

**NEW SEC CLIMATE CHANGE DISCLOSURE OBLIGATIONS FOR ALL FILERS
EFFECTIVE IMMEDIATELY**

All public companies are now required to consider addressing possible domestic and international climate change regulation, as well as possible physical and business impacts of climate change itself, under new guidance from the U.S. Securities and Exchange Commission (“SEC”).¹ While many companies already mention climate change in their filings, most do not provide sufficient detail to comply with the new guidance or address the business implications of climate change. For the first time, the SEC has stated its expectations for more detailed climate change disclosures.

Filers should consider these new expectations in the disclosures they are currently drafting for their annual reports on Form 10-K for fiscal year 2009. The guidance provides a four-tiered approach that has broad goals, but provides few details on how companies are supposed to measure the potential impacts. The SEC clearly intends to begin scrutinizing all company filings for disclosures about potential climate change risks, impacts, and opportunities.

Will This Affect You? The scope of the guidance is broad-based in that every filer should consider its potential applicability, including those whom climate change affects indirectly such as through impacts on suppliers and customers. Without limiting the types of businesses that would be covered, the SEC mentions the energy sector, transportation sector, agriculture, insurance companies, lenders, businesses located in coastal areas or affected by severe weather, and businesses whose environmental reputation is relevant to their operations or financial condition. Therefore, these sectors could expect particular scrutiny.

What Type of Reporting Will Be Required? The SEC describes four topics for climate change disclosure. These topics could be addressed in the Description of Business, Legal Proceedings, Risk Factors and/or Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”) sections of the company’s SEC filings.

(1) Impact of Domestic Legislation and Regulation. Filers should consider both the positive and negative consequences of existing and pending local, state, regional and federal legal requirements related to climate change.² Evaluation of pending legislation will be a particularly controversial area as the impacts may be difficult to quantify. Examples of potential impacts provided in the guidance include costs or profits from

¹ Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106, 34-61469 (Feb. 2, 2010) (<http://www.sec.gov/rules/interp/2010/33-9106.pdf>).

² E.g., Regional Greenhouse Gas Initiative and pending legislation in the U.S. Congress for a greenhouse gas (“GHG”) cap and trade system.

GHG emissions credits trading, costs to upgrade facilities and equipment, impacts on profits and losses from increased or decreased demand for goods and services, and changes in the costs of certain goods.

(2) Impacts of International Accords. The SEC expects disclosures of existing and pending legislation for those businesses materially impacted by international agreements related to climate change (e.g., European Union Emission Trading System and Kyoto Protocol).

(3) Indirect Consequences of Regulation or Business Trends. Examples include increased or decreased demand (and volatility in demand) for certain goods and energy sources (based on their GHG emissions impact), increased competition to develop climate change-related innovations, and impacts on a company's reputation based on publicly available data about GHG emissions.

(4) Physical Impacts of Climate Change. Certain businesses may be particularly vulnerable to the expected physical impacts from climate change, depending on the nature of the business and location of key facilities. These may include weather severity, sea levels, and water availability and quality. Other potential impacts include direct effects on operations concentrated along coastlines; indirect impacts from disruptions to operations of major customers or suppliers; increased insurance claims, liabilities, premiums, and deductibles; decreased insurance availability; and decreased agricultural production.

Notably, the SEC describes the four areas above as “some of the ways climate change may trigger disclosure.” Filers should evaluate whether other areas may be relevant to their specific business. As the SEC guidance acknowledges, certain considerations may become more or less important as the legal, political, technological, scientific, and business aspects of climate change evolve over the next few years. As a result, climate change disclosures are likely to remain dynamic and evolving, especially in the near term.

Practice Tips When Preparing Climate Change Disclosures. The SEC interpretative release provides no clear guidance on when climate change risks or opportunities rise to the level of materiality necessary for disclosure. Based on our previous experience advising many companies and on a recent influential climate change disclosure study to which we contributed,³ we recommend that most companies should consider seriously how climate change and/or regulation thereof may affect them. If disclosures are warranted, filers should avoid generic risk factor disclosures that could apply to any company. Instead, the filer should consider particular

³ *Reclaiming Transparency in a Changing Climate: Trends in Climate Risk Disclosure by the S&P 500 from 1995 to Present*, Center for Energy and Environmental Security, 2009 with forward by Harvey L. Pitt and E. Donald Elliott. Mr. Elliott is the chair of the Environment, Health, and Safety Department at Willkie Farr & Gallagher LLP.

risks and opportunities. In order to ensure consistency, filers should also consider whether disclosures of certain climate change related factors in other forums should be included in filings to the SEC. These may include GHG emissions reported to the EPA under the recently promulgated GHG Disclosure Rule or voluntarily provided to organizations such as the Carbon Disclosure Project. To the extent material difficulties arise in assessing the potential timing and effect of climate change related impacts, the SEC advises that those factors should be disclosed. This may be relevant, for example, when trying to evaluate the impact and likelihood of new regulations.

Next Steps. In its guidance, the SEC states that it will monitor the impact on future company filings. The SEC also plans to hold a public roundtable to further discuss climate change disclosure issues this spring. Therefore, further guidance or a rulemaking is possible. Corporate climate change disclosures will now become the norm for most businesses rather than the exception.

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If you have any questions regarding this memorandum, please contact E. Donald Elliott (202-303-1120, delliottd@willkie.com), or the attorney with whom you regularly work.

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