must disclose both positive and negative financial impacts of a particular law.

International Accords

Any international accord, such as the Kyoto Protocol or the European Union Emissions Trading System, must be considered when assessing possible disclosure obligations.

Indirect Consequences of Regulation or Business Trends

Legal, technological, political and scientific climate change developments may create a demand for new products or services or decrease a demand for existing services. Examples of indirect consequences or opportunities identified by the SEC that may require disclosure include:

- Decreased demand for goods that produce significant GHG emissions;
- Increased demand for goods that result in lower emissions than competing products;

- Increased competition to develop innovative new products;
- Increased demand for generation and transmission of energy from alternative energy sources; and
- Decreased demand for services related to carbon-based energy sources, such as drilling services or equipment maintenance services.

The SEC also concluded that disclosure is potentially required based on public perception and climate change risks that impact a registrant's reputation.

Physical Impacts of Climate Change

Significant physical effects of climate change, such as potential effects on the severity of weather (for instance, floods or hurricanes), sea levels, the arability of farmland and water availability and quality also may need to be disclosed.

In the past, many companies considered these risks too speculative to warrant disclosure in SEC reports. Recent developments are changing this view, including the reported growing scientific consensus about man's contribution to climate change, the predictions concerning the physical and social impacts of climate change, the significant worldwide regulatory developments and the expected federal legislation in the U.S.

In 2008, New York Attorney General Andrew Cuomo obtained the agreement of Xcel Energy Inc. to provide extensive shareholder disclosure of potential impacts on its business from climate change and climate change legislation. Xcel Energy agreed to the disclosure requirements to resolve an investigation and threatened enforcement action under New York laws.

For the next four years, Xcel Energy agreed to disclose in its Form 10-K filings climate change risks that may have a material financial effect on the company, including discussion of current legislation and regulations and probable future laws; litigation or judicial decisions related to climate change; physical impacts of climate change, such as changes in weather conditions, sea level increases and extreme weather events; and the company's current strategic position on GHG emissions management and corporate governance concerning climate change.

The agreed-to disclosures could be construed as the "state of the art" for other public companies that are most likely to be affected by climate change and climate change legislation. Such companies whose stocks trade on a New York-based exchange face the risk of similar enforcement actions.

Conclusion

The SEC issued the Guidance Document as a result of investor and public interest groups taking a hard look at climate change risk disclosures of U.S. publicly held companies.

Such groups have pressed the SEC for enforcement against companies that do not properly disclose the risks. Further guidance could be forthcoming from the SEC after the SEC holds a public roundtable discussion which is expected to be held this Spring 2010.

These climate change disclosure issues are maturing at the same time senior management is under increased scrutiny for accurate and transparent financial reports under the Sarbanes-Oxley Act.

Corporate managers should be asking: Should the company be disclosing such risks to the public (i.e., may climate change and GHG regulation have a material effect on its business)?

Does the company have systems in place to weigh, manage, assess and meet its disclosure obligations with respect to the risks posed by global climate change and GHG regulation (now and in coming years)?

Does the company have the proper insurance in place to address potential director and officer liability relating to climate change?

The Guidance Document is intended to help companies determine what needs to be disclosed. More importantly, the Guidance Document serves as a reminder of the SEC's consistent focus on risk management and transparency and that it will be paying closer attention to climate change disclosures under the Obama administration.

Public companies will need to ensure procedures are in place to assess whether disclosure is required regarding climate change and its impact on a public company.

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