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Client Alert | Investment Management

A Climate of Uncertainty: SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures

The U.S. Securities and Exchange Commission (SEC), in a 3-2 vote,¹ adopted rule changes on March 6 to require U.S. public companies and certain foreign private issuers to disclose more comprehensive and standardized climate-related information in their registration statements and periodic reports (the Amended Rules).² The Amended Rules add new reporting requirements for companies, including with respect to climate-related data, risks, strategies, goals and costs. They also require additional financial statement metrics and attestation of the proposed disclosure for certain registrants.³

The Amended Rules are already the subject of litigation across six circuit courts of appeal.⁴ The U.S. Court of Appeals for the Fifth Circuit [stayed the Amended Rules](#) on March 15.⁵

Read on for key takeaways for asset managers and funds and a brief overview of the Amended Rules.

¹ SEC Commissioner Hester Peirce dissented, stating that “climate issues [will receive] special treatment and disproportionate space in Commission disclosures and managers’ and directors’ brain space,” specifically noting the high costs and challenges of implementation to registrants. ([Green Regs and Spam: Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors](#) (March 6, 2024).) Commissioner Mark Uyeda dissented, stating that the rulemaking is “an extraordinary exercise of regulatory authority by the Commission,” the SEC “conducted a flawed process by not re-proposing the rule,” the rule is unduly burdensome on boards, and there are not enough exemptions for smaller registrants. ([A Climate Regulation Under the Commission’s Seal: Dissenting Statement on The Enhancement and Standardization of Climate-Related Disclosures for Investors](#) (March 6, 2024).)

² [The Enhancement and Standardization of Climate-Related Disclosures for Investors](#), Release Nos. 33-11275; 34-99678 (March 6, 2024) (Adopting Release).

³ The Amended Rules have an effective date of 60 days after publication in the Federal Register, except for items with a phase-in period. See the table in the “Summary of the Amended Rules” section below for more detail.

⁴ *Liberty Energy v. SEC*, No. 24-60109, *petition for rev.* (5th Cir. March 6, 2024); *Chamber of Commerce of the United States v. SEC*, No. 24-60109, *petition for rev.* (5th Cir. March 14, 2024); *Texas Alliance of Energy Producers v. SEC*, No. 24-60109, *petition for rev.* (5th Cir. March 11, 2024); *Louisiana v. SEC*, No. 24-60109, *petition for rev.* (5th Cir. March 7, 2024); *West Virginia v. SEC*, No. 24-10679, *petition for rev.* (11th Cir. March 6, 2024); *Iowa v. SEC*, No. 24-1522, *petition for rev.* (8th Cir. March 12, 2024); *Ohio Bureau of Workers’ Compensation v. SEC*, No. 24-3220, *petition for rev.* (6th Cir. March 13, 2024); *Sierra Club v. SEC*, No. 24-1067, *petition for rev.* (D.C. Cir. March 13, 2024); *Natural Resources Defense Council v. SEC*, No. 24-707, *petition for rev.* (2nd Cir. March 12, 2024). The SEC formally requested on March 19 that the suits be consolidated. One circuit court will be chosen at random to hear the suits in the coming days.

⁵ *Liberty Energy v. SEC*, No. 24-60109 (5th Cir. March 15, 2024).

Key Takeaways for Asset Managers and Funds

- **The Amended Rules, if they survive, would provide somewhat consistent and comparable climate-related data.**
 - The Amended Rules would be a step toward addressing long-standing requests from the asset management industry for consistent and comparable climate-related disclosures.⁶ However, given that issuers are able to determine what climate-related disclosures are material to their businesses and that smaller issuers are not required to disclose Scope 1 and Scope 2 emissions data, the asset management industry still will have to carefully scrutinize the climate-related disclosures that are provided by these companies and will not necessarily receive reliable or complete information.
 - Additionally, while the Amended Rules eliminate the Scope 3 emissions disclosure requirement for all companies, global issuers may already be disclosing Scope 3 emissions data if they are subject to regulations in other jurisdictions, such as the European Union. Moreover, California passed a law that would require disclosure of Scope 3 emissions for certain issuers doing business in the state.⁷ That law, however, is also subject to court challenge on the basis of, among other reasons, federal preemption by the Clean Air Act. The Amended Rules may provide a stronger preemption argument.
- **The SEC should consider the challenges to the Amended Rules in relation to finalizing any climate-related rules for asset managers and funds.**
 - As noted above, the Amended Rules have been challenged in the circuit courts, and the Fifth Circuit has already stayed the rule. The proceedings could be lengthy. The SEC should consider the impact of these delays in its adoption of any climate-related rules for asset managers and funds and ensure that any compliance period allows for these challenges to be resolved prior to any compliance date. As the SEC acknowledges as a basis for the Amended Rules, “many investors and those acting on their behalf — including investment advisers and investment management companies — currently seek information to assess how climate-related risks affect a registrant’s business and financial condition and thus the price of the registrant’s securities” and “[p]roviding these disclosures in Commission filings also will subject them to enhanced liability that provides important investor protections by promoting the reliability of the disclosures.” Asset managers and funds should have access to reliable data before they are required to make regulatory filings based on that data.
- **While the Adopting Release is focused on operating companies, there is some impact on certain funds and asset managers.**
 - The SEC determined not to exempt business development companies (BDCs) from the new climate-related disclosure requirements for annual reports on Form 10-K. Commenters suggested exempting BDCs from this requirement as they would already be subject to any ESG-related rules specific to asset managers and funds that the SEC has proposed. Exchange-traded products that file reports on Form 10-K, such as the recently approved spot bitcoin ETFs, generally would also fall within the scope of the Amended Rules. In addition, public parents of asset managers generally fall within the scope and will be subject to the disclosure and, depending on size, attestation requirements of the Amended Rules.

