

Making Waves: The SEC Publishes Final Climate Disclosure Rules

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Key Points:

- On Wednesday, March 6, 2024, the SEC in a 3-2 vote adopted “**The Enhancement and Standardization of Climate-Related Disclosures for Investors**” (Final Rule). The Final Rule will require public companies to disclose certain climate-related information in their registration statements and annual reports. The Final Rule is intended to enhance and standardize certain climate-related disclosures in order to address stakeholder demands for more consistent, comparable and reliable information about the financial effects of climate-related risks and how companies manage such risks.
- The Final Rule reflects the Biden administration’s whole of government approach to the U.S. government’s response to climate change, leveraging, in this instance, the SEC’s rulemaking authority to improve transparency significantly around climate risks and claims.
- This Alert summarizes the Final Rule, identifies criticisms and potential legal challenges and offers recommendations on how to prepare for the new disclosure requirements.

Summary

Modeled in part upon the Task Force on Climate-Related Financial Disclosures (TCFD)¹ disclosure framework, bound by materiality as a general threshold for the requirements, the Final Rule requires disclosure of the following topics.

- **Governance:** Describe the board’s and management’s oversight and governance of material climate-related risks.
- **Strategy:** Disclose the material impact or reasonably likely material impact of identified climate-related risks on strategy, results of operations or financial condition.
- **Risk Management:** Describe the processes for identifying, assessing and managing material climate-related risks, and any integration into overall risk management.
- **Targets and Goals:** Disclose any material climate-related targets or goals and their material impact or reasonably likely material impact, including (1) the scope of activities included in the targets and the time horizon for achieving such targets, (2) how such targets or goals are intended to be met and (3) any progress made toward the targets or goals, with annual updates.
- **GHG Emissions Metrics:** To the extent determined to be material, large accelerated filers and accelerated filers will be required to separately disclose direct greenhouse gases (GHG) emissions (Scope 1) and/or indirect GHG emissions from purchased electricity and other forms of energy (Scope 2), expressed both by disaggregated constituent GHG emissions and in the aggregate. Notably, the U.S. Securities and Exchange

Commission (SEC) elected to omit from the Final Rule a requirement that a company also disclose indirect emissions from upstream and downstream activities in such company's value chain (i.e., Scope 3 emissions information). Omission of the Scope 3 disclosure requirement represents a departure from the disclosure rule, as proposed, as well as a deviation from climate disclosure rules adopted by European regulators and the suite of climate disclosure legislation enacted by the state of California.

- **Attestation of Scope 1 and Scope 2 Emissions Disclosure:** Provide, if required to provide GHG emissions disclosures, an attestation report from a qualified outside service provider covering, at a minimum, the disclosure of Scope 1 and Scope 2 GHG emissions and certain related disclosures about the service provider.
- **Carbon Offsets:** Disclose information about the use of any carbon offsets or renewable energy certificates (RECs) used as a material component of a company's plan in achieving its climate-related targets or goals.
- **Financial Statement Metrics:** Provide climate-related financial statement metrics and related disclosure in a note to the company's audited financial statements.

Climate-related disclosures under the Final Rule, both narrative and quantitative in form, are to be tagged in Inline XBRL and will be filed rather than furnished. A more fulsome description of the Final Rule is set forth below.

The Final Rule will go into effect 60 days after publication in the Federal Register, and compliance will be phased in as described below.

Comments

In its adopting release, the SEC acknowledged the "extensive public comments" it received in relation to the proposed rule, noting that the agency received "over 4,500 unique comment letters...and over 18,000 form letters." Such comments were received from a broadly-based set of stakeholders, including "academics, accounting and audit firms, individuals, industry groups, investor groups, law firms, non-governmental organizations, pension funds, professional climate advisors, professional investment advisers and investment management companies, registrants, standard-setters, state government officials, and U.S. Senators and Members of the House of Representatives." The SEC also pointed out that each of its Investor Advisory Committee and Small Business Capital Formation Advisory Committee recommended modifications to the disclosure rules, as proposed, and that the Final Rule reflects modifications that "better effectuate our goals in requiring these additional disclosures while limiting the final rules' burdens on registrants."

