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Will Mandated ESG Disclosures Lead to Increased Litigation Risk?

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With the Securities and Exchange Commission resolute in its efforts to establish new disclosure requirements related to environmental, social and governance (ESG) risks, companies appear increasingly resigned to some measure of mandatory reporting. But these companies haven't yet given up: in an effort to contain litigation risk, they continue to press the SEC to show some flexibility in the means by which ESG risks are reported.

On March 15, 2021, the SEC issued a request for public comment on climate change disclosures. The Commission asked potential respondents to address fifteen different considerations, including the types of information to be disclosed, the possibility of varying reporting standards by industry, and the potential incorporation of existing voluntary disclosure frameworks. By the time the comment period closed on June 14, 2021, more than 400 individuals or entities had submitted comments, and the SEC had held more than 40 meetings with market participants. While the majority of public commenters seemed to accept some form of mandatory reporting, submissions varied on specific reporting methodology.

In perhaps the most anticipated comment—a joint letter filed on June 11, 2021 by tech giants Amazon, Alphabet, Autodesk, eBay, Facebook, Intel and Salesforce—the companies implored the SEC to keep climate change reporting out of public filings. While reiterating the companies' commitment to combating climate change, the joint letter recommended that the SEC require companies to furnish—not file—their climate change disclosures with the Commission. According to the group, "Given that climate disclosures rely on estimates and assumptions that involve inherent uncertainty, it is important not to subject companies to undue liability, including from private parties."[1]

The distinction between *furnishing* and *filing* climate change disclosures is not purely semantic, as filed disclosures are held to a higher regulatory standard than those that are merely furnished. Of primary concern to the commenting companies, if false or misleading ESG disclosures are filed with the SEC, they could form the basis for a private right of action under Section 18 of the Securities Exchange Act. Furnished disclosures, on the other hand, are exempt from Section 18 liability—though companies furnishing data would remain liable under other provisions of the Exchange Act, including for material misstatements and omissions in connection with the purchase or sale of securities. Notably, there is precedent for requiring disclosures to be furnished rather than filed, including for companies reporting oil and gas extraction and mining payments to foreign governments under the Dodd-Frank Act.

Interestingly, the Amazon group may have a sympathetic ear on the Commission. SEC Commissioner Elad Roisman has publicly expressed his hesitation to require climate change data in filings, emphasizing that the SEC's disclosure framework already mandates the filing of all information that a reasonable investor would find material. Earlier this month, Commissioner Roisman suggested that, if mandatory ESG reporting were to be adopted, the SEC should institute a safe harbor for companies who are "earnestly trying" to disclose forward-looking ESG information.[2] And on June 22, 2021, Commissioner Roisman expressed skepticism as to whether the SEC is even the appropriate agency to regulate climate change disclosures at all.[3]

Not all companies are advocating for the same scope of protection from liability. Walmart and Chevron submitted separate letters, advocating for a hybrid approach. Walmart proposed that the SEC require companies to submit certain reports in annual filings, and then encourage other ESG disclosures to be furnished outside of filings. For its part, Chevron proposed a phased approach to reporting, citing the ability of the SEC to focus on requesting the most important data first.

It is no surprise that comments from the investor and non-profit sectors propose a different approach, advocating for wholesale inclusion of climate change disclosures in public filings. Citing the SEC's critical oversight role here, and a concern that the lack of a filing requirement would not yield thorough enough climate data for review, groups like the Forum for Sustainable and Responsible Investment are steadfast in their insistence that "[d]isclosures should be in annual and quarterly SEC filings."[4]

While the SEC is actively considering these measures, it is not the only governmental entity focused on ESG disclosure issues. On June 16, 2021, the House of Representatives narrowly passed the Corporate Governance Improvement and Investor Protection Act, which would require disclosures regarding greenhouse gas emissions, fossil-fuel and related assets, and risks associated with climate change. In the aftermath of the bill's passage, Senate Republicans on the Banking Committee wrote a letter to the SEC, denouncing the bill and arguing that it is "misguided and will potentially have little to no effect on reducing [greenhouse gas] emissions."[5] In fact, these senators oppose the SEC's involvement altogether, arguing that "federal securities regulations are not the appropriate vehicle to advance climate change policy goals."[6] At the same time, the White House released a public statement endorsing the bill and touting its potential financial benefits to Americans. Given the likelihood of a Republican-led filibuster in the Senate, however, the odds of a legislative solution are slim at best.

Though the window for input has closed, the SEC's work is far from over. Bracewell is awaiting the SEC's decision on the precise methods of disclosure and is prepared to assist companies in navigating the ESG disclosure landscape. Bracewell has a multi-disciplinary team focused on ESG issues, which draws on our expertise in environmental strategies, securities matters, regulatory issues, government enforcement, commercial litigation, and crisis management, as well as being at the forefront of the transition to sustainable energy.

Please contact your Bracewell team member for more information.

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1. https://www.sec.gov/comments/climate-disclosure/cll12-8907252-244227.pdf

2. https://www.sec.gov/news/speech/roisman-esg-2021-06-03

3. https://www.law360.com/assetmanagement/articles/1396520/sec-commish-still-on-the-fence-about-esg-disclosure-plans

4. https://www.sec.gov/comments/climate-disclosure/cll12-8916213-245007.pdf

5. https://www.banking.senate.gov/imo/media/doc/banking_committee_republicans_letter_to_sec_on_climate_

6. *Id.*