⁶ See, e.g., [Statement on Proposed Mandatory Climate Risk Disclosures](#) (March 21, 2022). (SEC Chair Gary Gensler stated that “investors with \$130 trillion in assets under management have requested that companies disclose their climate risks.”)

⁷ Climate Corporate Data Accountability Act, California Health and Safety Code Section 38532 (2024).

Summary of the Amended Rules

The Amended Rules require companies to include a significant amount of climate-related information in their registration statements and periodic reports. Companies will be required to disclose, among others:

- Climate-related risks that have or are reasonably likely to have a material impact on the company's business or financial condition and the actual and potential material impacts of those risks.
- A quantitative and qualitative description of material costs a company incurs to mitigate a material climate-related risk, if it has undertaken to do so in its strategy, and a description of those activities.
- Any oversight and governance of climate-related risks by the board and management.
- Any process for identifying, assessing and managing climate-related risks and whether any such process is integrated into overall risk management systems.
- If applicable, a description of how the company's climate-related goals are likely to affect the company's business operations and financial conditions.
- For large accelerated filers (LAFs)⁸ and other non-exempt accelerated filers (AFs),⁹ information about material Scope 1 and/or Scope 2 emissions and an assurance report at a reasonable assurance level for LAFs and a limited assurance level for AFs.

The Amended Rules also include amendments to Regulation S-X, which require registrants to include climate-related financial statement metrics and related disclosures in a note to their audited financial statements. Specifically, the note would be required to disclose financial impact metrics, expenditure metrics, and financial estimates and assumptions. The financial statement metrics will be subject to audit by an independent registered public accounting firm.

Additionally, the Amended Rules require LAFs and AFs to include a third-party attestation report covering their Scope 1 and Scope 2 greenhouse gas (GHG) emissions disclosure, including any changes in and whether there have been any disagreements at the "decision-making level" with the third-party attestation provider. While providers of third-party attestation reports would not be limited to Public Company Accounting Oversight Board accountants, such providers would be required to be independent of the company and to have "significant experience in measuring, analyzing, reporting or attesting to GHG emissions."

Material Changes from the Proposed Rules

The Amended Rules modify the Proposing Release¹⁰ by:

- Adding a materiality element to certain climate-related disclosures.
- Eliminating the requirement for disclosure of board members' climate expertise.
- Requiring LAFs and AFs to disclose Scope 1 and Scope 2 emissions on a phased-in basis, and only when such emissions are material, extending the phase-in period for LAFs to provide reasonable assurance and only requiring limited assurance for AFs.

⁸ Generally, those issuers with a public float of at least \$700 million.

⁹ Generally, those issuers with a public float between \$75 million and \$700 million.

¹⁰ [The Enhancement and Standardization of Climate-Related Disclosures for Investors](#), Release Nos. 33-11042; 34-94478 (March 21, 2022) (Proposing Release).

- Eliminating Scope 3 emissions disclosure requirements.
- Eliminating the requirement to disclose the impact of severe weather events and other natural conditions and transition activities on each line item of consolidated financial statements.
- Adding a safe harbor from private liability for certain disclosures other than historical facts.
- Eliminating the requirement for a private company that is a party to a business combination transaction to provide Regulation S-K or S-X disclosures.
- Eliminating the requirement for registrants to disclose any material changes to their climate-related disclosures.
- Extending certain phase-in periods.

This table summarizes the timeline for phasing in the new climate-related disclosures and requirements:

Registrant Type	Disclosure and Financial Statement Effects Audit		GHG Emissions/Assurance		
	Financial Statements Disclosure (Except Those in the Next Column)	Expenditure Disclosure Related to Mitigation of Climate-Related Risks, Transition Plans, or Target or Goal Actions	Scopes 1 and 2 GHG Emissions	Limited Assurance	Reasonable Assurance
LAFs	Fiscal Year Beginning 2025	Fiscal Year Beginning 2026	Fiscal Year Beginning 2026	Fiscal Year Beginning 2029	Fiscal Year Beginning 2033
AFs (Other Than SRCs and EGCs)	Fiscal Year Beginning 2026	Fiscal Year Beginning 2027	Fiscal Year Beginning 2028	Fiscal Year Beginning 2031	N/A
SRCs, EGCs and NAFs	Fiscal Year Beginning 2027	Fiscal Year Beginning 2028	N/A	N/A	N/A

Legend:

LAF (large accelerated filer)	Generally, those issuers with a public float of at least \$700 million.
AF (accelerated filer)	Generally, those issuers with a public float between \$75 million and \$700 million.
SRC (smaller reporting company)	Generally, those issuers with a public float of less than \$250 million; or, issuers with annual revenues of less than \$100 million and either no public float or a public float of less than \$700 million.
EGC (emerging growth company)	Generally, those issuers with total annual gross revenues of less than \$1.235 billion during their most recently completed fiscal year and have not met the specified conditions for no longer being considered an EGC.
NAF (non-accelerated filer)	Those issuers that are not LAFs or AFs.

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