Hogan Lovells

SEC Update

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SEC proposes expansive climate-related disclosure rules

On March 21, in one of its most significant rulemakings in recent years, the Securities and Exchange Commission proposed rules that would require public companies to provide investors with extensive, consistent, and comparable climate-related information in their Exchange Act and Securities Act filings.

Under the new rules, companies would be obligated to present sweeping and detailed climate-related disclosures in their annual reports and registration statements. The new disclosures would encompass climate-related risks and their actual or likely material impacts on the company's business, strategy, and outlook; governance of climate-related risks and relevant risk management processes; greenhouse gas (GHG) emissions; specified climate-related financial metrics appearing in a note to the audited financial statements; and information about climate-related targets and goals, including any transition plans.

In developing its approach to standardized climate-related disclosure, the SEC drew on a number of disclosure frameworks used by many companies to prepare sustainability reports, including, most notably, the framework published by the Task Force on Climate-Related Financial Disclosures (TCFD) and the accounting and reporting standards for GHG emissions under the Greenhouse Gas Protocol.

The new rules would apply to all operating companies filing reports and registration statements with the SEC, including foreign private issuers as well as domestic registrants. Compliance with the rules would be subject to phase-in periods based on the company's SEC filer status and fiscal year-end.

The SEC's voluminous release describing the proposed rules (Release No. 33-11042) can be viewed here and the related fact sheet published by the SEC here. The comment period on the proposal will remain open until May 20, 2022.

Background

While far-reaching, the rule proposal does not represent the SEC's first effort to focus registrants on climate-related issues. Climate change has been a topic of particular interest at the agency for over a decade.

For example, in 2010 the SEC published an interpretive release describing how its existing rules may require disclosure of climate change impacts on a company's business or financial condition. The 2010 guidance highlighted, as potential disclosure topics, direct and indirect impacts of climate-related legislation or regulations, business trends, and the physical impacts of climate change.

Increasing investor interest in and overall awareness of climate-related impacts on businesses and the economy prompted Acting SEC Chair Allison Herren Lee in March 2021 to request public input on a range of issues, including how the SEC could best regulate climate change disclosure and whether it should require the disclosure of certain climate-related metrics. Beginning in late 2021, the SEC's Division of Corporation Finance underscored its increasing focus on climate-related disclosures by issuing comment letters to filers promoting their compliance with the disclosure topics addressed in the SEC's 2010 guidance.

Notwithstanding this backdrop, the SEC concluded that its existing principles-based disclosure rules are not eliciting consistent, comparable, and reliable information investors need to assess accurately the potential impacts of climate-related risks on a company's business and to gauge how a company's board and management are evaluating and addressing those impacts. The SEC aims to address these purported deficiencies through its proposal, including by adding to its rules an array of prescriptive requirements that are intended to provide a uniform framework for climate-related disclosure. In titling its proposing release "The Enhancement and Standardization of Climate-Related Disclosures for Investors," the SEC signals that it believes the marketplace should receive climate-related disclosures that are consistent across public companies.

Summary of proposed rules

The SEC proposes to add a new Subpart 1500 of Regulation S-K and a new Article 14 of Regulation S-X that would set forth line-item disclosure requirements designed to provide a comprehensive framework for climate-related disclosure.

Under this framework, companies would be required to address, among other matters, the impact of severe weather events and other material *physical risks* of climate change on their operations and the operations of their major customers or suppliers, including harm to plants, facilities, and other physical assets and disruption of manufacturing, service, and distribution operations. Companies also would be directed to discuss material *transition risks* related to climate change, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, technological changes, and other risks associated with the process of adjusting to a lower-carbon economy.

Governance, strategy, and risk management disclosure

The SEC proposes to require companies to disclose detailed information about their governance of climate-related risks, any climate-related impacts on their strategy, business model, and outlook, and their management of climate-related risks. The proposal would expressly permit companies to include disclosure of any identified climate-related opportunities, as well as the actual or potential positive impacts of climate-related conditions and events on their consolidated financial statements, business operations, or value chains as a whole.

