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Investigators Continue to Scrutinize Climate Change Disclosures

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The ongoing state and federal investigations regarding climate change disclosures have become a political football, with proponents arguing that they are routine checks on securities fraud, while critics argue they are politically motivated and designed to stifle First Amendment rights and the "right to conduct scientific research free from intimidation." Leading the critic's charge is House Republican Lamar Smith, who chairs the House Committee on Science, Space and Technology. In July, the Committee sent subpoenas to the New York and Massachusetts attorneys general and environmental organizations seeking a broad range of information regarding the ongoing investigations. The parties have refused to comply, leading to the September 14 hearing.

Caught in the middle of this back-and-forth are public companies concerned about the sufficiency of their ongoing disclosures to investors under current SEC guidance and the annual ritual of dealing with concerned shareholder proposals during each proxy season. Companies must provide investors with sufficient information to make informed investment and voting decisions, including information regarding environmental risks; in this era of information overload, the SEC is also seeking the public's input to streamline corporate disclosures under its Disclosure Effectiveness project. While concrete guidance is limited on what is ultimately required (more extensive disclosure requirements are being considered), it is clear that a company must disclose the material effects of compliance with environmental laws, including climate change laws, and the material business risks related to climate change issues. Downplaying those risks is perilous and may open the door to state or federal investigations.

Despite Rep. Smith's actions, it seems unlikely that federal or state authorities will rein in their investigations. Shortly before the September 14 hearing, a number of Democratic leaders joined with environmental organizations to show support for the New York and Massachusetts attorneys general and to urge more state attorneys general to open similar investigations. Companies thus should continue to carefully scrutinize and update their public disclosures to address relevant climate change risks and costs to their business, monitor the evolving regulatory climate, and consider potential alternatives and strategies to mitigate the pitfalls of climate change.

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