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April 25, 2024

SEC Pauses Implementation of Recently Announced Climate-Related Disclosure Requirements for Public Companies Amidst Consolidated Judicial Review

In light of recent challenges, the Securities and Exchange Commission (the "SEC" or the "Commission") has voluntarily delayed implementing its new rule, adopted on March 6, 2024, which includes a comprehensive package of climate disclosure rules that, after a phase in period, would require extensive climate–related disclosures by public companies in their periodic reports and registrations statements.

The Enhancement and Standardization of Climate-Related Disclosures for Investors (the "Final Rule"),[1] adopted by a 3-2 vote nearly two years after it was initially proposed (the "Proposed Rule"),[2] would require disclosure of material climate-related risks, financial impacts of severe weather events and, for certain registrants, greenhouse gas ("GHG") emissions if material. Though scaled back considerably from the Proposed Rule, the Final Rule would create significant compliance obligations for many registrants in what is the first federal disclosure requirement for public companies specifically related to climate. In the wake of the announcement of the Final Rule, several legal challenges have been brought against it, with some arguing that the Final Rule goes too far and others arguing that it does not go far enough. All of the various petitions have been consolidated and, by random lottery, assigned to the US Circuit Court of Appeals for the Eighth Circuit for review. The SEC announced a voluntary stay of the rules on April 4, 2024,[3] explaining that the stay will allow for an orderly reconciliation of the various challenges.

Despite the delay and the challenges, public companies should familiarize themselves with the requirements of the Final Rule and take steps to prepare for compliance.

Disclosure of Climate-Related Risks

While many public companies already disclose some amount of climate-related information, the disclosure varies widely and, in many instances, does not allow for comparison of one company to another. The Final Rule is intended to enhance and standardize disclosures available in a registrant's public filings. According to SEC Chair

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[1] See Securities and Exchange Commission Release Nos. 33-11275; 34-99678 "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (https://www.sec.gov/files/rules/final/2024/33-11275.pdf). Unless otherwise specified, quoted statements in this memorandum are taken from this release.

[2] See Securities and Exchange Commission Release Nos. 33-11042; 34-94478 "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (https://www.sec.gov/rules/proposed/2022/33-11042.pdf). For a summary of the Proposed Rule, see our previous client memo: https://www.cahill.com/publications/firm-memoranda/2022-04-06-sec-proposes-climate-related-disclosure-for-public-companies.

[3] In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors, Order Issuing Stay (https://www.sec.gov/files/rules/other/2024/33-11280.pdf).

Gary Gensler, the Final Rule will "benefit investors and issuers alike" by providing "investors with consistent, comparable, decision-useful information, and issuers with clear reporting requirements."[4]

The Final Rule adds Item 1500 to Regulation S-K and requires disclosures to be contained in the body of an annual report or registration statement in a section separately captioned "Climate-Related Disclosure.". These new disclosures will be qualitative in nature. The Final Rule also establishes a new Article 14 of Regulation S-X, requiring certain disaggregated financial statement metrics to be disclosed in a separate note to the audited financial statements in filings where the registrant is required to include the new Regulation S-K disclosure. Like the Proposed Rule, the Final Rule is based on the Task Force on Climate-related Financial Disclosure ("TCFD") reporting framework and the GHG Protocol emissions reporting standard, which are both frameworks widely used by companies around the world. For those companies already utilizing the TCFD and/or the GHG Protocol frameworks, compliance with the Final Rule may be more streamlined. In addition, after receipt and review of an unprecedented number of comments, letters and reports regarding the Proposed Rule, the Commission revised the Proposed Rule in notable ways intended to make it easier for public companies to comply.

Departures from the Proposed Rule

The Commission received close to 5,000 unique comment letters and nearly 20,000 form letters after the Proposed Rule was published. This large volume of public feedback led the Commission to make several meaningful revisions to the Proposed Rule in adopting the Final Rule. Perhaps most important is the revision requiring most disclosures to be made *only* if "material,"[5] including disclosures relating to Scope 1 and Scope 2 GHG emissions, scenario analysis, and internal carbon pricing.