Compliance

The following table sets forth compliance deadlines:

Compliance Dates under the Final Rule ¹						
Registrant Type	Disclosure and Financial Statement Effects Audit		GHG Emissions/Assurance			Electronic Tagging
	<i>All Reg. S-K and S-X disclosures, other than as noted in this table</i>	<i>Item 1502(d)(2), Item 1502(e)(2), and Item 1504(c)(2)</i>	<i>Item 1505 (Scopes 1 and 2 GHG emissions)</i>	<i>Item 1506 - Limited Assurance</i>	<i>Item 1506 - Reasonable Assurance</i>	<i>Item 1508 - Inline XBRL tagging for subpart 1500²</i>
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
	<p>1 As used in this chart, “FYB” refers to any fiscal year beginning in the calendar year listed.</p> <p>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.</p>					

LAF—Large Accelerated Filer

AF—Accelerated Filer

NAF—Non-Accelerated Filer

SRC—Smaller Reporting Company

EGC—Emerging Growth Company

Impacted Forms

The Final Rule will impact each of Form S-1, Form F-1, Form S-4, Form F-4, Form S-11, Form 10, Form 10-K, and Form 20-F.

Criticism and Potential Legal Challenges

The Final Rule continues to face opposition by certain businesses and conservative groups that view the disclosure scheme as illegal and overreaching; however, the changes made between the proposed rule and Final Rule also has angered long-time proponents of strong climate disclosure rules. For instance, Senator Elizabeth Warren (D-MA) and House Financial Services Ranking Member Maxine Waters (D-CA) both criticized the Final Rule as not going far enough. Warren described the Final Rule as “the bare minimum.”

The most significant opposition to the Final Rule comes from Republican-aligned politicians and business organizations, as well as the SEC's two Republican Commissioners. Commissioners Peirce and Uyeda dissented over the agency's decision to adopt the Final Rule. Commissioner Peirce's dissent indicated that the SEC fell short in terms of justifying why climate-related disclosures merit special treatment and suggested that, as a result of the breadth and scope of comments made in response to the proposed rules, as well as climate-related disclosure requirements enacted by California and the European Union (EU), the agency should have modified and re-proposed the disclosure rules. In addition, Commissioner Peirce also questioned whether the agency's analysis of the economic impacts of the Final Rule was adequate.

The Final Rule will certainly face extensive litigation in federal court. Just hours after the commissioners voted to approve the Final Rule, a group of 10 Republican Attorneys General² filed a petition for review with the U.S. Court of Appeals for the 11th Circuit. The petition argues the Final Rule exceeds the agency's authority and is otherwise arbitrary, capricious, an abuse of discretion and not in accordance with the applicable law.

Business organizations and trade associations are expected to file suit as well. The U.S. Chamber of Commerce has stated that it is reviewing the Final Rule and will "use all the tools at [its] disposal, including litigation, if necessary, to prevent government overreach and preserve a competitive capital market."

Indeed, litigation brought by the U.S. Chamber of Commerce and other litigants against the state of California alleging that its recently enacted climate disclosure legislation – S.B. 253 and S.B. 261 – is instructive. Specifically, the lawsuit claims that these two laws, which require large corporations to disclose their GHG emissions and measures taken to address climate-related risk, violate the First Amendment by compelling speech, are pre-empted by federal law (i.e., the Clean Air Act), and violate the Dormant Commerce Clause by virtue of having regulatory implications that are extra-territorial in their impact. California's climate disclosure legislation was widely viewed as a precursor to the Final Rule and challenges to both the Final Rule and California's legislation are likely to wind-up before the U.S. Supreme Court in light of their breadth and impact. Relatedly, the Final Rule and related litigation will play out against a backdrop defined by even more prescriptive rulemaking initiatives in the EU and United Kingdom.

In Congress, Republicans are expected to use all available mechanisms to try to overturn or undermine the Final Rule. House Majority Leader Steve Scalise (R-LA) issued a press release promising that Congress would "act to protect our economic prosperity and energy security by overturning this rule." Republicans (and possibly Senator Joe Manchin) will attempt to use the Congressional Review Act (CRA), a mechanism Congress can use to overturn final agency decisions and rules. President Biden would be expected to veto any CRA resolution in relation to the Final Rule.

