Client Alert | US Public Company Advisory Group, Environment & Climate Change

SEC Adopts Climate Change Disclosure Rules;

Court Imposes Temporary Stay

March 2024

On March 6, 2024, in a 3 to 2 vote of the Commissioners, the US Securities and Exchange Commission (the "SEC") adopted rules that will require public companies to disclose extensive climate change-related information in their SEC filings.[1] On March 15, 2024, a federal appellate court imposed a temporary stay pending judicial review of the new rules.

The final rules have been pared down from what the SEC originally proposed two years ago following its receipt of more than 24,000 comments.[2] As further described below, key changes from the proposed rules include the elimination of proposed requirements to disclose Scope 3 greenhouse gas ("GHG") emissions, limiting Scope 1 and 2 GHG emissions disclosure for larger public companies (and only if such emissions are material), and eliminating proposed requirements to disclose climate-related board of directors expertise. However, the final rules, if implemented, still require significant new disclosures for both domestic and foreign private issuers that file annual reports and registration statements with the SEC. The new rules apply to companies on a phased-in basis, with the first compliance deadline for large accelerated filers[3] required for fiscal year 2025 annual reports filed in 2026.

Specifically, the final rules add new Subpart 1500 (Items 1500 to 1508) of Regulation S-K and new Article 14 to Regulation S-X to require disclosure of, among other things, climate-related risks that have had or are reasonably likely to have a material impact on business strategy, results of operations or financial condition; assessment, management, board oversight and mitigation of these risks; Scope 1 and 2 GHG emissions for large accelerated filers and accelerated filers if those emissions are material, including an independent attestation report; and financial statement disclosures, such as costs and losses, related to the effects of severe weather events and other natural conditions as well as those associated with carbon offsets and renewable energy credits if material to a company's plans to achieve climate-related targets or goals. *See* **Appendix A** for definitions of the terms used in the rule.

The SEC eliminated some of the more burdensome requirements in the proposed rules. In response to public comments to the proposed rules, the SEC emphasized that its focus is on investor protection and providing investors with access to comparable and consistent climate-related disclosure, rather than on influencing registrants' decisions as to how to manage climate risks. The two dissenting Commissioners, Hester M. Peirce

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1 The final rules are available here, and the fact sheet is available here. *See also,* SEC Chair Gary Gensler's statement.

2 The proposed rules are available here, and the fact sheet on the proposed rules is available here. Our alert on the proposed rules is available here.

3 A large accelerated filer is a company that has (a) filed at least one annual report, and (b) had more than $700 million unaffiliated market capitalization as of the last day of the most recently completed second fiscal quarter.

and Mark T. Uyeda, noted that the rules are overly prescriptive and may result in immaterial and overly broad disclosures, and will likely require companies to incur excessive, unnecessary costs.[4]

Legal Challenges and Current Status of the Rules

On March 15, the U.S. Fifth Circuit Court of Appeals granted a temporary stay of the rules pending judicial review, in response to a petition arguing, among other things, that the rules would cause irreparable harm and exceed the SEC's authority.[5] To date, litigation challenging the rules has been filed in several federal courts, including the U.S. Courts of Appeals for the D.C.[6], Second[7], Fifth, Sixth[8], Eighth[9] and Eleventh[10] Circuits, and additional lawsuits are expected. On March 19, the SEC requested that the litigation challenging the rules be consolidated in a single court of appeals, which will determine whether the stay will remain in place.[11] In addition, Republican members of Congress have been preparing a resolution to repeal the rules under the Congressional Review Act.[12]

Highlights of the New Rules

The new rules require disclosure in annual reports and registration statements of:

- **Climate-related goals and targets and material climate-related risks** that have had or are reasonably likely to have a material impact on the company's business strategy, results of operations or financial condition, and the actual and potential material impacts of any identified climate-related risks on the company's strategy, business model and outlook;
- **Activities to mitigate or adapt to a material climate-related risk,** including quantitative and qualitative descriptions of material expenditures incurred and material impacts on financial estimates directly resulting from such activities, as well as the use of any transition plans, scenario analysis or internal carbon prices;
- **Board oversight of climate-related risks** and any role management plays in assessing and managing material climate-related risks; any processes for identifying, assessing and managing material climate-related risks and whether and how any such processes are integrated into the company's overall risk management system;
- **Material Scope 1 and 2 GHG emissions disclosure** for *large accelerated filers* and *accelerated filers* (that are not otherwise exempted), including an independent assurance report at the *limited assurance*

[4] Commissioner Peirce emphasized her belief that the existing materiality-based disclosure regime was sufficient to elicit any relevant climate-related disclosure and that these rules put climate on a pedestal as the SEC's "pet topic of the day." Her dissent is available here. Commissioner Uyeda argued that the SEC is a "securities regulator without statutory authority or expertise to address political and social issues…[which has] ventured outside of its lane and set a precedent for using its disclosure regime as a means for driving social change." Commissioner Uyeda's dissenting statement is available here.

[5] The order is available at Liberty Energy, Inc., et al. v. U.S Securities and Exchange Commission, No. 24-60109 (5th Cir. 2024). The petitioners indicated that they would be "irreparably harmed" by the failure to grant a stay because the disclosures that will be first required in 2026 must include data collected in 2025 and companies are implementing systems to prepare the required disclosure.

[6] *See* Sierra Club v. U.S. Securities and Exchange Commission, No. 24-1064 (D.C. Cir. filed Mar. 13, 2024).

