An In-Depth Review of the SEC Proposed Climate Change Disclosure Rule

April 25, 2022

The U.S. Securities and Exchange Commission ("SEC") released its long-awaited proposed rule on the "Enhancement and Standardization of Climate-Related Disclosures for Investors" ("Proposed Rule") on March 21, 2022. The Proposed Rule would apply to all SEC registrants, including public companies, and is intended to require "consistent, comparable, and decision-useful information" on registrants' climate-related disclosures. If adopted, the Proposed Rule would constitute one of the most dramatic changes ever to SEC disclosure requirements, though it likely will generate a large number of comments, both in favor and in opposition, and may ultimately face legal challenges. The SEC has requested comment on the Proposed Rule by May 20, 2022.

Under the Proposed Rule, there would be new, often prescriptive, climate-related disclosure requirements added to Regulation S-K, which primarily governs qualitative disclosures, and Regulation S-X, which governs financial statements and other financial disclosures. In general, these disclosures would address various climate-related risks to registrants' business, operations and financial condition, including disclosure of registrants' greenhouse gas ("GHG") emissions. The Proposed Rule draws heavily from the Task Force on Climate-Related Financial Disclosures ("TCFD") framework, a widely-adopted, voluntary climate-related reporting framework, and the Greenhouse Gas Protocol ("GHG Protocol"), which the SEC identifies as the leading accounting and reporting standard for GHG emissions.

This Debevoise In Depth provides a detailed analysis of the Proposed Rule's key provisions, questions on which the SEC requested comment, and related policy and legal issues. As discussed in further detail below, the Proposed Rule largely reflects expectations, but, in some areas, is more expansive than many predicted. For example, for certain registrants, the Proposed Rule would require the disclosure of GHG emissions by all entities in a registrant's value chain and the submission of attestation reports regarding GHG emissions.

Background

Prior SEC Guidance and Policy Activity on Climate Change Disclosures

In 2010, the SEC released its "Commission Guidance Regarding Disclosure Related to Climate Change," which provided initial clarification about how the SEC's existing disclosure requirements under Regulation S-K apply to climate change matters;[1] the 2010 guidance was subsequently reiterated in a January 2020 statement by then-SEC Chairman Jay Clayton.[2] In March 2021, the SEC requested public input on issues relating to climate change disclosures.[3] Both initiatives informed the Proposed Rule, which directly addressed feedback received in response to the March 2021 request for comment.

Additionally, in September 2021, the SEC sent requests for additional climate and ESG information to a number of public companies.[4] The SEC concurrently released a "Sample Letter to Companies Regarding Climate Change Disclosures" ("Sample Letter"), which serves as an example of a potential request for information from the agency to public companies "regarding their climate-related disclosure or the absence of such disclosure."[5] The Sample Letter suggests that, going forward, SEC examination staff would likely inquire about registrants':

- Identification of any recent or pending federal and state legislation or international accords regarding climate change having a material effect on the registrant's business;
- Disclosure of any material transition risks related to climate change that could affect the registrant's business;
- Disclosure of any material litigation related to climate change that may impact the registrant;

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1 Securities & Exchange Commission, "Commission Guidance Regarding Disclosure Related to Climate Change" (Feb. 8, 2010), *available at* https://www.sec.gov/rules/interp/2010/33-9106.pdf.

2 Securities & Exchange Commission, Jay Clayton, "Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure" (Jan. 30, 2020), *available at* https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30.

3 Securities & Exchange Commission, Allison Lee, "Public Input Welcomed on Climate Change Disclosures" (Mar. 15, 2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

4 *See, e.g.*, Wall Street Journal, Paul Kiernan, "SEC Asks Dozens of Companies for More Climate Disclosures" (Sept. 22, 2021), *available at* https://www.wsj.com/articles/regulators-ask-dozens-of-companies-for-more-climate-disclosures-11632341672.

5 Securities & Exchange Commission, "Sample Letter to Companies Regarding Climate Change Disclosures" (Sep. 22, 2021), *available at* https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures.

- Disclosure of any material past or future capital expenditures for climate-related projects;
- Discussion of any material indirect changes in business trends caused by climate change (*e.g.*, an increase in demand for goods that result in lower emissions);
- Disclosure of any material physical effects of climate change on the registrant's business;
- Quantification of any material increases in compliance costs related to climate change; and
- Disclosure of any material purchase of carbon credits or offsets and any associated material effects on the registrant's business, financial conditions, and results of operations.

The SEC may also inquire about any discrepancies between a registrant's climate-related disclosures in its SEC filings and in its other public statements, including in its Corporate Social Responsibility or ESG report, if applicable. Corporate Responsibility and ESG reports are frequently published on the registrants' websites, but not filed with or furnished to the SEC.

Recent ESG-Related Examination and Enforcement Activity

In addition to its work on the Proposed Rule, the SEC's Division of Examinations regularly reviews filings and disclosures of registered investment advisers and investment companies. The division also conducts examinations of these registrants to ensure, among other things, that (to the extent they are offering, recommending or advertising ESG investments) their disclosures are complete and accurate. In April 2021, the SEC released a risk alert on ESG investing, which noted that SEC exams focus primarily on investment advisers' and investment companies' portfolio management, performance advertising and marketing, and compliance programs. The risk alert found deficiencies in several of these areas.[6] In addition, the SEC's 2022 Examinations Priorities document lists environmental, social and governance factors ("ESG") as one of the agency's priority examination areas.[7] The SEC intends to especially scrutinize potential "greenwashing," a practice in which an investment adviser, for example, overstates or misrepresents the ESG factors considered or incorporated into portfolio selection, such as in the adviser's performance advertising and marketing. We note that

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[6] Securities & Exchange Commission, "The Division of Examinations' Review of ESG Investing," Risk Alert (Apr. 9, 2021), *available at* https://www.sec.gov/files/esg-risk-alert.pdf.

[7] Securities & Exchange Commission, "SEC Division of Examinations Announces 2022 Examination Priorities," Press Release (Mar. 30, 2022), *available at* https://www.sec.gov/news/press-release/2022-57.

2022 is the first year that ESG has received a standalone section in the SEC examination priorities, providing yet another signal that the SEC plans to increase its focus on ESG.[8]

As further evidence of the SEC's focus on ESG matters, the SEC formed an enforcement task force focused on climate and ESG in March 2021.[9] While the SEC has not yet announced any filed actions from the efforts of the task force, in February 2022, the SEC brought a settled action against a robo-advisory firm for, among other conduct, failing to adopt and implement written policies and procedures on how it would ensure compliance with its faith-based investment strategy on an ongoing basis.[10]

These recent developments suggest a likely increase in examination, and potentially enforcement, activities in tandem with the rulemaking process for the new climate disclosure rules.

Other Climate-Related Actions from U.S. Financial Regulators and International Organizations

Other U.S. financial regulators have also started to focus on climate change in recent years. Notably:

- On December 16, 2021, the Office of the Comptroller of the Currency ("OCC") released for public comment its draft principles for the management of climate-related financial risk by OCC-supervised banking organizations with more than $100 billion in total consolidated assets ("OCC Principles").[11] The OCC Principles are intended to "provide a high-level framework" for climate risk management, covering several areas, including corporate governance, policies and procedures, scenario analysis, and data reporting. The comment period for the OCC Principles closed in

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[8] In June 2021, the SEC announced an extensive list of proposed rulemakings that included "Rules Related to Investment Companies and Investment Advisers to Address Matters Relating to Environmental, Social and Governance Factors." While such proposed rules have yet to be released, it is widely anticipated that they will be released before the end of the calendar year. *See* Securities & Exchange Commission, "SEC Announces Annual Regulatory Agenda," Press Release (Jun. 11, 2021), *available at* https://www.sec.gov/news/press-release/2021-99.

[9] Securities & Exchange Commission, "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues," Press Release (Mar. 4, 2021), *available at* https://www.sec.gov/news/press-release/2021-42.

[10] *In the Matter of Wahed, LLC,* Investment Advisers Act Release No. 5959 (Feb. 10, 2022), *available at* https://www.sec.gov/litigation/admin/2022/ia-5959.pdf.

[11] *See* Debevoise In Depth, "OCC and Basel Committee Issue Separate Proposed Principles for the Management of Climate-Related Financial Risks," Jan. 5, 2022, *available at* https://www.debevoise.com/insights/publications/2022/01/occ-and-basel-committee-issue-separate.

February 2022, and, later this year, the OCC is expected to issue more detailed guidance on the matter.[12]

- The Federal Deposit Insurance Corporation ("FDIC") released its own set of climate principles on March 29, 2022 ("FDIC Principles"), which are substantively similar to the OCC Principles, with only a few minor differences in the introduction and requests for comment.[13] Like the OCC Principles, the FDIC Principles also provide a framework for climate risk management for financial institutions with more than $100 billion in total consolidated assets, and both Principles cover the same topics. The comment period for the FDIC Principles ends on June 3, 2022.[14]

- The Financial Stability Oversight Council ("FSOC") released a "Report on Climate-Related Financial Risk" in October 2021 ("FSOC Climate Report").[15] The FSOC Climate Report (i) reviews current efforts by member institutions to incorporate climate-related financial risk into their regulatory and supervisory activities, (ii) highlights associated data and methodological challenges, (iii) discusses the role of disclosure, (iv) addresses implications of these risks on financial stability and (v) issues recommendations for itself, its members, and other regulatory bodies. Notably, the FSOC Climate Report emphasizes the need for member agencies to develop "scenario analysis" tools to measure and predict risks across financial institutions arising from climate change; scenario analysis is also covered in the OCC Principles.[16]

- Also in October 2021, the Board of Governors of the Federal Reserve ("Federal Reserve") announced that it is developing scenario analyses to model potential financial risks associated with climate change and assess the resilience of individual financial institutions, and the financial system as a whole, to these risks. Federal Reserve Governor Lael Brainard stated that she anticipates that it "will be helpful to provide supervisory guidance for large banking institutions in their efforts to

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12 Office of the Comptroller of the Currency, "Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback," OCC Bulletin, December 16, 2021, *available at* https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62.html.

