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# Amid storm of controversy, SEC adopts final climate disclosure rules

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Changes from the proposal include elimination of Scope 3 disclosures, scaled back attestation requirements, additional materiality qualifiers and narrower financial statement triggers. Given the lack of explicit congressional authorization for this new sweeping disclosure regime, its political sensitivity, complexity, cost and the substantial challenges already underway in federal courts, we anticipate rapid developments and possibly confusing stops and starts to unfold over the coming weeks.

After nearly two years and over 24,000 comment letters, the SEC has adopted final rules for public companies that mandate significant new disclosures relating to climate-related risks, Scope 1 and Scope 2 greenhouse gas (GHG) emissions and climate-related financial metrics. The commentary in the 886-page adopting release and lively debate among SEC commissioners during the open meeting highlight the challenges faced by the SEC, which adopted the final rules in a 3-2 vote along party lines.

The majority defended the final rules as reflecting the "same materiality standard that appears in numerous disclosure rules governing registration statements and public company annual reports." In his dissent, Commissioner Uyeda questioned the SEC's authority, citing the major questions doctrine, which provides that agency rules of major significance must be based on clear delegation of congressional authority. Commissioner Peirce argued the rules would "spam investors with details about the Commission's pet topic of the day" and cited data from the cost-benefit analysis in the adopting release to conclude that the rules will "increase the typical external costs of being a public company by around 21%." On the other end of the spectrum, Commissioner Crenshaw voiced concerns over the omission of Scope 3 GHG emissions disclosures and the addition of materiality qualifiers, calling the final rules the "bare minimum."

The final rules highlight a pronounced divide in perspectives, and a number of lawsuits have already begun, with more expected. Our key takeaways are set forth immediately below followed by a deeper dive into the final rules.

## Our key takeaways

In our view, although the SEC modified its original proposal to reduce the burden of certain proposed rules, the final rules, which apply to essentially all reporting companies, including foreign private issuers, remain complex, will be costly to implement and will expose reporting companies to increased litigation risk.

- **The adoption of materiality-based disclosure requirements throughout most of the rules are a welcome change, but questions remain.**
  - Most disclosure requirements under the final rules are now qualified based on the long-standing definition of materiality. We expect these changes will provide some comfort to companies who are well-versed in making materiality determinations in the normal course of their SEC reporting, but such determinations may be complicated by several factors.

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- Many companies will not be making climate-related disclosure decisions in a vacuum. Climate reporting is already widespread, particularly among larger companies. For example, a study cited in the adopting release reported that, among Russell 1000 companies, almost 90% disclose some degree of climate information, with 60% disclosing information regarding emissions. These reports are often being made under third-party frameworks such as those developed by the Sustainability Accounting Standards Board (SASB), Task Force on Climate-Related Financial Disclosures (TCFD) and Global Reporting Initiative (GRI).

  Will larger companies that already disclose climate-related risks, Scope 1 and/or 2 GHG emissions and targets and goals outside of their SEC filings continue their current practice? Although the adopting release makes repeated reference to traditional standards of materiality, it suggests in certain places that the SEC has tipped the scales of materiality determinations toward disclosure. For example, the SEC suggests it may assert that the mere fact that a company must comply with other emissions reporting regimes could mean such emissions metrics are material under the final rules due to the threat of additional regulatory burdens.

- Companies that have made public statements regarding the materiality or immateriality of climate-related risks and emissions must carefully consider those statements in assessing their approach to the final rules. For instance, beginning in 2021, many companies received comment letters from the SEC questioning their lack of climate-related disclosures. For those companies that issued responses to the SEC concluding that climate-related risks and GHG emissions were not material, taking a different position on materiality under the final rules may draw scrutiny from the SEC and private litigants.

  In making these determinations, context matters. If, for example, TCFD disclosures characterize climate issues as a material risk, the company may be subject to SEC scrutiny if it decides not to disclose these matters under the final rules. Under certain disclosure regimes, such as the European Union's (EU) Corporate Sustainability Reporting Directive (CSRD) or the GRI, materiality can refer to a company's material impacts on society, which differs from materiality as a matter of U.S. securities law. A company's statements regarding this type of materiality will generally not be relevant to a company's materiality assessment for U.S. securities laws.

- Not for nothing did Commissioner Peirce say in her dissent that the Commission "decorated the final rule with materiality ribbons, [but] embraces materiality in name only."

