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EPN's Comments on Climate Change Disclosures
June 3, 2021

The Environmental Protection Network (EPN) is an organization of almost 550 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of EPA, human health, and the environment. EPN has the following comments in response to the U.S. Securities and Exchange Commission's (SEC) March 15, 2021, invitation for public input on climate change disclosures.

Introduction

The United Nations found that we have less than 10 years to cut carbon emissions nearly in half to avoid catastrophic climate change. Consistently, President Biden announced at the International Climate Summit on April 22, 2020, Earth Day, that the U.S. will cut greenhouse gas emissions (GHGs) as much as 52% by 2030. The key to achieving the goal is credible measurement. Nowhere is credible measurement more important than in the industrial sector.

The SEC plays a pivotal role in the industrial sector by calling for the reporting of material climate risks associated with companies' operations. Investors not only want to know how companies are preparing for the impact of climate change on their business, but also the level of GHGs related to the companies' operations and how the emission levels impact the external and other costs associated with the business. Regulation S-K already requires companies to disclose material climate risks. The SEC reaffirmed that Regulation S-K requires disclosure of material climate risks in the 2010 Interpretation: Commission Guidance Regarding Disclosure Related to Climate Change. The SEC has also called for updating these regulations with this call for comments.

But regulations in and of themselves do not mean much if they are not followed. In this case, the SEC regulations are too often being ignored. According to Ceres, a nonprofit that evaluates climate disclosures to the SEC, "nearly half of the 600 largest U.S. companiesthat we assessed still do not provide decision-useful disclosures on climate-related risks. Those that do often provide disclosures that are mere boilerplate or too brief, and effectively meaningless."

The value of proper disclosure and transparency is to promote the public trust in the credibility and reliability of industries' claims. Unfortunately, the data suggests that proper disclosure is just not happening. The role of the SEC is to use the tool of enforcementto ensure a "level playing field" and to make sure that no company can gain an unfair competitive advantage by skirting the rules.

Acting Commissioner Herren Lee has recognized the need for proper climate change disclosure. However, the stark truth is that, to date, the SEC has initiated **zero** enforcement actions related to climate disclosures. If industry is to account for credible measurements of climate risks, then the SEC must enforce the rules. EPN's comments are directed at finding a path for proper disclosure using the enforcement tools at the disposal of the SEC.

Recommendations

1. Proposed enforcement plan

The SEC guidance provides an adequate framework for complying with the climate disclosure requirements of Regulation S-K. It identifies non-financial statement disclosure rules that may require disclosure and topics to consider disclosing, including weather-related impacts, impacts of regulation and legislation, treaty obligations, and indirect consequences of regulations or business trends. However, the SEC guidance is over 10 years old, and much has been learned about the risks of climate change and about how to mitigate the risks or adapt to the effects of climate change. An updated guidance (either in the form of changing the existing guidance or drafting new regulations) could offer the regulated community more certainty as to how to meet its compliance obligations.

To balance the pressing urgency to address climate issues and an appreciation that clear legal requirements would be beneficial to investors and to the regulated community, the following enforcement strategy is proposed. First, immediately send a notice to all registrants that the SEC will be enforcing climate disclosure requirements within the next 30 days. Second, focus the first wave of enforcement on identifying registrants in sectors where no, or very minimal, disclosures have been submitted based on Regulation S-K and the current SEC guidance. Third, update the current SEC guidance. Fourth, pursue a second round of enforcement based on the updating of the current guidance.

There are several policy advantages to this approach. All registrants are provided adequate notice prior to the SEC initiating any actions. In addition, the first wave of enforcement will apply to situations where there was no disclosure or very minimal disclosure, which will avoid questions about the specificity of the 2010 SEC guidance. The second wave of enforcement, applying the updated guidance, will raise the bar on the nature of climate disclosures expected of the regulatory community by providing more specific steps that should be taken.

2. The SEC should transfer enforcement of Regulation S-K's climate provisions to its Office of Enforcement.

The 2018 Government Accountability Office (GAO) Audit found that senior staff of the SEC's Division of Corporate Finance believed that they did "not have the authority to subpoena additional information from companies" (page 1). The Corporate Finance Division relies on what the companies provide and do not have the ability to independently verify their claims. Based on the information provided by the company, if a violation is found, only then can they refer it to the SEC Office of Enforcement (page 17).

