

NEW YORK

1285 Avenue of the Americas
New York, NY 10019-6064
+1 212 373 3000

BEIJING

Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86 10 5828 6300

HONG KONG

12th FL, Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852 2846 0300

LONDON

Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44 20 7367 1600

TOKYO

Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81 3 3597 8101

WASHINGTON, D.C.

2001 K Street NW
Washington, DC 20006-1047
+1 202 223 7300

WILMINGTON

Brandywine Building
1000 N. West Street, Suite 1200
Wilmington, DE 19801
+1 302 655 4410

February 9, 2010

SEC Publishes Interpretive Guidance on Climate Change Disclosure

On February 2, 2010, the SEC released guidance outlining its interpretation of the existing disclosure requirements as they apply to climate change matters (Release No. 33-9106). In summary, the SEC explained that SEC registrants should, if material, disclose in their risk factors, description of business, MD&A and description of legal proceedings, the actual and potential impacts and risks relating to:

- existing and proposed domestic legislation and regulations as well as international accords relating to climate change,
- business trends associated with climate change, and
- physical effects of climate change such as effects on the severity of weather, sea levels, the arability of farmland and water availability and quality.

The SEC noted that there has been greater regulation of greenhouse gas emissions in recent years, and that such regulatory developments could have a significant effect on operating and financial decisions, including those involving capital expenditures to reduce emissions. In addition, the SEC highlighted that some companies are subject to “cap and trade” laws and that those companies should consider the expenses related to purchasing allowances if reduction targets cannot be met.

The SEC also noted that a number of companies make climate change-related disclosure voluntarily or pursuant to regulatory requirements under existing reporting regimes or other initiatives administered by Federal, state or international regulatory bodies. For example, the U.S. Environmental Protection Agency, the European Union Emissions Trading System, the Climate Registry, the Carbon Disclosure Project and Global Reporting Initiative compile climate change information.

Climate Change Related Disclosure

The SEC described the following topics as examples of climate change-related issues that companies may need to consider:

Existing and Proposed Legislation, Regulation and International Accords

Management of a reporting company should consider the actual and potential consequences of existing and proposed domestic legislation and regulation, as well as international accords and treaties, relating to climate change, including:

- costs required to improve facilities and equipment to reduce greenhouse gas emissions or otherwise comply with regulatory requirements,

© 2010 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this advisory may be considered attorney advertising. Past representations are no guarantee of future outcomes.

- costs to purchase, or profits from sales of, allowances or credits under a greenhouse gas emission “cap and trade” system, and
- changes to the company’s profit and loss arising from an increase or decrease in demand for its goods and services directly caused by legislation or regulation, and indirectly by changes in costs of goods sold.

When evaluating the impact of pending legislation or regulation, management should consider whether the pending legislation or regulation is reasonably likely to be enacted or promulgated. Unless management concludes that it is not reasonably likely to be enacted or promulgated, management must consider whether the legislation or regulation, if enacted or promulgated, is reasonably likely to have a material impact on the company, its financial condition or results of operations. Unless management determines that a material impact is not reasonably likely, disclosure is required. Management should also consider disclosure, if material, of the difficulties involved in assessing the timing and effect of the pending legislation or regulation. This probability/magnitude approach to disclosure has been set forth as a general principle to disclosure by the SEC in a 1989 Interpretive Release relating to MD&A disclosure (Release No. 33-6835, May 18, 1989).

Management should also consider whether it is appropriate or necessary to provide disclosure about any new business opportunities that may arise due to regulatory changes and/or resulting changes in business practices.

Regulatory or Business Trends

Actual or potential indirect consequences, including opportunities and risks, created by legal, technological, political and scientific developments relating to climate change, should also be considered. Examples of such consequences include:

- decreased demand for goods that produce significant greenhouse gas emission,
- increased demand for products that result in lower emissions compared to competing products,
- increased competition for the development of new innovative products,
- increased demand for generation and transmission of energy from alternative energy sources,
- decreased demand for services relating to carbon based energy sources, such as drilling services or equipment maintenance services, and
- damage to reputation due to the nature of a company’s business or its sensitivity to public opinion.

Physical Changes in the Climate

Physical effects of climate change on a company’s business should also be considered. Climate change may affect the severity of weather, resulting in floods and hurricanes, sea levels, the arability of farmland, and water availability and quality. In this connection, management should assess:

- the impact of property damage and disruptions to operations, including manufacturing operations and the transport of manufactured products;
- the indirect financial or operational impact from disruptions to the operations of major customers and suppliers caused by severe weather;
- increased credit risks for banks whose borrowers are located in at-risk areas;

- increased insurance premiums and deductions, or a decrease in the availability of coverage, for companies with plants or operations in areas subject to severe weather;
- increased insurance claims and liabilities for insurance and reinsurance companies; and
- decreased agricultural production capacity in areas affected by drought or other weather-related changes.

Where to Include Climate Change Related Disclosures

Disclosure of material impacts and risks relating to climate change, including those described above, may be made in a reporting company's description of business, description of legal proceedings, MD&A and/or risk factors.

Foreign private issuers are also required to provide similar disclosure in their annual reports on Form 20-F in their risk factors, description of the material effects of government regulations, description of property, plants and equipment, MD&A and/or description of legal proceedings.

Implications

This interpretive guidance is not adding new disclosure requirements, amending existing disclosure requirements or refining existing standards of materiality. Instead, the SEC intends this guidance to serve simply as a reminder and guide to companies to consider climate change issues as they prepare their required disclosures.

The SEC indicated that it will monitor the impact of this interpretive guidance on company filings as part of its ongoing disclosure review program. Management should ensure that it has sufficient data to assess, and assess as part of its regular disclosure process, the impact of climate change related matters, including but not limited to the examples described above, on the company and, if applicable, its customers, suppliers and competitors. Moreover, companies should draw the attention of their disclosure committees to the potential impact of this interpretive guidance.

* * *

This client memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning the issues addressed in this client memorandum may be directed to Mark S. Bergman (+44-20-7367-1601), David S. Huntington (+1-212-373-3124) or Tong Yu (+81-3-3597-6306).