Cahill

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SEC Announces Enhanced Review of Climate-Related Disclosure

The Acting Chair of the Securities and Exchange Commission (the "SEC") announced on February 24, 2021[1] that she has directed the Division of Corporation Finance to conduct an enhanced review of climate-related disclosures in public filings. In 2010, the SEC issued guidance[2] to assist companies in crafting their disclosures related to the impact of climate change. The new announcement states that "the staff will review the extent to which public companies address the topics identified in the 2010 guidance, assess compliance with disclosure obligations under the federal securities laws, engage with public companies on these issues, and absorb critical lessons on how the market is currently managing climate-related risks." The announcement also states that the goal is for the staff to update the 2010 guidance to account for changes that have occurred over the past decade.

The 2010 guidance explained that, depending on a registrant's particular circumstances, in addition to the information expressly required by SEC regulations, climate change may trigger additional disclosures of material information in public filings to the extent necessary to make the required statements not misleading in light of the circumstances under which they are made. Specifically, the 2010 guidance points to four areas of focus: description of business (Item 101 of Regulation S-K) , legal proceedings (Item 103), risk factors (Item 105) and management's discussion and analysis of financial condition and results of operations (MD&A) (Item 303).

In the description of the business, Item 101 expressly requires disclosure regarding certain costs of complying with environmental laws. Item 103 has specific requirements for environmental disclosure in legal proceedings. Although Items 101 and 103 were amended in 2020, the 2010 guidance adopts a materiality approach that is still relevant. In risk factors, Item 105(a) requires "a discussion of the most significant factors that make an investment in the registrant speculative or risky," which may include climate change-related risks. In MD&A, a registrant is required to disclose, among other things, "known trends… demands, commitments, events or uncertainties" that are reasonably likely to have a material effect on its financial condition or operating performance.

The 2010 guidance highlights four topics related to climate change that could require disclosure under these provisions: impact of climate change legislation and regulation, international accords, physical impacts of climate change, and indirect impacts of regulation or business trends. The 2010 guidance on each of these topics is as relevant today as it was then, if not more so. The 2010 guidance provides that registrants whose businesses are reasonably likely to be affected by legislation or any international treaties or agreements, or proposed legislation or agreements that are likely to be enacted or signed, should monitor the progress of any potential agreements and consider the possible impact in satisfying their disclosure obligations. Further, the 2010 guidance directs registrants to monitor legal, technological, political and scientific developments regarding climate change as they may create new opportunities or risks that require disclosure. The 2010 guidance also suggests that registrants whose

[1] For the full text of the announcement, see Securities and Exchange Commission, Statement on the Review of Climate-Related Disclosure (February 24, 2021), available at https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure?utm_medium=email&utm_source=govdelivery.

[2] For the full text of the 2010 guidance, see Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33–9106; 34–61469; FR–82, 75 Fed. Reg. 25 (February 8, 2010), available at https://www.sec.gov/rules/interp/2010/33-9106fr.pdf.

businesses may be vulnerable to severe weather or climate-related events or reputational risk should consider disclosing any material risk or consequences.

In light of the Acting Chair's announcement and the expectation for enhanced review of climate-related disclosures, public companies should revisit the 2010 guidance and consider updating their climate change disclosure, especially given today's announcement by the SEC of the creation of a special task force on climate and ESG in the Division of Enforcement with an initial focus on identifying material gaps or misstatements in disclosure of climate risks under existing rules.[3]

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene R. Banks (partner) at 212.701.3439 or hbanks@cahill.com; or Maria Vlasie (law clerk) at 212.701.3108 or mvlasie@cahill.com; or e-mail publications@cahill.com.

[3] For the full text of the announcement, see Securities and Exchange Commission,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.