Based on EPA's enforcement experience, an enforcement agency cannot wait for companies to voluntarily disclose violations before pursuing enforcement. EPA relies on its information-gathering authority to verify the compliance claims of companies and then decide whether to pursue enforcement. Based on the SEC's current practice of not requiring companies to submit additional information to verify compliance, it is not surprising that no SEC enforcement actions have been referred to the Office of Enforcement regarding climate disclosures.

If the SEC wants to determine whether companies comply with their regulations as they pertain to climate change, they need to treat climate issues like any other legal issue subject to the SEC's jurisdiction. Transfer compliance evaluations to the Office of Enforcement where the culture is likely more amenable to determining whether companies are in compliance with the law. As the 2018 GAO Audit revealed, the New York State Attorney General has no problem in ascertaining compliance in these areas (pages 17-18). If the SEC's enforcement arm was charged with the enforcement responsibility, it would most likely obtain the necessary information to appropriately enforce the laws.

However, the SEC has not had prior enforcement experience with climate change disclosure cases, and it would probably be helpful for SEC Headquarters and the Regions to have a working group to discuss practice issues. For example, the group could raise questions as to whether different Regions are taking conflicting litigation positions. Also, the working group could serve as a sounding board with other practitioners who are trying similar cases.

3. The SEC should collaborate with EPA.

An updated version of the SEC guidance would raise many issues where the EPA (and states such as California) can provide a depth of technical expertise that would be helpful in evaluating a company's disclosure. The following are examples where collaboration might be useful:

a. Compare the emissions claimed by the registrant with what has been reported by the company or other companies in the sector, applying the EPA Greenhouse Gas Reporting Requirements at 40 CFR Part 98. EPA can assist in determining if the calculations described in the regulation were correctly applied by the registrant;

b. Evaluate the projected external cost of a facility emitting tons of GHGs based on credible emissions projections. EPA can review the plant layout to ensure that the emissions are identified and the GHG potential of each chemical is accurately applied;

c. Assess methods for mitigation of GHGs. EPA can determine whether best practices are being followed;

d. Review adaptation measures proposed by the companies, e.g., addressing risk and financial exposure associated with extreme weather events. EPA can provide input as to what measures other similar facilities in the sector are taking;

e. Review business opportunities and their valuation, e.g., control GHGs from refrigerants (see https://news.bloomberglaw.com/environment-and-energy/insight-a-neglected-business-opportunity-to-save-the-planet); and

f. Identify additional information that might be needed for follow-up with a registrant.

4. The SEC should change the culture of the agency to support informing investors about the material risks from climate change.

a. **Performance evaluations.** SEC management should incorporate a stated goal in performance evaluations for SEC staff and for management to determine the extent to which the employee has worked to address climate change issues.

b. **Training.** The GAO Audit found that although new staff receive training on how to conduct filing reviews in general, there was no training specifically on climate-related disclosures. Moreover, SEC staff who were interviewed recalled no industry-specific training on climate-related disclosures (pages 23-24). EPA and other federal agencies can provide training to SEC management and staff as to the environmental aspects of evaluating climate change disclosures.

c. **Staff resources.** Proper enforcement of climate disclosures requires intensive data review to evaluate potential omission of information or whether any false or misleading statements are being provided by the registrant. Such an effort will undoubtedly require additional resources for the SEC. It will also require additional resources for EPA and other federal agencies to support the effort. However, the extent of the resources needed and how these resources should be allocated is beyond the scope of these comments.

Conclusion

We do not have the luxury of delaying actions before addressing the climate issue. The SEC can play a leadership role in restoring faith in the claims made by industry related to material climate disclosures and helping to meet the President's goal with credible data. It does not matter what regulations are proposed or how, if industry believes there are no consequences for ignoring the regulations or disclosing meaningless information. We are then merely "kicking the can down the road" when we have already run out of time to meet our goal.

EPN's comments are directed at helping to assure adequate compliance by SEC registrants. We are available to answer any questions or discuss this matter with you.

Respectfully submitted,

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