SEC Climate Change Disclosure Guidance: An Overview and Congressional Concerns

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Summary

Publicly traded companies are required to transparently disclose material business risks to investors through regular filings with the Securities and Exchange Commission (SEC). On January 27, 2010, the SEC voted to publish *Commission Guidance Regarding Disclosure Related to Climate Change* (the Guidance), which clarifies how publicly traded corporations should apply existing SEC disclosure rules to certain mandatory financial filings with the SEC regarding the risk that climate change developments may have on their businesses. The Guidance has been controversial and prompted legislation in the 112th Congress to repeal it.

Proponents of the Guidance, including several union and public pension funds, argued that it was necessary because a consensus has been established on the reality of climate change and that, given the salience of climate change and the various related legislative and regulatory responses to it, the Guidance would help foster a better understanding of how the SEC's existing disclosure requirements applied to it. Some that oppose the Guidance, including several business interests, have argued that the current state of the science and the law underlying the idea of global climate change remains uncertain; existing SEC disclosure rules are adequate with respect to corporate reporting on environmental change; and while certain interest groups had advocated for such climate change disclosure guidance, the climate change disclosure guidance's usefulness for most investors is unclear.

In the 112th Congress, Senator John Barrasso and Representative Bill Posey introduced identical bills (S. 1393 and H.R. 2603, respectively) that would prohibit the enforcement of the SEC's climate change disclosure guidance. To date, in the 113th Congress, no bills involving the Guidance have been introduced.

Since the Guidance went into effect on February 8, 2010, there have been several attempts to gauge its impact. For example, a 2011 report from Ceres, a nonprofit coalition of institutional investors, environmental organizations, and other public interest groups, concluded that most corporate filers needed more experience at communicating the risks associated with climate change. Although it found that large public companies had improved their climate-change risk disclosures in recent years, the report concluded that there was more work to be done in this area.

A report from the law firm of Davis Polk & Wardwell found that the Guidance did not appear to have had as significant an impact on disclosure as some had expected; that new disclosures emerged involving potential changes in demand for products and services and increases in fuel prices; and that there was little disclosure of actual or potential reputational harm that might result from climate change.

A study published for the American Bar Association found that many companies reported seeing little upside and even less downside in climate change disclosures. It also found that many companies reported few meaningful business opportunities resulting from climate change disclosures, which instead carried a potential for creating risks. In addition, many companies indicated that disclosing frequently uncertain climate change-related information was often a very speculative process and that there were few, if any, penalties from the SEC for nondisclosure of climate change matters. This perception was underscored by other observations that characterized the SEC's level of enforcement in this area as negligible.

This report will be updated as events warrant.

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Introduction

On January 27, 2010, the Securities and Exchange Commission (SEC) voted to provide an interpretive guidance, the *Commission Guidance Regarding Disclosure Related to Climate Change* (the Guidance), which technically does not create new legal obligations, but clarifies how publicly traded corporations should apply existing SEC disclosure rules to certain mandatory financial filings with the SEC regarding the risk that climate change developments may have on their businesses.[1] The Guidance's release was controversial and prompted legislation in the 112th Congress to repeal it. To date, no bills have been introduced in the 113th Congress that address the Guidance.

This report (1) briefly describes the Guidance; (2) provides opposing views on the Guidance, including past congressional legislation; (3) summarizes a study on potential corporate costs and benefits of implementing the Guidance; and (4) examines the impact of the Guidance from the perspectives of investors, corporations, and finance professionals.