Governance. A new Item 1501 of Regulation S-K would add disclosure requirements regarding oversight and governance of climate-related risks by a company's board and management. In its description of the board's oversight of such risks, the company would be obligated to:

- identify the board members or board committee responsible for the oversight of climate-related risks;
- specify board members with expertise, and the nature of that expertise, in climate-related risks;
- address how often the board or applicable committee discusses climate-related risks and the process for the discussion; and
- disclose whether climate-related risks are a part of the board's business strategy, risk management, and financial oversight.

The company also would be required to describe management's role in assessing and managing climate-related risks. This disclosure would include a description of the positions or committees responsible for assessing and managing those risks and the expertise of the individuals holding such positions, how the individuals or committees monitor the risks, and how frequently they report to the board regarding the risks.

Strategy. Under a new Item 1502 of Regulation S-K, a company would be obligated to address climate-related risks that affect the company's strategy, business model, and outlook. Item 1502 would direct the company to discuss climate-related risks that are "reasonably likely" to have a material impact on the company, including on its business or financial statements. The company would be required to disclose whether the climate-related risks affecting it are physical or transition risks and the nature of those risks. The mandatory disclosure topics would include specific actual and potential impacts of climate-related risks — including impacts on business operations, products, or services — as well as activities undertaken to mitigate climate risks, such as new technologies and investment in research and development.

The disclosures would present current and forward-looking information intended to enhance investor understanding of whether the implications of climate-related risks have been integrated into the company's business model or strategy and whether and how those risks have affected or are reasonably likely to affect the company's consolidated financial statements. If the company uses an internal carbon price (representing an estimated cost of carbon emissions) when assessing climate-related risks, it would be required to disclose information about the price and the methodology used to establish it. The company also would be required to describe any analytical tool, such as scenario analysis, used in the risk assessment.

Risk management. Proposed new Item 1503 of Regulation S-K would require a company to disclose its process for identifying, assessing, and managing climate-related risks, including how it determines the materiality of those risks. In this disclosure, the company would describe how it decides whether to mitigate, accept, or adapt to a particular risk and how it prioritizes climate-related risks. The company also would address how these processes are integrated into the company's overall risk management system, and describe any transition plan the company has adopted as a part of its climate-related risk management strategy. If the company discloses a transition plan, it would be required to describe the relevant metrics and targets used to identify and manage climate-related risks. The plan description would have to be updated for each fiscal year to disclose the actions taken during the year to achieve the plan's targets or goals.

Disclosure and attestation of GHG emissions metrics and attestation

Proposed new Item 1504 of Regulation S-K would create new disclosure requirements related to Scope 1, Scope 2, and Scope 3 emissions. Consistent with industry practice, the SEC defines:

- *Scope 1 emissions* as direct GHG emissions from operations that are owned or controlled by a company;
- *Scope 2 emissions* as indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by the company; and
- *Scope 3 emissions* as all indirect GHG emissions not otherwise included in the company's Scope 2 emissions that occur in the upstream and downstream activities of the company's value chain.

Disclosure of Scope 1, Scope 2, and Scope 3 emissions. A company would be required to disclose total Scope 1 emissions and total Scope 2 emissions separately after calculating them from all sources that are included in the company's organizational and operational boundaries. The company would disclose its Scope 1 and Scope 2 emissions by disaggregated constituent GHGs and in the aggregate, and in absolute and intensity terms.

The company would be required to disclose separately its total Scope 3 emissions if those emissions are material or if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions. The company would disclose its Scope 3 emissions by disaggregated constituent GHGs and in the aggregate, and in absolute and intensity terms. The proposed rules would exempt smaller reporting companies from the Scope 3 emissions disclosure requirement.

The new rules would require a company to disclose its GHG emissions data from its most recently completed fiscal year and for the historical fiscal years included in the company's financial statements in the applicable filing, to the extent such historical GHG emissions data are reasonably available. For the most recent fiscal year, the rules would allow the company to use a reasonable estimate of its GHG emissions for its fourth fiscal quarter, if actual reported data are not reasonably available, together with actual, determined GHG emissions data for the first three fiscal quarters. If the company avails itself of this accommodation, it would be required to disclose promptly in a subsequent filing any material difference between the estimate used and the actual, determined GHG emissions data for the fourth fiscal quarter, when the fourth quarter information becomes available.

