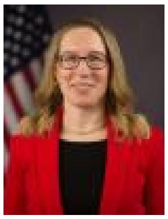
Public Statement

Enhancing Focus on the SEC's Enhanced Climate Change Efforts



Commissioner Hester M. Peirce

Commissioner Elad L. Roisman

March 4, 2021

Over the past two weeks, we and the public have seen a steady flow of SEC "climate" statements and press releases.[1] Our Divisions of Corporation Finance, Examinations, and Enforcement all have announced climate- or ESG-related initiatives. What does this "enhanced focus" on climate-related matters mean? The short answer is: it's not yet clear. Do these announcements represent a change from current Commission practices or a continuation of the status quo with a new public relations twist? Time will tell. In the meantime, it is important to contextualize the recent announcements by providing some historical and procedural background.

The Division of Corporation Finance, per a recent statement by the Acting Chair, will enhance its focus on climate-related disclosure in public company filings and embark on the task of updating the Commission's guidance in this area.[2] The staff of our Corporation Finance Division has been reviewing companies' disclosures, assessing their compliance with disclosure requirements under the federal securities laws, and engaging with them on climate change and a variety of issues that fall under the ESG umbrella, for decades. For example, the Commission approved the 2010 Commission Guidance Regarding Disclosure Related to Climate Change,[3] and Division staff regularly assesses whether climate-related disclosures comply with our rules.[4] Indeed, even before the Commission issued its 2010 guidance, our disclosure regime encompassed climate-related issues.[5] All of the Division's work has been rooted in materiality, the touchstone we use in assessing issuer disclosure on all topics, including climate.

Given this history, we assume that the new initiative is simply a *continuation* of the work the staff has been doing for more than a decade and not a program to assess public filers' disclosure against any *new* standards or expectations. After all, the Commission has not voted on any new standards or expectations relating to climate-related disclosure. The timing of this release—just before many public companies were due to file their annual reports—underscores its apparent function as a re-framing of the ongoing work, rather than the announcement of anything new.

The Acting Chair also announced that the staff would begin updating the Commission's 2010 guidance.[6] The staff can, and frequently does, recommend that the Commission update or revisit prior Commission action. We welcome any recommendations the staff may have with respect to enhancing our interpretive guidance to meet investors' needs for information material to their financial decision-making consistent with our Congressionally-mandated mission and authority. The staff also can issue interpretive guidance or certain exemptive relief on its own that does not contradict Commission-level actions. So the new announcement cannot foreshadow a plan for the staff to issue guidance that would elicit more specific line items or otherwise convert the Commission's generally principles-based approach to a prescriptive one. Such a change, of course, would require a new Commission vote.

The press release announcing our Division of Examinations' 2021 examination priorities included an introduction about how this year's priorities have an "enhanced focus" on climate and ESG-related risks.[7] The Examination priorities themselves,[8] however, refer only briefly to climate and ESG-related risks and do not contain any discussion of a thematic climate focus. Instead, as one would expect, the Examinations Division is prioritizing risk-based reviews of entities' compliance with existing statutes and regulations. These reviews touch on climate and ESG-related risks, which is not surprising given the increasing number of climate- and ESG-themed products and services, but their focus is appropriately much broader.[9]

The most recent announcement related to the Division of Enforcement also highlights climate and ESG issues, stating that the newly created "Climate and ESG Task Force will develop initiatives to proactively identify ESG-related misconduct."[10] What that means programmatically is unclear. Our Division of Enforcement will continue to identify, investigate, and bring actions against those who violate our laws and rules. Some of those violators might be public companies or advisers whose climate- or ESG-related statements are false or misleading, but such actions would not be based on any new standard; we have always pursued violations of our antifraud provisions.

If, instead, this announcement is designed to add heft to the announcements of the Divisions of Corporation Finance and Examinations that preceded it, the message is an odd one. Wouldn't it be more prudent for us to await the results of the Corporation Finance staff's latest review of climate change-related disclosure and the Examinations staff's climate- or ESG-related findings in this new exam cycle before allocating resources to an ESG-*specific* Enforcement initiative? Better yet, shouldn't we wait for our Corporation Finance staff to complete its assessment of our existing rules relating to ESG disclosures to find out if they are unclear or in need of updating before we announce an initiative aimed at bringing enforcement actions in this area? But then maybe the Enforcement Division is merely continuing ongoing efforts with a little extra fanfare. Either way, we must continue to review any alleged securities violations in light of the regulations and guidance *in existence* at the time of the conduct in question.