At the opening of the SEC commissioners' vote on the Guidance, then-SEC Chairman Mary Schapiro explained that the Guidance provided "interpretive guidance on existing [public company] disclosure requirements as they relate to business or legislative events on the issue of climate change."[2] As such, the Guidance, which went into effect on February 8, 2010, attempts to give greater specificity to various existing disclosure rules that may require a public company to disclose the impact that business, legal, regulatory, or legislative developments related to climate change may have on its business. This information must meet the test of "materiality"—the notion that information should be disclosed if a reasonable investor would want it in order to make an informed investment decision.[3]

Specifically, the Guidance states what companies could be required to disclose in relation to climate change under the corporate disclosure requirements that fall under the SEC's Regulation S-K,[4] including Forms 10-K[5] and 20-F filings.[6] In accordance with the Sarbanes-Oxley Act of

1 U.S. Securities and Exchange Commission, "SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change," January 27, 2010, available at http://www.sec.gov/news/press/2010/2010-15.html and "Commission Guidance Regarding Disclosure Related to Climate Change: Securities and Exchange Commission, February 2, 2010, available at http://www.sec.gov/rules/interp/2010/33-9106.pdf.

2 "Speech by SEC Chairman: Statement Before the Open Commission Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change by Chairman Mary Schapiro," January 27, 2010, available at http://www.sec.gov/news/speech/2010/spch012710mls-climate.htm.

3 For example, see "Speech by SEC Commissioner: Remarks to the 'SEC Speaks in 2008' Program of the Practising Law Institute by SEC Commissioner Paul S. Atkins," February 8, 2008, available at http://www.sec.gov/news/speech/2008/spch020808psa.htm.

4 Regulation S-K is part of the 1933 Securities Act that sets forth in detail the information to be disclosed in registration statements and periodic reports of public companies and lays out the policies and procedures for companies to report in filings to the SEC.

5 A 10-K is a comprehensive summary report of a company's performance that must be submitted annually to the SEC. Typically, the 10-K contains much more detail than the annual report to shareholders.

6 Foreign-private issuers registered with the SEC are required to file Form 20-F with the SEC. There are several applicable types of Form 20-F filings for foreign-private issuers, including a form for issuing an annual report. A foreign-private issuer is any publicly traded foreign company other than a foreign government defined as (1) having more than 50% of the outstanding voting securities of such issuer directly or indirectly owned by residents of the United States and (2) any one of the following:

(continued...)

2010 (P.L. 107-204), the SEC must look at one filing from each public company at least once every three years.

In part, the Guidance attempts to clarify how certain climate change-related matters should be disclosed under the aforementioned SEC corporate disclosures through providing examples of developments that could trigger such disclosures. Key points expressed in the Guidance include the

- impact of climate change legislation and regulation,
- impact of international accords on climate change,
- indirect consequences of regulation or business trends, and
- physical impacts of climate change.

On the day that the SEC voted to adopt the Guidance, then-SEC Chairman Mary Schapiro, who had voted for adoption, observed,

> [T]he Commission is not making any kind of statement regarding the facts as they relate to the topic of "climate change" or "global warming." And, we are not opining on whether the world's climate is changing; at what pace it might be changing; or due to what causes. Nothing that the Commission does today should be construed as weighing in on those topics…. It is neither surprising nor especially remarkable for us to conclude that of course a company must consider whether potential legislation—whether that legislation concerns climate change or new licensing requirements—is likely to occur. If so, then under our traditional framework the company must then evaluate the impact it would have on the company's liquidity, capital resources, or results of operations, and disclose to shareholders when that potential impact will be material. Similarly, a company must disclose the significant risks that it faces, whether those risks are due to increased competition or severe weather. These principles of materiality form the bedrock of our disclosure framework. Today's guidance will help to ensure that our disclosure rules are consistently applied, regardless of the political sensitivity of the issue at hand, so that investors get reliable information.[7]

Views on the Need for and Merits of the Guidance

The vote by the SEC commissioners in favor of the Guidance split 3-2, a vote that reflected two rival perspectives on the merits of the Guidance. Below are examples of views both in support of and in opposition to the Guidance.

(...continued)

- the majority of the executive officers or directors are U.S. citizens or residents,
- more than 50% of the assets of the company are located in the United States, or
- the business of the issuer is administered principally in the United States.