▪ Regardless of the final materiality determination, companies will need to assess whether their disclosure controls and procedures need to be revamped in light of the final rules to ensure that information required to be considered for disclosure is recorded, processed and reported internally (and externally if need be) on a timely basis.

▪ Finally, materiality qualifiers did not find their way into all aspects of the final rules. Most notably, the financial statement disclosure requirements eschew a materiality-based approach, instead employing immaterial thresholds of expenses and capitalized costs and charges of 1% of pre-tax income or loss and shareholders' equity or deficit, respectively. Whatever the purported benefits of such financial statement disclosure may be, the costs associated with such disclosures are sure to be substantial.

– **The final rules will impose significant costs on companies.**

▪ The final rules will impose significant new costs on companies as they update their disclosure and internal controls. To comply, most companies will need to build in new, otherwise unnecessary disclosure and internal controls and procedures and create board, management and risk processes and procedures. Professional expenses associated with required disclosures will be significant due to the third-party attestation report requirement, as well as the inclusion of climate-related disclosure in financial statements, which are subject to audit review, internal controls over financial reporting and, if applicable, external audit by a company's independent registered public accounting firm. The net effect of all of these new policies, procedures, third-party reviews and controls will be significant costs to public companies.

  Although the SEC concludes that annual compliance costs over the first ten years could range from $197,000 to over $739,000, the upper bound of this range may be much higher for some companies depending on the scope and complexity of their reporting.

– **The final rules will also heighten costs for companies considering going public and foreign private issuers, who remain subject to the full weight of the final rules.**

▪ Even though the final rules offer a reprieve for smaller filers, including emerging growth companies (EGCs), from the onerous GHG emissions reporting requirements, IPO filers will nonetheless be subject to the vast majority of the requirements in the final rules beginning with fiscal year 2027. As Commissioner Peirce notes in her dissent,

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these additional costs unfortunately come at a time when fewer companies are choosing to go public.

- Although the final rules provide certain important exemptions (for example, for private companies party to a business combination transaction registered on Form S-4 or Form F-4, and certain exempt Canadian issuers), foreign private issuers are subject to all of the requirements in the final rules, with no ability to substitute home country practice as other SEC rules allow. The lack of exemptions puts many foreign private issuers in a challenging position, as they must navigate overlapping reporting requirements in their home countries which, in many cases, are different than the final rules, and may discourage new listings by foreign private issuers and could encourage delisting.

– **Requirement to disclose information related to targets, goals and transition risks, among others, could require Scope 3 GHG emissions disclosure.**

- Although the final rules dropped the requirement to disclose Scope 3 GHG emissions, there may be circumstances where other provisions of the final rules call for their disclosure. For example, many companies have adopted "net zero" targets pursuant to the Science Based Targets initiative, which requires such targets to include Scope 3 GHG emissions. Some degree of Scope 3 GHG emissions disclosure (as well as Scope 1 and/or 2) may be required either to quantify progress in meeting a target or goal or because eliminating or offsetting these emissions involves material costs. Some companies' disclosure controls and procedures will, as a result, be tested much earlier than suggested by the phase-in dates for GHG emissions reporting. Similarly, if a company's Scope 3 GHG emissions create transition risk because its supply chain partners are in jurisdictions where they must comply with GHG emissions regulations that could increase the costs of doing business or reduce the availability of key supplies, a company may conclude that it must make disclosure of its Scope 3 GHG emissions. Whether Scope 3 GHG emissions disclosures would be required notwithstanding the SEC's disavowal of such a requirement is not expressly addressed by the final rules and will ultimately depend on the specific facts and circumstances.