[7] *See* Natural Resources Defense Council, Inc. v. U.S Securities and Exchange Commission, No. 24-707 (2nd Cir. filed Mar. 15, 2024).

[8] *See* Ohio Bureau of Workers' Compensation, et al v. SEC, No. 24-03220 (6th Cir. filed Mar. 13, 2024).

[9] *See* State of Iowa, et al v. U.S Securities and Exchange Commission*,* No. 24-01522 (8th Cir. filed Mar.13, 2024).

[10] *See* State of West Virginia v. U.S Securities and Exchange Commission*,* No. 24- (11th Cir. filed Mar. 6, 2024).

[11] The SEC submitted this request to the US Judicial Panel on Multidistrict Litigation. The courts that have received at least one petition related to the SEC rules will each get one entry in a "drum," from which a clerk based in Washington will draw the name of the venue to hear the consolidated case. This system previously has been employed in the context of federal regulations that attracted a number of challenges.

[12] *See* Congressional Republicans Maneuver to Block SEC's Climate Rules (bloomberglaw.com).

level which, for large accelerated filers only, will increase to a *reasonable assurance level* following a transition period; and

- **Financial statement disclosure** regarding the effects of severe weather events and other natural conditions, including, for example, the following: costs and losses; similar disclosure as to costs and losses related to carbon offsets and renewable energy credits if material to plans to achieve climate-related targets or goals; and a description of how estimates and assumptions used in the financial statements were materially impacted by severe weather events and other material conditions.

For a detailed description of these requirements, *see* "**Content of the New Disclosures**" below.

Most Significant Differences from the Proposed Rules

The adopted rules differ from the proposed rules in some important respects. Key differences include:

Addition of materiality qualifiers: In the final rules, the SEC added a materiality qualifier to most of the disclosure requirements, including those regarding Scope 1 and 2 greenhouse gas emissions, impacts of climate-related risks, use of scenario analysis, and a maintained internal carbon price.

Reduced requirements for GHG emissions disclosure and attestation reports: (i) Smaller reporting companies ("SRCs"), emerging growth companies ("EGCs") and non-accelerated filers are exempt from the GHG disclosure and associated attestation requirements; (ii) Scope 1 and Scope 2 GHG emissions are required *only* if material and *only* for large accelerated filers and accelerated filers; (iii) Scope 3 GHG emissions disclosure requirements were eliminated for all issuers; (iv) attestation report requirements only apply to accelerated filers and large accelerated filers; and (v) the form and content of the attestation reports were reduced and do not need to follow prescriptive content requirements.

Delayed requirements for disclosure of Scope 1 and 2 emissions after fiscal year end: The final rules also include an accommodation that allows Scope 1 and/or Scope 2 emissions disclosure, if required, to be filed on a delayed basis following the fiscal year end, as further described below in "**Phase-In Periods and Accommodations**."

Governance: The proposed requirement to disclose board of director expertise on climate was eliminated, but disclosure on board and management oversight of climate related risks remained.

Financial statement disclosures: The scope of financial statement disclosure in the final rules is significantly narrower than the proposal and focused on requiring the disclosure of a discrete set of actual expenses that registrants incur and can attribute to severe weather events and other natural conditions. Instead of requiring individual financial statement line item disclosure of impacts from severe weather events and other natural conditions, there will be new financial footnote disclosure requirements for such financial impacts, as well as for disclosure of certain costs, expenditures and losses related to carbon offsets and renewable energy credits or certificates.

Expanded private liability safe harbor: The safe harbor for forward-looking climate-related disclosures was expanded in order to also extend the protections to disclosures (other than historical facts) regarding transition plans, scenario analysis, internal carbon pricing, and targets and goals, which can include a complex mixture of both forward-looking and factual information.

Lengthened timeline for required disclosures: The final rules provide for extended phase-in periods compared to the proposed rules, with large accelerated filers being first required to comply for fiscal year 2025 in filings made in 2026, as further described below under "**Phase-In Periods and Accommodations**."

Content of the New Disclosures

The rules are modeled in part on the framework and recommendations from the Task Force for Climate-Related Financial Disclosures and draw upon the Greenhouse Gas Protocol.[13] The rules apply to both domestic registrants and foreign private issuers ("FPIs") and to all types of registrants (large accelerated filers, accelerated filers, SRCs and EGCs, except as noted below) and, if implemented, will require the registrant to disclose, in either a separately captioned section of its registration statement or annual report (or in another appropriate section) information about:

- ***Material climate-related risks***: climate-related risks that have had or are reasonably likely to have a material impact on a registrant, including on its strategy, results of operations or financial condition in the short-term (*i.e.*, the next 12 months) or long term (*i.e.*, beyond the next 12 months);[14]
    - "Climate-related risks" are defined as the actual or potential negative impacts of climate-related conditions and events on the registrant's business, results of operations or financial condition, and includes both physical and transition risks:
        - Acute physical risk and chronic physical risk should be disclosed, along with information regarding properties, processes or operations subject to the risk. "Acute risks" are defined as event-driven risks related to shorter-term extreme weather events and "chronic risks" are defined as those that a company may face as a result of longer-term weather patterns and related effects.
        - The nature of transition risk (*e.g.*, regulatory, technological, market or other factors) should be disclosed, along with related impacts to the registrant.
- ***Impacts of climate-related risks on strategy, business model and outlook***: The actual and potential material impacts of any identified climate-related risks on the registrant's strategy, business model and outlook[15] and whether the impacts of these climate-related risks have been integrated into their business model or strategy, including whether and how resources are being used to mitigate climate-related risks.[16]
    - Mitigation Activities: If, as part of its strategy, a registrant has undertaken activities to mitigate or adapt to a material climate-related risk, it must provide a quantitative and qualitative description of material expenditures incurred and material impacts on financial estimates and assumptions that directly result from such activities;[17]
    - Transition Plans: If a registrant has adopted a transition plan to manage a material transition risk, the rules call for a description of that plan and quantitative and qualitative disclosure of material expenditures and material impacts on financial estimates and assumptions as a direct result of the disclosed actions:[18]