Final Rule

The Final Rule adds a new Subpart 1500 in Regulation S-K "Climate-Related Disclosure," including new Items 1500 (Definitions); 1501 (Governance); 1502 (Strategy); 1503 (Risk Management); 1504 (Targets and Goals); 1505 (GHG Emissions Metrics); 1506 (Attestation of Scope 1 and Scope 2 Emissions Disclosure); 1507 (Safe Harbor for Certain Climate-Related Disclosures); 1508 (Interactive Data Requirement); and a new Article 14 in Regulation S-X "Disclosure of Severe Weather Events and Other Information." The following is a summary of the significant aspects of the Final Rule.

Regulation S-K Subpart 1500 (Climate-Related Disclosure)

Governance (S-K Item 1501)

In describing the board of director's oversight of climate-related risks, include, as applicable:

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- The identification of any board committee or subcommittee responsible for the oversight of climate-related risks.
 - The processes by which such board committee or subcommittee is informed about climate-related risks.
 - If there is a climate-related target or goal disclosed pursuant to Item 1504, or transition plan disclosed pursuant to Item 1502, describe whether and how the board of directors oversees progress against such target, goal or transition plan.

In describing management's role in assessing and managing material climate-related risks, include, as applicable:

- Whether and which management positions or committees are responsible for assessing and managing climate-related risks and the relevant experience of the position holders or committee members in such detail as necessary to fully describe the nature of the experience.
- The processes by which such positions or committees assess and manage climate-related risks.
- Whether such positions or committees report information about climate-related risks to the board, committee or subcommittee of the board.

Strategy (S-K Item 1502)

Companies should describe any climate-related risks that have materially impacted or are reasonably likely to have a material impact on the company, including on its strategy, results of operations, or financial condition.

Disclosure of climate-related risks should define the time horizon and specify the nature of the risks presented. For physical risks, the description should note if it may be categorized as an acute or chronic risk, and the geographic location and nature of the properties, processes or operations subject to the physical risk. For transition risks, the description should note whether it relates to regulatory, technological, market, or other transition-related factors, and how those factors impact the company.

The description should include the actual and potential material impacts of any climate-related risks, including any material impacts on the company's:

- Business operations, including the types and locations of its operations.
- Products or services.
- Suppliers, purchasers or counterparties to material contracts, to the extent known or reasonably available.
- Activities to mitigate or adapt to climate-related risks, including adoption of new technologies or processes.
- Expenditure for research and development.

Further, the disclosure should indicate whether and how the company considers any of the described impacts as part of its strategy, financial planning and capital allocation, and whether they have been integrated into the company's business model or strategy.

The company should discuss how any described climate-related risks have materially impacted or are reasonably likely to impact the company's business, results of operations, or financial condition. It should describe quantitatively and qualitatively the material expenditures incurred and material impacts on financial estimates and assumptions that directly result from the described mitigation activities.

In addition, if a company has adopted a transition plan to manage a material transition risk, describe the plan. It must include quantitative and qualitative disclosure of material expenditures incurred and material impacts on financial estimates and assumptions as a direct result of the described transition plan.

If a company uses scenario analysis to assess the impact of climate-related risks on its business, results of operations, or financial condition, and if, based on the results of such scenario analysis, the company determines that a climate-related risk is reasonably likely to have a material impact on its business, results of operations, or financial condition, the company must describe each such scenario including a brief description of the parameters, assumptions, and analytical choices used, as well as the expected material impacts, including financial impacts, on the company under each such scenario.

If a company's use of an internal carbon price is material to how it evaluates and manages a described climate-related risk, it should disclose in units of the company's reporting currency:

- The price per metric ton of carbon dioxide equivalent (CO₂e).
- The total price, including how the total price is estimated to change over time, if applicable.

Such disclosure should indicate how any internal carbon price is used to evaluate and manage climate-related risks and, if more than one internal carbon price is used, the reasons for using different prices.

Risk Management (S-K Item 1503)

Describe any processes for identifying, assessing and managing material climate-related risks, including, as applicable, how the company:

- Identifies whether it has incurred or is reasonably likely to incur a material physical or transition risk.
- Decides whether to mitigate, accept, or adapt to the particular risk.
- Prioritizes whether to address the climate-related risk.