– **Legal challenges have already begun, and more will follow.**

- Court challenges from two separate groups of states have been brought in the Eleventh and Fifth Circuits, and a challenge by two energy companies has been filed in the Fifth Circuit. Others are expected. Challenges are expected to include constitutional arguments under the First Amendment, quasi-constitutional arguments under the major questions doctrine and arguments under the Administrative Procedure Act. It is unclear whether a stay will be granted during the pendency of any of these suits.
- Arguments under the First Amendment would challenge whether required climate disclosure is "compelled" speech that should be subject to heightened scrutiny under the First Amendment. The U.S. Supreme Court stated in its decision in *National Institute of Family and Life Advocates v. Becerra* that it typically applies deferential review to regulations of commercial speech that require the disclosure of "factual, noncontroversial information" unless they are "unjustified or unduly burdensome." Litigants may argue that the disclosure requirements are "controversial" or "unduly burdensome," or an opinion rather than a fact, and therefore should be subject to heightened scrutiny. This area of the law may be impacted by litigation currently pending before the U.S. Supreme Court involving some of these questions (*NetChoice, LLC v. Paxton*).
- Arguments pursuant to the major questions doctrine would challenge the SEC's authority to promulgate a rule mandating climate disclosure. As noted in our basic primer on the major questions doctrine, if an agency seeks to impose a rule on a topic of "great political significance" or which would impose "billions of dollars" of costs on private persons or entities, then the agency's authority from Congress to do so must be clear. *West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).
- Arguments under the Administrative Procedure Act would attack the agency's cost-benefit analysis, as has been done in a string of cases at the D.C. Circuit, including *SEC v. Business Roundtable*. Challengers may also argue that the final rules are not a "logical outgrowth" of the proposed rules and, as a result, there was insufficient notice to the public regarding the content of the final rules. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007).

# Overview and insights

## Enhanced disclosure obligations outside the financial statements

– **GHG emissions**

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- **Scope 3 GHG emissions.** In a significant departure from the proposed rules, the final rules removed the requirement for all companies to disclose Scope 3 GHG emissions, in apparent recognition of the inherent difficulty in collecting and reporting emissions data derived from third parties in a company's value chain.
- **Material Scope 1 and/or 2 GHG emissions.**
  - In the adopting release, the SEC highlighted its view that information about a company's Scope 1 and 2 GHG emissions is "a central measure and indicator of exposure to transition risk" and therefore is decision-useful to the extent such emissions are material.
  - Large accelerated filers and accelerated filers, other than EGCs and smaller reporting companies (SRCs), are required to disclose Scope 1 and/or 2 GHG emissions **to the extent material,** with a compliance phase-in described below.
  - Materiality in this context is to be understood in light of the Federal securities laws and U.S. Supreme Court precedent. Scope 1 and/or 2 GHG emissions therefore must only be disclosed to the extent "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision. As we note in our key takeaways above, however, such an analysis may be complicated by existing climate-related disclosures, among other things.
  - Companies must also consider their exposure to transition risk as a result of their Scope 1 and/or 2 GHG emissions. Overlapping requirements relating to GHG emissions under foreign or state law that directly or indirectly impact a company may create additional regulatory burdens, such as penalties or increased costs, that could impact materiality assessments.

– **Attestation reports**

- **Scaled back attestation requirements.** Large accelerated filers and accelerated filers (other than EGCs and SRCs) that have material Scope 1 and/or 2 GHG emissions are required to include an attestation report covering such disclosure. The form and content of attestation reports need only follow standards that are publicly available or widely used. The final rule also extended the compliance dates as follows:
  - **Large accelerated filers –** attestation reports must be at a "limited assurance" level beginning with fiscal year 2029, and at a "reasonable assurance" level beginning with fiscal year 2033.
  - **Accelerated filers –** attestation reports are only required at a "limited assurance" level, beginning with fiscal year 2031. There is no requirement for attestation reports at a "reasonable assurance" level.
- **Requirements for providers.** Providers of attestation reports must be experts in GHG emissions by virtue of having significant experience in GHG emissions reporting and must be independent from the company under standards equivalent to those applicable to auditors under Rule 2-01 of Regulation S-X.

  This approach subjects GHG emissions attestation providers to the same level of scrutiny as accountants, instead of more flexible standards provided to other service providers such as reserve engineers for natural resources. In response to commenters who voiced concerns that there will not be a sufficiently large pool of attestation providers who meet these heightened independence standards, the final rules point to the extended phase-in periods and assume that service providers will adapt their business practices to ensure they are independent by the time the attestation phase-in periods elapse.
- **Disclosures regarding changes in attestation providers.** Changes in a company's attestation provider trigger requirements to disclose certain facts relating to the change, including any disagreements between the attestation provider and the company regarding GHG emissions disclosure or other issues. These requirements are modeled on SEC rules regarding changes in a company's auditor.
- **Bifurcated approach for Securities Act liability**. GHG emissions attestation providers that provide "limited assurance" reports are exempt from the strict liability provisions under Section 11 of the Securities Act and the related consent requirements, but providers whose reports are at the "reasonable assurance" level receive no such reprieve. This enhanced liability is sure to increase costs and complexity for large accelerated filers and their attestation providers.
- **Voluntary assurance.** Companies that are not required to include an attestation report but voluntarily include GHG disclosures that must receive a third-party assurance are required to include information about the assurance provider, its services and the nature of its relationship with the company.