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[13] A GHG accounting standard created through a partnership between the World Resources Institute and the World Business Council for Sustainable Development.

[14] Item 1502(a) of Regulation S-K.

[15] Item 1502(b) of Regulation S-K. Specifically, registrants will have to disclose, if applicable, impacts on its: (i) business operations, including the types and locations of its operations; (ii) products or services; (iii) suppliers, purchasers or counterparties to material contracts, to the extent known or reasonably available; (iv) activities to mitigate or adapt to climate-related risks, including adoption of new technologies or processes; and (v) expenditures for research and development. The release notes that this is a non-exclusive list.

[16] Item 1502(c) of Regulation S-K. Also asks registrants to disclose how any of the targets referenced in Item 1504(b) or in a described transition plan relate to the registrant's business model or strategy.

[17] Item 1502(d) of Regulation S-K.

[18] Item 1502(e). This includes, but is not limited to, a registrant's: (i) business operations, including the types and locations of its operations; (ii) products and services; (iii) suppliers, purchasers or counterparties to material contracts, to the extent known or reasonably available; (iv) activities to mitigate or adapt to climate-related risks, including adoption of new technologies or processes; and (v) expenditures for research and development.

  - The description must be updated in subsequent years to describe actions taken under the plan and their impacts on the registrant's business, results of operations, or financial condition.
  - Transition plan disclosure will be subject to the expanded PLSRA safe harbor, as further described under "Accommodations and Safe Harbor" below.

  The final rules do not mandate that registrants adopt a transition plan; if a registrant does not have a plan, no disclosure is required.

  - Scenario Analysis: If a registrant uses scenario analysis and, in doing so, determines that a climate-related risk is reasonably likely to have a material impact on its business, results of operations or financial condition, it must make certain disclosures regarding such use of scenario analysis, including assumptions, parameters and expected material financial and other impacts:[19]
    - If a registrant conducts scenario analysis and determines that it is *not* likely to be materially impacted by a climate-related risk, no disclosure about the scenario analysis is required.
    - Any scenario analysis disclosure will be subject to the expanded PSLRA safe harbor.

  The final rules do not mandate that any registrant conduct a scenario analysis; if a registrant does not conduct such an analysis, no such disclosure is required.

  - Internal Carbon Price: If a registrant's use of an internal carbon price is material to how it evaluates and manages a material climate-related risk, the rules require registrants to provide specified disclosures about that price, including: (i) the price per metric ton of CO2e; and (ii) the total price, including how the total price is estimated to change over the time periods referenced in Item 1502(a), as applicable.[20]

- ***GHG Emissions Metrics and Attestations***:[21]
  - Scopes 1 and 2 GHG emissions metrics: Only larger SEC registrants—meaning large accelerated filers and accelerated filers that are *not* smaller reporting companies or emerging growth companies—will be required to disclose their Scope 1 and 2 GHG emissions,[22] expressed in the aggregate in terms of CO2e,[23] *if such emissions are material.* GHG emissions data in gross terms, excluding any use of purchased or generated offsets, must be disclosed.
    - The adopting release emphasizes that "traditional notions of materiality under the Federal securities laws" apply when making this determination and that the materiality analysis should be made using the "reasonable investor" standard. The release specifically notes that materiality is not determined just by the amount of emissions and provides examples of when emissions might be considered material, such as where foreign laws might subject the

[19] Item 1502(f) of Regulation S-K.

[20] Item 1502(g) of Regulation S-K. If a registrant uses more than one internal carbon price to evaluate and manage a material climate-related risk, it must provide the required disclosures for each internal carbon price and disclose its reasons for using different prices. If the scope of entities and operations involved in the use of a described internal carbon price is materially different than the organizational boundaries included in the registrant's financial statements, the registrant must briefly describe this difference.

[21] Item 1505 of Regulation S-K.

[22] Scope 1 emissions typically include a company's direct emissions associated with its onsite fossil fuel combustion to produce energy. Scope 2 emissions typically include a company's indirect emissions associated with energy produced offsite and consumed by the company.

[23] If a registrant is required to disclose its Scope 1 and/or Scope 2 emissions, and any constituent gas of the disclosed emissions is individually material, it must also disclose such constituent gas disaggregated from the other gases. A registrant may use reasonable estimates when disclosing its GHG emissions as long as it also describes the assumptions underlying, and its reasons for using, the estimates.

company to additional regulatory burdens or penalties based on its emissions, or where the emissions calculations and disclosure are necessary to enable investors to understand whether the company has made progress toward achieving a target, goal or a transition plan.[24]

- The disclosure is required to include a description of the methodology, significant inputs and significant assumptions used to calculate the GHG emissions metrics, including the organization boundaries used, how emissions and emissions sources are categorized, and which protocol or standard is used (as well as the type and source of any emissions factors used).