With respect to such processes, if managing a material climate-related risk, disclose whether and how they are integrated into the company's overall risk management system or processes.

Targets and Goals (S-K Item 1504)

A company must disclose any climate-related target or goal if that target or goal has materially affected or is reasonably likely to materially affect the company's business, results of operations or financial condition. In providing this disclosure, the company must provide any additional information or explanation necessary to an understanding of the material impact or reasonably likely material impact of the target or goal, including, as applicable, a description of:

- The scope of activities included in the target.
- The unit of measurement.
- The defined time horizon by which the target is intended to be achieved, and whether the time horizon is based on one or more goals established by a climate-related treaty, law, regulation, policy or organization.
- If the company has established a baseline for the target or goal, the defined baseline time period and the means by which progress will be tracked.
- A qualitative description of how the company intends to meet its climate-related targets or goals.

A company must update this disclosure each fiscal year with any progress made toward meeting the target or goal and how any such progress has been achieved. The company must include a discussion of any material impacts to its business, results of operations, or financial condition as a direct result of the target or goal or the actions taken to make progress toward meeting the target or goal. It must also include quantitative and qualitative disclosure or any material expenditures and material impacts on financial estimates and assumptions as a direct result of the target or goal or the actions taken to make progress toward meeting the target or goal.

If carbon offsets or RECs have been used as a material component of a plan to achieve climate-related targets or goals, the company must separately disclose the amount of carbon avoidance, reduction or removal represented by the offsets or the amount of generated renewable energy represented by the RECs, the nature and source of the offsets or RECs, a description and location of the underlying projects, any registries or other authentication of the offsets or RECs, and the cost of the offsets or RECs.

GHG Emissions Metrics (S-K Item 1505)

A company that is a large accelerated filer or an accelerated filer must disclose its Scope 1 emissions and/or its Scope 2 emissions, if such emissions are material, for its most recently completed fiscal year, and, to the extent previously disclosed in a filing with the SEC, for the historical fiscal years included in the consolidated financial statements in the filing. For any GHG emissions required to be disclosed pursuant to Item 1505, disclose Scope 1 and/or Scope 2 emissions separately, each expressed in the aggregate, in terms of CO₂e. In addition, if any constituent gas of the disclosed emissions is individually material, disclose such constituent gas disaggregated from the other gases. Disclose Scope 1 emissions and/or Scope 2 emissions in gross terms by excluding the impact of any purchased or generated offsets.

Smaller reporting companies and emerging growth companies are exempt from the disclosure requirements set forth in S-K Item 1505.

Methodology and Related Instructions

A company must describe the methodology, significant inputs and significant assumptions used to calculate its GHG emissions. The description of the company's methodology must include the company's organizational boundaries³ when calculating disclosed GHG emissions, including the method used to determine those boundaries. If the organizational boundaries materially differ from the scope of entities and operations included in a company's consolidated financial statements, then a brief explanation of the difference should be included in the disclosure. In addition, companies should include a brief description, using sufficient detail, regarding (x) the operational boundaries used (including the approach to categorization of emissions and emissions sources), and (y) the protocol or standard used to report the GHG emissions, including the calculation approach, the type and source of any emission factors used and any calculation tools used to calculate the GHG emissions.

A company may use reasonable estimates when disclosing its GHG emissions as long as it also describes the underlying assumptions, and its reasons for using, such estimates.

Incorporation by Reference

GHG emissions metrics disclosed pursuant to S-K Item 1505 in a company's annual report on Form 10-K may be incorporated by reference from such company's Form 10-Q for the second fiscal quarter in the fiscal year immediately following the year to which the GHG emissions metrics disclosure relates, or may be included in an amended report on Form 10-K no later than the due date for such Form 10-Q. For foreign private issuers, such information may be disclosed in an amendment to its annual report on Form 20-F, which shall be due no later than 225 days after the end of the fiscal year to which the GHG emissions metrics disclosure relates. Importantly, in either case, a company must include an express statement in its annual report indicating its intention to incorporate by reference this information from either a quarterly report on Form 10-Q or amend its annual report on Form 10-K or Form 20-F to provide this information by the required date. For registration statements filed under the Securities Act of 1933 or filed on Form 10 or Form 20-F, any GHG emissions metrics disclosed under S-K Item 1505 must be provided as of the most recently completed fiscal year that is at least 225 days prior to the registration statement's effectiveness.