Several other changes from the Proposed Rule are important to highlight:

- Elimination of Scope 3 disclosure requirements;
- Extension of the timeline for compliance;
- Removal of Scope 1 and Scope 2 GHG emissions disclosure requirements for small reporting companies ("SRCs") and emerging growth companies ("EGCs");
- Deletion of terminology requiring future determinations, including "Climate-related opportunities" and "Global warming potential";
- Clarifications as to the instructions for foreign private issuers;
- Elimination of a "medium term" disclosure requirement; and
- General narrowing of disclosure requirements.

[4] Statement on Final Rules Regarding Mandatory Climate Risk Disclosures, by Chair Gary Gensler (https://www.sec.gov/news/statement/gensler-statement-mandatory-climate-risk-disclosures-030624).

[5] The Final Rule cites the following regarding the meaning of "material": "See 17 CFR 230.405 (definition of "material"); 17 CFR 240.12b-2 (definition of "material"). See also Basic Inc. v. Levinson, 485 U.S. 224, 231, 232, and 240 (1988) (holding that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision; and quoting TSC Industries, Inc. v. Northway, Inc., 426 U. S. 438, 449 (1977) to further explain that an omitted fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.")"

Qualitative Requirements

Despite the narrowing of the Proposed Rule, the Final Rule still includes significant, newly-required disclosures. Absent any further revisions stemming from the on-going review process, new Item 1500 of Regulation S-K will require the following disclosures:

- Any material climate-related risks identified that have had or are reasonably likely to have a material impact on a company's strategy, results of operations, or financial condition in the short-term and in the long-term;[6]
- Material impacts of any identified climate-related risks on the company's strategy, business model, and outlook, including, as applicable, any material impacts on a non-exclusive list of items;
- If any activities to mitigate or adapt to a material climate-related risk have been carried out by the company, a quantitative and qualitative description of material expenditures incurred and material impacts on financial estimates and assumptions that directly result from such activities;[7]
- A description of a transition plan to manage a material, climate-related transition risk, if one exists;[8]
- If using scenario analysis to determine that a climate-related risk is reasonably likely to have a material impact on a company's business, results of operations, or financial condition, a description of each scenario, including parameters, assumptions and analytical choices used;
- If using an internal carbon price is material to the evaluation and management of a material climate-related risk, certain material disclosures about such internal carbon price;[9]
- Board oversight of climate-related risks and any role by management in assessing and managing material climate-related risks;
- Processes 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, as applicable;

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[6] It is recommended that these disclosures be set forth on a non-exclusive list of items. The Final Rule defines "short-term" as within 12 months and "long-term" as 12 months and beyond.

[7] This determination is made in management's best judgment.

[8] Transition risks are defined as "the actual or potential negative impacts on a registrant's business, results of operations, or financial condition attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks." The Final Rule would also require "updated disclosures in the subsequent years describing the actions taken during the year under the plan, including how the actions have impacted the registrant's business, results of operations, or financial condition, and quantitative and qualitative disclosure of material expenditures incurred and material impacts on financial estimates and assumptions as a direct result of the disclosed actions."

[9] The Final Rule would require disclosure of the price per metric ton of carbon dioxide equivalents ("CO_2e"), if material, and the total price, including estimated changes over time, per Item 1502(a). The use of internal carbon pricing as a planning tool can help registrants identify climate-related risks and opportunities, incentivize them to drive energy efficiencies and reduce costs, quantify potential costs incurred if a carbon tax was put into effect, and guide capital investment decisions.

- If a climate-related target or goal has materially affected or is reasonably likely to materially affect a company's business, results of operations, or financial condition, certain disclosures about such target or goal to allow an understanding of the impact;[10]
- If carbon offsets or renewable energy credits ("RECs") are a material component of climate-related targets or goals, certain disclosures of the amount of carbon offset or renewable energy generated, and the nature and source of the offsets or RECs;
- If a registrant is a large accelerated filer or an accelerated filer that is not otherwise exempt, and its Scope 1 and/or Scope 2 GHG emissions metrics are material, certain disclosure about those emissions, as discussed in more detail below; and
- Certain financial information regarding the impact of severe weather events and other natural conditions and information about carbon offsets and RECs, as discussed in more detail below.