- Attestation for Scope 1 and Scope 2 Emissions Disclosure:[25] A registrant, including an FPI, that is required to provide Scope 1 and/or Scope 2 emissions disclosure, must include an attestation report from a "GHG emissions attestation provider"[26] covering the disclosure of its Scope 1 and/or Scope 2 emissions in the relevant filing.[27]

  - Both accelerated filers and large accelerated filers are required to obtain *limited assurance* beginning with the fourth fiscal year of disclosure; however, only large accelerated filers are required to obtain an attestation report at a "reasonable assurance level" starting with the eighth fiscal year of disclosure. As the release explains, the primary difference between the two assurance levels relates to "the nature, timing, and extent of procedures required to obtain sufficient, appropriate evidence to support the limited assurance conclusion or reasonable assurance opinion."[28]

  - The attestation report must be provided pursuant to standards that are established by a body or group that has followed due process procedures, including the broad distribution of the

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24 *See* pages 246 – 247 of the adopting release.

25 This is a noteworthy departure from standard SEC procedure, as SEC rules typically do not require registrants to obtain assurance over disclosure provided outside of the financial statements, including quantitative disclosure. While acknowledging this discrepancy, the release notes that "GHG emissions disclosures are unique in that many companies currently voluntarily seek third-party assurance over their climate-related disclosures, and commenters, including investors, have expressed a particular need for assurance over GHG emissions disclosures. Current voluntary assurance practices have been varied and this fragmentation has diminished the comparability of assurance provided. Prescribing a minimum level of assurance required for accelerated filers and large accelerated filers over their Scope 1 and/or Scope 2 emissions in the final rules, along with minimum requirements for the GHG emissions attestation provider and the engagement, will enhance comparability and consistency with respect to assurance over GHG emissions disclosures." *See* page 288 of the adopting release. The release further notes that "[t]he benefits that assurance will provide in terms of investor protection and increased confidence in GHG emissions disclosure warrants requiring attestation." *See* page 287 of the adopting release.

26 Item 1506(d) requires registrants to disclose whether the GHG emission attestation engagement is subject to any oversight inspection program. Registrants must also disclose certain information when there is a change in, and disagreement with, the registrant's GHG emissions attestation provider.

27 The release clarifies that the final rules apply on a prospective basis only with disclosure for historical periods phasing in over time. Specifically, in the first year that an accelerated filer or large accelerated filer is required to provide an attestation report, such report is only required to cover the Scope 1 and/or Scope 2 emissions for its most recently completed fiscal year. To the extent the accelerated filer or large accelerated filer disclosed Scope 1 and/or Scope 2 emissions for a historical period, it would not be required to obtain an assurance report covering such historical period in the first year of the attestation rule's applicability. However, for each subsequent fiscal year's annual report, the registrant will be required to provide an attestation report for an additional fiscal year until an attestation report is provided for the entire period covered by the registrant's GHG emissions disclosures.

28 For example, in a limited assurance engagement, the attestation provider's procedures are generally limited to analytical procedures and inquiries, but in a reasonable assurance engagement, they are also required to perform risk assessment and detailed testing procedures to respond to the assessed risk. As a result, the outcome of a reasonable assurance engagement results in "positive assurance" (*e.g.*, "the provider forms an opinion about whether the registrant's GHG emissions disclosures are in accordance with Item 1505 in all material respects") while the outcome of a limited assurance engagement results in negative assurance (*e.g.*, "the provider forms a conclusion about whether it is aware of any material modifications that should be made to the disclosures for it to be in accordance with Item 1505").

framework for public comment.[29] The standards must be either (i) publicly available at no cost or (ii) widely used for GHG emissions assurance.[30] In addition, the form and content of the GHG emissions attestation report must follow the requirements set forth by the attestation standard or standards used; however, the final rules do not prescribe minimum report requirements.

- The new rules provide that GHG emissions attestation providers that perform *limited assurance engagements* are exempt from Section 11 liability and the consent requirements associated with expertized reports.[31] [32] However, providers whose reports are at the *reasonable assurance* level are not exempt from this liability, as the "heightened level of review associated with reasonable assurance makes it appropriate for the report to be expertized."[33]

- The rules *do not* require a registrant to obtain an attestation report specifically covering the effectiveness of internal control over GHG emissions disclosure.

- ***Governance Disclosure***: The oversight and governance of climate-related risks by the board and management, including:[34]

    - Board oversight disclosure[35]: (i) board committees or subcommittees responsible for the oversight of climate-related risks; (ii) the processes by which the board or committee is informed about climate-related risks; and (iii) if applicable, whether and how the board oversees progress against climate-related targets or goals or transition plans;[36]

    - Management oversight disclosure: (i) whether and which management positions or committees are responsible for assessing and managing climate-related risks and, if so, the relevant expertise of the position holders or members (relevant expertise of management may include, for example: prior work experience in climate-related matters; any relevant degrees or certifications; any knowledge, skills or other background in climate-related matters); (ii) the processes by which the responsible managers or committees assess and manage climate-related risks; and (iii) whether such positions or committees report information about such risks to the board of directors (or a committee or subcommittee thereof).

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[29] Item 1506(a)(2) of Regulation S-K.