While these new climate-related announcements raise more questions than they answer, we look forward to working with SEC staff in the relevant divisions as they review disclosures, assess the adequacy of our guidance and rules, examine for compliance with our rules, and pursue securities law violations. We encourage investors, issuers, and practitioners to join this effort by engaging with the staff and with us on these matters. Without the benefit of the public's experience, knowledge, and views, it would be premature for the Commission to make major changes to longstanding practices.

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[1] *See*, *e.g.*, Acting Chair Allison Herren Lee, "Statement on the Review of Climate-Related Disclosure" (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure (hereinafter "Statement of Acting Chair Herren Lee"); "SEC Division of Examinations Announces 2021 Examination Priorities: Enhanced Focus on Climate-Related Risks" (Mar. 3, 2021), https://www.sec.gov/news/press-release/2021-39; (hereinafter "Press Release Announcing 2021 Examination Priorities"); "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues" (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42?utm_medium=email&utm_source=govdelivery (hereinafter "Press Release Announcing Enforcement Task Force").

[2] *See* Statement of Acting Chair Herren Lee, *supra* note 1.

[3] *See* "Commission Guidance Regarding Disclosure Related to Climate Change," Rel. No. 33-9106 (Feb 8. 2010), https://sec.gov/rules/interp/2010/33-9106.pdf (hereinafter, the "2010 Guidance").

[4] In March 2019, then Corporation Finance Director Bill Hinman noted specific examples of how climate-related issues might trigger the need for material disclosures from filers, consistent with the Commission's 2010 Guidance. *See* "Applying a Principles Based Approach to Disclosing Complex, Uncertain, and Evolving Risks," William Hinman, Director Corporation Finance, U.S. Securities and Exchange Commission (March 19, 2019), https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519. *See also* GAO Report to Congressional Requesters, "Climate-Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements," at 14-15, https://www.gao.gov/assets/700/690197.pdf (detailing staff reports of climate-related disclosures to the Senate Committee on Appropriations in 2012 and 2014 and certain comment letters sent on climate-related disclosures between 2010-2017); GAO Report to the Honorable Mark Warner, U.S. Senate, "Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them," at 36-37 https://www.gao.gov/assets/710/707949.pdf (explaining that since 2014, staff has conducted additional internal assessments on climate-related disclosures and assessments of disclosures on selected ESG topics).

[5] As Commissioner Casey said at the time the 2010 Guidance was adopted, "our disclosure regime related to environmental issues including climate change is highly developed and robust, and registrants are well aware of, and have decades of experience complying with, these disclosure requirements." *See* Commissioner Kathleen L. Casey, "Statement at Open Meeting — Interpretive Release Regarding Disclosure of Climate Change Matters" (Jan. 27, 2010), https://www.sec.gov/news/speech/2010/spch012710klc-climate.htm.

[6] *See* Statement of Acting Chair Herren Lee, *supra* note 1.

[7] *See* Press Release Announcing 2021 Examination Priorities, *supra* note 1.

[8] SEC Division of Examinations 2021 Examination Priorities (Mar. 3, 2021), https://www.sec.gov/files/2021-exam-priorities.pdf.

[9] Take the discussion of registered investment advisers' compliance programs with respect to their sustainability offerings: "The Division will review the consistency and adequacy of the disclosures RIAs and fund complexes provide to clients regarding these strategies, determine whether the firms' processes and practices match their disclosures, review fund advertising for false or misleading statements, and review proxy voting policies and procedures and votes to assess whether they align with the strategies." *Id*. at 32. The focus, however, is a variation of the same theme that has motivated examinations for many years: advisers owe a fiduciary duty to their clients, which includes doing what you tell them you're doing and informing them about conflicts of interest.

[10] Press Release Announcing Enforcement Task Force, *supra* note 1. The announcement states that "[t]he initial focus will be to identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules." It is unclear how that initial focus may evolve.