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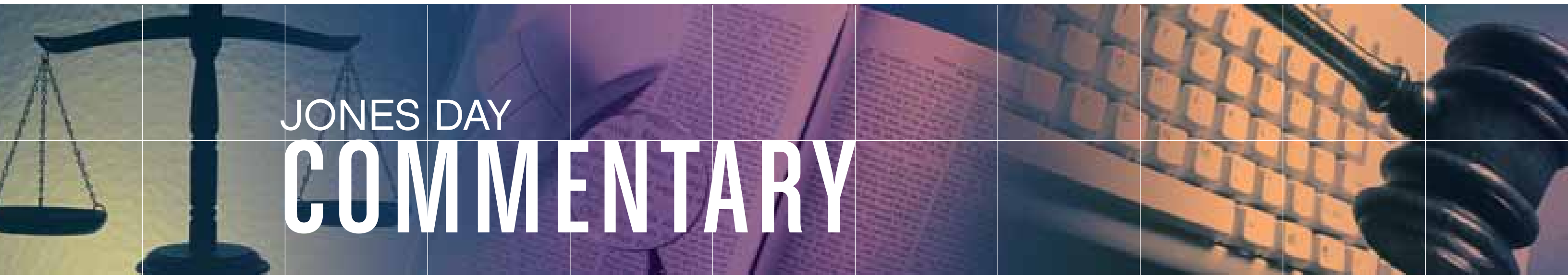

SEC ISSUES GUIDANCE ON DISCLOSURES RELATED TO CLIMATE CHANGE

On January 27, 2010, the SEC issued an interpretive release regarding climate change disclosure.[1] In connection with the issuance of the release, the SEC stressed it was not taking any position on the world's climate change but merely providing guidance regarding existing disclosure rules.

Although various interest groups have advocated for greater climate change disclosure by U.S. and non-U.S. companies, the SEC's guidance does not mandate disclosure of specific categories of information or implementation of specific procedures for evaluating the costs and benefits of matters related to climate change. The SEC's guidance confirms that the general materiality analysis historically applied in evaluating whether information is required to be included in a filing is the relevant analysis for climate change disclosure. The guidance also outlines specific climate change-related issues that the SEC would expect registrants to consider. These climate change-related issues provide an insight into how the SEC is likely to approach review of climate change disclosure. In preparation for such a review, registrants should be prepared to explain their climate change risk evaluation process, including the structuring of their internal risk management systems, and anticipate requests for supplemental information and supporting documentation.

APPLICABLE DISCLOSURE REQUIREMENTS

The release discusses the four most pertinent non-financial sources of disclosure relating to climate change for U.S. registrants:

- Item 101 of Regulation S-K – Description of Business
- Item 103 of Regulation S-K – Legal Proceedings

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

- Item 503(c) of Regulation S-K – Risk Factors
- Item 303 of Regulation S-K – Management's Discussion and Analysis of Financial Condition and Results of Operation [2]

EXAMPLES FOR CONSIDERATION

The SEC also provided examples of four nonexclusive areas that may trigger disclosure under the disclosure rules listed above:

- **Impact of Legislation and Regulation.** The release emphasizes that a registrant should discuss the significant developments in state and federal legislation and regulation regarding climate change that could affect the registrant. Such developments may include costs to reduce emissions or to purchase allowances or credits under a "cap and trade" system. Benefits could include profits from increased demand for goods and services and the sale of allowances or credits under carbon credit trading systems.

- **International Accords.** In addition to domestic legislation and regulation, the release states that registrants should discuss, where material, the impact of international treaties and accords relating to climate change, such as the Kyoto Protocol, the Copenhagen Accord, and the European Union Emissions Trading System.

- **Indirect Consequences of Regulation or Business Trends.** The SEC expects that registrants will disclose risks and opportunities that arise from legal, technological, political, and scientific developments relating to climate change. Such developments may impact the demand for the registrant's products or cause the registrant to shift its plans of operations to meet the changing trends.

- **Physical Impacts of Climate Change.** The SEC cites a 2007 Government Accountability Office report to stress that the physical effects of climate change, including severe weather (such as floods and hurricanes), changing sea levels, arability of farmland, and water availability, should be disclosed when such effects have a material impact on registrants' businesses.

CONSIDERATIONS FOR FUTURE DISCLOSURE

In attempting to analyze and understand the timing, degree, and costs of climate change legislation and the physical and indirect impacts of climate change, registrants should consider referring to experts' predictions and analysis to minimize the uncertain nature of such analysis.[3] Certain industries, including the energy utilities, insurance, transportation, and manufacturing industries, may be affected more by climate change than others. Many of these companies already provide extensive climate change disclosure. In addition, many of these companies consider the information provided by third-party or governmental reports such as the Carbon Disclosure Project.[4]

The following are a few items registrants should consider in evaluating their climate change-related disclosure:

- Registrants that otherwise disclose climate change-related information, for example, pursuant to industry regulatory requirements or voluntary disclosure programs, should review their SEC and other climate change-related disclosures for consistency.

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2 With respect to non-U.S. registrants, the SEC notes that although the forms and regulations that are the sources of the disclosure requirements are different from those applicable to U.S. registrants, the climate change-related disclosure requirements are essentially the same. As a result, non-U.S. registrants should consider the SEC's climate change guidance as applying equally to them.

3 For example, registrants could refer to "Global Climate Change in the United States" for assistance in understanding the impact of climate change. This report was issued in June 2009 under the U.S. Global Change Research Program by an expert team of scientists operating under the Federal Advisory Committee Act. The report was approved by the National Oceanic and Atmospheric Administration and other federal agencies that are part of the U.S. Global Change Research Program. This report discusses both global and national climate change, and climate change impacts by industries and regions of the United States.

4 The Carbon Disclosure Project collects and distributes climate change information, both quantitative (emissions amounts) and qualitative (risks and opportunities), on behalf of institutional investors.

- Although implementation of international accords and prospects for U.S. Congressional action is uncertain, registrants should give particular consideration to the impact of climate change regulations from the state regulatory and legislative bodies and the U.S. Environmental Protection Agency.[5]

- Although the impact of climate change on weather patterns may be uncertain and long-term, the release highlights that severe weather, whether or not caused by climate change, may already be a relevant disclosure consideration for some companies.

- In preparing disclosure, registrants should review their peers' disclosures related to climate change.

- Registrants should review their internal risk management systems, including internal control systems and disclosure controls and procedures, to ensure they are adequate to monitor the climate change issues identified as relevant to the registrant.

- Registrants should expect SEC comments relating to the areas noted above as well as requests for supplemental information and documentation confirming registrants' systems and support for their conclusions regarding their disclosure.

Because the SEC's interpretive guidance leaves registrants a great degree of flexibility in determining the content and form of climate change-related disclosure, it is likely that the staff will be closely monitoring registrants' efforts in this area. Registrants should anticipate that the SEC may mandate more specific disclosure if it deems as inadequate the responses to the SEC's "encouragement" to improve climate change disclosure.

5 The release notes numerous state and regulatory actions that registrants should consider, including the Environmental Protection Agency's Mandatory Reporting of Greenhouse Gases (adopted under the Clean Air Act) and the California Air Resources Board's Global Warming Solutions Act of 2006. For a more detailed list of state action on climate change, the release references a list provided by the Pew Center on Global Climate Change, "States News" (*available at* http://www.pewclimate.org/states-regions/news?page=1).

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