[30] The release notes that "PCAOB, AICPA, and IAASB standards meet the due process requirements and are publicly available at no cost to investors. In addition…we also believe that the ISO standards related to the attestation of GHG emissions disclosures would meet these requirements."

[31] The SEC did amend Item 601 of Regulation S-K to require registrants to file as an exhibit to certain registration statements under the Securities Act or reports on Form 10-K or 10-Q that are incorporated into these registration statements a letter from the attestation provider that acknowledges its awareness of the use in certain registration statements of any of its reports which are not subject to the consent requirement of section 7.

[32] The SEC included this amendment, in part, due to concern that the potential for section 11 liability could deter or reduce the number of attestation providers willing to accept these engagements, or alternatively, if GHG emissions attestation providers perform significantly expanded procedures, much closer to reasonable assurance, in order to meet potential liability concerns under section 11, substantial increased costs to issuers could result. The release notes that the same considerations do not apply to reasonable assurance engagements.

[33] The release notes that this "bifurcated approach to reasonable versus limited assurance engagements is consistent with the current treatment of audited financial statements and unaudited (reviewed) interim financial statements." *See* page 335 of the adopting release.

[34] Item 1501 of Regulation S-K.

[35] In the case of an FPI with a two-tier board of directors, for purposes of paragraph (a) of this section, the term "board of directors" means the supervisory or non-management board. In the case of an FPI meeting the requirements of 17 CFR § 240.10A–3(c)(3), the term "board of directors" means the issuer's board of auditors (or similar body) or statutory auditors, as applicable.

[36] These disclosures are not required for registrants that do not exercise board oversight of climate-related risk.

- ***Risk Management Disclosure***: The registrant's processes for identifying, assessing and managing material climate-related risks and whether and how any such processes are integrated into the registrant's overall risk management system or processes.[37]
    - Disclosure should address, as applicable, how the registrant: (i) identifies whether it has incurred or is reasonably likely to incur a material physical or transition risk; (ii) decides whether to mitigate, accept or adapt to the particular risk; and (iii) prioritizes whether to address the climate-related risk.
- ***Targets and Goals Disclosure***:[38] Any climate-related target or goal *if* such target or goal has materially affected or is reasonably likely to materially affect the registrant's business, results of operations or financial condition, including:
    - Any additional information or explanation necessary to an understanding of the material impact or reasonably likely material impact of the target or goal; [39] [40]
    - How it intends to meet its climate-related targets or goals, and any progress toward meeting the target or goal and how such progress has been achieved;[41] and
    - A discussion of any material impacts to the registrant's business, results of operations or financial condition as a direct result of the target or goal or the actions taken to make progress toward meeting the target or goal. This discussion must include quantitative and qualitative disclosure of any material expenditures and material impacts on financial estimates and assumptions as a direct result of the target or goal or the actions taken to make progress toward meeting the target or goal.[42]
  - If carbon offsets or renewable energy credits or certificates have been used as a material component of a registrant's plan to achieve climate-related targets or goals, then the registrant must disclose: (i) the amount of carbon avoidance, reduction or removal represented by the offsets or the amount of generated renewable energy represented by the renewable energy credits or certificates; (ii) the nature and source of the offsets or renewable energy credits or certificates; (iii) a description and location of the underlying projects; (iv) any registries or other authentication of the offsets or renewable energy credits or certificates; and (v) the cost of the offsets or renewable energy credits or certificates.[43]

Financial Statement Footnote Disclosures

For all reporting companies, including smaller reporting companies and emerging growth companies, the final rules also added required disclosure in the Notes to the audited financial statements included in a registrant's annual report or registration statement filed with the SEC, as follows:

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[37] Item 1503 of Regulation S-K.

[38] Item 1504 of Regulation S-K.

[39] This includes, as applicable, a description of: (i) the scope of activities included in the target; (ii) the unit of measurement; (iii) the defined time horizon by which the target is intended to be achieved, and whether the time horizon is based on one or more goals established by a climate-related treaty, law, regulation, policy or organization; (iv) if the registrant has established a baseline for the target or goal, the defined baseline time period and the means by which progress will be tracked; and (v) a qualitative description of how the registrant intends to meet its climate-related targets or goals.

[40] Item 1504(b) of Regulation S-K.

[41] Item 1504(c) of Regulation S-K. Registrants must update this disclosure each fiscal year by describing the actions taken during the year to achieve its targets or goals. The release notes this will "better enable investors to monitor impacts on the registrant as it attempts to meet its targets or goals."

[42] This disclosure can be provided as part of a discussion regarding another disclosure item in order to eliminate redundancies.

[43] Item 1504(d) of Regulation S-K. Note that a registrant is not required to make a determination that a severe weather event or other natural condition was, in fact, caused by climate change in order to trigger the disclosure requirement.