13 *See* Debevoise In Depth, "The FDIC, Following the OCC Last December, Issues Draft Principles for Climate-Related Financial Risk Management" (Apr. 6, 2022), *available at* https://www.debevoise.com/insights/publications/2022/04/the-fdic-following-the-occ-last-december-issues.

14 Federal Deposit Insurance Corporation, "Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions" (Apr. 4, 2022), *available at* https://www.fdic.gov/news/board-matters/2022/2022-03-29-notational-fr.pdf.

15 *See* Debevoise In Depth, "FSOC and Federal Banking Agencies Move on Climate Change" (Oct. 26, 2021), *available at* https://www.debevoise.com/insights/publications/2021/10/fsoc-and-federal-banking-agencies-move-on.

16 Financial Stability Oversight Council, *Report on Climate-Related Financial Risk* (Oct. 2021), *available at* https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf.

> appropriately measure, monitor, and manage material climate-related risks, following the lead of a number of other countries."[17]

Internationally, a number of standard-setting bodies have also undertaken projects focused on measuring, managing and mitigating climate-related financial risks against the backdrop of the November 2021 United Nations Climate Change Conference ("COP 26") in Glasgow. At COP26, the International Financial Reporting Standards Foundation, which sets global accounting standards, announced that it would establish the International Sustainability Standards Board ("ISSB") to develop standards on sustainability reporting.[18] On March 31, 2022, the ISSB launched consultations for its first two proposed standards: (1) general sustainability-related disclosure requirements;[19] and (2) climate-related disclosure requirements.[20]

Additionally of note, in November 2021, the International Organization of Securities Commissions Task Force on Sustainable Finance released a report, titled "Recommendations on Sustainability-Related Practices," which provides high-level recommendations for regulators to conduct work relating to asset management disclosure and practices, disclosure for sustainability-related products and other similar topics.[21]

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17 Board of Governors of the Federal Reserve System, Lael Brainard, "Building Climate Scenario Analysis on the Foundations of Economic Research," Speech (Oct. 7, 2021), *available at* https://www.federalreserve.gov/newsevents/speech/brainard20211007a.htm.

18 International Financial Reporting Standards, "IFRS Foundation announces International Sustainability Standards Board, consolidation with CDSB and VRF, and publication of prototype disclosure requirements" (Nov. 3, 2021), *available at* https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/.

19 International Financial Reporting Standards, "Exposure Draft: IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information" (Mar. 2022), *available at* https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf.

20 International Financial Reporting Standards, "Exposure Draft: IFRS S2 Climate-related Disclosures" (Mar. 2022), *available at* https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf.

21 International Organization of Securities Commissions, "Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management – Final Report" (Nov. 2021), *available at* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD688.pdf.

Key Provisions of the Proposed Rule

General Observations

Regulations and Forms Amended

The Proposed Rule would add additional climate-related disclosure requirements to a separate "Climate-Related Disclosure" section of Regulation S-K, which primarily governs qualitative disclosures,[22] and Regulation S-X, which governs financial statements and other financial disclosures.[23] Information must be disclosed in XBRL format, per Regulation S-T standards.[24] The Proposed Rule also amends several forms under the Securities Act of 1933, as amended ("1933 Act") and Securities Exchange Act of 1934, as amended ("1934 Act")—including Forms 10-K and 10-Q (for public companies) and 20-F (for foreign private issuers)—to add new sections on climate that incorporate the Regulation S-K and Regulation S-X changes.[25] The SEC opted against the alternative option of creating a separate form for climate disclosures that would not be incorporated by reference into registration statements, which was the SEC's approach for the conflict mineral disclosures on SEC Form SD.[26]

Liability

In general, Section 18 of the 1934 Act imposes liability for false and misleading statements made in documents filed with the SEC, subject to applicable defenses.[27] Therefore, by requiring that the climate disclosures be made as part of forms filed with the SEC, the Proposed Rule would create potential liability for filers under this section.[28] Filers would also be subject to the broad anti-fraud provisions of Section 10(b) of the 1934 Act[29] and Rule 10b-5 thereunder,[30] which prohibit fraudulent and deceptive practices, as well as untrue statements or omissions of material facts, made in connection with securities, including with respect to public statements, press releases, and shareholder reports. If filers make this disclosure in registration statements[31]—

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[22] Proposed 17 CFR 229.1500, *et seq.*, 87 Fed. Reg. 21465-71 (2022).

[23] Proposed 17 CFR 210.8-01, 210.14-01, 210.14-02, 87 Fed. Reg. 21464.

[24] Proposed 17 CFR 229.1507, 87 Fed. Reg. 21471; Proposed 17 CFR 232.405, 87 Fed. Reg. 21471.

[25] Proposed 17 CFR 239 (Forms S-1, S-11, S-4, F-4), 249 (Form 10, 20-F, 6-K, 10-Q, 10-K), 87 Fed. Reg. 21471-73.

[26] Securities and Exchange Commission Form S-D, *available at* https://www.sec.gov/files/formsd.pdf. The SEC requested comment on whether they should permit a registrant to provide certain of the proposed climate-related disclosures in SEC filings other than the annual report or registration statement. *See* 87 Fed. Reg. 21349, ¶ 7.

[27] 15 U.S.C. § 78r.

[28] *Id*. Note that Section 18 liability does not attach to disclosures on SEC Form 6-K, which is "furnished," rather than "filed" with the SEC. The SEC asks in the Proposed Rule whether some or all of the climate disclosures should be treated as "furnished" to the SEC (and therefore exempt from Section 18 liability), rather than "filed." *See* 87 Fed. Reg. 21382, ¶¶ 194-196.

[29] 15 U.S.C. § 78j.

[30] 17 CFR 240.10b-5.

[31] 15 U.S.C. §§ 77k, 77l.

including by incorporating by reference the forms affected by the Proposed Rule, such as Forms 10-K and 10-Q—filers may also be subject to a strict liability standard for false or misleading statements, even for unintentional mistakes. Existing safe harbors for forward-looking statements[32] are available for aspects of the proposed disclosures, including those of maintained internal carbon prices, scenario analysis, risk management processes, GHG emissions metrics, and targets and goals.[33]

Materiality Standard

With respect to most disclosure requirements under the Proposed Rule, information would need to be disclosed only if it is "material," defined as when "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment or voting decision, or it would have "significantly altered the total mix of information made available."[34] However, there are several exceptions; for example, most types of emissions must always be disclosed, regardless of materiality.[35] In other cases, amounts of certain items, such as financial impacts and expenditures, above a quantitative threshold are automatically deemed by the SEC to be material.[36]

Applicability to Financial Institutions

The Proposed Rule provides some, albeit limited, guidance specific to financial institutions, which may have unique considerations, especially if they directly or indirectly provide financing for or investment in activities that result in GHG emissions.

Compliance Deadlines

The table below indicates the compliance dates[37] for the Proposed Rule's disclosure requirements, which vary depending on filer type.[38]

All Proposed Disclosures (Excluding Scope 3)

Filer Type	Disclosure Compliance Date
Large Accelerated Filer	Fiscal year 2023 (filed in 2024)
Accelerated Filer	Fiscal year 2024 (filed in 2025)
Smaller Reporting Company	Fiscal year 2025 (filed in 2026)

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32 15 U.S.C. §§ 77z-2, 78u-5. Note that these statutory safe harbors do not apply to forward-looking statements included in financial statements prepared in accordance with generally accepted accounting principles ("GAAP") or made in connection with an initial public offering, among other exceptions. *Id.*

33 87 Fed. Reg. 21337, n. 28.

34 Proposed 17 CFR 240.12b-2 (definition of "material"). The SEC further notes that the materiality standard is similar to what is required when preparing the "Management Discussion and Analysis" ("MD&A") section in a registration statement or annual report. *See* 87 Fed. Reg. 21352.

35 Proposed 17 CFR 229.1504(b)(1), 87 Fed. Reg. 21468 (Scope 1 and 2 emissions).

36 *See* Proposed 17 CFR 210.14-02(b), 87 Fed. Reg. 21464 (financial impact and expenditure metric disclosures, pursuant to Regulation S-K).

37 All references to target compliance dates are based on an assumed effective date of final rules in December 2022 and a registrant with a December 31 fiscal year-end.

38 87 Fed. Reg. 21411-12.

