SEC Issues Staff Guidance on Required Climate Change Disclosures

February 2, 2010
Hinshaw Alert

Public companies will need to pay increased attention to the developing climate-related science and policy. The imminent release of United States Securities and Exchange Commission (SEC) staff guidance on the issue of climate change will put each public company to the test of trying to objectively assess whether there is a material effect on its business from a range of existing and proposed laws and the state of human knowledge on the subject of climate change.

The SEC announced on January 27, 2010 that it will release a staff interpretive guidance on what disclosures are required of public companies respecting climate change. Federal securities law and rules require disclosures of material facts and factors that would be of interest to stockholders and potential investors. The SEC stressed that the staff interpretive guidance does not modify existing disclosure rules, but instead directs public companies to discuss climate change within the confines of these rules.

The SEC's present rules require companies to disclose information that is material to investors, when it would viewed by a reasonable investor as having significantly affected the total universe of information made available. However, the staff has emphasized that if there is any doubt to whether something is material, it should be disclosed.

The SEC action follows by only a few weeks the finding of the Administrator of the United States Environmental Protection Agency (EPA) under the Clean Air Act that certain "greenhouse gases," especially carbon dioxide, pose a threat to the environment.

The decision to release SEC guidance was taken on a split vote by the agency's commissioners. Two commissioners announced that they are opposed to the emphasis on climate change, especially because "the science, law and policy relating to climate change appear to be increasingly in flux."

SEC Chairman Mary Schapiro indicated that the agency is neither making any kind of statement regarding the facts related to climate change or "global warming," nor opining on whether the world's climate is changing, or why. She stressed also that no change in existing rules is occurring. Rather, the SEC is only providing suggestions to companies as to what issues might be material to

Attorneys

Timothy M. Sullivan

Service Areas

Environmental

shareholders. However, Ms. Schapiro also indicated that consideration of pending legislative changes and licensing requirements should to be evaluated for their potential impact on the liquidity, capital resources and results of operations of a company. Additionally, the guidance is reported to suggest that companies should note public perception and reputational factors that may affect share value.

Public entities should treat this official invitation to discuss the climate change issue seriously. Existing regulations already require large fuel combustion sources and a wide variety of industries, including electricity production, municipal landfills, chemical, glass, paper and metallic production industries, among others, to quantify and report their greenhouse gas emissions. Additionally, whether or not “cap and trade” regulation such as that which passed the U.S. House of Representatives last year, or similar legislation, is enacted, several courts have already ruled that they will entertain complaints that carbon dioxide emissions are the cause of hurricanes, rising seas and other climatological phenomena.

The SEC’s press release indicates that the interpretative guidance will list the following ways by which climate change may trigger disclosure requirements:

1. Impact of Legislation and Regulation: When assessing potential disclosure obligations, a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. In certain circumstances, a company should also evaluate the potential impact of pending legislation and regulation related to this topic.

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

3. 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 instance, a company may face decreased demand for goods that produce significant greenhouse gas emissions or increased demand for goods that result in lower emissions than competing products. As such, a company should consider, for disclosure purposes, the actual or potential indirect consequences it may face due to climate change related regulatory or business trends.

4. Physical Impacts of Climate Change: Companies should also evaluate for disclosure purposes the actual and potential material impacts of environmental matters on their business.

The challenge to firms subject to the disclosure rules will be to be both objective and balanced in their disclosure, especially given the current scientific controversy over whether mankind's greenhouse gas emissions are a significant threat to the earth’s climate.

The prospect and cost of government regulating and taxing how businesses buy and use energy and produce products has sweeping implications. Disclosures that meet the requirements of the law and that are scientifically supportable, while minimizing lack of balance and incurrence of unnecessary litigation risk, will therefore be critical.

For further information, contact: Harvey M. Sheldon , Timothy M. Sullivan or your regular Hinshaw attorney.