

SEC Adopts Climate Disclosure Rules for Public Companies

On March 6, 2024, the Securities and Exchange Commission (the “SEC”) voted 3–2 to adopt final rules (the “Final Rules”) requiring climate-related disclosures for public companies. The Final Rules have been long-awaited and are not as detailed or as prescriptive as the rules that were proposed in March 2022 (the “Proposed Rules”).¹ For example, the Final Rules add materiality qualifiers to required disclosure in many cases, do not require disclosure of Scope 3 greenhouse gas (“GHG”) emissions and provide for extended compliance periods for certain disclosures and registrants. Nonetheless, the new requirements still represent a significant expansion of the amount of climate-related disclosure that will be required by public companies and will require a significant amount of time and effort for companies and their advisors to be ready to comply. Not surprisingly, parties have already started litigation or announced pending litigation to challenge the Final Rules.

Set out below is a high-level summary of the key requirements of the Final Rules. We will provide a more comprehensive summary of the Final Rules—with additional observations about the scope of disclosure obligations and recommendations for next steps—in a forthcoming memorandum.

GENERAL SCOPE AND APPLICATION

The Final Rules introduce a new subpart 1500 of Regulation S-K and Article 14 of Regulation S-X that will apply to annual reports and registration statements and to both domestic and foreign private issuers (other than Canadian issuers who use the Multijurisdictional Disclosure System). While the Final Rules, like the Proposed Rules, are generally aligned with the disclosure framework laid out in the Recommendations of the Task Force on Climate-Related Financial Disclosures (the “TCFD Recommendations”), the Final Rules do not generally contemplate a regime of substituted compliance by permitting issuers to comply with the

TCFD Recommendations or other international disclosure standards, such as those of the International Sustainability Standards Board. For this reason, registrants may be subject to both the requirements of the Final Rules as well as related but distinct regimes, including the Corporate Sustainability Reporting Directive in the EU and California’s Climate Corporate Data Accountability Act and Climate-Related Financial Risk Act.²

REQUIRED DISCLOSURES

The requirements of the Final Rules can generally be grouped into five categories, described briefly below.

01

Governance, Strategy and Risk Management Disclosures.

GOVERNANCE

The Final Rules require a description of climate-related governance at both the Board of Directors and management levels. For the Board, this includes identifying any committees tasked with overseeing climate-related risks, the processes by which the Board is informed of such risks and any Board oversight of climate-related targets and goals. The Final Rules contemplate similar disclosure of management's role in assessing and managing material climate-related risks (including as to climate-related expertise), with disclosures generally aligning with the analogous disclosures from the recently finalized cybersecurity rules. Notably, unlike in the Proposed Rules, Board-level expertise disclosures are not required.

STRATEGY

The Final Rules require disclosure of the extent to which climate-related risks have materially impacted or are reasonably likely to materially impact the registrant, including its strategy, results of operations or financial condition, including both in the short term (*i.e.*, in the next 12 months) and in the longer term (*i.e.*, beyond the next 12 months). Risks will need to be identified as physical or transition risks, as defined in the Final Rules. Certain disclosures will also be required for any transition plan (if one has been adopted by the registrant to manage a material transition risk), as well as the company's use of (1) scenario analysis (including a brief description of the related parameters, assumptions and analytical choices and the expected material impacts) and (2) an internal carbon price, if material to how it evaluates and manages climate-related risks.

RISK MANAGEMENT

The Final Rules require a description of the registrant's process for identifying, assessing and managing material climate-related risks, including how it identifies whether it has incurred or is reasonably likely to incur a material physical or transition risk and how it decides whether to mitigate, accept or adapt to such risk. Registrants will also need to describe their integration of these risks into their overall risk management system.

02

Targets and Goals.

Registrants will be required to describe any climate-related target or goal set by the registrant that has materially affected or is reasonably likely to materially affect the registrant's business, results of operations or financial condition, as well as provide annual updates on the progress made towards such target or goal.

Disclosure is also required as to the registrant's use of carbon offsets or renewable energy credits / certificates ("RECs"), if they are a material component of the registrant's plan to reach a climate-related target or goal.

03

Scope 1 and 2 GHG Emissions Metrics.

Unlike the Proposed Rules, no Scope 3 GHG emissions disclosures are required under the Final Rules.

Large accelerated filers and accelerated filers (but not smaller reporting companies or emerging growth companies) are required to provide their Scope 1 and Scope 2 GHG emissions if material, with the SEC making clear it intends registrants to apply traditional definitions of materiality used elsewhere in the federal securities laws. Registrants will also need to describe the assumptions and methodology used in preparing their emissions disclosures.