[7] "Statement Before the Open Commission Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change by SEC Chairman Mary Schapiro," January 27, 2010, available at http://www.sec.gov/news/speech/2010/spch012710mls-climate.htm.

Supportive Perspectives on the Guidance

A Supportive SEC Commissioner. Articulating a view commonly found among many of the Guidance's advocates, Luis A. Aguilar, a Democratic commissioner who voted for it, argued for the Guidance's importance. His stance significantly derived from his view that a clear consensus had been established on the reality of climate change. At the time, his view was also informed by the belief that, given the salience of climate change and the various related legislative and regulatory responses to it, the Guidance would help foster a better understanding of how the SEC's existing disclosure requirements applied to climate change. Climate change, he argued, had become increasingly material to corporate affairs as well as to corporate investors, the disclosures' ultimate beneficiaries:

> Over two years ago, the Intergovernmental Panel on Climate Change concluded that it is "unequivocal" that the Earth's climate is warming. In October of last year, 13 federal agencies and departments published a coordinated annual report to Congress that reached the same conclusion. It is expected that climate change, if unchecked, will result in severe harm to ecosystems and people around the world. So it is no surprise that regulation of greenhouse gases has the attention of state governments, Capitol Hill, and the Environmental Protection Agency, as well as the attention of investors and companies. Against this backdrop of a changing climate and changing legislative and regulatory landscapes, it is only natural that there are questions about what companies should be disclosing to investors. Today's release is an important step toward answering these questions. By explaining what our existing rules currently require with respect to climate change disclosure, today's release should help companies comply.... Climate change and related governmental action can create risks and opportunities for companies. It is clear that disclosure of this material information will inform and aid investors in their decision making.... This release clarifies that effects resulting from climate change that are keeping management up at night should be disclosed to investors. Additionally, today's interpretive release should facilitate disclosure to investors regarding regulatory restrictions on greenhouse gas emissions that would materially change a company's business and future prospects.[8]

A Supportive Group of Institutional Investors. In March 2010, soon after the release of the Guidance, a group called the Investor Network for Climate Risk, a coalition of public pension fund and corporate treasurers, comptrollers, controllers, institutional investors, and asset managers, wrote to then-SEC Chairman Schapiro to lend their support to the guidance. Echoing the views expressed by Commissioner Aguilar, the network stressed that the Guidance would add significant value to corporate disclosures:

> Climate change already poses significant risks to economies and investments. Many of us have concluded that corporate assessments of the regulatory, physical and litigation risks from climate change are critical in understanding the value of our investments. In response to our efforts to engage companies, more businesses have started to account for the impacts of climate change on their financial performance, while others have pursued opportunities to develop energy-efficient and low-carbon products and services in order to gain market share and improve competitiveness. However, few companies disclose sufficient information about these issues in SEC filings to allow us to make more informed investment decisions. The SEC's new interpretive guidance provides registrants valuable information about how to

[8] "Statement Before the Open Commission Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change by SEC Chairman Mary Schapiro," January 27, 2010, available at http://www.sec.gov/news/speech/2010/spch012710laa-climate.htm.

> apply longstanding disclosure requirements to the evolving challenges posed by climate change.[9]

Two Supportive Members of Congress During the 111th Congress. In January 2010, during the 111th Congress, Senator Christopher Dodd, then-chair of the Senate Committee on Banking, Housing, and Urban Affairs, lent his support to the Guidance.