– **Climate-related risks**

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- All companies must disclose climate-related risks that have had or are reasonably likely to have a material impact on the company. Compared to the proposed rules, the final rules modify the definitions of climate-related risks, reduce granular disclosure requirements and provide greater flexibility in how climate-risk disclosures are made, allowing each company to determine materiality based on its unique circumstances.

| Key definitions | |
|---|---|
| **Climate-related risks** | The actual or potential negative impacts of climate-related conditions and events on a company's business, results of operation or financial condition. Climate-related risks include physical (acute and chronic) and transition risks. |
| **Physical risks** | Include both acute and chronic risks to the company's business operations. |
| **Acute risks** | Event-driven and may relate to shorter-term severe weather events (e.g., hurricanes, floods, tornados and wildfires) |
| **Chronic risks** | Relate to longer-term weather patterns (e.g., sustained higher temperatures, sea level rise and drought), as well as related effects (e.g., decreased arability of farmland, habitability of land and availability of fresh water). |
| **Transition risks** | Actual or potential negative impacts on a company's business, results of operation or financial condition attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks (e.g., changes in law or policy, stranded assets, reduced market demand for carbon-intensive products, legal liability and reputational impacts). |

- A company that has identified a material climate-related risk must categorize the risk as a physical (acute or chronic) or transition risk and provide context necessary for an understanding of the nature of the risk and the extent of the company's exposure to such risk. This includes describing whether such risks are reasonably likely to manifest in the short term (within the next 12 months) or long term (beyond the next 12 months).
  - Although the adopting release suggests this short term versus long term distinction should be familiar based on existing Management's Discussion and Analysis (MD&A) disclosure rules that require companies to separately consider their short-term and long-term liquidity and capital resources, it remains to be seen whether companies will be able to predict whether a climate-related impact may occur within 12 months with a similar degree of certainty as to whether their cashflows will be sufficient for the next 12 months.
- A company also must disclose:
  - The actual and potential material impacts of any identified climate-related risks on the company's strategy, business model and outlook, and whether and how such impacts are considered as part of its strategy, financial planning and capital allocation.
  - If, as part of its strategy, a company has undertaken activities to mitigate or adapt to a material climate-related risk, a quantitative and qualitative description of material expenditures incurred and material impacts on financial estimates and assumptions that directly result from such mitigation or adaptation activities.
  - Specified disclosures regarding a company's activities, if material, related to its evaluation, management or assessment of climate-related risks, such as the use of transition plans, scenario analysis or internal carbon prices.

– **Risk management**

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- The final rules require disclosure of any processes the company follows for identifying, assessing and managing material climate-related risks and, if the company is managing those risks, whether and how any such processes are integrated into the company's overall risk management system or processes and management's role in such processes.
- Even if a company determines that climate-related risks or Scope 1 and/or 2 GHG emissions are not material, the process by which that determination is made must flow through a company's disclosure controls and procedures. In addition, a company must provide disclosure regarding the process by which it determines whether climate-related risks are material. Such disclosure will enhance the risk of second guessing of materiality determinations by the SEC and/or private litigants.

– **Governance**

- **Board oversight of climate-related risks.** The final rules reflect a disclosure-based approach to board oversight over climate-related risks, similar to other recent SEC rulemaking, including the SEC's cybersecurity rules. Companies must identify any applicable board committee or subcommittee responsible for oversight of climate-related risks and provide a description of the processes to inform the board.
- **Board oversight of climate targets or goals.** For companies that have climate targets, goals or transition plans, the final rule requires disclosure of board oversight of and assessment of progress on those targets, goals or transition plans.

