

**SEC ISSUES SAMPLE LETTER TO COMPANIES REGARDING CLIMATE CHANGE DISCLOSURES**

On September 22, 2021, the staff of the Securities and Exchange Commission's (the "SEC") Division of Corporation Finance (the "SEC Staff") provided guidance to public companies on climate change disclosure with its publication of a sample letter to a fictitious "ABC Corporation" requesting additional information and clarification on the company's climate-related disclosures (the "Sample Letter").<sup>1</sup> The "illustrative letter contains sample comments that the Division may issue to companies regarding their climate-related disclosure or the absence of such disclosure."<sup>2</sup> While the Sample Letter is offered as a generic guide, the SEC specified that any comments actually issued to a company would be "appropriately tailored to the specific company and industry, and would take into consideration the disclosure that a company has provided in Commission filings" or lack thereof.<sup>3</sup>

The Sample Letter aims to elicit information regarding issuer compliance with the SEC's 2010 Guidance Regarding Disclosure Related to Climate Change.<sup>4</sup> To date, compliance with the 2010 Guidance has been limited to voluntary disclosure of information considered by the issuer to be material "in principle" to shareholders. The resulting disclosures are viewed today as insufficient by some investors for whom climate change and other environmental, social and governance ("ESG") issues are not only material but gaining in urgency. In issuing the Sample Letter the SEC Staff cited SEC rules which require that companies disclose, in addition to the information expressly required by Commission regulation, "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."<sup>5</sup> Thus, by publishing the Sample Letter the SEC Staff appears to be attempting to take an incremental step towards requiring more enhanced

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<sup>1</sup> [SEC.gov | Sample Letter to Companies Regarding Climate Change Disclosures\[1\]](#)

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> [Interpretation: Commission Guidance Regarding Disclosure Related to Climate Change \(sec.gov\)](#) ; Release No. 33-9106 (Feb. 2, 2010).

<sup>5</sup> Note 1, supra, citing in footnote 3 Rule 408 under the Securities Act of 1933 and Rule 12b-20 under the Securities Exchange Act of 1934.

disclosure of climate-related risk in filings. Companies have reportedly begun receiving such letters from the SEC.<sup>6</sup>

The Sample Letter sets out three categories of questions: (i) General; (ii) Risk Factors; and (iii) Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A").

### CSR Reports vs SEC Filings

The Sample Letter's single "general" question notes that the issuer's corporate social responsibility ("CSR") report disclosures are more expansive than in its SEC filings and asks why the disclosures are not the same. Implicit in this hypothetical is the observation by the SEC that inconsistencies in disclosures may have become too frequent and require redress. Also referred to as "sustainability reports," CSR reports are internal assessments of a company's impact on the environment and community. While publication of CSR reports is mandatory in some countries, it is not yet so in the United States. Nor are there uniform standards of CSR reporting in the United States, which results in varying standards and disparate emphasis on information and format. 90% of the S&P 500 published CSR reports in 2020,<sup>7</sup> with the majority referencing one or more frameworks such as the GRI Standards,<sup>8</sup> the SASB,<sup>9</sup> the CDP,<sup>10</sup> the TCFD,<sup>11</sup> and the United Nations SDGs.<sup>12</sup>

The anti-fraud provisions of the Exchange Act prohibit making fraudulent statements to investors, whether in an SEC filing or in a CSR report (or anywhere else).<sup>13</sup> Omitting material information also may create liability when there is a duty to disclose. For example, Item 303 of Regulation S-K requires issuers to disclose "known trends and uncertainties" in their MD&A, which could require ESG disclosures. However, "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5."<sup>14</sup> The SEC is signaling that

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<sup>6</sup> See [https://www.law360.com/securities/articles/1424603/sec-letter-raises-climate-reporting-bar-before-rules-drop?nl\\_pk=99858c42-d6d3-4f73-b656-7cc8abf6437d&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=securities](https://www.law360.com/securities/articles/1424603/sec-letter-raises-climate-reporting-bar-before-rules-drop?nl_pk=99858c42-d6d3-4f73-b656-7cc8abf6437d&utm_source=newsletter&utm_medium=email&utm_campaign=securities)

