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client alert

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JANUARY 2010

For more information or if you have any questions about this and other environmental law topics please contact any attorney on our Environmental team or the authors below.

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SEC to Require Public Companies to Disclose Climate Change Risks

On January 27, the Securities and Exchange Commission (SEC) approved publication of interpretive guidance on certain disclosure rules that may affect public companies' disclosure of risk related to climate change. The relevant SEC rules cover a company's business description, legal proceedings, management's discussion and analysis, and risk factors. These rules are found in Regulation S-K, Items 101, 103, 303, and 503(c). The Commission reminded the public that interpretive guidance documents "do not create new legal requirements nor [sic] modify existing ones, but are intended to provide clarity" regarding existing requirements. The Commission also stressed that it was "not opining on whether the world's climate is changing, at what pace it might be changing, or do to what causes."

Among the items that may need to be disclosed under the guidance are (1) the impact of legislation and regulation, (2) the impact of international accords, (3) the indirect consequences of regulation and business trends, and (4) the physical impacts of climate change. While the guidance itself has not yet been released – the SEC will post the guidance on its website and publish it in the Federal Register, "as soon as possible" – it will likely be a challenge to follow.

The first two items are currently in a state of flux – the U.S. House of Representatives has passed climate change legislation but the Senate has not, EPA has proposed four different climate change regulations but adopted only one, and international efforts last month to reach an agreement to replace the Kyoto Accord were unsuccessful. Moreover, the SEC wants companies to evaluate the physical impacts of climate change (such as severe weather and rising sea levels) and the indirect consequences of climate change (such as the possible decreased demand for carbon-intensive products) on their businesses. The latter is obviously hard to predict, while forecasts of the former – rising sea levels and the chance of increasingly severe weather – are still subject to significant variation, even among the experts.

In the interim, private efforts to establish the scope of business' disclosure obligations are ongoing, particularly under the auspices of ASTM International (the former American Society for Testing and Materials) (ASTM). ASTM is currently in the process of drafting a standard guide outlining options for climate change disclosures. That drafting is near completion but was briefly on hold pending the SEC's action. With the imminent release of the SEC's guidance, ASTM's efforts will undoubtedly continue.

If the interpretive guidance sheds light on how to better describe the risks outlined above, we will describe it in a subsequent Client Alert. In the interim, however, for more information on how climate change legislation or regulation may effect your business or how to comply with SEC's new interpretive guidance, please call Lowell Rothschild (202.344.4065), Eric Smith (410.528.2355) or Bill Weissman (202.344.4503).