The SEC decided not to propose a GHG emissions calculation methodology, thereby affording companies flexibility in selecting a suitable methodology. The company would be required to describe its methodology along with the significant inputs and significant assumptions used to calculate its GHG emissions metrics.

Materiality of Scope 3 emissions. The SEC confirms that companies should use existing materiality principles under the federal securities laws to determine whether their Scope 3 emissions are material and therefore disclosable under the new rules. Under those principles, Scope 3 emissions would be deemed material if there is a substantial likelihood that a reasonable stockholder would consider information about those emissions important to an investment decision or if disclosure of the information would be viewed by a reasonable investor as having significantly altered the "total mix" of information made available. The SEC indicates that, when assessing the materiality of Scope 3 emissions, companies should consider whether those emissions make up a relatively significant portion of their overall GHG emissions. The SEC also suggests, but the proposed rules would not require, that companies consider explaining the basis for any determination that their Scope 3 emissions (or categories of Scope 3 emissions) are not material.

Liability safe harbor for disclosure of Scope 3 emissions. Acknowledging the potential relative difficulty entailed in data collection and measurement of Scope 3 emissions compared to Scope 1 and Scope 2 emissions, the SEC proposes to include in the new rules a safe harbor from liability for certain disclosures relating to Scope 3 emissions. Under the safe harbor, disclosure of Scope 3 emissions by or on behalf of the company would be deemed not to constitute a fraudulent statement unless it is shown that the relevant statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith. Notably, this limited safe harbor for Scope 3 emissions disclosure and the safe harbor generally available for other climate-related disclosures that constitute forward-looking information differ in application, and companies should seek to ensure that their statements are protected to the extent available under either safe harbor.

Attestation of Scope 1 and Scope 2 emissions disclosures. Proposed new Item 1505 of Regulation S-K would require accelerated filers and large accelerated filers to include in the relevant filing an attestation report from a GHG emissions attestation provider covering the disclosure of their Scope 1 and Scope 2 emissions. The proposed rules set forth minimum standards for the experience, expertise, and independence for such a provider, but do not require that the provider be an independent registered public accounting firm.

The proposed rules include a phase-in period for the attestation requirement. No attestation report would be required for the first year for which GHG emissions disclosure is required. Attestation would be furnished on a "limited assurance" basis for the first two years for which attestation is required, and on a "reasonable assurance" basis thereafter.

Disclosure of climate-related targets and goals

If a company has set climate-related targets or goals, proposed new Item 1506 of Regulation S-K would require the company to disclose:

- the scope of activities and emissions included in the target;
- the unit of measurement, including whether the target is absolute or intensity-based;
- the time horizon for achievement and whether the time horizon is consistent with one or more goals established by a climate-related treaty, law, regulation, policy, or organization;
- the baseline time period and baseline emissions against which progress will be measured, with a consistent base year set for multiple targets;
- any interim targets set by the company;
- how the company intends to meet its climate-related targets or goals; and
- any use of carbon offsets or renewable energy credits (RECs), including the amount of carbon reduction represented by the offsets or amount of generated renewable energy from the RECs, description and location of the underlying projects, and information about the source, cost, and authentication of the offsets or RECs.

The disclosure would be updated for each fiscal year by describing the actions taken during the year to achieve the applicable targets or goals.

The SEC clarifies that to the extent information regarding a company's climate-related targets or goals would constitute forward-looking statements, the statements would fall within the scope of the Private Securities Litigation Reform Act liability safe harbor, assuming all other statutory requirements for the safe harbor are satisfied.

Disclosure of climate-related financial statement metrics

The proposal would add a new Article 14 of Regulation S-X to require that companies include a new note to their audited financial statements describing the disaggregated impact of climate-related events and transition activities on financial statement line items, as well as the financial estimates and assumptions used in the financial statements.

Disclosure of the disaggregated climate-related effects would be required for the company's most recently completed fiscal year and for the historical years included in the audited financial statements (generally three years for metrics corresponding to income and cash flow statement items and two years for metrics corresponding to balance sheet items). Because this information would be included in the audited financial statements, the information would be within the ambit of the company's internal control over financial reporting.