> Investors have a right to know if their investment may be helped or hurt by severe weather, rising sea levels, or new greenhouse gases regulation or legislation. These new guidelines will help ensure that investors have the guidance they need to make well-informed decisions.[10]

At the same time, Senator Jack Reed, then-chair of the Senate Banking Subcommittee on Securities, Insurance, and Investment, expressed similar support:

> I am pleased the SEC has taken the important step of issuing guidelines regarding climate change disclosure that will increase informational transparency. Climate change is creating new opportunities and risks in the economy. Major environmental risks and liabilities can significantly impact companies' future earnings and, if undisclosed, could impair investors' ability to make sound investment decisions.[11]

Opposing Views on the Guidance

A Critical SEC Commissioner. At the time, then-SEC Commissioner Katherine Casey cast one of the two dissenting votes against adopting the Guidance. Ms. Casey argued that her opposition largely stemmed from her view that (1) the state of the science and the law underlying the idea of global change lacked certainty; (2) existing SEC disclosure rules were adequate with respect to corporate reporting on environmental change; and (3) while certain interest groups had advocated for such climate change disclosure guidance, the usefulness of the information to most investors from the Guidance was questionable:

> I believe that the release is premised on the false notion that registrants may not recognize that disclosure related to "climate change" issues may be required. In truth, 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.... There is undoubtedly a constituency that is interested in, and has long pressed the Commission to require, more extensive disclosures on environmental issues in order to drive particular environmental policy objectives. The issuance of this release, however, at a time when the state of the science, law and policy relating to climate change appear to be increasingly in flux, makes little sense.... I do not believe that this release will result in greater availability of material, decision-useful information geared toward the needs of the broad majority of investors.[12]

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9 "Letter to SEC Chairman Schapiro from the Investor Network for Climate Risk," March 3, 2010, available at http://www.ceres.org/files/INCR_SEC_LETTER_March_2010.pdf.

10 U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, *Dodd, Reed, Praise SEC Decision on Climate Risk Disclosure*, news release, January 27, 2010, available at http://banking.senate.gov/public/index.cfm?FuseAction=Newsroom.PressReleases&ContentRecord_id=76a31da5-ecc6-9a2e-6847-aece2d94c719&Region_id=&Issue_id=.

11 Ibid.

12 SEC, "Speech by SEC Commissioner: Statement at Open Meeting on Interpretive Release Regarding Disclosure of (continued...)

Criticism from an Electrical Utility Industry Trade Group. In the private sector, major criticism of the Guidance came from the Edison Electrical Institute, an electrical utility trade group, which reports that its members are responsible for 60% of the total electricity supplied in the United States. In a July 2010 letter to then-SEC Chairman Schapiro, the group voiced concerns that the SEC Guidance (1) required too much speculation by corporate registrants in areas such as predicting weather patterns, the likelihood of enacting climate-change-related legislation, and potential corporate reputational damage related to climate change; (2) could discourage voluntary disclosures by registrants fearful of liability under securities laws for the contents of such disclosures, which would reduce the total amount of general climate change information provided to investors; and (3) might be interpreted as requiring that corporate management conduct a comprehensive review of climate change-related matters, which could be both unnecessary and excessively burdensome.[13]

Critical Responses in Congress. To date, in the 113th Congress, no legislation involving the climate change guidance has been introduced.

However, in both the 111th and 112th Congresses, various Members have expressed displeasure with the SEC's Guidance by introducing legislation and through correspondence with the SEC.

In the 112th Congress, Senator John Barrasso and Representative Bill Posey introduced identical bills (S. 1393 and H.R. 2603, respectively) that would prohibit the enforcement of the SEC's climate change disclosure guidance. In a joint news release accompanying the introduction of the bills, the Members explained the purpose behind the legislation:

> In this economy, the SEC's main responsibility should be to protect American investors and maintain fair markets. Instead, it's actually using time and resources on regulating climate change. This is yet another startling example of how the Administration is making it worse for job creators across our country. Our bill blocks the SEC from forcing American employers to conduct burdensome and expensive climate analysis.[14]

In March 2010, during the 111th Congress, Representative Posey was joined by 20 of his House colleagues in writing a letter to Chairman Schapiro to express their opposition to the climate change disclosure guidance. Among the signatories were former Representative Ron Paul and Representative Scott Garrett, currently chair of the Subcommittee on Capital Markets and Government-Sponsored Enterprises of the House Financial Services Committee.[15] Earlier in the 111th Congress, similar concerns were expressed in a February 2, 2010, letter to Chair Schapiro from Representative Spencer Bachus, then-ranking Member of the House Committee on Financial Services. In his letter, Representative Bachus reportedly observed,

(...continued)

Climate Change Matters by SEC Commissioner Kathleen L. Casey," January 27, 2010, available at http://www.sec.gov/news/speech/2010/spch012710klc-climate.htm.