Scope 1, 2 and 3 Emissions

The Proposed Rule would require a registrant to disclose its GHG emissions, including those from outsourced activities,[39] for its most recently completed fiscal year and for the historical fiscal years included in its consolidated financial statements in the filing, to the extent that such historical GHG emissions data is reasonably available.[40]

Emissions Definitions

The Proposed Rule's definitions of GHG emissions are substantially similar to those in the GHG Protocol, although there are some differences between them in other respects.[41] For purposes of both the Proposed Rule and the GHG Protocol, "Scope 1" emissions include direct emissions from operations that are owned or controlled by the registrant;[42] "Scope 2" covers indirect emissions from the generation of purchased electricity, steam, heating and cooling consumed by the registrant;[43] and "Scope 3" includes all other indirect emissions that occur in the upstream or downstream activities in the registrant's value chain, including purchased goods and services, employee commuting, and investments.[44] Registrants may use data submitted to the U.S. Environmental Protection Agency ("EPA") in partial fulfillment of their GHG disclosure obligations pursuant to the Proposed Rule.[45]

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[39] Proposed 17 CFR 229.1504(e)(8), 87 Fed. Reg. 21469. Outsourced activities are defined as those that a registrant previously disclosed as part of its own operations, as reflected in financial statements for the periods covered in the filing. *Id*.

[40] Proposed 17 CFR 229.1504(a), 87 Fed. Reg. 21438.

[41] 87 Fed. Reg. 21344. For example, the methodology that a registrant would be required to use when calculating its GHG emissions differs between the GHG Protocol and the Proposed Rule. *See* Proposed Rule, 87 Fed. Reg. 21384. For the purposes of the Proposed Rule, GHGs include carbon dioxide, methane, nitrous oxide, nitrogen trifluoride, hydrofluorocarbon, perfluorocarbons and sulfur hexafluoride. *See* Proposed 17 CFR 229.1500(g), 87 Fed. Reg. 21466.

[42] Proposed 17 CFR 229.1500(p), 87 Fed. Reg. 21466.

[43] Proposed 17 CFR 229.1500(q), 87 Fed. Reg. 21466.

[44] *Id*. Upstream activities may include activities by a party other than the registrant that relate to the initial stages of a registrant's production of a good or service (*e.g.*, materials sourcing, materials processing and supplier activities). Downstream activities may include activities by a party other than the registrant that relate to processing materials into a finished product and delivering it or providing a service to the end user (*e.g.*, transportation and distribution, processing of sold products, use of sold products, end of life treatment of sold products and investments). *See* Proposed 17 CFR 229.1500(t), 87 Fed. Reg. 21466. However, this list is non-exclusive. *See* 87 Fed. Reg. 21377. Under the Proposed Rule, registrants may provide their own categories of upstream and downstream activities. *See* 87 Fed. Reg. 21382, ¶ 104 ("Should we, as proposed, allow a registrant to provide their own categories of upstream or downstream activities?").

[45] 87 Fed. Reg. 21373.

Calculating Emissions Disclosures

The Proposed Rule would require all registrants to disclose Scope 1 and 2 emissions separately, regardless of whether the emissions are material,[46] and some registrants would be required to disclose Scope 3 emissions (to be discussed in further detail below).

For each of Scope 1, 2 and 3 emissions, the Proposed Rule would require a registrant to disclose the emissions both (i) disaggregated by each constituent GHG and (ii) in the aggregate, expressed in terms of metric tons of carbon dioxide equivalent.[47] The disclosures would exclude the impact of any offsets.[48] Registrants must disclose emissions in gross terms and also separately disclose in terms of "GHG intensity," a ratio of the metric tons of carbon dioxide emissions per unit of total revenue and per unit of production relevant to the registrant's industry.[49]

The SEC requests comment regarding several calculation issues, including whether both aggregated and disaggregated emissions should be required (as proposed); whether offsets should be excluded (as proposed); and whether the SEC should require disclosure of GHG intensity (as proposed) or consider a different method of calculating GHG intensity.[50]

Methodology Disclosure

Registrants would need to disclose their calculation methodology (including any emission factors used and the source of the emission factors), significant inputs and significant assumptions used to calculate GHG emissions metrics.[51] This includes any material changes in methodology or assumptions underlying GHG emissions disclosure from the previous fiscal year,[52] as well as any data gaps.[53] Registrants using third-party data in calculating GHG emissions would need to disclose the use of such data to the extent material.[54] Registrants may use reasonable estimates when disclosing GHG emissions as long as they also describe the assumptions underlying, and their reasons for using, the estimates.[55]

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[46] Proposed 17 CFR 229.1504(b)(1), 87 Fed. Reg. 21468. Registrants must calculate these emissions from all sources that are included within the registrant's organizational and operational boundaries. *Id*.

[47] Proposed 17 CFR 229.1504(a)(1), 87 Fed. Reg. 21468.

[48] Proposed 17 CFR 229.1504(a)(2), 87 Fed. Reg. 21468.

[49] Proposed 17 CFR 229.1504(d)(1), 87 Fed. Reg. 21469.

[50] 87 Fed. Reg. 21381-83, ¶¶ 94, 101, 109-113.

[51] Proposed 17 CFR 229.1504(e)(1), 87 Fed. Reg. 21469; 87 Fed. Reg. 21385-88.

[52] Proposed 17 CFR 229.1504(e)(6), 87 Fed. Reg. 21469.

[53] Proposed 17 CFR 229.1504(e)(7), 87 Fed. Reg. 21469.

[54] Proposed 17 CFR 229.1504(e)(5), 87 Fed. Reg. 21469. This provision is most relevant to the calculation of Scope 3 emissions, although it may be applicable to Scope 1 and 2 emissions as well.

[55] Proposed 17 CFR 229.1504(e)(4), 87 Fed. Reg. 21469.

Some topics on which the SEC requests comment include whether registrants should be required to disclose their methodologies for emissions and emissions metrics (as proposed);[56] whether the SEC should require registrants to use a particular methodology instead;[57] whether the use of reasonable estimates should be permitted (as proposed);[58] and whether the use of third-party data should be disclosed (as proposed).[59]

Attestation

With respect to Scope 1 and Scope 2 emissions only, the Proposed Rule includes an attestation requirement for accelerated and large accelerated filers.[60] These registrants must (i) include with their filings attestation reports that cover these emissions disclosures[61] and (ii) provide certain information about the attestation service provider.[62] The attestation provider must be an expert in GHG emissions and independent of the registrant, but need not be an auditor.[63] We note that such an attestation requirement departs from the SEC's typical practice for disclosures required under Regulation S-K, which, unlike financial statements submitted in accordance with Regulation S-X, are not audited.

The attestation requirements would be phased in according to the following timetable. Initially, registrants must provide "limited assurance" (*i.e.*, assurance that no material misstatement of fact or omission was found after a review, which is equivalent to the level of assurance provided over a registrant's interim financial statements included in a Form 10-Q) and eventually must provide "reasonable assurance" (*i.e.*, the level of assurance that is equivalent to that of an audit of financial statements included in a Form 10-K).[64]

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[56] 87 Fed. Reg. 21388, ¶ 115.

[57] *Id.*

[58] 87 Fed. Reg. 21389, ¶ 125.

[59] 87 Fed. Reg. 21389, ¶ 126.

[60] Proposed 17 CFR 229.1505, 87 Fed. Reg. 21470. Smaller reporting companies are excluded from this requirement. The terms "accelerated filer," "large accelerated filer" and "smaller reporting company" are defined in the SEC's Rule 12b-2 under the 1934 Act. *See* 17 CFR 240.12b-2.

[61] Proposed 17 CFR 229.1505(c), 87 Fed. Reg. 21470. The attestation report must include the assurance level and be publicly available, among other requirements. *Id.*

[62] Proposed 17 CFR 229.1505(b), 87 Fed. Reg. 21470.

[63] *Id.*

[64] Proposed 17 CFR 229.1505(a)(1), 87 Fed. Reg. 21469. Note that the SEC did not propose definitions of the terms "limited assurance" or "reasonable assurance," but rather expects that the term be understood as it is within industry. *See* 87 Fed. Reg. 21392, n. 564; 87 Fed. Reg. 21397, ¶ 141.

Attestation Requirement for Scopes 1 & 2 Disclosures (SRCs Exempted)

Filer Type	Scopes 1 & 2 Disclosure Compliance Date	Limited Assurance	Reasonable Assurance
Large Accelerated Filer	Fiscal year 2023 (filed in 2024)	Fiscal year 2024 (filed in 2025)	Fiscal year 2026 (filed in 2027)
Accelerated Filer	Fiscal year 2024 (filed in 2025)	Fiscal year 2025 (filed in 2026)	Fiscal year 2027 (filed in 2028)

In its request for comment, the SEC asks whether attestation reports should be required, whether and how the attestation report should be phased in, who should be required to file the reports and whether the requirements for the attestation report and attestation providers are reasonable, among other questions.[65]

Scope 3 GHG Emissions Disclosures.

The Proposed Rule would require registrants other than smaller reporting companies[66] to disclose Scope 3 emissions (i) if material, or (ii) even if not material, if the registrant has set a GHG emissions reduction target or goal that includes Scope 3 GHG emissions.[67] We note that, for many registrants, Scope 3 emissions account for the largest share of emissions by far, but are also the most difficult to measure reliably.