- ***Capitalized costs and expenditures***: Registrants must disclose the capitalized costs, expenditures expensed, charges and losses incurred as a result of severe weather events and other natural conditions:[44]
  - A cost, expenditure, charge, loss or recovery is considered attributable to a severe weather event or other natural condition when the event or condition is a "significant contributing factor" in incurring the cost, expenditure, charge, loss or recovery.[45]
  - *Quantitative disclosure thresholds[46]:* Disclosure is <u>not</u> required if:
    - Expenditures expensed as incurred and losses (net of recoveries) are <u>less than one percent of the absolute value of pre-tax income or loss</u>, or if they do not exceed a $100,000 *de minimis* threshold; or
    - Capitalized costs and charges (net of recoveries) are <u>less than one percent of the absolute value of shareholders' equity or deficit</u> at the end of the relevant fiscal year, or if they do not exceed a $500,000 *de minimis* threshold.
- ***Recoveries***: Registrants must separately disclose the aggregate amount of any recoveries recognized during the fiscal year as a result of the severe weather events and other natural conditions for which capitalized costs, expenditures expensed, charges or losses have been disclosed.[47]
- ***Carbon offsets and renewable energy credits***: Registrants must disclose capitalized costs, expenditures expensed, and losses related to the purchase and use of carbon offsets and renewable energy credits or certificates in the financial statements, if they are used as a material component of a company's plans to achieve its climate-related targets or goals:[48]
  - This disclosure requirement is *not* subject to the one percent disclosure threshold that applies to the disclosure of costs resulting from severe weather events and other natural conditions.
  - Companies must separately identify where the capitalized costs, expenditures expensed and losses are presented in the income statement and the balance sheet.
- ***Estimates and assumptions***: If the estimates and assumptions used in preparing the financial statements were materially impacted by exposure to risks and uncertainties associated with severe weather events and other natural conditions or any disclosed climate-related targets or transition plans, registrants must describe *in qualitative terms,* how such estimates and assumptions were impacted by such risks and uncertainties.[49]
- ***Contextual Information***: Registrants must provide contextual information, describing how each specified financial statement effect was derived, including a description of the significant inputs and assumptions used, significant judgments made, other information that is important to understand the

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[44] Rules 14-02(c) and (d) of Regulation S-X

[45] Rule 14-02(g) of Regulation S-X. The rules do not require a determination that the severe weather event or other natural condition is climate-related, but they do require companies to determine what constitutes a severe weather event or other natural condition. According to the adopting release, a company will have flexibility based on the particular risks faced by the company, considering its geographic location, historical experience and the financial impact of the event on the company. Examples given include hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures and sea level rise, but the release makes clear this is a non-exclusive and non-exhaustive list and that the final rules "give registrants the flexibility to adopt reasonable approaches to identifying severe weather events and other natural conditions and adapt to changing circumstances." *See* pages 483-487 of the adopting release.

[46] Rule 14-02(b) of Regulation S-X.

[47] Rule 14-02(f) of Regulation S-X.

[48] Rule 14-02(e) of Regulation S-X.

[49] Rule 14-02(h) of Regulation S-X.

financial statement effect and, if applicable, policy decisions made by the registrant to calculate the specified disclosure.[50]

Presentation of the New Disclosures

If implemented, the new rules will be applicable for registrants' Form S-1, Form S-4, Form F-1, Form F-4, Form S-11, Form 10, Form 10-K and Form 20-F as follows[51]:

- **Registration Statements and Annual Reports**: Registrants must provide the Regulation S-K mandated climate-related disclosures, including the attestation, if required, either (i) in a separately-captioned section of its registration statement or annual report, or (ii) in another appropriate section of the filing, such as Risk Factors, Description of Business or Management's Discussion and Analysis of Financial Condition and Results of Operations. The Regulation S-X mandated disclosure must be provided in the registration statement or annual report financial statements. The Regulation S-K disclosure can also be incorporated by reference from another SEC filing as long as the disclosure meets the electronic tagging requirements of the final rules.
- **iXBRL**: Both narrative and quantitative climate-related disclosures must be electronically tagged in Inline XBRL.

The SEC did not adopt any prescriptive requirement for material changes to climate-related disclosures to be disclosed on Form 10-Q or Form 6-K during the fiscal year.

Private Companies: Notably, private companies that are parties to business combinations will *not* have to comply with these requirements in Forms S-4 or F-4 (i.e. if the target being acquired is not a public reporting company, climate-related disclosures with respect to the target will not be required). However, private companies going public in an initial public offering on a Form S-1 or Form F-1 must comply on the tiered timelines set forth below, without any exemption or additional phase-in.

Phase-In Periods and Accommodations

Phase-Ins

Subject to the stay, the rules may become effective 60 days after publication in the *Federal Register*. The final rules include a phase-in period for all registrants, with the compliance date dependent on the registrant's filer status, and an additional phase-in period for Scope 1 and 2 emissions disclosure as well as for the assurance requirement and the level of assurance required.

Registrant Type	Disclosure and financial statement effects audit		GHG emissions/assurance			Electronic Tagging
	All Reg. S-K and S-X disclosures, other than as noted in this table	*Item 1502(d)(2), Item 1502(e)(2), and Item 1504(c)(2)*	*Item 1505 (Scopes 1 and 2 GHG emissions) 1500*	*Item 1506 – Limited Assurance*	*Item 1506 – Reasonable Assurance*	*Item 1508 – Inline XBRL tagging for subpart 1500[1]*
Large accelerated filers	Fiscal year beginning in calendar year 2025 *for filings in 2026*	Fiscal year beginning in calendar year 2026 *for filings in 2027*	Fiscal year beginning in calendar year 2026 *for filings in 2027*	Fiscal year beginning in calendar year 2029	Fiscal year beginning in calendar year 2033	Fiscal year beginning in calendar year 2026 *for filings in 2027*

[50] Rule 14-02(a) of Regulation S-X.