– **Targets and goals**

- If a company has climate-related targets and goals, such as a goal to reduce GHG emissions or become "net-zero," then it must disclose those targets that have materially affected or are reasonably likely to materially affect its business, results of operations, or financial condition.
- If material targets and goals are identified, a qualitative discussion is required regarding how the company intends to meet its climate-related goals. Additionally, companies must disclose **any progress** toward meeting the target or goal and how such progress has been achieved. As a result, companies that determine that they have material targets and goals relating to Scope 1, 2 and/or 3 GHG emissions will be required to report on progress made on such goals, which may require quantitative disclosure of the amount of emissions reductions. This disclosure will be required well ahead of the compliance phase-in dates for general Scope 1 and/or 2 GHG emissions reporting – meaning such companies' disclosure controls and procedures will be tested earlier than suggested by the phase-in dates for GHG emissions reporting.
- Companies must also disclose material expenditures and material impacts on financial estimates, along with assumptions made as a direct result of the target or goal or actions taken to make progress toward meeting such target or goal.
- Narrowed from the proposed rule, companies will have to disclose carbon offsets or renewable energy credits (RECs) only if they have been used as a material component of a company's plan to achieve climate-related targets or goals. If required, the disclosure must address a variety of items, including: the amount of carbon avoidance, reduction or removal represented by the offsets or the amount of generated renewable energy represented by the RECs; the nature and source of the offsets or RECs; a description and location of the underlying projects; any registries or other authentication of the offsets or RECs; and the cost of the offsets or RECs.

## Financial statement footnote disclosures

The final rules do not require line item by line item disclosure of financial impacts from severe weather events and other natural conditions and transition activities, but add significant new footnote disclosure requirements untethered to traditional concepts of materiality.

– **Capitalized costs and expenditures**

- Capitalized costs, expenditures expensed, charges, and losses incurred as a result of severe weather events and other natural conditions must be disclosed in a note to the financial statements, subject to applicable one percent and de minimis disclosure thresholds.

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- **Quantitative disclosure thresholds apply.** Footnote disclosure is required if, as a result of severe weather events and other natural conditions, the aggregate amount of resulting:
  - expenditures expensed as incurred and losses (net of recoveries) equals or exceeds 1% of the absolute value of pre-tax income or loss (with a $100,000 de minimis exception) or
  - capitalized costs and charges (net of recoveries) equals or exceeds 1% of the absolute value of stockholders' equity or deficit at the end of the relevant fiscal year (with a $500,000 de minimis exception).

    By adopting a quantitative threshold based on pre-tax income, the final rules are sure to result in immaterial disclosures being required for companies and sectors with significant operating income and/or EBITDA but relatively low pre-tax income or loss due to high levels of non-operating expenses. Companies will not know the final dollar amount for the 1% thresholds until the end of the relevant period, which will require monitoring transactions that will ultimately prove to be below the threshold.

- **Location in the financial statements.** The final rules also require companies to disclose where on the balance sheet and income statement these capitalized costs, expenditures expensed, charges and losses are presented.

- **Attribution of costs to severe weather events and other natural conditions.** The final rules require that companies attribute a cost, expenditure, charge, loss or recovery to a severe weather event or other natural condition and disclose the entire amount of the expenditure or recovery when the event or condition is a **significant contributing factor** in incurring the cost, expenditure, charge, loss or recovery.

  These new financial statement disclosure requirements do **not** require a determination that the severe weather event or other natural condition is climate-related. They do, however, require determination of what constitutes a **severe weather event** or other **natural condition**. According to the adopting release, a company will have flexibility based on the particular risks faced by the company, taking into consideration its geographic location, historical experience and the financial impact of the event on the company. For example, a company with operations in Florida could consider the relative frequency and severity of hurricanes in determining whether a particular hurricane is a "severe weather" event. These judgments must flow through internal controls over financial reporting, providing an additional layer of complexity, and it will be of interest to see how market practice develops in this respect.

- **Carbon offsets and RECs.** Capitalized costs, expenditures expensed and losses related to carbon offsets and RECs, if used as a material component of a company's plans to achieve its disclosed climate-related targets or goals, must be disclosed in a note to the financial statements, including the beginning and ending balances of the capitalized carbon offsets and RECs for the fiscal year. Unlike the disclosures related to severe weather events and other natural conditions, companies do not get the benefit of a disclosure threshold for capitalized costs, expenditures and losses related to carbon offsets and RECs. Companies must separately identify where the capitalized costs, expenditures expensed and losses are presented in the income statement and the balance sheet.

- **Recoveries.** Companies must separately disclose, as part of the required contextual information, any recoveries resulting from severe weather events and other natural conditions to reflect the net effect that severe weather events and other natural conditions have on a company's financial statements.

