



SEC Form 10-K Comments Regarding Climate-Related Disclosures

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Editor’s note: Brian V. Breheny and Raquel Fox are partners and Andrew J. Brady is of counsel at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on a Skadden memorandum by Mr. Breheny, Ms. Fox, Mr. Brady, [Caroline S. Kim](#), and [James Rapp](#). Related research from the Program on Corporate Governance includes [The Illusory Promise of Stakeholder Governance](#) (discussed on the Forum [here](#)) and [Will Corporations Deliver to All Stakeholders?](#), both by Lucian A. Bebchuk and Roberto Tallarita; [For Whom Corporate Leaders Bargain](#) by Lucian A. Bebchuk, Kobi Kastiel, and Roberto Tallarita (discussed on the Forum [here](#)); and [Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock](#) by Leo E. Strine, Jr. (discussed on the Forum [here](#)).

As anticipated, the staff in the SEC’s Division of Corporation Finance has begun issuing detailed comments regarding climate-related disclosures.¹ In February 2021, then Acting SEC Chair Allison Herren Lee [announced](#) that she directed the staff to “enhance its focus on climate-related disclosure in public company filings.”

To date, the comments have been issued in stand-alone letters referencing the companies’ most recent Form 10-K filings. These letters have addressed a combination, but not necessarily all, of the following topics that ask companies to:

- Disclose considerations the company has given to providing the same type of climate-related disclosure in SEC filings as corporate sustainability reports.
- Identify and quantify any material past and/or future capital expenditures for climate-related initiatives.
- To the extent material, quantify or discuss the significant physical effects of climate change on the company’s property or operations.
- To the extent material, disclose any weather-related impacts on the cost or availability of insurance.
- Identify or quantify any material compliance costs related to climate change, including compliance costs associated with relevant environmental regulations.
- Disclose any material litigation risks related to climate change and the potential impact to the company.

¹ On September 22, 2021, the staff published a [sample comment letter](#) regarding climate change disclosures. The sample letter includes an illustrative, non-exhaustive list of comments that the Division of Corporation Finance may issue to companies about their climate-related disclosure or the absence of such disclosure.

- Disclose the material effects of transition risks related to climate change that may affect the company's business, financial condition and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks or technological changes.
- To the extent material, disclose the company's purchase or sale of carbon credits or offsets and any material effects on the company's business, financial condition and results of operations.

Many of these topics were covered in the [SEC's 2010 interpretative guidance](#) on climate change disclosure and, accordingly, should have been previously disclosed if the company believed they were material. The comment letters do not reference amending previous disclosures through future SEC filings. Therefore, it is unclear what steps, if any, the SEC may take if companies determine that material changes are required to their Form 10-Ks in response to these comments. It is possible the staff may insist that the 10-K be amended to include further disclosures.

At this stage, the SEC staff has not indicated whether they will accept or challenge companies' materiality determinations, particularly if a company does not believe additional disclosures are warranted in response. In any event, company responses should be informed by current Form 10-K disclosure requirements, and companies should be prepared to support their prior materiality determinations. In this regard, it is important to note that disclosure of certain climate-related information outside of SEC filings (e.g., in an ESG report) does not necessarily mean such information would have been material for SEC reporting purposes. Importantly, ESG reports often refer to "material" topics to designate issues of importance to stakeholders in a manner that is separate and distinct from the definition of "material" under the federal securities laws, and those reports often contain disclaimers of this fact.

In addition, in March 2021, the SEC's Division of Enforcement announced the [creation of a taskforce on climate and ESG matters](#). It is our understanding that the SEC's enforcement staff is interested in pursuing such matters. It is possible, therefore, that these comment letters could lead to interest from the taskforce.

Finally, as we noted in our alert on Chair Gary Gensler's [regulatory agenda](#), climate change disclosure is a topic on the SEC's short-term rulemaking agenda. The SEC has not announced a meeting date to consider a rule proposal related to climate change. But we anticipate that the SEC may consider this topic in 2021.