Harvard Law School Forum on Corporate Governance

SEC Adopts New Rules for Climate-Related Disclosures

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Editor's note: Brian Breheny, Marc Gerber, and Raquel Fox are Partners at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on a Skadden memorandum by Mr. Breheny, Mr. Gerber, Ms. Fox, Caroline Kim, Liz Malone and Jeongu Gim. Related research from the Program on Corporate Governance includes The Illusory Promise of Stakeholder Governance (discussed on the Forum here) by Lucian A. Bebchuk and Roberto Tallarita; For Whom Corporate Leaders Bargain (discussed on the Forum here) and Stakeholder Capitalism in the Time of COVID (discussed on the Forum here) both by Lucian A. Bebchuk, Kobi Kastiel, and Roberto Tallarita; and Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy – A Reply to Professor Rock (discussed on the Forum here) by Leo E. Strine, Jr.

On March 6, 2024, the Securities and Exchange Commission (SEC) voted 3-2 to adopt new rules mandating climate-related disclosures in public companies' annual reports and registration statements. While the final rules are meaningfully scaled back from the proposed rules and adopt a materiality-based approach, they nevertheless add potentially significant climate-related disclosure requirements for companies, including foreign private issuers. The final rules provide extensive phase-in periods as summarized in the annex to this publication, and the earliest compliance period applies to large accelerated filers for their annual reports for fiscal year 2025.clim

Highlights of the new disclosure requirements are described below.

Overview

Potentially Extensive Disclosure Requirements, but Scaled Back From the Proposed Rules. In many cases, climate-related disclosures will be required only if determined to be material. Among others, potentially required disclosure items include:

- Climate-related risks and their impacts on business strategy and outlook.
- Climate-related mitigation or adaptation activities.
- Climate-related targets or goals.
- Climate-related risk oversight and governance.

In addition, large accelerated filers and non-exempt accelerated filers (rather than all SEC registrants) will be required to disclose material Scope 1 and/or Scope 2 greenhouse gas (GHG)

emissions, and the final rules do not require the disclosure of Scope 3 emissions.[1] In order to better align with the timing of reporting GHG emissions under other regulations (*e.g.*, the Environmental Protection Agency's GHG emissions reporting requirements), the final rules allow for GHG emissions disclosure to be provided on a delayed basis in the second quarter Form 10-Q filed after fiscal year end (or in an amendment to Form 10-K), or in a Form 20-F amendment for foreign private issuers within 225 days after fiscal year end. Large accelerated and accelerated filers eventually would be required to obtain third-party assurance of their GHG emissions.

Financial Statement Footnote Disclosures. The final rules also require a new note to companies' audited financial statements disclosing the financial impacts of severe weather events and other natural conditions[2] on a disaggregated basis, including certain costs and losses, subject to certain thresholds.[3] Companies are also required to disclose the estimates and assumptions used to produce the financial statements that were materially impacted by risks and uncertainties associated with severe weather events and other natural conditions.

Safe Harbor. The final rules include a safe harbor from private securities litigation for climate-related disclosures (excluding historical facts) relating to transition plans, scenario analysis, the use of an internal carbon price, and targets and goals.

Phase-In Periods. The final rules provide phase-in periods based on SEC filer status, with extended phase-in periods for required third-party attestation of GHG emissions. Phase-in periods are summarized in the annex to this publication.

Preparing for New Disclosures. Certain aspects of the new rules apply to large accelerated filers as soon as their annual report on Form 10-K or 20-F with respect to the fiscal year beginning on or after January 1, 2025. Companies should start preparing now to be in a position to make materiality determinations for potential new disclosure items and collect the required data and other information necessary to comply with the applicable disclosure and financial statement requirements. Relatedly, companies should begin preparing for the new rules by evaluating the impact on, and necessary changes to, their existing disclosure controls and procedures and internal control over financial reporting.

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[1] As defined under new Regulation S-K Item 1500, Scope 1 emissions are direct GHG emissions from operations that are owned or controlled by a company. Scope 2 emissions are 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 company. While not defined by the SEC, Scope 3 emissions generally refer to indirect emissions from upstream and downstream activities in a company's value chain.