The Proposed Rule clarifies in the preamble that Scope 3 GHG emissions may be material where (i) they comprise a relatively significant portion of overall GHG emissions, although a quantitative analysis alone would not suffice for determining materiality,[68] or (ii) where Scope 3 emissions represent a significant risk, they are subject to significant regulatory focus, or if there is a substantial likelihood that a reasonable investor would consider them important.[69] Additionally, the preamble indicates that, if a registrant determines that Scope 3 emissions are not material, it may be useful to investors to understand the basis for that determination.[70]

In the Scope 3 emissions disclosures, registrants must identify categories of upstream or downstream activities that have been included in the calculation of Scope 3 emissions and must describe their data sources.[71] The registrant may use "reasonable estimates" and present its estimates in the terms of a range, as long as the registrant discloses the reasons for using the range and the underlying assumptions.[72] If there is any significant

[65] 87 Fed. Reg. 21396-98, ¶¶ 135-43.

[66] Proposed 17 CFR 229.1504(c)(3), 87 Fed. Reg. 21469. The term "smaller reporting company" is defined in the SEC's Rule 12b-2 under the 1934 Act. *See* 17 CFR 240.12b-2; *see also* 17 CFR 229.10(f)(1), 230.405.

[67] Proposed 17 CFR 229.1504(c)(1), 87 Fed. Reg. 21468.

[68] The SEC did note in the preamble that some companies use a quantitative threshold, such as 40%, when assessing the materiality of Scope 3 emissions. *See* 87 Fed. Reg. 21377-81.

[69] *Id.*

[70] *Id.*

[71] Proposed 17 CFR 229.1504(c)(1), (2), 87 Fed. Reg. 21468-69.

[72] Proposed 17 CFR 229.1504(e)(4)(i), (ii), 87 Fed. Reg. 21469.

overlap in the categories of activities producing Scope 3 emissions, the registrant must describe the overlap, how the registrant accounted for the overlap and the effect of the overlap on the registrant's total Scope 3 emissions.[73]

Scope 3 emissions disclosure requirements would be phased in on a delayed basis in accordance with the timetable below.

Scope 3 Disclosures

Filer Type	Disclosure Compliance Date
Large Accelerated Filer	Fiscal year 2024 (filed in 2025)
Accelerated Filer	Fiscal year 2025 (filed in 2026)
Smaller Reporting Company	Exempted

In order to encourage more robust Scope 3 emissions reporting, the Proposed Rule includes a safe harbor from potential U.S. securities law liability for Scope 3 emissions disclosures. The proposed safe harbor would provide that Scope 3 emissions disclosed under the Proposed Rule would be deemed not to be fraudulent statements, unless it is shown that such statements were (i) made or reaffirmed without a reasonable basis or (ii) disclosed other than in good faith.[74]

In the Proposed Rule, the SEC requests comment regarding whether registrants should be required to disclose only material Scope 3 emissions, as proposed, as well as whether the SEC should set a quantitative threshold for determining materiality, which the SEC did not do in the Proposed Rule.[75] The SEC also asks whether the safe harbor that was proposed is appropriate;[76] whether allowing ranges of Scope 3 emissions disclosures, as proposed, is appropriate;[77] whether Scope 3 emissions disclosure in general should be voluntary;[78] whether smaller registrants or other entities should be exempt from Scope 3 emissions disclosure requirements, as proposed;[79] and whether entities who might otherwise be subject to a disclosure exemption should still be exempted if they have set Scope 3 emissions reduction targets or goals.[80]

Application to Financial Institutions

In the preamble and economic analysis of the Proposed Rule, the SEC notes that banks are among the industries with the highest percentage of downstream emissions relative

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73 Proposed 17 CFR 229.1504(e)(9), 87 Fed. Reg. 21469.
74 Proposed 17 CFR 229.1504(f), 87 Fed. Reg. 21469.
75 87 Fed. Reg. 21381, ¶ 98.
76 87 Fed. Reg. 21391, ¶ 133.
77 87 Fed. Reg. 21390, ¶ 131.
78 87 Fed. Reg. 21381, ¶ 100.
79 87 Fed. Reg. 21391, ¶ 134.
80 *Id.*

to their total emissions. For banks, downstream emissions—which typically come from financing emissions of other companies through debt and equity financing ("financed emissions")—account for 81% of banks' total emissions.[81] The SEC notes in the Proposed Rule's preamble that, like registrants in other sectors, financial institutions must comply with the applicable disclosure requirements for Scope 3 emissions. The SEC cited the Partnership for Carbon Accounting Financials' Global GHG Accounting and Reporting Standard ("PCAF Standard") as one potential methodology for banks to use in disclosing Scope 3 emissions.[82] According to the SEC, by not requiring a specific methodology from financial institutions, the SEC is providing each financial institution with the "flexibility to choose the methodology that best suits its particular portfolio and financing activities."[83]

Risk Management Disclosure

The Proposed Rule would require disclosure of a registrant's process for identifying, assessing and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system or processes.[84] In the preamble, the SEC states that detailed information will allow investors to better understand registrants' climate risk management, including how registrants assess and address climate-related risks.[85] We note that, currently, only a minority of public companies currently disclose this information, but the Proposed Rule would make this disclosure a requirement for all SEC registrants.

The Proposed Rule would require registrants to disclose detailed information regarding the registrants' process for identifying and assessing climate-related risks, including how the registrants determine and consider:

- The relative significance of climate-related risks compared to other risks;
- Existing or likely regulatory requirements or policies, such as GHG emissions limits, when identifying climate-related risks;

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81 87 Fed. Reg. 21435, n. 885; 87 Fed. Reg. 21385. The SEC highlights in the Proposed Rule's preamble that, as financial institutions set their own GHG emissions goals, they would likely be interested in Scope 1 and 2 emissions of companies that they finance or invest in. *See* 87 Fed. Reg. 21378.

82 *See* Partnership for Carbon Accounting Financials, "The Global GHG Accounting and Reporting Standard for the Financial Industry," First edition (2020), *available at* https://carbonaccountingfinancials.com/files/downloads/PCAF-Global-GHG-Standard.pdf. The PCAF standard covers six asset classes: listed equity and corporate bonds; business loans and unlisted equity; project finance; commercial real estate; mortgages; and motor vehicle loans. *See* 87 Fed. Reg. 21387.

83 87 Fed. Reg. 21387.

84 Proposed 17 CFR 229.1503, 87 Fed. Reg. 21468.

85 87 Fed. Reg. 21361.

- Shifts in customer or counterparty preferences, technological changes, or changes in market prices in assessing potential transition risks; and

- The materiality of climate-related risks, including how it assesses the potential scope and impact of an identified climate-related risk.[86]

Aside from identifying and assessing risks, registrants must also disclose how they will manage identified climate-related risks, including deciding (i) whether to mitigate, accept, or adapt to a particular risk, (ii) how to prioritize certain climate-related risks and (iii) how to mitigate high-priority risks.[87] If a registrant utilizes insurance or other financial tools to mitigate climate risk exposures, a disclosure of its use of these tools may be required in this risk management description.[88]

For both the identification and management of climate risks, registrants also must disclose whether their climate-risk processes are integrated into the company's overall risk management system or handled by a separate governance board, as well as the details of these arrangements.[89]

The SEC is requesting comment on most aspects of the risk disclosures, including whether companies should disclose the process for identifying and assessing climate risks, and whether there are other factors that companies should disclose regarding their identification and assessment of the risks.[90] Further, the SEC seeks comment on whether a registrant should have to disclose how the climate-risk disclosures have been integrated into its overall risk management program.[91]

Impacts of Climate-Related Risks (Qualitative Disclosure)

The Proposed Rule would (i) require qualitative disclosure of how any climate-related risks identified by the registrant have had, or are likely to have, a material impact on the registrant's business and consolidated financial statements, which may manifest over the short, medium or long term[92] and (ii) provide registrants with the option of discussing the impacts of climate-related opportunities.

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[86] Proposed 17 CFR 229.1503(a)(1), 87 Fed. Reg. 21468.
[87] Proposed 17 CFR 229.1503(a)(2), 87 Fed. Reg. 21468.
[88] 87 Fed. Reg. 21361.
[89] Proposed 17 CFR 229.1503(b), 87 Fed. Reg. 21468.
[90] 87 Fed. Reg. 21362, ¶¶ 42-44.
[91] *Id.*, ¶¶ 45.
[92] Proposed 17 CFR 229.1502(a), 87 Fed. Reg. 21467.

The SEC's proposed definitions for "climate-related risks" and "climate-related opportunities"[93] are substantially similar to those recommended by the TCFD. Specifically, the Proposed Rule defines climate-related risks as "the actual or potential negative impacts of climate-related conditions and events on a registrant's consolidated financial statements, business operations, or value chains, as a whole."[94] Such climate-related risks may be physical (*i.e.*, risks in connection with weather events or trends) or transition risks (*i.e.*, risks in connection with the transition to a low-carbon economy),[95] and physical risks are further broken down into acute or chronic risks.[96] Of note, the Proposed Rule specifically highlights physical risks related to areas that are prone to excessive water events, such as flooding, and to places with water stress, such as drought.[97]

For physical and transition risks that are reasonably likely to have a material impact on the registrant, the Proposed Rule would require granular descriptions of the nature of such risks and their categorizations. For physical risks, registrants must include the location and nature of the properties, processes or operations subject to the physical risk.[98] The SEC notes in the preamble that, to identify the location, registrants should submit ZIP codes or subnational postal zones, rather than a geographic name, to ensure accuracy for investors.[99] For transition risks, registrants must include an assessment of whether the risk relates to regulatory, technological, market, liability, reputational or

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93 The SEC has defined "climate-related opportunities" as "the actual or potential positive impacts of climate-related conditions and events on a registrant's consolidated financial statements, business operations, or value chains, as a whole." *See* Proposed 17 CFR 229.1500(b), 87 Fed. Reg. 21465.