[13] "Letter from Richard McMahon, executive director of the Edison Electric Institute, to SEC Chairman Mary L. Schapiro," July 13, 2010, available at http://www.eei.org/whatwedo/PublicPolicyAdvocacy/TFB%20Documents/100713McMahonSECClimateChangeDisclosures.pdf.

[14] U.S. Congress, Office of Bill Posey, "Posey, Barrasso Defend Job Creators from Excessive SEC Regulations," press release, July 20, 2011, available at http://posey.house.gov/News/DocumentSingle.aspx?DocumentID=252940.

[15] "Letter from Representative Bill Posey, et al, to SEC Chairman Mary Schapiro," March 16, 2010, available at http://posey.house.gov/UploadedFiles/SECLetter-ClimateChangeRegs-March15-2010.pdf.

> With legislative progress on climate change having stalled, this guidance suggests an attempt by the SEC to promote a political agenda through regulation. The guidance reaches beyond the SEC's expertise and will impose potentially significant compliance costs on issuers with little apparent benefit to investors.[16]

A Preliminary Look at Potential Costs and Benefits from Implementing the Guidance

The Guidance did not address the issue of the added costs or burdens of its implementation. Soon after the Guidance's release, however, a law review article was published that examined the Guidance's potential costs and benefits for corporations. Among other things, the article, *An Inconvenient Risk: Climate Change Disclosure and the Burden on Corporations*, concluded that (1) in the context of the fairly limited data that exist on climate change risks previously placed in 10-K filings and in existing voluntary disclosure protocols, the Guidance would require expanded disclosure of "all relevant information"; (2) there are legitimate concerns that the added burdens of identifying and measuring climate change-related risk would exacerbate the challenges of determining what disclosures are material;[17] and (3) in the context of potential corporate "maximum liability" for risks related to climate change, the added cost of comprehensively assessing climate change risks as dictated by the Guidance would appear to be justified.[18]

Studies on the Guidance's Impact

The Guidance has been in effect since early February 2010. Several studies examined its impact for the initial year. This section examines three such studies, which reflected, respectively, investor, corporate, and finance perspectives.

The Quality of Disclosures After the Guidance, from an Investor's Perspective

One impact study after the Guidance's first year was done by Ceres, a nonprofit coalition of institutional investors, environmental organizations, and other public interest groups. Ceres works with companies to address what it calls sustainability challenges, such as global climate change and water scarcity. Ceres was also one of several entities that petitioned the SEC in 2007 to "issue an interpretive release clarifying that material climate-related information must be included in corporate disclosures under existing law." Other entities included the California Public

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[16] U.S. Congress, Office of Spencer Bachus, "Congressman Bachus Criticizes Back-Door Climate Change Rule," press release, February 3, 2010, http://bachus.house.gov/index.php?option=com_content&task=view&id=935.

[17] A former SEC Commissioner characterized the concept of "materiality" thus "The crux of our federal disclosure system is that all material information must be disclosed… [T] he Supreme Court has said that something is material if 'there is a substantial likelihood that a reasonable shareholder would consider it … as having significantly altered the "total mix" of information made available.'" "Remarks to the 'SEC Speaks in 2008' program of the Practising Law Institute by SEC Commissioner Paul S. Atkins," February 8, 2008, available at http://www.sec.gov/news/speech/2008/spch020808psa.htm.