GHG Emissions Disclosure

The Final Rule would require disclosure of Scope 1 and Scope 2 GHG emissions for large accelerated filers ("LAFs") and accelerated filers ("AFs") in their annual reports and registration statements. Though the Proposed Rule would have required all filers to disclose Scope 1 and Scope 2 GHG emissions irrespective of materiality, the Final Rule narrows this requirement to require LAFs and AFs to disclose Scope 1 and/or Scope 2 GHG emission metrics *only* if they are material. The materiality analysis should focus on the traditional interpretation under the Federal securities laws,[11] not only on the amount of emissions. In other words, the relevant inquiry would be whether a reasonable investor would consider this information to be important in deciding whether to invest or how to vote, or whether the omission of the disclosure significantly alter the total mix of information available.

Recognizing that the cost burden necessary to analyze and track these new disclosure requirements may be significant, especially for companies that have not been tracking this information previously, the Commission has revised the Proposed Rule to phase-in the GHG emissions disclosure requirements and to exclude SRCs and EGCs from the requirement.

Unlike the Proposed Rule, which would have required filers to disclose data disaggregated by constituent GHGs, the Final Rule allows emissions to be expressed in terms of CO_2e, only requiring separate GHG disclosure where a specific gas emission is material on its own. The disclosure must be in gross terms, without taking into account purchased or generated offsets.

Consistent with the Proposed Rule, the Final Rule mandates descriptions of the method used, as well as the significant inputs and assumptions made, in computing the disclosed GHG emissions. The Commission explained that this information is pertinent to investors as it will aid in understanding the scope of GHG emissions in context.

For disclosures required annually, filers will be given until the end of their second fiscal quarter to make their disclosure of material Scope 1 and Scope 2 GHG emissions. For foreign private issuers, the due date is extended to no later than 225 days after the end of the fiscal year to which the GHG emissions metrics disclosure relates. These

[10] These include "material expenditures and material impacts on financial estimates and assumptions as a direct result of the target or goal or actions taken to make progress toward meeting such target or goal." Updated disclosures would be required in subsequent years.

[11] See footnote 5 above.

filers must include a statement of intent to disclose in their Annual Report on Form10-K or 20-F, as applicable, in anticipation of their eventual disclosure.

An attestation report by an independent third-party service provider covering the disclosure of Scope 1 and/or Scope 2 GHG emissions will be required on a "limited assurance" basis (equivalent to that provided in a review of interim financial statements included in a Quarterly Report on Form 10-Q) as of fiscal year 2029 for LAFs, and as of fiscal year 2031 for AFs. LAFs will be required to obtain attestation on a "reasonable assurance" basis (equivalent to that provided in an audit of consolidated financial statements included in an Annual Report on Form 10-K) starting in fiscal year 2033. Limited and reasonable assurance differ primarily in the nature, timing, and extent of procedures required.

The Final Rule notes as an example that where a limited assurance report's procedures are generally limited to analytical inquiries, a reasonable assurance report's procedures would require an additional risk assessment be performed, accompanied by detailed testing procedures in response to the assessed risks. The Final Rule further notes that an outcome of a reasonable assurance engagement essentially yields a "positive assurance" that the disclosure is free from material misstatements (e.g., "the provider forms an opinion about whether the registrant's GHG emissions disclosures are in accordance with Item 1505 in all material respects"), whereas in the case of a limited assurance outcome, the yield is a "negative assurance" (e.g., "the provider forms a conclusion about whether it is aware of any material modifications that should be made to the disclosures for it to be in accordance with Item 1505").