[2] "Severe weather events and other natural conditions" include hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures and sea level rise.

[3] The adopting release notes that the incremental compliance costs are expected to be limited because the required disclosure items — capitalized costs, expenditures expensed, charges and losses — are already required to be recorded in a company's financial statements.

Key Climate-Related Disclosure and Other Requirements

Highlights of the new disclosure and other requirements are outlined below.[4]

- **Disclosure of climate-related risks, mitigation, oversight and goals.** A new subpart 1500 to Regulation S-K adds potentially extensive disclosure requirements for certain climate-related information, including the following:
  - Whether and how any identified climate-related risks have materially impacted or are reasonably likely to materially impact the company's strategy, results of operations or financial condition, as well as the actual and potential material impacts of those risks on the company's strategy, business model and outlook.
  - The company's activities to mitigate or adapt to a material climate-related risk or use of a transition plan to manage a material transition risk, and associated material expenditures incurred and impacts on financial estimates and assumptions.
  - The company's use of a scenario analysis or an internal carbon price, if applicable and material.
  - The oversight and governance of climate-related risks by the board and management.[5]
  - The company's processes to identify, assess and manage material climate-related risks.
  - Whether and how any climate-related targets or goals have materially affected or are reasonably likely to materially affect the company's business, results of operations or financial condition. If carbon offsets or renewable energy credits or certificates are used as a material component of the company's plan to achieve climate-related targets or goals, details should be provided on such uses.
- **Disclosure of material Scopes 1 and 2 GHG emissions (but not Scope 3).** For large accelerated filers and accelerated filers that are not also smaller reporting companies or emerging growth companies, the new rules require disclosure of Scope 1 and/or Scope 2 GHG emissions, and related methodology, significant inputs and significant assumptions, if such emissions are material. Notably, in a departure from the proposed rules, the final rules include the materiality qualifier for Scopes 1 and 2 GHG emissions disclosure and do not require disclosure of Scope 3 GHG emissions. The adopting release explains that a company should "apply traditional notions of materiality under the Federal securities

[4] In the adopting release, the SEC noted that the new rules are based in part on the disclosure frameworks of the Task Force on Climate-related Financial Disclosure and the GHG Protocol.

[5] The final rules do not include the proposed requirement to describe board members' climate expertise.

laws when evaluating whether its Scopes 1 and/or 2 emissions are material." The release goes on to state that under this approach, materiality is "not determined merely by the amount of these emissions," but rather "the guiding principle" should be "whether a reasonable investor would consider the disclosure … important when making an iInvestment or voting decision or such a reasonable investor would view omission of the disclosure as having significantly altered the total mix of information made available." The final rules allow companies to provide GHG emissions disclosures on a delayed basis in the second quarter Form 10-Q filed after fiscal year end (or in an amendment to Form 10-K), or in a Form 20-F amendment for foreign private issuers within 225 days after fiscal year end. For registration statements, any required GHG emissions disclosure must be provided as of the most recently completed fiscal year that is at least 225 days prior to the date of effectiveness of the registration statement.

- **Independent third-party assurance for GHG emissions.** Subject to lengthy phase-in periods, large accelerated filers and accelerated filers would need to obtain limited assurance on their GHG emissions disclosure, and large accelerated filers eventually would need to obtain reasonable assurance.[6] In each case, companies must include an attestation report from the assurance provider in respect of those emissions in the relevant filing. The rules also prescribe minimum standards for the required independent third-party assurance and the accompanying attestation report.
- **Financial impacts and related disclosure in a note to the audited financial statements.** New Article 14 of Regulation S-X requires a new note in the audited financial statements disclosing certain financial impacts on a disaggregated basis, if those impacts meet certain thresholds, including the following:
    - Capitalized costs, expenditures expensed, charges and losses incurred as a result of severe weather events and other natural conditions, subject to applicable one percent and de minimis disclosure thresholds. Under Regulation S-X Article 14-02(b), no disclosure of expenditures expensed as incurred and losses is required if the aggregate amount is less than (i) one percent of the absolute value of income or loss before income tax expense or benefit or (ii) $100,000 for the relevant fiscal year, and no disclosure of the absolute value of capitalized costs and charges is required if the aggregate amount is less than (a) one percent of the absolute value of stockholders' equity or deficit at year end or (b) $500,000 for the relevant fiscal year.