[18] Camden D. Burton, "An Inconvenient Risk: Climate Change Disclosure and the Burden on Corporations," *The Administrative Law Review*, vol. 62, no. 4, 2010, pp. 1287-1290.

Employees' Retirement System, California state controller, Friends of the Earth, New York City comptroller, New York state attorney general, Rhode Island general treasurer, Vermont state treasurer, North Carolina state treasurer, and Maine state treasurer.[19] The SEC Guidance essentially reflects many of the recommendations from the 2007 petition.

Ceres has also been responsible for several reports that examined public company disclosures after the Guidance went into effect. Three such efforts are described below.

A 2011 report by Ceres, *Disclosing Climate Risks & Opportunities in SEC Filings: A Guide for Corporate Executives, Attorneys & Directors*, examined various public company disclosures after the Guidance went into effect, with a focus on the quality of climate change risk disclosures from an investor perspective. The study's central conclusion was that most corporate filers needed more experience at communicating the risks associated with climate change. Overall, it found that large public companies have improved their climate change risk disclosures in recent years, but recommended that more work be done.[20]

In assessing the quality of companies' disclosures, Ceres rated such disclosures as either

- *good*—detailed disclosure of the financial impacts of existing and proposed regulatory requirements on the company;
- *fair*—disclosure of regulatory risk discusses legislation and its possible effects on the company, but makes no attempt at quantifying or assigning a value to the risks, or fails to place such values in a meaningful context; or
- *poor*—disclosure of regulatory risks does not mention existing or proposed regulations, or mentions them without analyzing possible effects on the company.

The study concluded that good climate change risk disclosures were rare and that the vast majority of climate change risk disclosures were either fair, poor, or involved no such disclosure. Summarizing its findings, Ceres observed,

> Although public companies' climate reporting has improved somewhat in recent years, it remains true that disclosures very often fail to satisfy investors' legitimate expectations. Ensuring adequate disclosure will require commitment from management, as well as continued attention from regulators - and it will require that investors continue to make their needs heard. Greater attention to risks and opportunities will help companies themselves, and improved disclosure will help investors and the broader public.[21]

Released on June 18, 2012, the Ceres report, *Clearing the Waters: A Review of Corporate Water Risk Disclosure in SEC Filings*, examined corporate disclosure with respect to water risks in an attempt to ascertain how such disclosures have evolved between 2009 and 2011, a year after the Guidance was issued. For example, the report looked at changes in water risk disclosures of 82 companies in the beverage, chemicals, electric power, food, homebuilding, mining, oil and gas,

[19] "Petition for Interpretive Guidance on Climate Risk Disclosure," September 20, 2007, available at http://www.sec.gov/rules/petitions/2007/petn4-547.pdf.

[20] Jim Coburn, Sean H. Donahue, and Suriya Jayanati, "Disclosing Climate Risks & Opportunities in SEC Filings: A Guide for Corporate Executives, Attorneys & Directors," Ceres, February 2011, p. 32, available at http://www.ceres.org/resources/reports/disclosing-climate-risks-2011.

[21] Ibid., p. 33.

and semiconductors sectors. Among other things, the report found that there had been a large increase in the number of analyzed companies that disclosed their exposure to water risk in 2011 over those that did so in 2009. It reported that a significant focus of the corporate disclosures involved reporting of water-related physical risks. Eighty-seven percent of the companies it analyzed in 2011 reported that they disclosed such risks, up from the 76% that did so in 2009 before the release of the Guidance.[22] Within this, the percentage of companies in the oil and gas and chemicals sectors reporting water-related physical risks grew from 31% in 2009 to 45% in the 2011 disclosures.