94 Proposed 17 CFR 229.1500(c), 87 Fed. Reg. 21465.

95 Specifically, transition risks are defined as "the actual or potential negative impacts on a registrant's consolidated financial statements, business operations, or value chains attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks, such as 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, 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." *See* Proposed 17 CFR 229.1500(c)(4), 87 Fed. Reg. 21465.

96 Under the Proposed Rule's definition, physical risks include "both acute risks and chronic risks to the registrant's business operations or the operations of those with whom it does business." Acute risks "are event-driven and may relate to shorter term extreme weather events, such as hurricanes, floods, and tornadoes, among other events" while chronic risks "relate to longer term weather patterns and related effects, such as sustained higher temperatures, sea level rise, drought, and increased wildfires, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water." *See* Proposed Rule 17 CFR 229.1500(c)(1)-(3), 87 Fed. Reg. 21465.

97 Proposed 17 CFR 229.1502(a)(1)(i)(A)-(B), 87 Fed. Reg. 21467.

98 Proposed 17 CFR 229.1502 (a)(1)(i), 87 Fed. Reg. 21467.

99 87 Fed. Reg. 21350.

other transition-related factors, as well as how these factors would impact the registrants.[100]

The Proposed Rule also would require disclosure of actual and potential impacts of identified material climate-related risks on the registrant's strategy, business model and outlook.[101] This includes disclosure of these impacts on the business's operations, products or services, suppliers and other parties in the value chain, activities to mitigate or adapt to climate-related risks, research and development expenditures, and all other significant changes or impacts. Each of these disclosures should include a time horizon (*i.e.*, whether the impacts are short, medium or long term).[102] The Proposed Rule requires registrants to disclose how they define "short," "medium" and "long" term in their disclosures, as opposed to requiring an alternate approach of making disclosures in alignment with SEC-provided definitions.[103] In the preamble, the SEC stated that the proposed approach would allow registrants to select time horizons that are appropriate for their circumstances.[104]

Some topics on which the SEC requests comment include: whether registrants should disclose material risks over the short, medium and long timeframes (as proposed) or those timeframes should be set by the SEC;[105] the definition of "climate-related risks," specifically whether the TCFD definition should be used (as proposed);[106] and whether registrants should be required to disclose the negative impacts on both their upstream and downstream value chains (as proposed).[107] For registrants that expect to be affected by physical risks, the SEC requests comment on the identification of those risks (*i.e.*, through ZIP codes and other postal or geographic codes) and the potential material impacts they have.[108]

Corporate Governance Disclosures

The Proposed Rule would require registrants to disclose information about the oversight and governance of climate-related risks by both the registrant's board of directors and management.[109] This requirement is similar to one in the TCFD framework and is based on specific recommendations from the TCFD, although the

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[100] Additionally, the Proposed Rule notes that registrants with significant operations in jurisdictions with GHG emission reduction targets may be exposed to transition risks related to the implementation of the commitment. *See* Proposed 17 CFR 229.1502(a) (ii), 87 Fed. Reg. 21467.

[101] Proposed 17 CFR 229.1502(b), 87 Fed. Reg. 21467.

[102] Proposed 17 CFR 229.1502, 87 Fed. Reg. 21467.

[103] Proposed 17 CFR 229.1502(a)(2), 87 Fed. Reg. 21467.

[104] 87 Fed. Reg. 21351.

[105] 87 Fed. Reg. 21352, ¶ 8.

[106] 87 Fed. Reg. 21352, ¶ 9.

[107] 87 Fed. Reg. 21353, ¶ 17.

[108] 87 Fed. Reg. 21353, ¶¶ 12-14.

[109] Proposed 17 CFR 229.1501, 87 Fed. Reg. 21467.

SEC notes in the preamble that only a small minority of TCFD participants presented governance disclosure aligned with the TCFD's recommendations.[110]

Board Oversight

Disclosures regarding the board's role would include, as applicable:

- The identity of any board members or board committee responsible for the oversight of climate-related risks (which could be an existing committee like audit or risk, or a committee specifically designated to oversee climate-related risks);[111]
- Any relevant board member qualifications and expertise in climate-related risks and detailed descriptions thereof;
- Board oversight processes, including the manner and frequency of board discussions on climate-related risks;
- Whether and how the board or board committee considers climate-related risks as part of its business strategy, risk management, and financial oversight; and
- Whether and how the board sets climate-related targets or goals (including any interim ones) and its oversight of progress against the set targets or goals.[112]

Management Responsibility

Required disclosures regarding management's role would include, as applicable:

- The identity of any management positions or committees responsible for assessing and managing climate-related risks, and detailed descriptions of any relevant expertise of the position holders or committee members;
- Management processes for staying informed about and monitoring climate-related risks (including the extent to which management relies on in-house experts and/or third-party consultants);[113] and
- Board reporting processes, including the manner and frequency of board reporting on climate-related risks.[114]

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[110] 87 Fed. Reg. 21359.

[111] *Id.*

[112] Proposed 17 CFR 229.1501(a)(1), 87 Fed. Reg. 21467.

[113] 87 Fed. Reg. 21360.

[114] Proposed 17 CFR 229.1501(b)(1), 87 Fed. Reg. 21467.

Notably, the SEC chose not to propose mandated disclosure of executive compensation linked to the achievement of climate-related targets and goals, as the SEC believes that existing executive compensation requirements are sufficient.[115]

For both categories of governance disclosures, the Proposed Rule provides that a registrant may also describe the role of (i) the board in overseeing and (ii) management in assessing and managing climate-related opportunities in addition to risks.[116]

The SEC seeks comment generally on whether each of the disclosure elements should be required, including the contemplated voluntary disclosures regarding climate-related opportunities.[117] Of note, the SEC asked about (i) whether the pre-existing rules requiring disclosure of director and officer business experience are sufficient to elicit adequate disclosures about board or management expertise relevant to climate-related risks, as contemplated by the Proposed Rule;[118] (ii) whether requiring disclosures of the board's (1) considerations of climate-related risks as part of its business strategy, risk management and financial oversight and (2) setting of climate-related targets or goals raises competitive harm concerns, and if so, how these might be addressed;[119] and (iii) whether a specific disclosure regarding any connection between executive remuneration and the achievement of climate-related targets and goals should be required, in addition to the preexisting executive compensation disclosure requirement in Item 402 of Regulation S-K.[120]

Registrant Climate Policy-Specific Disclosures

The Proposed Rule would require disclosures on climate-related targets and goals, transition plans, internal carbon pricing and scenario analyses, to the extent that these tools are used by the registrant.

Climate-Related Targets and Goals

If a registrant has set any climate-related targets or goals—including those related to the reduction of GHG emissions, energy or water usage, or revenues from low-carbon products—the Proposed Rule would require it to provide certain information about those goals.[121] Examples of goals covered include those established in line with climate-related treaties, laws, regulations and policies. Specifically, the disclosure would include, as applicable, descriptions of:

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[115] 87 Fed. Reg. 21360.
[116] 17 CFR 229.1501(a)(2), b(2), 87 Fed. Reg. 21467.
[117] 87 Fed. Reg. 21360-21361, ¶¶ 34-39, 41.
[118] 87 Fed. Reg. 21360, ¶ 34.
[119] 87 Fed. Reg. 21360, ¶¶ 36-37.
[120] 17 CFR 229.402(b). *See* 87 Fed. Reg. 21361, ¶ 41. *See also* SEC's discussion of pre-existing comments on the topic in the proposal's preamble. 87 Fed. Reg. 21360.
[121] 17 CFR 229.1506(a)(1), 87 Fed. Reg. 21405.

- The scope of activities and emissions included in the target;
- The unit of measurement, including whether the target is absolute or intensity-based;
- The defined time horizon by which the target is intended to be achieved;
- The defined baseline time period and baseline emissions against which progress will be tracked;
- Any interim targets set by the registrant; and
- How the registrant intends to meet its climate-related targets or goals.[122]

Each fiscal year, the registrant would be required to update its disclosure by describing the action taken during the past year to achieve its targets or goals, and disclose relevant data to indicate any progress made.[123]

If a registrant has used carbon offsets or Renewable Energy Certificates ("RECs") in its plan to achieve climate-related targets or goals, it would be required to disclose (i) the amount of carbon reduction represented by the offsets or the amount of generated renewable energy represented by the RECs, (ii) the source of the offsets or RECs, (iii) a description and location of the underlying projects, (iv) any registries or other authentication of the offsets or RECs and (v) the cost of the offsets or RECs.[124]

The SEC notes in the preamble that such information is intended to help investors better understand the potential impacts on a registrant associated with pursuing its climate-related targets or goals, as well as how well the registrant is managing its identified climate-related risks. Such disclosure can also help mitigate instances of "greenwashing," a major concern of the SEC.[125]

The SEC requests comment on each element of the disclosure requirement and seeks feedback on contemplated additions, including whether the rule should specify any other climate-related targets or goals[126] or whether the rule should require disclosure in any particular format, such as charts.[127] The SEC also asks for comment on whether to adopt an exception to the safe harbors that would cover climate-related forward-looking

