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News Alert

SEC Issues Proposed Rules on Climate-Related Disclosures

On March 21, 2022, the Securities and Exchange Commission (SEC) voted (in a 3:1 decision) to propose new rules "To Enhance and Standardize Climate-Related Disclosures for Investors." The proposed rules would require disclosures of climate-related risks, greenhouse gas emissions, as well as certain climate-related financial metrics, and would impose attestation and assurance requirements on certain aspects of the disclosures. The comment period on the proposed rules will be open for 30 days following publication in the Federal Register, or until May 20, 2022, whichever is later. If adopted, the SEC envisions that the rules could become effective as early as December 2022, though the requirements would be phased in according to the registrant's status and the type of disclosure, with requirements beginning in fiscal year 2023 or later.

Key Highlights

The proposed rules fulfill a major objective of the Biden administration and build on a comment period the SEC held last year. Notably, the SEC states that it has "modeled the proposed disclosure rules in part" on the framework created by the Task Force on Climate-Related Financial Disclosures (TCFD), a standard currently employed by some large corporations and investment banks.

The proposed rules will expand the SEC's current framework for reporting on material climate-related risk, which is based on the SEC's 2010 Climate Change Guidance. The proposed rules would make significant enhancements to that framework, requiring disclosure of material climate-related risks that may "manifest

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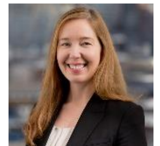

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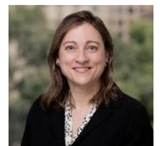

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Beveridge & Diamond's more than 125 lawyers across the U.S. focus on environmental and natural resources law, litigation, and alternative dispute resolution. We help clients around the world resolve critical environmental and sustainability issues relating to their products, facilities, and operations.

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over the short, medium, and long term." Importantly, the SEC would also clarify how it views the materiality assessment, cautioning that "[i]n the context of climate, the magnitude, and probability of such risks vary and can be significant over such time periods."

The proposed rules would generally require registrants (both domestic and foreign private issuers) to disclose new climate-related information not previously required by the SEC, including:

- Scope 1 and 2 GHG emissions, expressed in disaggregated constituent greenhouse gases and in the aggregate, and in absolute and intensity terms (for accelerated and large accelerated filers, these disclosures would be subject to attestation by an attestation service provider meeting certain minimum requirements);
- Scope 3 GHG emissions and intensity, if material, or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions;
- An issuer's internal carbon price, if the issuer uses one;
- Information relating to climate risks and registrants' processes for identifying and responding to such risks;
- The impact of climate-related events and transition activities on a line-item basis (which would be subject to an audit by an independent registered public accounting firm), as well as the financial estimates and the assumptions impacted by such events and activities; and
- The registrant's climate-related targets or goals, and transition plan, if any.

Phased Timetable for Initial Disclosure Requirements

The Scope 1 and Scope 2 disclosure requirements would be phased in for registrants as follows, assuming the rule is finalized in or before December 2022:

- **Large accelerated filers** would be required to include all proposed disclosure requirements, including Scope 1, Scope 2, and associated intensity metrics, but excluding Scope 3, in their filings for fiscal year 2023.
- **Accelerated filers and non-accelerated filers** would be required to include all proposed disclosure requirements, including Scope 1, Scope 2, and associated intensity metrics, but excluding Scope 3 emissions, in their filings for fiscal year 2024.
- **Smaller reporting companies (SRCs)** would be expected to include all proposed disclosure requirements, including Scope 1, Scope 2, and associated intensity metrics, but excluding Scope 3, in their filings for fiscal year 2025.

Special Provisions for Scope 3 Disclosures

The proposed rules would also require large accelerated filers and accelerated filers to disclose Scope 3 emissions on a phased-in period. Large accelerated filers would be required to include Scope 3 emissions metrics in their disclosures for their filings for fiscal year 2024, whereas accelerated filers would need to incorporate Scope 3 emissions metrics in their disclosures for their fiscal year 2025 filings. The proposed rules also provide additional accommodations relating to disclosures of Scope 3 emissions, including a safe harbor from liability, and an exemption from Scope 3 reporting altogether for smaller reporting companies.

Attestation and Assurance Requirements

Under the proposed rules, GHG emissions disclosures are subject to third-party attestation. Large accelerated filers or accelerated filers would be required to include an attestation report that covers, at a

minimum, the disclosure of a filer's Scope 1 and Scope 2 emissions, as well as information about the attestation service provider. Attestation requirements would be phased-in over time. These disclosures would initially be subject to limited assurance, and eventually to reasonable assurance.

Initial Observations and Next Steps

Certain provisions raise several concerns for issuers, especially for those issuers that already have been engaged in voluntary reporting or non-public work on climate issues. For example:

- Some issuers would be required to disclose non-material Scope 3 emissions simply based on their having done so in a voluntary context—while issuers that have not previously disclosed or relied on Scope 3 emissions in voluntary reports or target setting would only need to disclose Scope 3 emissions if material.
- Registrants that use an internal carbon price when assessing climate-related factors would be required to disclose specifics about their internal carbon price, including the price, how it is estimated to change over time, and the rationale for the selected carbon price.
- Registrants that utilize scenario analysis would be required to disclose certain information about their use of scenarios.
- The proposed rules would require disclosure of additional information when a registrant uses carbon offsets or renewable energy credits or certificates (RECs). Specifically, the rules require registrants to disclose the role that carbon offsets or RECs play in the registrant's climate-related business strategy.

The proposed rules have a long road ahead and are likely to be challenged in court if finalized by the SEC. In her opposition to the proposed rule, Commissioner Peirce outlined perceived legal vulnerabilities, including her view that the proposed rules go beyond the authority granted to the SEC by Congress, and that the mandated disclosures may violate the First Amendment as unconstitutionally compelled speech.

The SEC has sought comment on several specific items related both to material risk disclosure as well as its new GHG and ESG disclosure requirements. Issuers should consider commenting on aspects of the proposed rules, either on their own or working with their industry associations and representatives, and should continue to carefully review their climate-related statements and communications in light of these potential new requirements.

Beveridge & Diamond's ESG and Climate Change practices have been closely monitoring these developments and will continue to issue alerts as events warrant.

Beveridge & Diamond's ESG and Climate Change practice groups help clients navigate complex and interrelated legal and reputational issues in the fast-moving area of sustainability. Our experience and capabilities extend to: required or voluntary disclosures, interactions with sustainability rating agencies, supply chain and product stewardship, interactions with suppliers and customers, responsible sourcing, human rights, climate change law and policy, GHG emissions credit trading, environmental justice, facility issues, and more. Coupled with B&D's robust Clean Air Act regulatory, enforcement, and litigation practice, we offer companies significant and well-rounded capability to understand and incorporate emerging GHG legal and regulatory requirements across their enterprises. For more information, please contact the authors or your usual B&D contact.

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