<sup>7</sup> [G A-Flash-Report-2020.pdf \(ga-institute.com\)](#)

<sup>8</sup> [GRI - Standards \(globalreporting.org\)](#)

<sup>9</sup> [SASB](#)

<sup>10</sup> [Home - CDP](#)

<sup>11</sup> [Task Force on Climate-Related Financial Disclosures | TCFD \(fsb-tcfid.org\)](#)

<sup>12</sup> [THE 17 GOALS | Sustainable Development \(un.org\)](#)

<sup>13</sup> Section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934 (the "Exchange Act") allow for an SEC or a private cause of action against persons, including issuers and their officers and directors, who make fraudulent statements to investors.

<sup>14</sup> [Basic v. Levinson](#), 485 U.S. 224, n. 17 (1988).

expansive language in a CSR report or elsewhere may appear misleading or at least invite further scrutiny if similar or identical language does not appear in the issuer's SEC filings.

### Transition Risks and Litigation

The second sample question requests disclosure of the “material effects of transition risks related to climate change” that may affect the issuer. The term “transition risk” refers to risks relating to the issuer’s affirmative steps to reduce or neutralize greenhouse gas (“GHG”) emissions, in particular transitioning business operations and practices to a low carbon economy that produces no more emissions than can be offset by 2050 (“Net Zero”). Achieving Net Zero will require most issuers to modify their strategies, policies, procedures, operations, investments and (in some cases) core businesses, which raises inherent financial, legal and reputational risks.

One specific type of transition risk—litigation risk related to climate change—is the subject of the third sample question. In explaining the potential impact of litigation risk, issuers must almost certainly discuss their strategies and efforts to mitigate such risk, which could require a greater degree of specificity in disclosures than is currently to the SEC’s liking.

### MD&A

The remaining six hypothetical questions of the sample letter relate to the MD&A section of SEC periodic reports, which analyzes the issuer’s financial fundamentals and management performance. The sample questions ask for revised or additional disclosures of material impacts of climate-related laws and regulations, capital expenditures, business trends, physical operations, compliance, and carbon credits or offsets. The sample questions request additional information to the extent that it is material.

The fact that capital markets are “pricing in” transition risk is no longer controversial. SEC Chairman Gary Gensler recently said that “investors increasingly want to understand the climate risks of the companies whose stock they own or might buy.... Investors are looking for consistent, comparable, and decision-useful disclosures so they can put their money in companies that fit their needs.”<sup>15</sup> Arguably, investors are also aware that the costs of transitioning to Net Zero, however significant, will increase exponentially over time the later the transition begins. Transition risk therefore is priced in and priced against the risk of doing nothing or doing too little. This awareness seems reflected in the Sample Letter.

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<sup>15</sup> [SEC.gov | Prepared Remarks Before the Principles for Responsible Investment “Climate and Global Financial Markets” Webinar](#)

### Conclusion

In light of the Sample Letter, issuers should begin reviewing their upcoming annual and quarterly reports for sections where additional disclosure may be warranted. In the absence of new rules mandating specific and quantifiable disclosures—which could well be forthcoming<sup>16</sup>—issuers may continue to apply the aforementioned frameworks for their ESG disclosures, but the Sample Letter suggests that technically compliant disclosures, which are otherwise not meaningful to investors, may no longer be tolerated by the SEC. It remains to be seen whether the SEC is using the Sample Letter as a way to address potential greenwashing by issuers or whether it is mere guidance non-implicit of a greenwashing problem. Issuers should also compare their SEC filings with existing CSR reports, websites, and other public statements for substantive discrepancies relating to ESG, whether or not the SEC comes calling.

FisherBroyles attorneys are knowledgeable on ESG and SEC matters and are able to advise and assist you with SEC disclosure matters as well as both proactive efforts to build and maintain a risk and/or compliance program, as well as responding to regulatory inquiries and enforcement matters.

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<sup>16</sup> See generally n. 16 *supra*. See also [SEC.gov | Public Input Welcomed on Climate Change Disclosures](#)

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