122 17 CFR 229.1506(b), 87 Fed Reg. 21406.
123 17 CFR 229.1506(c), 87 Fed Reg. 21406.
124 17 CFR 229.1506(d), 87 Fed Reg. 21406.
125 87 Fed Reg. 21406.
126 87 Fed Reg. 21407, ¶ 168.
127 87 Fed Reg. 21406, ¶ 172.

disclosures made in an initial public offering registration statement, which is currently not proposed.[128]

Transition Plan

The Proposed Rule requires disclosure of a registrant's transition plan (if any) to mitigate or adapt to climate-related risks. The Proposed Rule defines a "transition plan" as a registrant's strategy and implementation plan to reduce climate-related risks.[129] Such a plan may include reducing GHG emissions or addressing the transition risk that arises from changes in customer or business counterparty preferences, technological change or changes in market prices.[130]

If a registrant has adopted a transition plan, the Proposed Rule would require it to:

- Describe the plan, including relevant metrics and targets used to identify and manage physical and transition risks;
- Discuss how it plans to mitigate or adapt to any transition risks identified in the filing, including (a) laws, regulations, or policies that restrict GHG emissions or products with high GHG footprints, or that require the protection of high conservation value land or natural assets, (b) the imposition of a carbon price, and (c) changing demands or preferences of consumers, investors, employees, and business counterparties; and
- Update its disclosure about its transition plan each year by describing the actions taken during the year to achieve the plan's targets or goals.[131]

Registrants who have identified transition plans may also include disclosures of climate-related opportunities.[132]

The SEC requests comment on each element of the disclosure requirement and asks whether there are other items relevant to a registrant's identification and assessment of climate-related risks that the SEC should require it to disclose instead of, or in addition to, the proposed disclosure items.[133] The SEC also seeks comment on whether disclosures should be required detailing interaction between, and corresponding roles of,

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[128] 87 Fed Reg. 21406, ¶ 174.
[129] 17 CFR 229.1500(s), 87 Fed Reg. 21468.
[130] 87 Fed. Reg. 21361.
[131] 17 CFR 229.1503(c), 87 Fed Reg. 21468.
[132] 17 CFR 229.1503(c)(3), 87 Fed Reg. 21468.
[133] 87 Fed. Reg. 21362, ¶¶ 42-44.

the board or any management committee responsible for assessing climate-related risks.[134]

Carbon Price

If a registrant maintains an internal carbon price, the Proposed Rule would require disclosure of:

- The price per metric ton of carbon dioxide equivalent;
- The total price and how it is estimated to change over time;
- The boundaries for measurement of overall carbon dioxide emissions (if different from those used in the GHG emission disclosures);
- The registrant's rationale for selecting the internal carbon price applied; and
- A description of how the registrant uses any internal carbon price disclosed to evaluate and manage climate-related risks.[135]

If a registrant uses more than one internal carbon price, the Proposed Rule would require the registrant to provide disclosures for each and to disclose its reasons for using different prices.[136] The Proposed Rule defines an internal carbon price as "an estimated cost of carbon emissions used internally within an organization."[137] The preamble notes that carbon pricing can be a key data point with which investors evaluate how a registrant is planning for and managing climate-related risks.[138] Significantly, however, the Proposed Rule neither requires registrants to maintain an internal carbon price, nor mandates a particular carbon pricing methodology.

The SEC seeks comment on several alternative approaches to the one proposed, including requiring registrants to (i) describe the methodology used to calculate the internal carbon price[139] and (ii) disclose an internal carbon price and prescribe a methodology for determining it.[140] The SEC also asks whether requiring disclosure of

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134 87 Fed. Reg. 21362-21363, ¶ 45.
135 Proposed 17 CFR 229.1502(e)(1)-(2), 87 Fed. Reg. 21467.
136 Proposed 17 CFR 229.1502(e)(3), 87 Fed. Reg. 21467.
137 Proposed 17 CFR 229.1500(j), 87 Fed. Reg. 21466.
138 87 Fed. Reg. 21355.
139 87 Fed. Reg. 21358, ¶ 27.
140 87 Fed. Reg. 21358, ¶ 29.

the registrant's use of an internal carbon price would raise competitive harm concerns that would act as a disincentive to use internal carbon prices.[141]

Scenario Analysis

The Proposed Rule would require a registrant to describe any analytical tools, such as scenario analysis, that the registrant uses to assess the impact of climate-related risks on its business and consolidated financial statements and to support the resilience of its strategy and business model.[142] If the registrant uses scenario analysis to assess the resilience of its business strategy to climate-related risks, the Proposed Rule would require disclosure of the scenarios considered (*e.g.*, an increase of no greater than 3° C, 2° C, or 1.5° C above pre-industrial levels)—including the parameters, assumptions and analytical choices, and projected principal financial impacts on the registrant's business strategy under each scenario.[143] The Proposed Rule provides that the "disclosure should include both qualitative and quantitative information."[144]

The Proposed Rule would define scenario analysis as a tool used to consider how, under various possible future climate scenarios, climate-related risks may impact a registrant's operations, business strategy and consolidated financial statements over time. In the preamble, the SEC explains that registrants might use scenario analysis to test the resilience of their strategies under future climate scenarios.[145] The SEC also notes that, while the disclosures are intended to help investors evaluate the resilience of the registrant's business strategy, the Proposed Rule does not mandate the use of scenario analysis.[146]

Some topics on which the SEC requested comment include whether there are situations in which some registrants should be required to conduct and provide disclosure of scenario analysis (as proposed); whether all registrants should be required to provide scenario analysis disclosures (as proposed); and, alternatively, whether registrants should be required to follow certain publicly available scenario models and, if so, which models.[147]

Financial Statement Metrics (Reg S-X Amendments)

In addition to the new disclosures that would be required pursuant to Regulation S-K (described in the previous subsections of this Debevoise In Depth), the Proposed Rule amends Regulation S-X to require registrants to disclose information on the impact of

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[141] 87 Fed. Reg. 21358, ¶ 27.
[142] Proposed 17 CFR 229.1502(f), 87 Fed. Reg. 21468.
[143] *Id.*
[144] *Id.*
[145] Proposed 17 CFR 229.1500(o), 87 Fed. Reg. 21466.
[146] 87 Fed. Reg. 21357.
[147] 87 Fed. Reg. 21358, ¶ 30.

climate-related risks (both physical and transition) on the registrants' business and consolidated financial statements ("S-X Disclosures").[148] Specifically, the Proposed Rule would require disclosures about the following categories:

- The financial impact of severe weather events and other natural conditions ("climate-related events") and transition activities on the line items of a registrant's consolidated financial statements and related expenditures ("Financial Impact Metrics");
- Expenditure metrics ("Expenditure Metrics"); and
- Financial estimates and assumptions impacted by such climate-related events and transition activities (including non-material estimates).[149]

A registrant must also include in its S-X Disclosures the impact of any climate-related risks identified in the risk management disclosure under Regulation S-K (*i.e.*, the section pursuant to 17 CFR 229.1502(a)).[150] The S-X Disclosures also must include contextual information regarding how a certain metric was derived, including descriptions of significant inputs and assumptions, as well as any policy decisions adopted by the registrant in the calculation of the metrics.[151]

With respect to the Financial Impact and Expenditure Metric requirements, the SEC opted to propose a 1% quantitative threshold to determine materiality,[152] rather than a broad materiality standard, to determine what information is required to be disclosed (to be discussed in further detail below). The SEC noted that such a quantitative threshold provides a bright-line standard, which would help reduce the risk of underreporting and encourage comparability and consistency over time for a given registrant, and among different registrants.[153]

In addition, the Proposed Rule would allow, but does not mandate, disclosure of the impact of any climate-related opportunities on any of the financial statement metrics disclosed pursuant to this section.[154] Emphasizing the need for consistency, the Proposed Rule would require that, if a registrant were to elect to make such disclosures,

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[148] Proposed 17 CFR 210.14-01 and 14-02, 87 Fed. Reg. 21345.

[149] Proposed 17 CFR 210.14-02(c)-(h), 87 Fed. Reg. 21345-47.

[150] Proposed 17 CFR 210.14-02(i), 87 Fed. Reg. 21347.

[151] Proposed 17 CFR 210.14-02(a), 87 Fed. Reg. 21363. *See* 87 Fed. Reg. 21365-71 for examples of contextual information for financial impact and expenditure disclosures, respectively (*e.g.*, specific events aggregated for the purposes of the calculation, estimation methodology used, etc.).

[152] Proposed 17 CFR 210.14-02(b), 87 Fed. Reg. 21366.

[153] 87 Fed. Reg. 21365-69.

[154] Proposed 17 CFR 210.14-02(j), 87 Fed. Reg. 21369.

the registrant must do so uniformly for the fiscal years presented, as well as include all relevant opportunities identified and for each financial statement line item.