[6] The adopting release notes that limited assurance is equivalent to the level of assurance (commonly referred to as a "review") provided over a company's interim financial statements included in a Form 10-Q and that reasonable assurance is equivalent to the level of assurance provided in an audit of a company's consolidated financial statements included in a Form 10-K.

- Financial impacts and accounting policy related to the use of carbon offsets or renewable energy credits or certificates, if used as a material component of the company's plan to achieve climate-related targets or goals.
- A description of whether and how the estimates and assumptions the company uses to produce the financial statements were materially impacted by risks and uncertainties associated with severe weather events and other natural conditions or any disclosed climate-related targets or transition plans.

As part of the audited financial statements, this new disclosure would be subject to audit by an independent auditor and fall within the scope of the company's internal control over financial reporting.

Safe Harbor for Certain Climate-Related Disclosures

The final rules include a safe harbor from private securities litigation for climate-related disclosures (excluding historical facts[7]) relating to transition plans, scenario analysis, the use of an internal carbon price, and targets and goals. Such disclosures would be considered forward-looking statements for purposes of the Private Securities Litigation Reform Act safe harbors for forward-looking statements provided in section 27A of the Securities Act and section 21E of the Exchange Act.[8]

Legal Challenges

The new rules are already facing legal challenges. On the same day the rules were adopted, a coalition of 10 states filed a petition with the Court of Appeals for the Eleventh Circuit, asking the court to declare the new rules unlawful and vacate them. It also has been reported that certain environmental groups may challenge the rules for not going far enough, such as the removal of the proposed disclosure requirement for Scope 3 GHG emissions.

SEC Commissioners Hester Peirce and Mark Uyeda, who voted against the adoption of the rules, noted in their dissenting statements that the final rules should be re-proposed given the significant changes made to the proposed rules and that the cost-benefit analysis was not appropriate, among other issues. In addition, SEC Commissioner Caroline Crenshaw, who voted for the final rules,

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[7] New Regulation S-K Item 1507(b) includes a list of nonexclusive examples of historical facts, such as material expenditures actually incurred or terms related to carbon offsets or renewable energy credits or certificates.

[8] Consistent with their general application in other contexts, these safe harbors are not available for forward-looking statements included in the financial statements (including when forward-looking statements are incorporated by reference from the financial statements into the other parts of the filing). Companies also would need to satisfy the rest of the safe harbor requirements, such as accompanying a forward-looking statement with a meaningful cautionary statement that identifies important factors that could cause actual results to differ materially from those in the forward-looking statement.

noted that while the adopted rules are "important steps forward," she would have adopted more fulsome disclosure requirements.

Annex

Phase-In Periods for Compliance With Climate-Related Disclosure Rules[9]

	Applicable Rules	**Large Accelerated Filer**	**Accelerated Filer**	**Non-Accelerated Filer Smaller Reporting Company Emerging Growth Company**
All required disclosures, other than those noted below	All new Regulation S-K and S-X disclosure items, other than those noted below	2025	2026	2027
Material financial impacts from climate-related mitigation activities, transition plans and/or targets or goals	Regulation S-K Items 1502(d)(2), 1502(e)(2) and 1504(c)(2)	2026	2027	2028
Scopes 1 and 2 GHG emissions	Regulation S-K Item 1505	2026	2028	N/A
Attestation report – limited assurance	Regulation S-K Item 1506	2029	2031	N/A
Attestation report –	Regulation S-K Item 1506	2033	N/A	N/A

[9] Years in the table reflect any fiscal year beginning in the calendar year listed. For example, a large accelerated filer with a December 31 fiscal year end would be required to comply with the earliest disclosure requirements beginning with its annual report for fiscal year ending December 31, 2025 (filed in 2026).

reasonable assurance				
Inline XBRL tagging[10]	Regulation S-K Item 1508	2026	2026	2027

[10] Financial statement disclosures under new Regulation S-X Article 14 will be required to be tagged in accordance with existing rules pertaining to the tagging of financial statements.