The attestation report must be included in the filing that contains the GHG emissions disclosure. These requirements also apply to foreign private issuers, as the Commission declined to carve out any exceptions for foreign issuers which may have different disclosure requirements already in place in their respective country of organization. The provider of the attestation statement must be an expert in GHG emissions[12] with significant experience[13] in calculating, scrutinizing, reporting or attesting to GHG emissions. They must also be independent as to the company and its affiliates for whom they are providing the report.[14]

If a registrant voluntarily obtains third-party assurance for its GHG emissions disclosure when it is otherwise not required, the Final Rule requires the registrant to disclose certain information about the assurance engagement. If subject to third party assurance, a company must disclose (i) the identity of the assurance provider, (ii) a description of the standard used, level/scope of services and brief results, (iii) whether the assurance provider had any material relationships with the company and (iv) whether there was any oversight inspection program for the provider. The Commission explained that these requirements are intended to resolve the current issue of the varied disclosure practices as it relates to levels of assurance provided, standards used and types and scope of services provided. The uniformity of these disclosures will aid investors in making their investing and/or voting decisions. Even if a registrant decides to voluntarily disclose more than what is required by the Final Rule, the Commission cautions that these disclosures must still be truthful and accurate and free of any materially misleading statements or omissions.

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[12] An expert in GHG emissions under the Final Rule is held to the same level of scrutiny and independence as applicable to accountants under Regulation S-X, Rule 2-01. The expert provider is shielded from strict liability where providing only *limited* assurance, but will be held to strict scrutiny if providing *reasonable* assurance.

[13] To have "significant experience" the provider must be provably able to perform the tasks for attestation in line with professional standards and according to applicable law and regulation.

[14] The Commission explained that several factors could be considered in determining an attesting provider's independence, including if a relationship or terms of service (i) creates aligned interests or conflicts, (ii) allows the expert to attest to one's own work, (iii) results in the provider acting in a managerial capacity or employee of the company and (iv) makes the provider an advocate of the company. The Commission will consider all relevant circumstances in determining independence.

Though the Proposed Rule suggested a safe harbor for disclosure of Scope 3 GHG emissions, the Final Rule adopts a broader approach, extending the safe harbor to certain disclosures about (i) transition plans, (ii) scenario analyses, (iii) internal carbon pricing and (iv) targets and goals, if such statements would similarly constitute "forward-looking statements"[15] under the Private Securities Litigation Reform Act ("PSLRA"). The Commission reasoned that the necessity of estimates and judgments in accurately calculating the above four categories makes it prudent to consider these disclosures "forward-looking statements" for safe harbor purposes. The protection extends to issuers who would otherwise not be covered by PSLRA protections for forward-looking statements, including registrants conducting their initial public offering and Special Purpose Acquisition Companies. However, the Commission explicitly declined to extend the coverage to statements on Scope 1 and Scope 2 GHG emissions disclosures because they consider there to already be "well-established methodology" in calculating these metrics, making such an extension unnecessary. Consistent with the PSLRA, the safe harbor will not extend to any statements of historical facts.

Lastly, the Commission stated that although a sunset on the safe harbor provision had been suggested and they may implement one at a later date, this provision will not be subject to a sunset clause at this time.

Financial Statement Disclosures

Pursuant to a new Article 14 of Regulation S-X, registrants will be required to disclose certain disaggregated financial statement metrics in a separate note to their audited financial statements in filings where the registrant is required to make the new Regulation S-K disclosure discussed above. Information must be provided for the previous fiscal year and, to the extent previously disclosed, for the year prior to the previous fiscal year.

The Final Rule requires disclosure of capitalized costs, expenditures expensed, charges, and losses incurred in relation to (a) severe weather events and other natural conditions, and (b) carbon offsets and RECs, subject to specific disclosure thresholds with carve outs for de minimis amounts. The Final Rule requires registrants to disaggregate quantitative information derived from transactions that are already recorded in a registrant's books and records underlying the financial statements and balance sheet and income statements, and to inform investors where on the balance sheet and income statement such amounts are being accounted for.

Due to significant concerns raised by the comments regarding the potential burdens of making the disclosures required by the Proposed Rule, the Commission narrowed the Final Rule significantly, while still requiring registrants to provide "decision-useful" information about physical risk exposure for investors. The Final Rule aims to provide clarity and transparency regarding climate-related impacts without requiring as many line item disclosures of impacts as the Proposed Rule. The Proposed Rule had set out three main categories of disclosure requirements, of which the Final Rule adopted only two, each with substantial modifications: (i) Expenditure Effects, and (ii) Financial Estimates and Assumptions. The Final Rule omits the third proposed category, Financial Impact Metrics, which would have required line-by-line disclosures of climate-related impacts in a registrant's financial statements.