The report also observed that while overall disclosure improved between 2009 and 2011, there was still a dearth of disclosed data on water use and the financial implications of water-related risks. Arguing for the importance of such disclosures, it observed that it helped "investors understand the exposure of their portfolio companies to current and future water stress, as well as potential regulatory developments."[23]

The report recommended that companies boost their use of quantitative data (e.g., water use data, the proportion of operations affected by new regulations, the extent of financial losses from drought, or cost reductions through innovations or advances in efficiencies) as well as qualitative disclosures. It also recommended that companies bolster their use of performance targets, and risk management disclosures to better explain the nature of their responses to water-related risks.[24]

Another Ceres publication, *Sustainable Extraction? An Analysis of SEC Disclosure by Major Oil & Gas Companies on Climate Risk and Deepwater Drilling Risk*, was released in August 2012. The report examined the quality of material climate risk and deepwater drilling risks in the 2010 annual financial filings as disclosed in 2011 among 10 of the world's largest publicly held oil and gas companies, Apache, BP, Chevron, ConocoPhillips, Eni, ExxonMobil, Marathon, Shell, Suncor, and Total.

Among other things, in the area of climate risk disclosure, it found that

- none of the corporate disclosure warranted an excellent rating because no company provided reporting of that quality;
- while the companies are broadly involved in undertaking extensive capital investments related to climate change and deepwater drilling, which carry material financial risks, they are generally deficient in properly disclosing them in ways that are consistent with SEC rules and investor needs;
- of a total of 60 climate disclosure ratings (described above) given by Ceres, only 5 were rated good and 34 (more than half) merited a poor rating or were simply not disclosed;
- while all the companies reported some disclosures on regulatory risks and indirect risks, they exhibited significant range in terms of specificity, comprehensiveness, and the quality of analysis; and

[22] "Clearing the Waters: A Review of Corporate Water Risk Disclosure in SEC Filings," *Ceres*, June 2012, available at http://www.ceres.org/resources/reports/clearing-the-waters-a-review-of-corporate-water-risk-disclosure-in-sec-filings/view.

[23] Ibid.

[24] Ibid.

- 6 of the 10 companies provided no disclosures and 3 provided poor disclosures.[25]

With respect to deepwater drilling risk disclosures, the report found that

- out of 50 deepwater drilling risk disclosure ratings given, 4 merited a good rating, and 29 were rated either poor or involved no disclosure;
- after the Gulf of Mexico oil drilling disaster, disclosure on drilling and safety generally remained weak, including disclosures related to drilling risk management and spill response strategy;
- 8 out of 10 of the companies disclosed minimal or no information on safety or environmental statistics; and
- 8 out of 10 of the companies disclosed minimal or no information regarding their investments in safety-related research and development.[26]

Overall, for both climate risk and deepwater drilling disclosures, the report concluded that its "findings are concerning, and demonstrate the need for oil and gas companies to better align their climate risk and deepwater drilling risk disclosure with SEC rules and investor expectations."[27]

Climate Change-Related Filings After the Guidance, from a Corporate Securities Law Firm's Perspective

Another study on the impact of the Guidance was published by Davis Polk & Wardwell, a law firm with a significant corporate securities practice. The study, *Environmental Disclosure in SEC Filings, 2011 Update*, examined a large number of 2010 corporate disclosure filings after the Guidance's first year. Some of its findings were as follows:

- Despite concerns of some critics that the Guidance would lead to extraneous and unimportant disclosure that might distract investors from focusing on significant disclosures, the Guidance did not appear to have had as significant an impact on disclosure as various critics had feared.
- Disclosures appeared to feature more generic weather risk factors.
- New disclosures emerged on potential changes in demand for products and services and on increases in fuel prices.
- There was relatively little disclosure of actual or potential reputational harm that may result from climate change.
- Companies in greenhouse gas intensive industries, especially energy companies, have expanded their disclosure. For example, they have added longer factual updates of legislative, regulatory, and litigation developments. Left unclear, however, was whether the increase in energy company climate change-based

[25] "An Analysis of SEC Disclosure by Major Oil & Gas Companies on Climate Risk and Deepwater Drilling Risk," *Ceres*, August 2012, available at http://www.ceres.org/resources/reports/sustainable-extraction-an-analysis-of-sec-disclosure-by-major-oil-gas-companies-on-climate-risk-and-deepwater-drilling-risk/view.

