Proskauer

The SEC Adopts Extensive Climate Change Disclosure Rules

Regulatory & Compliance on **March 6, 2024**

Two years after proposing rules on climate change disclosure, the SEC has adopted new rules, predictably by a split 3-2 vote. The adopted rules maintain the core of the original proposals, requiring that both domestic companies and foreign private issuers disclose the actual and potential impacts of climate change as well as management and governance processes to address those impacts. In the face of public comments highlighting the costs, burdens, and practicality of some aspects of the proposals, and political opposition, the SEC materially paired back the proposals, most significantly dropping the requirement to disclose Scope 3 greenhouse gas (GHG) omissions data relating to downstream and upstream sources, such as by vendors and customers. However, as described in our recent report, California's new rules will require Scope 3 information for companies doing business in California if implemented in their current form.

Consistent with the proposals, the new rules add a new "climate change" section in companies' registration statements and periodic reports on Form 10-K (and corresponding disclosures in Form 20-F for foreign private issuers) to include disclosure regarding:

- Actual or reasonably-likely material impacts on the company's results of operations, business strategy, and outlook, and how any climate-related risks have affected or are likely to affect them within the next 12 months, and beyond the next 12 months, and similar information about the impact of climate change mitigation activities.
- Processes for identifying, assessing, and managing material climate-related risks and whether and how any such processes are integrated into the registrant's overall risk management system or processes;
- If the company has adopted a transition plan, a description of the plan, and updates on activities and material financial and business impacts of the plan;
- Whether the company uses scenario analyses to assess climate risk and disclosures around use of such analyses in connection with reasonably likely material impacts;

- If material, greenhouse gas emissions metrics, including direct emissions (Scope 1) and indirect emissions from purchased electricity and other forms of energy (Scope 2), together with attestation reports, for large-accelerated filers and accelerated filers;
- For accelerated or large accelerated filers, an attestation report from an independent attestation service provider covering the company's Scopes 1 and 2 emissions disclosure;
- Disclosure about climate-related targets or goals that have or are reasonably likely to impact the company's business or results of operations;
- Certain other information about costs and losses associated with severe weather events, carbon offsets or renewable energy credits, and internally maintained carbon prices; and
- Board and management oversight and governance of climate-related risks and related risk management practices.

Compared to the SEC's proposals, the new rules include more "materiality" qualifiers while also appearing to require that materiality assessments for future events focus beyond the traditional 12-month time frame. The adopted rules also limit the scope of companies required to disclose GHG emissions to the largest, most seasoned public filers, and extend the length of phase-in periods for attestation reports. The safe harbors from civil liability were slightly extended, and the requirement to provide material updates in quarterly reports on Form 10-Q or reports on Form 6-K were eliminated.

As a transition period, the SEC has adopted staged phase-in periods beginning in fiscal 2025 for large, accelerated filers, for their annual reports on Form 10-K or 20-F filed in 2026, accelerated filers beginning to comply one year later, and all other filers, including smaller reporting companies and emerging growth companies, begin to comply a year after that. There are longer phase-in rules for assurance requirements related to GHG emissions data. Thus, for example, a large, accelerated filer would begin to comply for fiscal year 2025 (and the Form 10-K or 20-F filed in 2026), with "limited assurance" for Scope 1 and 2 greenhouse emissions data applying in 2029, and reasonable assurance in 2033.

The new disclosures, and the processes used to identify and synthesize relevant information, will be part of the company's required "disclosure controls and procedures," so companies may be subject to regulatory scrutiny even if their related disclosures are sufficient. In some cases, the SEC has focused its enforcement scrutiny on companies' disclosure controls even though it may not believe it has an adequate basis to challenge a company's end-product disclosures. Companies should focus on their internal procedures just as they focus on operational adjustments necessary to comply with the new rules. These rules received unprecedented attention and comments, and, like several other high profile rules adopted by the SEC and other regulators, we anticipate challenges to these rules, which we will continue to monitor.

View Original

Related Professionals

- **Frank Zarb**
  Partner
- **Louis Rambo**
  Partner