- **Estimates and assumptions.** If the estimates and assumptions a company uses to produce the financial statements were materially impacted by exposure to risks and uncertainties associated with, or known impacts from, severe weather events and other natural conditions or any disclosed climate-related targets or transition plans, companies must provide a qualitative description of how the development of such estimates and assumptions was impacted in a note to the financial statements.

- **Contextual information.** As one of the few areas where the SEC expanded upon its proposed rules, contextual information must be provided, describing how each specified financial statement effect was derived, including a description of the significant inputs and assumptions used, significant judgments made, other information that is important to understand the financial statement effect and, if applicable, policy decisions made by the company to calculate the specified disclosures.

- **GAAP/IFRS adherence and audits.** The final rules require companies to adhere to the same set of accounting principles required in preparation of the rest of the consolidated financial statements, and the financial statement disclosures required by the rules must be included in the scope of the audit when a company files financial statements.

  Financial statement footnote disclosures apply to foreign private issuers, irrespective of whether the company reports under GAAP, IFRS or local-GAAP.

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- **No exemption for smaller companies.** Financial statement disclosures apply to EGCs and SRCs.
- **No disclosure of climate-related opportunities.** In response to staunch criticism from commenters, the SEC decided not to adopt any requirements related to disclosure of climate-related opportunities in the financial statement footnote disclosures.

## Compliance phase-in

The final rule provides for longer compliance phase-in periods compared to the proposed rule, beginning with the fiscal years below. The compliance dates in the table below apply to both U.S. domestic companies and foreign private issuers.

| Compliance date* | | | | | |
|---|---|---|---|---|---|
| **Company type** | **Disclosure and financial statement effects** | | **GHG emissions/assurance** | | |
| | All required disclosure, other than as noted | Disclosure of certain material expenses and impacts on financial estimates** | Disclosure of material Scope 1 and/or 2 GHG emissions | Attestation of Scope 1 and 2 GHG emissions disclosure – limited assurance | Attestation of Scope 1 and 2 GHG emissions disclosure – reasonable assurance |
| **Large accelerated filers** | FYB 2025 | FYB 2026 | FYB 2026 | FYB 2029 | FYB 2033 |
| **Accelerated filers** | FYB 2026 | FYB 2027 | FYB 2028 | FYB 2031 | N/A |
| **SRCs, EGCs and non-accelerated filers** | FYB 2027 | FYB 2028 | N/A | N/A | N/A |

* As used in this chart, "FYB" refers to any fiscal year beginning in the calendar year listed. Compliance dates reflect beginning of fiscal year in which rules take effect. For large accelerated filers, for example, the earliest disclosure requirements do not apply until the FY 2025 10-K filed in 2026.

**Quantitative and qualitative disclosure regarding material expenditures incurred and material impacts on financial estimates and assumptions (i) that, in management's assessment, directly result from activities related to activities to mitigate or adapt to climate-related risks, including adoption of new technologies or processes, (ii) as a direct result of a transition plan, if any, and (iii) as a direct result of the target or goal or the actions taken to make progress toward meeting the target or goal, if any.

- **Inline XBRL tagging.** Companies will be required to electronically tag climate-related disclosures in Inline XBRL starting in filings covering fiscal year 2026 for large accelerated filers and accelerated filers. EGCs, SRCs and non-accelerated filers will need to comply with XBRL tagging requirements starting in filings covering fiscal year 2027.

