

CLIENT ALERT- SEC PROPOSES NEW MANDATORY DISCLOSURES RELATING TO CLIMATE CHANGE

On March 21, 2022, the Securities and Exchange Commission proposed a new rule (Subpart 1500 of Regulation S-K) that would require registrants (both domestic and foreign issuers) to disclose (i) information relating to climate risk that is “reasonably likely to have material impacts on its business or consolidated financial statements,”¹ and (ii) “GHG emissions metrics that could help investors assess those risks.”² The proposed rule would require an attestation by accelerated filers and large accelerated filers regarding disclosures of certain GHG emissions metrics.³

In addition, the SEC has proposed a new Article 14 of Regulation S-X that would require “disaggregated climate-related impacts on existing financial statement line items.”⁴ These financial statement metrics would be subject to audit by an independent registered public accounting firm and would come within the registrant’s internal control over financial reporting (“ICFR”).⁵

Content of Proposed Disclosures

The SEC has modeled the framework for its new disclosure regime on the TCFD⁶ recommendations and the GHG Protocol.⁷ In particular, the proposed rules would require registrants to disclose information about:

- Oversight and governance of climate-related risks by the registrant’s board and management;⁸

¹ [Proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors \(sec.gov\)](#) at p. 42.

² *Id.* at p. 43. “GHG” is an acronym for “greenhouse gas.”

³ *Id.*

⁴ *Id.*

⁵ *Id.* at p. 44. ICFR refers to policies and procedures designed to provide reasonable assurance regarding the reliability of a company’s financial reporting and financial statements prepared in accordance with GAAP.

⁶ [Task Force on Climate-Related Financial Disclosures | TCFD\) \(fsb-tcfd.org\)](#)

⁷ [Greenhouse Gas Protocol | \(ghgprotocol.org\)](#) The GHG Protocol Corporate Accounting and Reporting Standard is the most widely used guidance for corporate reporting of GHG emissions, including the calculation of Scope 1, 2, and 3 emissions which the proposed rule largely adopts.

⁸ *Supra* n. 1, Section II.D.

- How any identified climate-related risks will have or are likely to have a material impact on the registrant's business and consolidated financial statements, whether in the short, medium or long term;⁹
- How any identified climate-related risks will affect or are likely to affect the registrant's strategy, business model, and outlook;¹⁰
- The registrant's processes for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system or processes;¹¹
- The impact of climate-related events (such as severe weather and other identified physical risks) and transition activities and risks¹² on the line items of a registrant's consolidated financial statements and related expenditures,¹³ and disclosure of financial estimates and assumptions impacted by such climate-related events and transition activities;¹⁴
- Scope 1 and 2 GHG emissions metrics, separately disclosed and expressed:
 - o Both by disaggregated constituent greenhouse gases and in the aggregate, and
 - o In absolute and intensity terms¹⁵
- 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;¹⁶ and
- The registrant's climate-related targets or goals, and transition plan, if any.¹⁷

Optional Disclosure of Opportunities

In addition to the proposed required disclosure of climate-related risks, registrants may also disclose the actual and potential impacts of climate-related opportunities that it is pursuing.¹⁸ The proposed rule defines "climate-related opportunities" as "actual or potential positive impacts of climate-related conditions

⁹ *Supra* n. 1, Section II.B and C.

¹⁰ *Supra* n. 1, Section II.C.

¹¹ *Supra* n. 1, Section II.E.

¹² "Transition risk" is defined in the proposed rule as "actual or potential negative impacts on a registrant's consolidated financial statements, business operations, or value chains attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks." *Supra* n.1, p. 62.

¹³ *Supra* n. 1, Sections II.F.2 and 3.

¹⁴ *Supra* n. 1, Section II.F.4.

¹⁵ *Supra* n. 1, Section II.G.1.

¹⁶ *Id.*

¹⁷ *Supra* n. 1, Section II.I.

¹⁸ *Supra* n. 1, p. 60.

and events on a registrant’s consolidated financial statements, business operations, or value chains, as a whole.”¹⁹ However, unlike disclosure of climate-related risks, disclosure of climate-related opportunities is not mandatory.

When and Where to Disclose

Under the proposed rules, a registrant must make climate-related disclosures in its registration statement and in its annual reports.²⁰ The disclosures must appear in a separately captioned “Climate-Related Disclosure” section and in the financial statements.²¹ Alternatively, a registrant would be able to incorporate by reference disclosures from other parts of the filing—e.g. Risk Factors, MD&A, financial statements—or from other filed or submitted reports if appropriately responsive and properly incorporated by reference under SEC rules.²²

Attestation for Scope 1 and Scope 2 Emissions Disclosure

Accelerated filers and large accelerated filers would be required to include in their filings an attestation report covering at a minimum the disclosure of its Scope 1 and Scope 2 emissions and to provide certain related disclosures about the service provider.²³ Both filers would have one fiscal year to transition to providing limited assurance and two additional fiscal years to transition to providing reasonable assurance. The proposed rules also provide minimum requirements and standards for the attestation report and minimum qualifications for the attestation service provider, who would not have to be a registered public accounting firm.²⁴

Phase-In Periods and Accommodations

The proposed rules would include:

- Phase-in periods for compliance for all registrants, depending on the registrant’s filer status;²⁵
- For Scope 3 emissions disclosure:
 - o A safe harbor from certain forms of liability;

¹⁹ *Supra* n. 1, p. 67. The definitions of “climate-related risks” and “climate-related opportunities” are both based on the TCFD’s definitions.

²⁰ *Supra* n. 1, Section II.A.2.

²¹ *Supra* n. 1, Section II.J.

²² *Supra* n. 1, p. 55.

²³ *Supra* n. 1, Section II.H.

²⁴ *Id.*

²⁵ *Supra* n. 1, Section II.M.

- An exemption from disclosure for smaller reporting companies; and
- An additional delayed compliance date for disclosure.²⁶
- An allowance for a filer to use estimated GHG emissions for its fourth fiscal quarter, provided that the filer used actual, determined GHG emissions data for its first three fiscal quarters and filed the estimated fourth quarter data together with the first three quarters. Should the estimated fourth quarter data later turn out to be materially different from the actual fourth quarter data, further disclosure of the discrepancy would be required.²⁷

The Beginning, Not the End

The proposed new rules constitute a significant step towards a less discretionary, rules based ESG disclosure regime and a signal from the SEC that the discretionary disclosure regime in effect to date may not have provided sufficient material and transparent information upon which investors can rely. A 60-day public comment period should be expected, particularly regarding the uncertainty of applying the new standards and the potential monetary and non-monetary costs of compliance with such a new regime.

Assuming that most of the proposed new rules will be enacted, listed companies should begin determining the potential impacts of the new rules on their operations, compliance, financial and non-financial disclosures. Regardless of the final version of these climate-related rules, further regulation of other important ESG disclosures, including social and governance-related disclosures, are likely.

FisherBroyles attorneys are knowledgeable on ESG and SEC matters and are able to advise and assist you with SEC disclosure matters as well as both proactive efforts to build and maintain a risk and/or compliance program, as well as responding to regulatory inquiries and enforcement matters.

For additional information, please contact any of the following or your regular FisherBroyles contact for assistance: Ahpaly Coradin at ahpaly.coradin@fisherbroyles.com, Michael Pierson at michael.pierson@fisherbroyles.com, Robert Boresta at robert.boresta@fisherbroyles.com.

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²⁶ *Supra* n. 1, Section II.G.3.

²⁷ *Id.*

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