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February 3, 2020

US SEC Statements on Climate Risk Disclosure

[32190]

February 3, 2020 TO: ICI Members SUBJECTS: Compliance
Disclosure
International/Global
Investment Advisers
Portfolio Oversight
Risk Oversight RE: US SEC Statements on Climate Risk Disclosure

On January 30, SEC Chairman Clayton, Commissioner Lee, and Commissioner Peirce each published a statement regarding public operating company disclosure climate risk-related disclosure.[1] Separately, Commissioner Lee requested the SEC's new Asset Management Advisory Committee, or AMAC, to focus on ESG disclosure broadly, including climate risk. The four statements are summarized below.

This memorandum will be available, among other places on the ICI website, on the ESG Investing Resource Center's *Global ESG-Related Policy Developments Tracker Chart*.

Please note that you must log in to the ICI's website to view the Tracker.

Statement of Chairman Clayton

Clayton summarized the Commission's work on climate risk disclosure.[2] He noted at the outset that his views on how best to continue efforts in this area "may change as a result of various factors, including the actions of other policymakers, the actions of market participants and the availability of new information more generally."

Clayton asserted that several key characteristics of environmental and climate-related matters and related investment-oriented disclosures "should be recognized in crafting and reviewing securities law disclosures and, accordingly, in regulating those disclosures." The characteristics are:

- the landscape around these issues is complex, uncertain, multi-national/jurisdictional and dynamic;
- for both issuers and investors, capital allocation decisions based on, or materially influenced by, climate-related factors are substantially forward-looking and likely involve estimates and assumptions regarding, complex and uncertain matters that are both issuer- and industry-specific, as well as regional, national and multi-

national/jurisdictional, in nature;
- the SEC's disclosure-based regulatory regime is built largely around the provision by issuers of currently verifiable and largely historic issuer-specific information. Forward-looking disclosure requirements are limited and, in many cases where forward-looking information is required or provided voluntarily the information is afforded safe-harbor protection;
- when crafting and implementing disclosure mandates and guidance, he, as chairman of the SEC, "should not be substituting [his] operational and capital allocation judgments for those of issuers and investors"; and
- in efforts to coordinate with other regulators, particularly those from outside the United States, the SEC must recognize that the US regulatory regime stands apart from an investor protection perspective, as well as a public and private liability and enforcement, perspective.

Clayton went on to note that since the issuance of the 2010 Commission guidance on disclosure of climate risk, "SEC staff has continued to consider these matters, including, as part of regular reviews of annual and periodic reports and other company filings." He reported that "the staff has generally found robust efforts to comply with the disclosure requirements but also has issued comments questioning the sufficiency and consistency of the disclosures in certain instances." He noted that these staff reviews will continue. He also noted that the Office of Compliance Inspections and Examinations, or OCIE, "is reviewing disclosures of investment advisers and other issuers regarding funds and other products that pursue environmental or climate-related investment mandates to ensure that investors are receiving accurate and adequate information about the material aspects of those strategies."

Clayton noted that SEC staff frequently engage on environmental and climate-related disclosure topics, particularly focusing on, among other things, better understanding the environmental and climate-related information investors currently use and how they analyze that information to make investment decisions on both an issuer- and industry-specific basis and more generally.

He also noted that the SEC actively participates in climate-related disclosure and other work streams with many of international counterparts and authorities. Clayton observed that the SEC engages with senior officials from, for example, the UK Financial Conduct Authority, the European Securities and Markets Authority, and the European Commission on environmental and climate-related disclosures. He remarked that recent discussions "have focused more squarely on the shared, core purposes of capital markets disclosure regulation, including facilitating better analysis of long-term capital allocation decisions for both issuers and investors while being mindful that securities regulators should not be substituting our operational and investment judgments for those of the issuers and investors."