Disclosure of Expenditures And Costs

The Final Rule requires registrants to disclose capitalized costs, expenditures expensed, and charges and losses incurred during the prior fiscal year as a result of "severe weather events and other natural conditions, such as

[15] Forward-looking statements can be defined as any statement: (i) that contains financial related projections, (ii) of plans/objectives for future operations, (iii) of predicted future economic performance, (iv) based on assumptions underlying any of the above or (v) that contains a projection or estimate specified by Commission rules or regulations.

hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures, and sea level rise."[16] Registrants will be required to disclose contextual information to explain how the amounts were determined and any recoveries received.

The Final Rule reduces the requirements of the Proposed Rule, which sought to require disclosure of capitalized costs and expenditures expensed to mitigate climate-related risk, and in relation to, all transition[17] activities. The Commission noted that the shift in focus to only discrete expenditures "strikes an appropriate balance" between providing investors access to useful information regarding a registrant's financial position and performance while limiting the compliance burden on registrants to calculate these amounts. The Final Rule focuses on information already being recorded in the books and records of registrants and being captured by a registrant's income statement or balance sheet, thereby seeking to lessen the cost and burden of the new disclosure requirements. The Final Rule takes a bright-line approach, setting clear dollar thresholds for disclosure as follows:

(1) Expenditures expensed and losses incurred that are greater than 1% of a company's pre-tax income or loss (with a $100,000 minimum threshold); and

(2) Capitalized costs that are in excess of more than 1% of absolute value to stockholder's equity or deficit (with a $500,000 minimum threshold).

Compliance with these disclosures will require a registrant to first separately aggregate[18] the capitalized costs, expenditures expensed as incurred and losses, in order to then determine whether the applicable disclosure threshold is triggered. The rule provides that an applicable cost or charge results from a severe weather event when it is a "significant contributing factor" in incurring that cost or charge.

The Final Rule also requires disclosure relating to the purchase and use of carbon offsets and RECs to the extent they are a material component in achieving a disclosed climate-related target or goal. This disclosure threshold mirrors the threshold in the Regulation S-K amendments relating to offsets and RECs. Registrants would need to include (i) the aggregate amount of carbon offsets and RECs expensed, (ii) the aggregate amount of capitalized carbon offsets and RECs recognized, (iii) the aggregate amount of losses incurred on the capitalized carbon offsets and RECs during the fiscal year and (iv) the beginning and ending balances for the fiscal year.

Financial Estimates and Assumptions

The Final Rule mandates disclosure of whether financial estimates and assumptions were materially impacted by exposures to risks and uncertainties related to, or known impacts from, severe weather events and other natural conditions or any disclosed climate-related targets or transition plans. If so, the Final Rule requires the registrant to provide a qualitative description of those impacts. The Final Rule differs from the Proposed Rule by removing the disclosure of figures in relation to "a potential transition to a lower carbon economy" and narrowing the focus instead on estimates and assumptions related simply to transition activities, including transition plans by the registrant. Additionally, the focus on only those estimates and assumptions that were *materially impacted* aims to ease the burden of operational concerns relative to a registrant's compliance with the Final Rule. The Commission noted that these estimates and assumptions are already required for accounting and financial reporting purposes,

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[16] The Final Rule provides examples of such impacts: "For example, a registrant may be required to disclose the amount of expense or loss, as applicable, to restore operations, relocate assets or operations affected by the event or other natural condition, retire affected assets, repair affected assets, recognize impairment loss on affected assets, or otherwise respond to the effect that severe weather events and other natural conditions had on business operations." In the Commission's Open Meeting on March 6, 2024, the Commission made clear that a registrant does not need to determine whether such events or conditions were the result of climate change.

[17] See footnote 8 above.

[18] The Commission provides examples of such aggregation on pages 492-96 of the Final Rule.

and therefore, disclosure should provide decision-useful information and transparency regarding a registrant's targets or goals with respect to any climate-related events and transition activities.