Across the board, the SEC seeks comment on whether the S-X disclosures should be mandatory (as proposed), as opposed to being optional.[155]

Basis of Calculation, Accounting Principles and Historical Periods

The Proposed Rule would require a registrant to (i) use financial information that is consistent with the scope of the rest of its consolidated financial statements in the filing (which means it would have to include financial information from consolidated subsidiaries)[156] and (ii) apply the same accounting principles it is required to use for the rest of its consolidated financial statements.[157] Additionally, the Proposed Rule would require a registrant to disclose climate-related metrics for its most recently completed fiscal year and for the historical fiscal year(s) included in the consolidated financial statements in its filing (meaning that registrants would be able to take advantage of otherwise available accommodations or exemptions).[158] The SEC noted in the preamble that, even though preexisting accounting standards could elicit climate-related disclosures in financial statements, the Proposed Rule would provide additional clarity to registrants on when to provide such disclosures, as well as encourage comparability, by prescribing accounting principles and the basis of calculation.[159]

Some issues on which the SEC seeks comment include whether the SEC should specify the exact types of contextual information to be disclosed (in lieu of the current proposed approach);[160] whether it is clear how the contemplated basis of calculation and Generally Accepted Accounting Principles ("GAAP"), as proposed, are to be applied;[161] and whether additional guidance or changes would be helpful. With respect to potential additional guidance, the SEC also seeks specific comment on whether climate-related metrics should be calculated at a reportable segment level or by geography area;[162] whether historical fiscal year disclosures, as currently contemplated by the Proposed Rule, should be required;[163] and, with respect to historical year disclosures, whether

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[155] 87 Fed. Reg. 21368-69, ¶¶ 59 *et seq.*

[156] Proposed 17 CFR 210.14-01(c)(1), 87 Fed. Reg. 21364.

[157] Proposed 17 CFR 210.14-01(c)(2), 87 Fed. Reg. 21364.

[158] Proposed 17 CFR 210.14-01(d), 87 Fed. Reg. 21364.

[159] 87 Fed. Reg. 21363-65. 17 CFR § 210.4-01(A)(1) states that financial statements that are not prepared in accordance with GAAP will be presumed misleading or inaccurate unless the SEC has otherwise provided. The SEC noted in the Proposed Rule that further clarification in the Proposed Rule on the applicability of GAAP may be helpful to avoid any potential confusion. *Id.*

[160] 87 Fed. Reg. 21364, ¶ 52.

[161] 87 Fed. Reg. 21364-65, ¶¶ 53, 58.

[162] 87 Fed. Reg. 21364, ¶ 54.

[163] 87 Fed. Reg. 21364-65, ¶ 55.

preexisting accommodations regarding information unknown or not reasonably available are sufficient to address potential difficulties faced by certain registrants.[164]

Financial Impact Metrics

The Proposed Rule would require disclosure, at a minimum, on an aggregated line-by-line basis,[165] of all negative and all positive impacts (i) of severe weather events and other natural conditions (*e.g.*, flooding, drought, wildfires,[166] extreme temperatures and sea level rise) (collectively, "Severe Weather Events") and (ii) related to any efforts to reduce GHG emissions or otherwise mitigate exposure to transition risks (collectively, "Transition Activities").[167] Disclosure is not required if the sum of the absolute values of the aggregated impacts on the line item is less than 1% of the total line item for the relevant fiscal year.[168]

With respect to impacts or changes resulting from Severe Weather Events, the Proposed Rule enumerates the following examples: (i) revenues or costs from business or supply chain interruptions (and associated credit risks for banks);[169] (ii) asset availability and impairment charges; (iii) loss contingencies or reserves (*e.g.*, environmental reserves or loan loss allowances) and (iv) total expected insured losses, due to flooding or wildfire patterns.[170] The SEC acknowledged that, under certain circumstances, Severe Weather Events could also result in positive impacts to a registrant, for example, if the registrant is in the business of disaster recovery.[171]

With respect to impacts or changes resulting from Transition Activities, the Proposed Rule enumerates the following examples: (i) revenue or cost due to new emissions pricing or regulations resulting in the loss of a sales contract; (ii) operating, investing or financing cash flow from changes in upstream costs[172] (*e.g.*, from transportation of raw materials); (iii) carrying amount of assets (*e.g.*, due to reduction in useful life or salvage value) and (iv) interest expense driven by climate-related financial instruments (*e.g.*, climate-linked bonds).[173] The SEC noted that it provided such examples to aid in the

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[164] 87 Fed. Reg. 21365, ¶ 56. These accommodations are outlined in SEC Rules 409 and 12b-21. *See* 17 CFR §§ 230.409, 240.12b-21.

[165] *See* 87 Fed. Reg. 21365-69 for guidance on how to conduct such calculations in light of the 1% disclosure threshold.

[166] Note that wildfire is a type of natural event that could significantly impact a registrant's financial statements, but is not specifically mentioned in the 2010 Guidance.

[167] Proposed 17 CFR 210.14-02(c)-(d), 87 Fed. Reg. 21365-66.

[168] Proposed 17 CFR 210.14-02(b)(1), 87 Fed. Reg. 21366.

[169] 87 Fed. Reg. 21365-69.

[170] Proposed 17 CFR 210.14-02(c), 87 Fed. Reg. 21365-66.

[171] 87 Fed. Reg. 21365-69.

[172] The SEC seeks comment on whether "upstream costs" should be defined. 87 Fed. Reg. 21369, ¶ 70.

[173] *See* Proposed 17 CFR 210.14-02(d), 87 Fed. Reg. 213667-68. Such impacts could be driven by various transition-related vectors, including a registrant's public commitments or regulatory, technological, market, liability, reputational or other factors. 87 Fed. Reg. 21365-69.

comparability of the resulting disclosures, in addition to assisting registrants in their preparation of the disclosures.[174]

The SEC seeks comment on, among other issues, whether the climate-specific Financial Impact Metric disclosure requirements as proposed would elicit decision-useful or material information for investors; if different metrics (*e.g.*, change in cost of capital[175]) and disclosure thresholds would help achieve such purpose; and whether additional guidance would be helpful.[176] It also asks for comment on whether, in practice, registrants would be able to quantify and disaggregate the risks as required under the Proposed Rule.[177] In addition, the SEC seeks comment on whether separate quantitative disclosures of each climate-related event should be required in lieu of the aggregated method proposed.[178]

Expenditure Metrics

Similar to financial impact metrics, the Proposed Rule would require disclosure, on a separate basis, of the aggregate amount of (i) expenditure expensed and (ii) capitalized costs incurred during the fiscal years presented to (a) mitigate the risks from Severe Weather Events and (b) reduce GHG emissions or otherwise mitigate exposure to Transition Risks.[179] Disclosure is not required if the amount is less than 1% of total expenditure expensed or total capitalized costs incurred, respectively, for the relevant fiscal year.[180]

With respect to Severe Weather Events, the Proposed Rule cites as examples expenditures to (i) increase resilience of assets or operations; (ii) retire or shorten the estimated useful lives of the impacted assets; or (iii) relocate assets or operations.[181]

With respect to Transition Activities-related expenditures, the Proposed Rule would require a registrant that has disclosed GHG emission reduction or other climate-related commitments to disclose expenditures related to meeting these commitments in the fiscal years presented. The Proposed Rule cites as examples the research and development expenses of new technologies or purchase of assets intended to reduce

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174 87 Fed. Reg. 21365-69.
175 87 Fed. Reg. 21369, ¶ 69.
176 87 Fed. Reg. 21368-69, ¶¶ 59, 61, 63-64, 71.
177 87 Fed. Reg. 21369, ¶ 69.
178 87 Fed. Reg. 21369, ¶ 65.
179 Proposed 17 CFR 210.14-02(e)-(f), 87 Fed. Reg. 21369-71.
180 Proposed 17 CFR 210.14-02(b)(2), 87 Fed. Reg. 21367. *See also* 87 Fed. Reg. 21369-71 for guidance on how to conduct such calculations in light of the 1% disclosure threshold.
181 Proposed 17 CFR 210.14-02(e), 87 Fed. Reg. 21369-70.

GHG emissions, increase energy efficiency, offset emissions or improve resource efficiency.[182]

As with the Financial Impact disclosures, the SEC seeks comment on, among other issues, whether the climate-specific Expenditure Metric disclosure requirements, as proposed, would elicit decision-useful or material information for investors; if different metrics and disclosure thresholds would help achieve such purpose; and whether additional guidance would be helpful.[183] Furthermore, the SEC seeks comment on whether, alternatively, partially incurred expenditures should be required to be disclosed and, if so, how.[184]

Financial Estimates and Assumptions

The Proposed Rule would require a registrant to disclose whether the estimates and assumptions used to produce the consolidated financial statements were impacted by risks and uncertainties associated with, or known impacts from, (i) Severe Weather Events and (ii) a potential transition to a lower-carbon economy or any climate-related targets disclosed by the registrant. If so, the Proposed Rule would require the registrant to provide a qualitative description of how the estimates and assumptions were impacted by such factor.[185] The SEC noted that such disclosures would allow investors to evaluate the reasonableness of the registrant's estimates and assumptions used to prepare its financial statements.[186]

The SEC seeks comment on, among other issues, whether the climate-specific estimates and assumptions regarding qualitative disclosure as proposed is appropriate,[187] or if it should instead require (i) *quantitative* disclosures;[188] (ii) only the disclosure of *significant* or *material* estimates and assumptions;[189] or (iii) be limited to a subset of climate-related events and transition activities.[190] The SEC also requested comment on an alternative approach of using terminology and thresholds consistent with the critical accounting estimate disclosure requirement in Item 303 of Regulation S-K.[191] Additionally, the SEC seeks comment on whether it should add an additional disclosure requirement of the