Emissions disclosures may be incorporated by reference from the Form 10-Q for the second quarter of the fiscal year following the year to which the disclosures relate, meaning for companies with a December 31 fiscal year end, emissions will need to be disclosed by August of the following year.

Scope 1 and 2 GHG emissions disclosures will be subject to attestation requirements, with large accelerated filers required to provide a limited assurance level attestation for their emissions disclosures filed in 2030 (2032 for accelerated filers). For large accelerated filers, attestation will step up to the reasonable assurance level for emissions disclosures filed in 2034.

The Final Rules include a number of additional requirements as to the independence and expertise of the assurance provider.

04

Safe Harbor.

The Final Rules provide a safe harbor under the Private Securities Litigation Reform Act for climate-related disclosures pertaining to transition plans, scenario analyses, the use of internal carbon prices and targets and goals made pursuant to the new disclosure requirements, except for historical facts (which would include, for example, annual updates regarding progress made toward targets or goals or under transition plans).

05

Regulation S-X Financial Statement Disclosures.

The new Article 14 of Regulation S-X requires companies to disclose the aggregate amount of expenditures, losses, capitalized costs and charges, excluding recoveries, incurred as a result of severe weather events and other “natural conditions”, such as hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures and sea level rise, subject to certain minimum thresholds.

- For expenditures and losses, disclosure is required if the aggregate amount equals or exceeds one percent of the absolute value of income or loss before income tax expense or benefit for the relevant fiscal year, but not if the aggregate amount is less than \$100,000 for the relevant fiscal year.

- Similarly, disclosure of capitalized costs and charges is required if the aggregate amount of the absolute value of such capitalized costs and charges equals or exceeds one percent of the absolute value of stockholders’ equity or deficit at the end of the relevant fiscal year, but not if the aggregate amount of the absolute value of such costs and charges is less than \$500,000 for the relevant fiscal year.

If carbon offsets or RECs have been used as a material component of a registrant’s plans to achieve disclosed climate-related targets or goals, the registrant must disclose (i) the aggregate amount of carbon offsets and RECs expensed, (ii) the aggregate amount of capitalized carbon offsets and RECs recognized and (iii) the aggregate amount of losses incurred on capitalized carbon offsets and RECs during the fiscal year.

Companies must also disclose whether estimates and assumptions used to prepare their consolidated financial statements were materially impacted by (i) exposures to risks and uncertainties associated with, or known impacts from, severe weather events and other natural conditions (as such term is described above) or (ii) any climate-related targets or transition plans they have disclosed.

COMPLIANCE PERIOD

The Final Rules include phased requirements for disclosure, generally summarized in the following chart.

| Filer Type ⁽¹⁾ | Disclosure and Financial Statement Effects | | GHG Emissions / Assurance | | | Electronic Tagging |
|---|--|--|---|-------------------------------|----------------------------------|---|
| | All Reg. S-K and S-X disclosures other than as otherwise noted | Item 1502(d)(2), Item 1502(e)(2) and Item 1504(c)(2) | Item 1505 (Scope 1 and 2 GHG emissions) | Item 1506 – limited assurance | Item 1506 – reasonable assurance | Item 1508 – Inline XBRL tagging for subpart 1500 ⁽³⁾ |
| LAFs | FYB ⁽²⁾ 2025 | FYB 2026 | FYB 2026 | FYB 2029 | FYB 2033 | FYB 2026 |
| AFs (other than SRCs and EGCs) | FYB 2026 | FYB 2027 | FYB 2028 | FYB 2031 | N/A | FYB 2026 |
| SRCs, EGCs and NAFs | FYB 2027 | FYB 2028 | N/A | N/A | N/A | FYB 2027 |
| <p>(1) “AFs” refers to accelerated filers; “EGCs” refers to emerging growth companies; “NAFs” refers to non-accelerated filers; “LAFs” refers to large accelerated filers; and “SRCs” refers to smaller reporting companies.</p> <p>(2) “FYB” refers to any fiscal year beginning in the calendar year listed.</p> <p>(3) Financial statement disclosures under Article 14 will be required to be tagged in accordance with existing rules pertaining to the tagging of financial statements.</p> | | | | | | |

1 See our memorandum summarizing the Proposed Rules, available at: <https://www.cravath.com/news/sec-proposes-landmark-rules-to-enhance-and-standardize-climate-related-disclosures.html>.

2 See our memorandum summarizing the California climate bills, available at: <https://www.cravath.com/news/california-legislature-passes-and-governor-newsom-signs-landmark-california-climate-bills.html>.

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