Compliance Timeline

The Final Rule was set to be phased-in, by disclosure category, over longer periods of time than the Proposed Rule, allowing for nearly two years with respect to a majority of the rules, and nearly six years for LAFs to comply with requirements for obtaining limited assurance on GHG emissions. The longer time horizons in the Final Rule were adopted in response to comments received and are intended to give registrants more time to establish the necessary systems and controls and to begin tracking data. Though the Commission stayed the implementation of the Final Rules while the Eighth Circuit is reviewing the consolidated claims, there has been no announcement on how this might affect future compliance timelines. Until a new timeline is dictated by a court ruling or the SEC issues an updated version, registrants should continue to prepare for disclosure based on the below phase-in timeline.

As summarized in the table below, LAFs will need to report first for the fiscal year beginning ("FYB") in 2025, followed by AFs for FYB 2026 and other registrants SRCs, EGCs and non-accelerated filers ("NAFs") for FYB 2027. Disclosures of quantitative and qualitative descriptions of material expenditures and impacts from activities to mitigate or adapt to climate-related risks (Item 1502(d)(2)), transition plans (Item 1502(e)(2)), and targets or goals (Item 1504(c)(2)) will not be required until the registrant's second year of reporting (e.g., for LAFs, FYB 2027).

Compliance Dates under the Final Rules[1]

Registrant Type	**Disclosure and Financial Statement Effects Audit**		**GHG Emissions/Assurance**			**Electronic Tagging**
	All Reg. S-K and S-X disclosures, other than as noted in this table	*Item 1502(d)(2), Item 1502(e)(2), and Item 1504(c)(2)*	*Item 1505 (Scopes 1 and 2 GHG emissions)*	*Item 1506 - Limited Assurance*	*Item 1506 - Reasonable Assurance*	*Item 1508 - Inline XBRL tagging for subpart 1500[2]*
LAFs	FYB 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
	[1] As used in this chart, "FYB" refers to any fiscal year beginning in the calendar year listed. [2] Financial statement disclosures under Article 14 will be required to be tagged in accordance with existing rules pertaining to the tagging of financial statements. *See* Rule 405(b)(1)(i) of Regulation S-T.					

Comparison to Other Climate Disclosure Regulations

The Final Rule adds new requirements to the complex and expanding landscape of climate disclosure regimes, both domestically and abroad. Notably, the Final Rule does not attempt to address any overlap or inconsistencies with the required disclosures of other jurisdictions, including California's climate disclosure laws[19] and

[19] The Climate Corporate Data Accountability Act (S.B. 253) and the Climate-Related Financial Risk Act (S.B. 261). See our prior discussion of California's laws: https://www.cahill.com/publications/firm-memoranda/2023-11-06-california-governor-signs-climate-disclosure-bills-for-public-and-private-companies.

the European Union's Corporate Sustainability Reporting Directive ("CSRD"). Registrants will need to evaluate these inconsistencies closely and ensure that they are meeting all requirements applicable to them.

The Final Rule is narrower in scope in some ways than both California's recent legislation and the CSRD. California's laws will require disclosure, including with respect to Scope 1, 2 and 3 GHG emissions, from public and private companies, and there are no exemptions for smaller companies as there are in the Final Rule. While California's laws require disclosures beginning in 2026 using 2025 data, the Governor's proposed budget for 2024-2025 did not provide funding for the GHG emissions reporting law, and the laws are being challenged in court. Companies that may be subject to the California laws should monitor future developments.

The CSRD is more expansive than the Final Rule in many ways, requiring disclosure of Scope 3 GHG emissions, as well as information relating to social and governance factors. In addition, the CSRD utilizes a "double-materiality" standard, which looks at both impact on the company's financial profile but also the impact of the company's actions on others, rather than the Final Rule's singular materiality standard focused solely on financial materiality to the company. The CSRD will be similarly phased in over several years for different covered entities, beginning with reporting covering fiscal year 2024 for the largest companies.