The disaggregated climate-related effects reportable under Article 14 would consist of three categories of information:

- financial impact metrics;
- expenditure metrics; and
- financial estimates and assumptions.

Financial impact metrics. Companies would be required to disclose the quantitative impact of climate-related conditions and events on each financial statement line item during the fiscal years presented, unless the aggregated impact of climate change on the line item is less than 1% of the total line item for the applicable fiscal year.

The conditions and events subject to disclosure would include the impact of severe weather events and other natural conditions — such as flooding, drought, wildfires, extreme temperatures, and sea level rise — on any relevant line item. The company also would be required to disclose the impact on line items of any climate-related risks identified and described in the disclosures made pursuant to Item 1502(a) of Regulation S-K, including both physical and transition risks, and to address any efforts to reduce GHG emissions or mitigate transition risks.

As discussed in the proposing release, physical risk impacts could include changes to revenues or costs from business operation or supply chain disruptions, impairment charges and changes to the carrying amount of assets, changes to loss contingencies or reserves, or changes to total expected insured losses due to flooding or wildfire patterns. Transition risk impacts could include the following impacts, among others:

- changes to revenue or costs due to new emissions pricing or regulations resulting in the loss of a sales contract;
- changes to operating, investing, or financing cash flows from changes in upstream costs, such as transportation of raw materials, changes to the carrying amount of assets due to a reduction of the asset's useful life or a change in the asset's salvage value as a result of exposure to transition activities; and
- changes to interest expense driven by financing instruments such as climate-linked bonds issued where the interest rate increases if certain climate-related targets are not met.

Expenditure metrics. The new rules would obligate companies to disclose the aggregate amount of expenditures and capitalized costs incurred to mitigate the risks from severe weather events and other natural conditions, other climate-related risks, and transition activities during the fiscal years covered by the audited financial statements. Those disclosures would be subject to the same 1% line item threshold applicable to the presentation of financial impact metrics.

As discussed in the proposing release, expenditures and capitalized costs incurred for climate-related physical risks could include amounts spent to increase the resilience of assets or operations, retire or shorten the estimated useful life of assets, or relocate assets or operations. Costs related to transition risks could include amounts incurred related to research and development of new technologies, or the purchase of assets, infrastructure or products, intended to reduce GHG emissions, increase energy efficiency, or offset emissions.

Financial estimates and assumptions. Companies would be required to disclose whether the estimates and assumptions used to produce the audited financial statements were affected by exposures to risks and uncertainties associated with, or by known impacts from, climate-related events, or by transition activities and risks. Those effects would be disclosed via separate qualitative descriptions of how the climate-related events or transition activities have affected the development of the estimates and assumptions.

Disclosure forms

The new Regulation S-K and Regulation S-X items containing climate-related disclosure requirements would apply to Exchange Act annual reports on Form 10-K and Form 20-F (for foreign private issuers) and to Securities Act registration statements, including those filed for initial public offerings. Because the proposed rules would require disclosure of any material change to previous climate-related disclosure, the proposed rules also would require disclosure in quarterly reports on Form 10-Q (and possibly on Form 6-K for foreign private issuers).

Phased-in compliance

The SEC has proposed phase-in periods for compliance tied to the company's filer status and fiscal year-end, as well as an additional phase-in period for Scope 3 emissions disclosure and attestation reports. The table below from the SEC's fact sheet summarizes the application of these requirements based on an assumed December 2022 effective date for a company with a December 31 fiscal year-end:

Registrant type	Disclosure compliance date			
	All proposed disclosures, including GHG emissions metrics: Scope 1, Scope 2, and associated intensity metric			Scope 3 and associated intensity metric
	Disclosures	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)	Fiscal year 2024 (filed in 2025)
Accelerated filer	Fiscal year 2024 (filed in 2025)	Fiscal year 2025 (filed in 2026)	Fiscal year 2027 (filed in 2028)	Fiscal year 2025 (filed in 2026)
Non-accelerated filer	Fiscal year 2024 (filed in 2025)	N/A	N/A	Fiscal year 2025 (filed in 2026)
Smaller reporting company	Fiscal year 2025 (filed in 2026)	N/A	N/A	Exempted

A filer with a different fiscal year-end that would result in commencement of its fiscal year 2023 before the effective date of the new rules would not be required to provide the new disclosures for the first time until the following year. The SEC indicates, as an example, that a large accelerated filer with a March 31 fiscal year-end would first be required to comply with the rules in its fiscal 2024 Form 10-K, filed in June 2024.

