SEC Proposes Climate-Related Disclosure Requirements

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On March 21, the Securities and Exchange Commission (SEC) proposed rule changes that would require registrants to include certain climate-related disclosure in their registration statements and periodic reports. The proposed rule would require companies to disclose information regarding climate-related risks that are reasonably likely to have a material impact on their businesses, results of operations, or financial conditions. Additionally, companies would be required to disclose their greenhouse gas emissions (GHG Emissions) and to include certain climate-related metrics in their financial statements. SEC Chair Gary Gensler stated that this proposal would "provide investors with consistent, comparable, and decision-useful information for making their investment decisions, and it would provide consistent and clear reporting obligations for issuers." The proposed rules, described in brief below, are based in part on guidance from the Task Force on Climate-related Financial Disclosures (TCFD) and the Greenhouse Gas Protocol (GHG Protocol).

Corporate Governance and Climate-Related Risks

The proposed rules would require companies to disclose how their boards oversee and manage climate-related risks and targets, and to identify any director with expertise in climate-related risks. A company that lacks a director with this expertise would not be able to make such identification and thus may receive pressure from shareholders or otherwise to appoint a climate expert to its board.

Companies would be required to disclose physical and transitional climate-related risks that are reasonably likely to have a material impact on their businesses, results of operations, or financial conditions over the short, medium, and long term. Companies providing such disclosures must include both current and forward-looking statements that facilitate an understanding of whether the implications of the identified climate-related risks have been integrated into the registrant's business model or strategy, including how resources are being used to mitigate climate-related risks. However, the SEC did not define these timeframes, and the proposed rule would leave it up to the registrant to

define and disclose its definition of short-, medium-, and long-term time horizons. Additionally, if companies have set climate-related targets or goals, they would be required to disclose the targets and goals, including the baseline year and their progress toward such goals. Companies that have adopted a climate-related transition plan would be required to include a description of how they plan to mitigate any identified climate-related physical or transition risks and provide an annual update describing actions taken in accordance with their transition plan.

Emissions Disclosure

Companies would also be required to disclose their GHG emissions for the fiscal years covered by the financial statements included in the applicable periodic report or registration statement. This disclosure must include contextual information, such as a description of how the metric was derived, a description of significant inputs and assumptions used, and policy decisions made by the registrant to calculate the specified metric. Under the proposed rule, every company would be required to disclose Scope 1 (direct emissions) and Scope 2 (emissions from consumption of purchased energy). Notably, Scope 3 (emissions from supply chain that are out of a company's control) emissions disclosure would only be required if material to a company, or where a company has included Scope 3 emissions as part of a public GHG emissions reduction target or goal, even if immaterial. Scope 3 emissions would be required to be disclosed if there is a substantial likelihood that a reasonable investor would consider Scope 3 emissions important when making an investment or voting decision. Smaller reporting companies would only be required to disclose their Scope 1 and 2 emissions. Under the proposed rule, Scope 1 and Scope 2 emissions must be disclosed on both an aggregated and disaggregated basis to the extent such data is available; however, Scope 3 disclosure can be disclosed as an estimated range so long as companies using a range disclose their reasons for doing so and their underlying assumptions. Additionally, if companies use carbon offsets or renewable energy credits, they would be required to disclose the costs and risks associated with purchasing or selling such offsets and credits.

Attestation Report

Accelerated and large accelerated filers would be required to include an attestation report from an independent attestation service provider for their Scope 1 and Scope 2 emissions beginning in the second year of compliance with the proposed rules. Providers of these attestation reports must be independent from the company and have expertise in GHG emissions, but need not be a registered public accounting firm. The attestation report must provide "limited assurance" (equivalent to the level of assurance provided over a registrant's interim financial statements included in a Form 10-Q) in the second and third fiscal years of compliance with the proposed rules and "reasonable assurance" (equivalent to the level of assurance provided in an audit of a registrant's annual financial statements included in a Form 10-K) from the fourth fiscal year of compliance with the proposed rules

and beyond. Because of the nature of Scope 3 emissions, so long as companies have a reasonable basis and the Scope 3 emissions are disclosed in good faith, Scope 3 emissions disclosures will fall under a safe harbor and will not require attestation.

Financial Statement Disclosure Requirements

Companies would also be required to make climate-related disclosures in their notes to financial statements, including disclosure of the financial impact of climate-related events (such as flooding, drought, fires, etc.) and transition activities, including transition risks identified by such companies. Companies would also be required to disclose expenditures for climate-related risk mitigation and to disclose financial estimates and assumptions impacted by such climate-related events and transition activities. The disclosure requirements for financial metrics will be subject to a 1 percent materiality threshold of the related line item. These financial metrics would be subject to audit by a company's independent registered public accounting firm and would fall under a company's internal control over financial reporting.

Compliance Dates by Registrant Type

As proposed, the rule would apply to both domestic and foreign private issuers other than registered investment companies (but including business development companies), asset-backed issuers and MJDS filers. However, the proposed rules include a phase-in period for all companies, with the compliance date dependent upon the registrant's filer status. The table below is an example of the compliance dates for each registrant type if the proposed rules are adopted in 2022:

	Compliance Date	
Registrant Type	**All disclosures except Scope 3**	**Scope 3**
Large accelerated filer	Fiscal year 2023 (filed in 2024)	Fiscal year 2024 (filed in 2025)

	Compliance Date	
Accelerated filer and non-accelerated filer	Fiscal year 2024 (filed in 2025)	Fiscal year 2025 (filed in 2026)
Smaller reporting company	Fiscal year 2025 (filed in 2026)	Exempted

Filer Type	Scope 1 and 2 GHG 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)

Seven Short-term Action Items

If adopted, the final rules are likely to differ from the proposed rules (and may be challenged in court), but will nonetheless drive stakeholder demands for climate-related disclosures. Accordingly, it would be prudent for companies to start taking certain actions now, including to:

- Familiarize themselves with TCFD and GHG Protocol frameworks.
- Consider changes in corporate charters, policies and internal disclosure controls and procedures around the disclosure of GHG emissions data.
- Prepare for the potential disclosure requirements by gathering climate-related data, informing their boards about the proposed rules and building the climate-related expertise of their senior executives and board members. For more information on preparing for potential disclosure requirements, please watch this webinar on ESG Shareholder Proposals hosted by Farzad Damania and read "ESG Shareholder Proposals: Practical Guidance from Proxy, Legal, IR and Consulting Perspectives" by Farzad Damania and Ryan Lilley.
- Consider the extent to which climate-related disclosures are appropriate under existing requirements. The SEC recently released climate-related comment letters for 25 different companies relating to existing rules. The comment letters provide insight as to existing disclosure requirements and obligations. For more information on existing climate-related

disclosure obligations, see "SEC's Climate-Related Comment Letters – Avoiding Potential Pitfalls" by Farzad Damania and Ryan Lilley.

- Take a hard look at compliance costs for climate-related disclosures. If adopted, the proposed rules will likely have a significant impact on compliance costs with the imposition of new disclosure requirements. While 90 percent of S&P 500 companies publish sustainability reports with some of the disclosure that the proposed rules would require, less than 20 percent include any reference to ESG factors in their SEC filings. These proposed disclosure requirements are likely to have a significant impact on smaller companies that are not prepared to make such disclosures, despite being exempted from reporting Scope 3 emissions.
- Consider the impact of announcing climate-related targets and goals, especially with regard to Scope 3 emissions targets.
- Consider commenting on the proposed rule. The comment period will remain open through at least May 20, 2022.

To read the full newsletter, please click here.

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