Attestation of Scope 1 and Scope 2 Emissions Disclosure (S-K Item 1506)

Attestation

A company that is required to provide Scope 1 and/or Scope 2 emissions disclosure pursuant to S-K Item 1505 must include an attestation report covering such disclosure in the relevant filing, subject to the following:

- For filings made by an accelerated filer beginning the third fiscal year after the compliance date (and thereafter), the attestation engagement must, at a minimum, be at a limited assurance level and cover the company's Scope 1 and/or Scope 2 emissions disclosure.
- For filings made by a large accelerated filer:
 - Beginning the third fiscal year after the compliance date, the attestation engagement must, at a minimum, be at a limited assurance level and cover the company's Scope 1 and/or Scope 2 emissions disclosure.
 - In addition, beginning the seventh fiscal year after the compliance date (and thereafter), the attestation engagement must be at a reasonable assurance level and cover the company's Scope 1 and/or Scope 2 emissions disclosure.

Attestation Report Requirements

Any attestation report required under the Final Rule must be provided pursuant to standards that are (x) publicly available at no cost or that are widely used for GHG emissions assurance and (y) established by a body or group that has followed due process procedures, including the broad distribution of the framework for public comment. In addition, the form and content of the attestation report must follow the requirements set forth by the attestation standard (or standards) used by the GHG emissions attestation provider.

GHG Emissions Attestation Provider

GHG emissions attestation reports must be prepared and signed by a GHG emissions attestation provider that:

- Is an expert in GHG emissions by virtue of having significant experience in measuring, analyzing, reporting or attesting to GHG emissions. For these purposes, "significant experience" means having sufficient competence and capabilities necessary to (x) perform engagements in accordance with attestation standards and applicable legal and regulatory requirements, and (y) enable the service provider to issue reports that are appropriate under the circumstances.
- Is independent with respect to the company, and any of its affiliates, for whom it is providing the attestation report, during the attestation and professional engagement period.⁴ Attestation providers are not independent if such provider is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that such provider is not, capable of exercising objective and impartial judgment on all issues encompassed within such provider's engagement.
- The Final Rule includes criteria the SEC will consider when determining whether an attestation provider is independent. These include:
 - Whether a relationship or provision of services creates a mutual or conflicting interest between the provider and the company (or any of its affiliates), places the provider in the position of attesting to its own work, results in the provider acting as management or an employee of the company (or any of its affiliates), or places the provider in a position of being an advocate for the company (or any of its affiliates).
 - All relevant circumstances, including all financial or other relationships between the provider and the company (or any of its affiliates) and not just circumstances relating to reports filed with the SEC.

Additional Disclosures

In addition to the GHG emissions attestation report required by S-K Item 1505, large accelerated filers and accelerated filers must also disclose, alongside the GHG emissions disclosure to which the attestation report relates, after requesting relevant information from any attestation provider as necessary:

- Whether the provider is subject to any oversight inspection program and if so, which program (or programs), and whether the attestation engagement is included within the scope of authority of such oversight inspection program.
- Whether any provider that was previously engaged to provide attestation over the company's GHG emissions disclosure for the fiscal year covered by the attestation report resigned, was dismissed, or indicated that it declined to stand for re-appointment after completing its engagement. Under these circumstances, the company must state:
 - Whether the provider resigned, declined to stand for re-appointment or was dismissed (including the date thereof).
 - If there was a disagreement between the company and the provider during the engagement on any matter of measurement, disclosure of GHG emissions or the scope of procedures used for the attestation, including a description of such disagreement and whether the company has authorized the provider to respond fully to inquiries of a successor provider concerning the subject of such disagreement.
 - The Final Rule notes that the term “disagreement” is meant to be interpreted broadly, requiring merely a difference in opinion; however, the term does not include initial differences of opinion based on incomplete facts or preliminary information that were later resolved to the provider's satisfaction, including by the company providing the provider with additional relevant facts or information.
 - Disagreements required to be reported include both disagreements that are resolved and those that are not resolved. In addition, disagreements are those that occur at the decision-making level (i.e., between company personnel responsible for presentation of GHG emissions disclosure and the provider's personnel responsible for rendering the attestation report). For these purposes, an oral communication from the engagement partner or another person responsible for rendering the attestation provider's opinion or conclusion (or their designee) will generally suffice as a statement of disagreement requiring disclosure pursuant to the Final Rule.