Finally, Clayton encouraged market participants to continue to engage with the SEC, including with respect to assisting it to better understand how issuers and investors use environmental and climate-related information to make capital allocation decisions on an issuer, industry and more general basis. He expressed specific interest in "discussing with asset managers that have been using environmental and climate-related models and metrics to allocate capital on an industry or issuer specific basis their experience with that process."

Statement of Commissioner Peirce

Commissioner Peirce's statement was much briefer, highlighting the need for the SEC "not [to] bow to demands for a new disclosure framework," but to instead continue to use a principles-based approach and apply the concept of materiality using a reasonable investor standard. She noted that, "[m]ateriality does not turn on what is important to non-investors or to a select group of investors motivated by objectives unrelated or only tangentially connected to their investment's profitability. If materiality were so loosely defined, it would lead to information overload in disclosure documents, increased costs associated with being a public company, increased litigation risk for public companies, a decrease in the attractiveness of our public capital markets, reduced investment returns, and—most alarmingly—a misallocation of capital."[3]

Statements of Commissioner Lee

Commissioner Lee's statement criticized the SEC's proposal for not making "any attempt to address investors' need for standardized disclosure on climate change risk."[4] She pointed out that:

the science is largely undisputed and the effects increasingly visible and dire; the looming economic threat to markets worldwide is more and more apparent; investors have increased their demands on companies and regulators for consistent, reliable, and comparable disclosures, and more companies understand these risks and have responded; voluntary reporting standards have proliferated; major legislation has been introduced, and regulators around the globe are taking action. … Investors are overwhelmingly telling us, through comment letters and petitions for rulemaking, that they need consistent, reliable, and comparable disclosures of the risks and opportunities related to sustainability measures, particularly climate risk. Investors have been clear that this information is material to their decision-making process, and a growing body of research confirms that. And MD&A is uniquely suited to disclosures related to climate risk; it provides a lens through which investors can assess the perspective of the stewards of their investment capital on this complex and critical issue. (footnotes omitted)

Commissioner Lee noted company's voluntary disclosures as a "welcome development" and explained why she favors SEC-mandated disclosure, including that without a mandatory standardized framework, not all issuers will disclose, and disclosure will continue to vary greatly by issuer, making it difficult if not impossible for investors to compare companies. She chose not to support the proposal because of the Commission's policy choice "to ignore the challenge of disclosure around climate change risk rather than to begin the difficult process of confronting it."

At the inaugural meeting of the AMAC, Commissioner Lee highlighted that she would like the committee to address "the increasing significance to investors of "their ability to accurately assess, compare, and invest in companies with sound policies on sustainability, ethical business standards, and good governance." She explained this further by suggesting the committee consider certain questions:

- [h]ow can the Commission ensure that asset managers and their clients can meaningfully pursue their investment goals and have access to critical information related to climate risk and, more broadly, to ESG issues?
- What set of standards will best serve investors and asset managers in evaluating a company's exposure to climate risk and assessing and pricing that risk?
- What should it mean when a fund calls itself an ESG fund?

- And how can the Commission and investors ensure that asset managers are not only investing in line with the long-term goals of their clients, but also voting in line with those goals?[5]

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endnotes

[1] The statements were delivered in connection with the SEC publishing proposed amendments to modernize and enhance public operating company financial disclosure. The proposed amendments do not apply to registered investment company disclosure requirements.

[2] *See* Chairman Jay Clayton, *Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure* (January 30, 2020), available at https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30.

[3] *See* Commissioner Peirce, *Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures* (January 30, 2020), available at https://www.sec.gov/news/public-statement/peirce-mda-2020-01-30.

[4] *See* Commissioner Lee, *"Modernizing" Regulation S-K Disclosure: Ignoring the Elephant in the Room* (January 30, 2020), available at https://www.sec.gov/news/public-statement/lee-mda-2020-01-30.

[5] *See* Commissioner Lee, *Statement at Inaugural Meeting of the Asset Management Advisory Committee* (January 14, 2020), available at https://www.sec.gov/news/speech/speech-lee-asset-management-advisory-committee-2020-01-14.