Contrary perspectives

The rule proposal, which was issued over the dissenting vote of one of the four Commissioners, will remain open for public comment until May 20, 2022. The supporting statements issued concurrently with publication of the proposal by Commissioners Gensler, Lee, and Crenshaw indicate strong support for the adoption of final rules.

In her dissenting statement, Commissioner Peirce presents arguments that are likely to form the basis of legal challenges to the proposed rules. A group of Republican members of the Senate and House of Representatives has already submitted comments opposing the rules, which largely echo various of the arguments made by Commissioner Peirce, including that the proposal exceeds the SEC's statutory rulemaking authority.

In addition, Commissioner Peirce expresses the view that the prescriptive framework for the proposed rules is unnecessary because existing disclosure requirements already require companies to disclose material risks related to climate change, and that the new rules would sweep in climate-related information without requiring any materiality nexus. Although the TCFD has released investor survey data suggesting that many investors view much of this information as useful for investment decisions, Commissioner Peirce asserts that long-term financial value is, at best, only tenuously connected to third-party GHG emissions, and that the proposed rules inappropriately focus on "non-investor-orientated information." The proposed rules are likely to attract similar objections from commenters opposing the proposal.

Looking ahead

In light of the expansive nature of the proposed rules, companies would be well served to begin developing their compliance strategy at an early date. In their planning, companies should:

- ***Evaluate the timetable for climate-related disclosures***. Companies should consider how the existing disclosure process would be affected if the rules are adopted in the form proposed. For example, if a company currently publishes a sustainability report several months after filing its Form 10-K, the timetable for publication of the sustainability report may have to be accelerated to allow more time for data collection and any internal reviews or third-party verifications to be completed for inclusion of the relevant information in the Form 10-K.
- ***Evaluate climate-related goals***. Companies should conduct an inventory of existing and

planned climate-related goals, weighing the potential ongoing disclosure implications and compliance burdens under the proposed rules (such as those triggered by the disclosure of a transition plan or an emissions target) against stakeholder expectations for action on climate-related matters.

- ***Devise a climate-related disclosure plan.*** Companies should evaluate their preparedness with respect to any additional disclosures required by the proposed rules. This assessment should include an analysis of:
  - human capital resources, including with respect to the additional data collection and reporting burdens, as well as climate-related expertise both within management and on the board;
  - data collection and aggregation processes, including the procedures or systems used to compile data;
  - the data, if any, that must be obtained from third parties, taking into consideration the materiality determinations required under the proposed rules;
  - whether Scope 3 emissions are material to the company, and if they are determined not to be material, how this determination will be explained to investors and the SEC staff;
  - requirements for third-party attestation and auditing, including selection of a third-party firm to perform the attestation or audit, and consideration of the additional costs involved;
  - climate risk assessment processes, including, if warranted, engagement of advisors to conduct physical climate risk assessments of the company's assets, and the integration of climate-related risks into existing risk management and compliance frameworks; and
  - the existence or required implementation of climate-related disclosure controls and procedures to avoid potentially deceptive "greenwashing" claims regarding the environmental benefits of company activities and generally to ensure the accuracy of climate-related disclosures in SEC filings.
- ***Evaluate current governance and oversight procedures.*** Companies should review the board processes for oversight of climate-related activities and consider the benefits of codifying those processes in governance documents, if they have not already done so.

  Companies also should consider whether any new processes, policies, or technologies will be needed to fulfill climate governance and oversight obligations.

Finally, companies should stay informed regarding developments with respect to potential legal challenges to the proposed rules. Such challenges may delay the issuance of the final rules or, even if the challenges are not ultimately successful, result in significant changes to the rules in the form proposed.

If you're interested in learning more about the proposed rules, please join us for a Hogan Lovells webinar on *Clearing the air around the SEC's proposed climate-related disclosure rules*, which will be held on Wednesday, April 27 from 12:30 p.m. – 1:30 p.m. (Eastern Time). Further details can be found here.

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