Dissent and Legal Challenges

The Proposed Rule received over 24,000 comment letters from stakeholders, many in opposition. Despite the narrowing of the Final Rule, the two dissenting commissioners delivered direct challenges to the other commissioners in the Open Meeting on March 6th.[20] Commissioner Hester Peirce argued that the Final Rule gives disproportionate attention to climate disclosures as compared to other topics, and that preexisting standards for material disclosure are sufficient for climate disclosure.[21] Commissioner Mark Uyeda likened the Final Rule to "climate regulation promulgated under the Commission's seal."[22]

In the wake of the announcement of the Final Rule, various legal challenges have been brought against it. A total of nine petitions for review have been filed in the US Courts of Appeal for the Second, Fifth, Sixth, Eighth, Eleventh and D.C. Circuits. Per statutory law,[23] these petitions have been consolidated and, by means of a random lottery. assigned to the Eighth Circuit for review.[24] Additional petitions have been filed subsequent to the consolidation order, one in the Fifth Circuit that was later transferred to the Eighth, and the other brought by two energy companies in the US District Court for the Northern District of Texas after their first suit was consolidated with the original set of petitions.

The Final Rule faces challenges on both sides of the coin; however, the majority of the petitions for review argue federal overreach. A majority of the petitioners comprise state attorneys general and a few public companies in industries that will face robust compliance challenges (e.g., energy). Prior to the SEC's voluntary stay, petitioners

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[20] Sunshine Act Notice regarding Open Meeting on March 6, 2024 (https://www.sec.gov/os/sunshine-act-notices/sunshine-act-notice-open-030624).

[21] Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors, by Commissioner Hester M. Peirce (https://www.sec.gov/news/statement/peirce-statement-mandatory-climate-risk-disclosures-030624).

[22] A Climate Regulation under the Commission's Seal: Dissenting Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors, by Commissioner Mark T. Uyeda (https://www.sec.gov/news/statement/uyeda-statement-mandatory-climate-risk-disclosures-030624).

[23] Multicircuit Petition Statute, 28 U.S. Code § 2112(a).

[24] In re: Securities and Exchange Commission, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Issued on March 6, 2024, Consolidation Order (https://www.jpml.uscourts.gov/sites/jpml/files/MCP-180-Consolidation_Order-3-21-2024.pdf).

requesting a stay in the Fifth Circuit successfully argued that the impending March 2026 disclosure date would require data collection to start in fiscal year 2025, which gives them insufficient time to develop and implement methodology for collection of such data. The petitioners in the Sixth, Eighth and Eleventh Circuits are challenging the rules on similar grounds.

Conversely, in the Second and D.C. Circuits, environmental groups such as The Natural Resources Defense Council and The Sierra Club have petitioned for review of the Final Rule on the grounds that it is a weaker version of the same protections provided to investors under other laws. These petitioners argue that because Scope 3 GHG emissions and other disclosures were left out of the Final Rule, the resulting disclosures will not be protective enough in terms of providing useful information for investors to adequately assess financial risk.

The Final Rule has been published in the Federal Register[25] and, prior to the SEC voluntary stay, would have become effective on May 28, 2024. The SEC's voluntary stay and the various legal challenges create uncertainty as to the Final Rule's scope and compliance timeline. Even if there is a court-mandated rollback of the Final Rule, enforcement of climate-related disclosure is likely to remain a focus for the Commission, which could bring enforcement cases under existing standards, such as failure to disclose material information or the use of misleading claims (e.g., greenwashing).

Conclusion

The Final Rule is a significant expansion of disclosure requirements for all registrants, and will require considerable attention and resources to meet its compliance obligations. While scaled back from the Proposed Rule, many requirements of the Final Rule could still pose compliance burdens. Although certain of the required disclosures are now qualified by materiality, registrants will in many cases still need to complete a materiality assessment in order to determine if disclosure is needed.

Despite the on-going legal challenges, registrants should consider what systems, processes and controls they will need to implement in order to meet the disclosure requirements as currently adopted. While legal challenges could affect the scope and timing of disclosure, given the strong push by investors for consistent information, it is likely that some form of enhanced climate-related disclosure requirements will survive.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene Banks (partner) at 212.701.3439 or hbanks@cahill.com; Lynn Schmidt (senior attorney) at 212.701.3641 or lschmidt@cahill.com; Kaitlin Flores (associate) at 212.701.3226 or kflores@cahill.com; or David Fuchs (associate) at 212.701.3274 or dfuchs@cahill.com; or email publicationscommittee@cahill.com.

[25] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 F.R. 21668.

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