## Presentation requirements and liability safe harbor

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- **Registration statements and annual reports.** Companies have flexibility to either provide mandated climate-related disclosures in a separate, appropriately captioned section of their registration statement or annual report, or in another appropriate section of the filing, such as Risk Factors, Description of Business or MD&A, or, alternatively, by incorporating such disclosure by reference from another SEC filing as long as the disclosure meets the electronic tagging requirements of the final rules.
- **Scope 1 and 2 GHG emissions disclosure periods.** If a company is required to disclose its Scope 1 and/or 2 GHG emissions, it must provide these disclosures for its most recently completed fiscal year and, to the extent previously disclosed, for the historical fiscal year(s) included in the filing.
- **Timing considerations.** Companies that are required to disclose Scope 1 and/or 2 GHG emissions must include such disclosure:
  - For registration statements, for any completed fiscal year that is at least 225 days prior to the date of effectiveness of such registration statement.
  - For foreign private issuers, in the annual report on Form 20-F, or in a 20-F amendment, due no later than 225 days after the end of the fiscal year to which the GHG emissions metrics disclosure relates.
  - For all other companies, in the annual report on Form 10-K, the quarterly report on Form 10-Q for the second fiscal quarter in the fiscal year immediately following the year to which the GHG emissions metrics disclosure relates (which must be specifically forward incorporated by reference into its Form 10-K) or in a Form 10-K amendment filed no later than the due date for the Form 10-Q for the second fiscal quarter.
- **Attestation reports and related disclosures.** Must be provided in the filing that contains the GHG emissions disclosures to which the attestation report relates.
- **Financial statement disclosures under Regulation S-X.** Must be included in a note to the audited financial statements.
- **Inline XBRL tagging.** The rules require companies to electronically tag both narrative and quantitative climate-related disclosures in Inline XBRL.
- **Liability safe harbor expanded.** The final rules extend the Private Securities Litigation Reform Act (PSLRA) safe harbors to transition plans, scenario analysis, internal carbon price and targets and goals, other than historic facts, and provide that these statements constitute "forward-looking statements" for purposes of the PSLRA safe harbors. Importantly, the safe harbor explicitly extends to issuers who would not otherwise enjoy the benefit of the PSLRA safe harbor for forward-looking statements, including IPO registrants and SPACs. The SEC declined, however, to expressly extend the PSLRA safe harbor provision to Scope 1 and 2 GHG emissions disclosures, due to what it considered to be the "well-established methodology" of calculating these metrics. Overall, the express application of the PSLRA safe harbor is a welcome change, but unlikely to reduce risks of private lawsuits.

## How do the final rules compare to existing climate disclosure regimes?

- Companies may also be required to comply with other mandatory climate risk disclosure rules, which impose very different obligations than the final rules. Two jurisdictions of particular relevance to companies are: California, which enacted two climate disclosure laws – S.B. 253 and 261 – last October, and currently under legal challenges in federal court, and the European Union (EU), which adopted the CSRD in January 2023. Key reporting differences between these requirements and the final rules include:[1]
  - **Scope 3 GHG disclosures.** Both CSRD and S.B. 253 require companies to disclose their Scope 3 GHG emissions.
  - **Scenario analysis.** S.B. 261 incorporates TCFD guidelines that require, among other things, companies to conduct a scenario analysis.
  - **Materiality.** CSRD's requirements contain "double materiality," which requires companies to consider their material "impacts" on society at large as well as traditional "financial" materiality, whereas S.B. 253 does not contain any materiality threshold.
  - **Beyond climate.** The CSRD covers the full suite of ESG topics, not just climate.
  - **Value chain information.** The CSRD contains explicit requirements to report on climate risks and impacts relating to a company's value chain, whereas the SEC removed explicit references to a company's value chain from the

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final rules. Although a company may nonetheless be required to disclose value chain information where it is material, this de-emphasis reflects the SEC's acknowledgment of the difficulty of obtaining information from third parties.

- Although directed to EU companies, the CSRD can be applicable to companies subject to the rule, including (i) foreign private issuers based in the EU meeting the CSRD thresholds, (ii) EU companies meeting the CSRD thresholds with U.S. public company parents, and (iii) U.S. public companies with a "significant presence" in the EU meeting the CSRD criteria. Under the CSRD, the last category of companies can satisfy the CSRD with reporting deemed "equivalent" to CSRD standards, but the rules for determining equivalency have not been developed and given the differences between the final rules and the CSRD it seems doubtful that compliance with the final rules will satisfy this standard.
- In addition, certain states impose climate-related disclosure requirements on certain industries, such as insurance, and GHG reporting requirements. Broadly applicable proposed climate disclosure legislation is also currently pending in three U.S. states: New York, Illinois and Washington, and climate activists' disappointment with the final rules may provide momentum to these efforts. The proposed Washington state law in particular calls for the state environmental agency to make recommendations regarding disclosure standards based on an assessment of the adequacy of the final SEC rules. At the federal level, the Greenhouse Gas Reporting Program requires reporting of GHG data and other relevant information from certain facilities such as large GHG emission sources, fuel and industrial gas suppliers and CO2 injection sites. Although the final rules may have eliminated the requirement for reporting Scope 3 GHG emissions and other climate-related information, companies will still need to determine whether to disclose such information under these other climate-related disclosure regimes.

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[1] See here for a more in-depth analysis comparing the California laws, CSRD and the proposed version of the rule.


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