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SEC Issues Guidance Regarding Climate Change Disclosures

By Alex Frutos, Peter K. Wahl and Shakeeb Mir

On February 2, 2010, the U.S. Securities and Exchange Commission (the "SEC") issued an interpretive release to provide guidance to public companies regarding the SEC's disclosure requirements as they relate to climate change matters.[1] This guidance is effective immediately and applies to all public companies, including those that are in the midst of preparing their annual reports on Form 10-K for 2009. Further, the guidance is broad in the companies it may impact—every public company should be considering how this guidance potentially impacts their disclosure, even if the effects of climate change are indirect.

While this is the first time the SEC has addressed climate change disclosures, it is not the first time the SEC has addressed disclosure of environmental matters.[2] The release does not purport to create new disclosure requirements or modify existing disclosure requirements. While the new interpretive release expresses an intent to clarify when climate change disclosure is required under existing rules, the practical impact is to require issuers to focus more on its climate-related disclosures, particularly in the respects discussed in the release, and to review its disclosure controls to assess whether changes should be made to provide information to address the required disclosures.

Addressing climate change matters in SEC filings is made particularly complicated considering the present uncertainty regarding climate change matters, particularly the prospect of U.S. and international regulation of greenhouse gases such as carbon dioxide and the number of bodies that are considering additional regulations. The U.S. Congress is working on laws to address climate change, with the U.S. House of Representatives passing a bill that includes a mechanism to reduce greenhouse gas emissions through a "cap and trade" program. The U.S. Environmental Protection Agency ("EPA") has also been very active promulgating greenhouse gas regulations, including steps to regulate greenhouse gases under the federal Clean Air Act and also a rule requiring many facilities to measure their 2010 greenhouse gas emissions and report them to the EPA by March

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31, 2011. Numerous state, regional and local programs to regulate greenhouse gas emissions have been enacted and are quickly emerging. Also, although the December 2009 United Nations Climate Change Conference in Copenhagen, Denmark did not result in any legally-binding greenhouse gas emission reduction requirements, international regulatory negotiations are ongoing.

The SEC's interpretive release addresses four particular topics involving climate change that may trigger disclosure obligations under existing SEC disclosure requirements:

- Impact of Legislation and Regulation: According to the SEC's guidance, a company should consider whether the impact of existing federal, state, and local laws and regulations in the U.S. and other countries regarding climate change is material. Further, the guidance provides that a company should also evaluate in a two-step process the potential impact and risks of pending climate change legislation and regulation. First, the company should evaluate whether pending legislation or regulation is reasonably likely to be enacted. Unless the company determines that it is not reasonably likely to be enacted, the company should proceed on the assumption that the legislation or regulation will be enacted. Second, the company should determine whether the legislation or regulation, if enacted, is reasonably likely to have a material effect. In addition, the company should consider disclosure, if material, on the difficulty in assessing the timing and effect of the pending legislation or regulation.

- Impact of International Accords: A company should consider, and disclose when material, the impact on its business of treaties or international accords relating to climate change.

- Indirect Consequences of Regulation or Business Trends: Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies. For example, these developments may decrease demand for products with significant greenhouse gas emissions and increase demand for new products with lower emissions or increase demand for energy from alternative energy sources and decrease demand for energy from carbon-based energy sources. As such, a company should consider, for disclosure purposes, the actual or potential indirect consequences it may face due to regulatory or business trends related to climate change. In addition, a company may have to consider whether the public's perception of its business and emissions could expose it to potential adverse consequences (i.e., reputational damage).

- Physical Impacts of Climate Change: Companies should also evaluate for disclosure purposes the potential material impacts of climatic matters on their business and operations. This includes physical harm to facilities or other disruptions in business on the company and the company's suppliers and customers due to the impact of floods, hurricanes, sea levels, arability of farmland and water availability and quality.

These topics may trigger disclosure obligations under Items 101 (Description of Business), 103 (Legal Proceedings), 303 (Management's Discussion & Analysis) and 503(c) (Risk Factors) of Regulation S-K. The SEC release demonstrates that the SEC is serious about environmental disclosures and has stated its intention to monitor the impact of this release on public company disclosures.

Companies should also take the SEC's interpretive guidance as a suggestion to review the adequacy of their disclosure controls and procedures in terms of identifying and disclosing risks related to climate change.

If you have questions concerning the new SEC Release or how existing or proposed climate change legislation and regulation may impact your business, please contact Alex Frutos**,** Peter Wahl or any of the following attorneys:

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[1] Interpretive Release No. 33-9106 (February 2, 2010).

[2] See, e.g., Interpretive Release No. 33-5170 (July 19, 1971), Interpretive

Release No. 33-6130 (September 27, 1979) and Interpretive Release No. 33-6383 (March 3, 1982).

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