[51] Canadian issuers filing on Form 40-F are exempt from the rules.

				for filings in 2030	*for filings in 2034*	
Accelerated filers (other than SRCs and EGCs)	Fiscal year beginning in calendar year 2026 *for filings in 2027*	Fiscal year beginning in calendar year 2027 *for filings in 2028*	Fiscal year beginning in calendar year 2028 *for filings in 2029*	Fiscal year beginning in calendar year 2031 *for filings in 2032*	N/A	Fiscal year beginning in calendar year 2026 *for filings in 2027*
SRCs, EGCs and Non-accelerated filers	Fiscal year beginning in calendar year 2027 *for filings in 2028*	Fiscal year beginning in calendar year 2028 *for filings in 2029*	N/A	N/A	N/A	Fiscal year beginning in calendar year 2027 *for filings in 2028*
[1] Financial statement disclosures under Article 14 will be required to be tagged in accordance with existing rules pertaining to the tagging of financial statements. *See* Rule 405(b)(1)(i) of Regulation S-T.						

Accommodations and Safe Harbor

(1) Accommodations for Smaller Reporting Companies and Emerging Growth Companies: The rules include the following accommodations and exemptions for smaller reporting companies and emerging growth companies:

- Extended compliance deadlines and phase-in periods for the required disclosures and associated electronic tagging requirements; and
- No requirements to disclose any Scope 1 or Scope 2 GHG emissions, or to provide any attestation report related thereto.

(2) Delayed emissions disclosure: The rules include an accommodation that allows Scope 1 and/or Scope 2 emissions disclosure, if required, to be filed on a delayed basis as follows:

- If a domestic registrant, in its Form 10-Q for the second fiscal quarter in the fiscal year immediately following the year to which the GHG emissions disclosure relates;
- If an FPI, in an amendment to its annual report on Form 20 F, which shall be due no later than when such disclosure would be due for a domestic registrant; and
- If filing a Securities Act or Exchange Act registration statement, as of the most recently completed fiscal year that is at least 225 days prior to the date of effectiveness of the registration statement.

(3) Safe harbor: The final rules extend the Private Securities Litigation Reform Act (“PSLRA”) safe harbors to transition plans, scenario analysis, internal carbon price and targets and goals and provide that these statements constitute “forward-looking statements” for purposes of the PSLRA safe harbors. The safe harbor explicitly extends to issuers who would not otherwise enjoy the benefit of the PSLRA safe harbor for forward-looking statements, including IPO registrants and SPACs. The SEC declined, however, to extend the PSLRA safe harbor to Scope 1 and 2 GHG emissions disclosures, given what it considered to be the “well-established methodology” of calculating these metrics.

Practical Considerations and Next Steps

In light of the newly adopted rules, companies should consider their next steps and the following items:

1. **Begin Preparations Early.** In light of the complexity and extensiveness of the new disclosure requirements, companies should begin their preparations early and develop a working group and plan,

including to assess which requirements in the new rules will apply and the steps required to comply. Although the rules are temporarily stayed, the outcome of the judicial proceedings is uncertain and the complexity of the new rules will require significant time for public companies to prepare.

2. **Tailor disclosures to fit risk profile and structures.** The SEC stepped back from across-the-board "prescriptive" disclosure requirements and instead made the required disclosure more principles-based, in line with other disclosure requirements, such as Management's Disclosure and Analysis of Financial Condition and Results of Operations. The SEC has also removed some of the burdensome requirements relating to third parties (*e.g.*, Scope 3 GHG emissions disclosure requirements, the requirement to assess climate risk based on impact to the registrant's value chain). This change provides companies with both an opportunity to assess the materiality of climate risk and some flexibility to tailor the disclosures based on their particular risk profile, risk management and oversight structures. Given this shift in focus, companies should first spend time thinking about how they assess, manage and mitigate climate-related risk (looking at each area covered by the rules) and only after that is complete should they begin work on the actual disclosure. Both the evaluation and drafting will require working with multidisciplinary teams, and companies should determine an approach that works best for their climate risk profiles and management structures.

3. **Assessing materiality in light of each company's circumstances.** While the addition of a materiality qualifier to many of the disclosure requirements was a welcome change from the proposed rules, it also raises many questions for issuers as they begin their assessment process. Companies may already be disclosing climate-related information, either voluntarily or in order to comply with other mandatory climate risk disclosure regimes, which may impose different requirements and serve different purposes than those in the new rules.[52] The adopting release makes clear that a traditional materiality analysis applies to the new disclosures, rather than an analysis that relies on the requirements of such other regimes. Each company must consider whether a disclosure is material based on whether a reasonable investor would consider it important in making an investment decision or would view omission of such disclosure as significantly altering the total mix of information made available. This assessment will be specific to a company's facts and circumstances, and companies will need to evaluate the particular facts and considerations (both quantitative and qualitative) for their own businesses and document the steps taken to reach their conclusions.

4. **Board Committees.** In light of the disclosure on board oversight of climate risk, companies should assess their board committees' responsibilities and charters. For example, a company should consider if it should delegate oversight of climate related risks to a particular board committee, and if it has already done so, it should consider whether to enhance the committee's charter to specify review of climate related disclosure in SEC filings.

5. **Internal Control over Financial Reporting ("ICFR").** The new rules impact financial statement disclosures, and will therefore be subject to SEC requirements for internal control over financial reporting. Companies will therefore need to start evaluating their controls to assess whether any changes will be needed to comply with the new requirements.