[26] Ibid.

[27] Ibid.

disclosure was largely due to the Guidance, earlier electric utility settlements with the office of the New York attorney general,[28] or the historical growth in climate change regulation in general.[29]

Changes in the Number of Climate Change-Related Disclosures After the Guidance, and Financial Professionals' Perceptions of Those Disclosures

Davis Polk & Wardwell took a granular approach in its study of post-guidance filings by focusing on the nature of individual filings. By contrast, an article in an American Bar Association (ABA) newsletter looked at (1) changes in the number of climate change-related disclosures during the Guidance's first year; and (2) the views of corporations and finance professionals on those disclosures.

Among other things, Davis Polk found that prior to the Guidance in 2009, of the 75,000 Form 10-Ks filed with the SEC, about 800, or 1.8%, included some reference to climate change or greenhouse gas. Immediately after the Guidance in the first quarter of 2010, the article in the ABA newsletter observed a significant increase in the percentage of such filings to 2.8%. However, by the third quarter of the year, it found that the percentage of climate change or greenhouse gas referenced in 10-K filings had fallen below the 2009 level to 1.6%.[30]

In addition, in its survey of how various corporations and finance professionals thought about the disclosures, the article also reported the following:

- Many companies saw little upside and even less downside in climate change disclosures.
- Many companies saw no meaningful business opportunities coming from climate change disclosures, but felt that they carried a potential for creating risks.
- Often disclosing uncertain climate change-related information was frequently seen as a speculative process that was driven by guidelines that lacked any recognized standards or had not resulted in any standardized practices.
- Investor relations professionals reportedly observed a general lack of interest in climate change from the financial community or other constituencies.
- Financial analysts had generally shown a small amount of interest in climate change-related issues.

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[28] In 2008, the New York attorney general's office reached separate agreements with two utility companies, Xcel and Dynegy, which required each of them in public filings with the SEC to provide investors with detailed information on the financial risks posed by climate change on their operations.

[29] "Environmental Disclosure in SEC Filings, 2011 Update," Davis Polk & Wardwell LLP, January 11, 2011, available at http://www.davispolk.com/files/Publication/eb800a1e-df86-43c6-9905-012267585822/Presentation/PublicationAttachment/722ad6f8-0e42-4e5c-988e-088be83f9219/011111_env_disclosure.pdf.

[30] Tom Karol, "SEC Climate Change Disclosure Cooling Off," *ABA Environmental Disclosure Community Newsletter*, March 2011, available at http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/ed/201103_ed.authcheckdam.pdf.

- About half of the asset managers surveyed indicated that they did not analyze climate risks because no investor clients requested that they do so.
- Many companies appeared to believe that there were few, if any, penalties from the SEC for nondisclosure of climate change matters, a perception that was reinforced by observations that also characterized the SEC's level of enforcement in this area as negligible.[31]

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[31] The ABA article noted that SEC staff involved in reviewing Form 10-Ks accepted many corporate filings without any references to climate change, while some firms in the same industries made such disclosures. A view that SEC enforcement has been limited can be found elsewhere. For example, an assessment of the impact of the Guidance after one year came from two environmental attorneys at the law firm of Debevoise & Plimpton LLP: "[SEC] enforcement of any perceived violations has been limited. Based on a review of publicly available information, there are fewer than a dozen comment letters in which the SEC sought additional information concerning climate disclosure in registrants' 2010 filings ... " Stuart Hammer and Lauren M. Boccardi, "Climate Change Disclosure," *Directorship*, July 26, 2011, available at http://www.directorship.com/climate-change-disclosure-in-sec-filings/.