SEC Will Aggressively Scrutinize Issuer's Climate Change Disclosure

Posted by Jason Saltsberg, Olshan Frome Wolosky LLP, on Thursday, March 11, 2021

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On February 24, 2021, SEC acting chair Allison Herren Lee announced that she has directed the Division of Corporation Finance to enhance its focus on climate-related disclosures in its reviews of corporate filings. This follows the SEC's announcement on February 1, 2021 of the appointment of its first-ever senior policy advisor for ESG issues.

Acting chair Lee has asked the staff to review the extent to which public companies are following the interpretive guidance concerning climate change disclosure issued on February 2, 2010 and to begin updating the guidance based on its findings. More specifically, she directed the staff to "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." Currently, there is no standardized disclosure required pursuant to Regulation S-K regarding climate change risk. It remains to be seen whether the SEC will adopt new rules to address climate change risk.

As we reported in our "Leadership Change at the SEC: What Activists Could Expect from Gary Gensler and the Biden Administration" blog post last month, the administration under President Joe Biden was anticipated to pursue progressive climate change policies and to use the SEC's disclosure requirements as one of its levers to promote this agenda. President Joe Biden, who appointed Lee as acting SEC chair on January 21, 2021, and Vice President Kamala Harris have made climate change risks one of the four urgent top priorities of their administration, in addition to the COVID-19 pandemic, the economy and racial inequality.

In delivering the keynote remarks at PLI's 52nd annual Institute on Securities Regulation on November 5, 2020, then-Commissioner Lee stated, "[B]roadly, we must ensure that we work with fellow regulators to understand and, where appropriate, address systemic risks to our economy posed by climate change. To assess systemic risk, we need complete, accurate, and reliable information about those risks. That starts with public company disclosure and financial firm reporting, and extends into our oversight of various fiduciaries and others. Investors also need this information so they can protect their investments and drive capital toward meeting their goals of a sustainable economy." The SEC's focus on climate change is expected to continue under Gary Gensler, President Biden's selection to permanently lead the agency, who is awaiting Senate confirmation.

Given the enhanced scrutiny from the SEC regarding climate-change disclosure, as well as increasing attention placed by institutional investors on ESG matters, issuers are advised to review their risk factors section to determine if it includes climate-related risk factors that specifically address their companies' risks or ones that could apply generically to any registrant or offering. If the latter, issuers should revise and tailor such risk factors to emphasize the specific relationship of the risk to their companies. Deficient disclosure could lead to delays in public offerings as a result of additional SEC comments, SEC enforcement actions or securities litigation.