6. **Risk of Liability under the US Federal Securities Laws.** The new disclosures in annual reports and registration statements will result in expanded liability risks for companies. For example, companies may face litigation over claims that the new disclosures contain materially misleading statements or omissions under the US federal securities laws. Therefore, it will be crucial to establish fulsome controls to vet and verify the new disclosure. Any forward-looking statements should be clearly identified and appropriate

[52] These include rules promulgated by the EPA, including their GHG reporting rules, the EU, which adopted the Corporate Sustainability Reporting Directive ("CSRD") in 2023, and individual states, such as California and its Senate Bills 261 and 531, all of which may have different disclosure standards and definitions than those in the new SEC rules. *See* our alerts, "Corporate Sustainability Reporting: New EU rules for large companies and listed SMEs" and "California Bills to Require Greenhouse Gas Emissions Reporting From Companies Doing Business in the State."

cautionary language added, and risk factor disclosure relating to climate should be assessed and reconsidered in light of the new disclosure, including to protect the company in the event of litigation.

The following White & Case attorneys authored this alert:
Maia Gez
Seth Kerschner
Scott Levi
Taylor Pullins
Michelle Rutta
Danielle Herrick

White & Case Team Members:

A.J. Ericksen: 713-496-9688, aj.ericksen@whitecase.com
Elodie Gal: 212-819-8242, egal@whitecase.com
Maia Gez: 212-819-8217, maia.gez@whitecase.com
David Johansen: 212-819-8509, djohansen@whitecase.com
Seth Kerschner: 212-819-8630, seth.kerschner@whitecase.com
Scott Levi: 212-819-8320, scott.levi@whitecase.com
Daniel Nussen: 213-620-7796, daniel.nussen@whitecase.com
Kimberly Petillo-Decossard: 212-819-8398, kimberly.petillo-decossard@whitecase.com
Taylor Pullins: 713-496-9653, taylor.pullins@whitecase.com
Jason Rocha: 713-496-9732, jason.rocha@whitecase.com
Jonathan Rochwarger: 212-819-7643, jrochwarger@whitecase.com
Joel Rubinstein: 212-819-7642, joel.rubinstein@whitecase.com
Michelle Rutta: 212-819-7864, mrutta@whitecase.com
Elliott Smith: 212-819-7644, elliott.smith@whitecase.com
Melinda Anderson: 212-819-7002, melinda.anderson@whitecase.com
Danielle Herrick: 212-819-8232, danielle.herrrick@whitecase.com
Patti Marks: 212-819-7019, pmarks@whitecase.com
Sarah Hernandez: 212-819-8429, sarah.hernandez@whitecase.com

Appendix A

Definitions Used in the New Rules

- "Climate-related risks": the actual or potential negative impacts of climate-related conditions and events on a registrant's business, results of operations, or financial condition.
- "Physical Risks": includes both acute and chronic risks to a registrant's business operations.
- "Acute risks" are defined as event-driven risks and may relate to shorter-term extreme weather events, such as hurricanes, flood, tornadoes, and wildfires, among other events.
- "Chronic risks" are defined as those risks that relate to longer term weather patterns, such as sustained higher temperatures, sea level rise and drought, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water.
- "Transition Risks": the actual or potential negative impacts on a registrant's business, results of operations, or financial condition attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks, including, but not limited to, increased costs attributable to changes in law or policy, reduced market demand for carbon-intensive products leading to decreased prices or profits for such products, the devaluation or abandonment of assets, risk of legal liability and litigation defense costs, competitive pressures associated with the adoption of new technologies, and reputational impacts (including those stemming from a registrant's customers or business counterparties) that might trigger changes to market behavior, consumer preferences or behavior, and registrant behavior.
- "Carbon dioxide equivalent or CO2e": means the common unit of measurement to indicate the global warming potential ("GWP") of each greenhouse gas, expressed in terms of the GWP of one unit of carbon dioxide.
- "Greenhouse Gases": carbon dioxide ("CO2"), methane, nitrous oxide, nitrogen trifluoride, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.
- "GHG emissions": direct and indirect emissions of greenhouse gases, expressed in metric tons of carbon dioxide equivalent (CO2e):
    - Direct emissions: GHG emissions from sources that are owned or controlled by a registrant.
    - Indirect emissions: GHG emissions that result from the activities of the registrant, but occur at sources not owned or controlled by the registrant.
- "GHG emissions attestation provider": a person or a firm that has all of the following characteristics:
    - Is an expert in GHG emissions by virtue of having significant experience in measuring, analyzing, reporting, or attesting to GHG emissions. Significant experience means having sufficient competence and capabilities necessary to:
        - Perform engagements in accordance with professional standards and applicable legal and regulatory requirements; and
        - Enable the service provider to issue reports that are appropriate under the circumstances.
    - Is independent with respect to the registrant, and any of its affiliates, for whom it is providing the attestation report, during the attestation and professional engagement period.
- "Internal carbon price": means an estimated cost of carbon emissions used internally within an organization.
- "Scenario analysis": means a process for identifying and assessing a potential range of outcomes of various possible future climate scenarios, and how climate-related risks may impact a registrant's business strategy, results of operations, or financial condition over time.

- "Scope 1 emissions": direct GHG emissions from operations that are owned or controlled by a registrant.
- "Scope 2 emissions": indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant.
- "Transition plan": means a registrant's strategy and implementation plan to reduce climate-related risks, which may include a plan to reduce its GHG emissions in line with its own commitments or commitments of jurisdictions within which it has significant operations.

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