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[182] Proposed 17 CFR 210.14-02(f), 87 Fed. Reg. 21369.
[183] 87 Fed. Reg. 21371, ¶¶ 72-74, 76-77, 80.
[184] 87 Fed. Reg. 21371, ¶ 79.
[185] Proposed 17 CFR 210.14-02(g)-(h), 87 Fed. Reg. 21371.
[186] 87 Fed. Reg. 21371-73.
[187] 87 Fed. Reg. 21372, ¶ 81.
[188] 87 Fed. Reg. 21372, ¶ 84.
[189] 87 Fed. Reg. 21372, ¶ 82.
[190] 87 Fed. Reg. 21372, ¶ 83.
[191] 17 CFR 229.303(b)(3). *See* 87 Fed. Reg. 21372, ¶ 84.

material changes in estimates, assumptions or methodology used among fiscal years, and if so, on what basis.[192]

Inclusion of Climate-Related Metrics in the Financial Statements

The proposed financial statement metrics would be required to be disclosed in the registrant's financial statements, and, as such, would need to be (i) included in the scope of any required audit of the financial statements in the relevant disclosure filing; (ii) subject to audit by an independent registered public accounting firm, in which Public Company Accounting Oversight Board ("PCAOB") auditing standards would apply, and (iii) within the scope of the registrant's Internal Control over Financial Reporting ("ICFR").[193] The proposed approach, according to the SEC, would enhance the reliability of the proposed financial statement metrics.[194]

Here the SEC seeks comment on, among other issues, the method and logistics of disclosure of the climate-related metrics. Specifically, it asks for comment on whether the disclosures should be required in a note (as proposed), or alternatively (i) in a schedule, and if so, whether it should be subject to audit and ICFR requirements; (ii) in a new standalone "consolidated climate statement"; or (iii) outside of the financial statements, in a separately captioned item.[195] The SEC also seeks comment on whether additional metrics, such as the GHG emission metrics, should be included in the financial statements and subject to audit and ICFR requirements.[196] Finally, the SEC seeks comment on whether additional guidance would be helpful on (i) applying the PCAOB auditing standards to the proposed financial statement metrics (including whether any revisions to the standards are necessary) and (ii) ensuring the scope of the audit prepared in accordance with IFRS as issued by the IASB includes the climate-related financial statement metrics (including whether any amendments to Form 20-F to explicitly expand the scope would be necessary).[197]

Policy Debates and Potential Legal Challenges

The Proposed Rule was passed by a 3-1 vote, with Chair Gary Gensler and Commissioners Allison Herren Lee and Caroline Crenshaw voting in favor, and Commissioner Hester Peirce, the sole Republican Commissioner, voting against. With the exception of the Scope 3 disclosure and the attestation requirements, the Proposed Rule's major provisions appear to be consistent with expectations based on the SEC's

[192] 87 Fed. Reg. 21373, ¶ 86.
[193] 87 Fed. Reg. 21373.
[194] *Id.*
[195] 87 Fed. Reg. 21373, ¶¶ 87-89.
[196] 87 Fed. Reg. 21373, ¶ 90.
[197] 87 Fed. Reg. 21373, ¶¶ 91-92.

recent activities in the area.[198] Notably, the Proposed Rule does not implement industry-specific metrics or include a requirement of scenario analysis, though some of the SEC's questions suggest that these could be considered in a subsequent proposed or final rule.

Key supporters of the Proposed Rule include Chair Gensler[199] and the Democratic commissioners, Senate Banking Committee Chairman Sherrod Brown[200] and House Financial Services Committee Chair Maxine Waters, as well as other legislators.[201] Proponents of the Proposed Rule have focused on increasing investor interest in climate issues and the growing materiality of the disclosures as climate affects investment values. Supporters also emphasize that the increased transparency resulting from the Proposed Rule, if adopted, would facilitate more environmentally-friendly investments.

The Proposed Rule also has significant detractors, including former SEC Chairman Jay Clayton, House Financial Services Ranking Member Patrick McHenry (R-NC)[202] and Commissioner Peirce, each of whom released public statements against the Proposed Rule shortly after its release.[203] Some opponents of the Proposed Rule have asserted that, if implemented, it would negatively impact businesses and distort U.S. energy policy.[204] Additionally, opponents have argued that existing rules sufficiently

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198 For instance, the Proposed Rule tracks Chairman Gary Gensler's speech in July 2021 discussing the SEC's considerations for the Proposed Rule, such as (1) whether such disclosures should be included in the Form 10-K; (2) what types of qualitative and quantitative metrics to mandate, including how registrants might disclose their Scope 1 and 2 emissions (from an issuer's own operations) and whether they should also disclose Scope 3 emissions (relating to that of others in an issuer's value chain); (3) whether there should be metrics for specific industries; (4) whether a registrant should be required to provide scenario analyses based on its physical and transition risks; and (5) whether a registrant that claims to be "net zero" should be required to specify how it is meeting that commitment and its precise scope. Of these five considerations, the Proposed Rule goes somewhat further than expected with regard to Scope 3 emissions disclosures. *See* Securities & Exchange Commission, Gary Gensler, "Prepared Remarks Before the Principles for Responsible Investment 'Climate and Global Financial Markets' Webinar," Speech (Jul. 28, 2021), *available at* https://www.sec.gov/news/speech/gensler-pri-2021-07-28?utm_medium=email&utm_source=govdelivery.

199 Securities & Exchange Commission, Gary Gensler, "Statement on Proposed Mandatory Climate Risk Disclosures" (Mar. 21, 2022), *available at* https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321.

200 U.S. Senate Committee on Banking, Housing, and Urban Affairs, Majority, "Brown Applauds SEC's New Climate Disclosure Rule" (Mar. 22, 2022), *available at* https://www.banking.senate.gov/newsroom/majority/brown-sec-climate-disclosure-rule.

201 U.S. House Committee on Financial Services, Majority, "Waters, Casten and Vargas Applaud SEC's Approval of Proposed Rule on Climate" (Mar. 21, 2022), *available at* https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409213.

202 Jay Clayton and Patrick McHenry, The Wall Street Journal, "The SEC's Climate-Change Overreach" (Mar. 20, 2022), *available at* https://www.wsj.com/articles/the-secs-climate-change-overreach-global-warming-risks-lawmakers-invertors-market-data-11647801469.

203 Securities & Exchange Commission, Hester M. Peirce, "We are Not the Securities and Environment Commission - At Least Not Yet" (Mar. 21, 2022), *available at* https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

204 Clayton and McHenry, *supra* note 202.

address climate risks and that, if implemented, the Proposed Rule would shift the focus of disclosure from issues that affect the value of the investment (arguably the primary consideration of many investors) to social issues that have less significance for investors' decision-making.

The Proposed Rule is expected to face legal challenges, as, unlike other financial regulators, the SEC has a statutory mandate to consider whether a new rule will promote efficiency, competition and capital formation.[205] The U.S. Circuit Court for the District of Columbia has in the past interpreted this mandate to require a high-quality cost-benefit analysis in connection with SEC rulemakings.[206] As such, some SEC rules are challenged on the grounds that the SEC did not fulfill its cost-benefit analysis obligations. The Proposed Rule, if implemented, would likely impose significant costs on registrants, including with respect to developing adequate compliance programs; collecting emissions data, especially for Scope 3 emissions; and hiring third-party consultants and attestation providers. Potential litigants could argue that the SEC failed to sufficiently consider these costs during the rulemaking process. Additionally, Commissioner Peirce, in a statement accompanying her vote against the Proposed Rule, articulated the view that the Proposed Rule amounts to compelled speech, which is unconstitutional under the First Amendment. Even absent a legal challenge, the Proposed Rule is likely to elicit hundreds, or even thousands, of comment letters.

Next Steps

In addition to commenting on the Proposed Rule, registrants should consider taking a number of actions that could better position themselves for the new disclosure rules and that would help mitigate potential enforcement risks.

First, registrants should review their current climate disclosures for accuracy and consistency, as well as ensure that any public and external statements regarding their climate-related commitments accord with their disclosures. As detailed in the "General Observations" section of this Debevoise In Depth, information disclosed under the Proposed Rule is subject to potential U.S. securities law liability if it includes any false or misleading statements, subject to applicable defenses, and, in some cases, could be held to a strict liability standard. Climate-related information disclosed to the public through other avenues, such as website information or public statements, could also result in

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[205] *Bus. Roundtable v. SEC*, 647 F.3d 1148 (D.C. Cir. 2011) ("Indeed, the Commission has a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation,'…").

[206] *Id.* at 49 (D.C. Cir. 2011) ("Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule").

liability. We therefore recommend that registrants' disclosures be clear, precise and tailored to their specific circumstances.

Second, registrants should adopt and continue to maintain a risk-based approach to climate governance. Registrants should consider continuously evaluating company- and business-line specific climate-related risks (including physical, transition, legal and reputational risks), as well as develop robust, forward-thinking policies and due diligence processes that sufficiently account for such risks.

Finally, registrants should consider allocating resources in a way that ensures that they are able to remain apprised of key regulatory developments, including likely revisions to the Proposed Rule. Registrants' management and compliance personnel should be knowledgeable about the registrants' specific ESG and climate-related practices. Registrants should also consider leveraging the expertise of accounting firms, outside counsel and other third parties to provide appropriate training to their work forces, as effective climate governance and regulatory compliance require a multi-disciplinary, coordinated effort.

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