Disclosure of Voluntary Assurance

Companies that are not required to include a GHG emissions attestation report pursuant to the Final Rule must disclose in the filing the following if a company's GHG emissions disclosure were subject to third-party assurance:

- Identification of the service provider of such assurance.
- Description of the assurance standard used.
- Description of the level and scope of assurance services provided.
- Brief description of the results of the assurance services.
- Whether the service provider has any material business relationships with or has provided any material professional services to the company.
- Whether the service provider is subject to any oversight inspection program, and if so, which program (or programs), and whether the assurance services over GHG emissions are included within the scope of authority of such oversight inspection program.

Location

A company must include the attestation report and disclosure required by the Final Rule in the filing containing the GHG emissions disclosure to which the attestation report and disclosure relate. If a company elects to incorporate by reference its GHG emissions disclosure from a Form 10-Q for the second fiscal quarter of the fiscal year immediately following the year to which the GHG emissions disclosure relates or to provide such information in an amended annual report on Form 10-K or Form 20-F, then the company must include an express statement in its annual report indicating its intention to incorporate by reference the attestation report from either the quarterly report on Form 10-Q or amend its annual report on Form 10-K or 20-F to provide the attestation report by the required date.

Safe Harbor for Certain Climate-Related Disclosures (S-K Item 1507)

The Final Rule provides a safe harbor for climate-related disclosures pertaining to transition plans, scenario analysis, the use of an internal carbon price, and targets and goals, provided pursuant to Regulation S-K Items 1502(e), 1502(f), 1502(g), and 1504. The safe harbor provides that all information required by the specified sections, except for historical facts, is considered a forward-looking statement for purposes of the Private Securities Litigation Reform Act safe harbors for forward-looking statements. Because the Final Rule does not require the disclosure of Scope 3 emissions from any company, the SEC did not adopt a safe harbor in relation to the Final Rule.

Regulation S-X Article 14 (Disclosure of Severe Weather Events and Other Information)

Contextual Information Under Regulation S-X Rule 14-02

Companies must provide contextual information, describing how each specified financial statement effect was derived, including a description of significant inputs and assumptions used, significant judgements made, and other information important to understand the financial statement effect and, if applicable, policy decisions made by the company to calculate the specified disclosures.

Disclosure Thresholds

Disclosures of the aggregate amount of expenditures expensed as incurred and losses is required if such aggregate expenditures expensed as incurred and losses equals or exceeds 1% of the absolute value of a company's income or loss (before income tax expenses or benefits) for the relevant fiscal year. Disclosures are not required, however, if such expenditures are less than \$100,000 for the relevant fiscal year. Disclosures of the aggregate amount of capitalized costs and charges incurred by a company due to severe weather events and other natural conditions is required if the absolute value of capitalized costs and charges is greater than or equal to 1% of the absolute value of stockholders' equity or deficit at the end of the relevant fiscal year. Disclosure is not required if the aggregate amount of the absolute value of capitalized costs and charges is less than \$500,000 for the relevant fiscal year.

Expenditures; expensed as incurred and losses resulting from severe weather events and other natural conditions; Capitalized costs and charges resulting from severe weather events and other natural conditions

Companies must disclose both the aggregate amount of expenditures expensed as incurred and losses as well as the aggregate amount of capitalized costs and charges (in both cases, excluding recoveries) incurred during the fiscal year because of severe weather events and other natural conditions. The Final Rule cites hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures, and sea level rises as examples of severe weather events. Companies must separately disclose and identify where the expenditures expensed as incurred and losses are presented in the income statement.

Carbon Offsets and RECs

If carbon offsets or RECs were used as a material component of a company's plan to achieve its disclosed climate-related targets or goals, it must disclose the following during the fiscal year:

- The aggregate amount of carbon offsets and RECs expensed.
- The aggregate amount of capitalized carbon offsets and RECs recognized.
- The aggregate amount of losses incurred on the capitalized carbon offsets and RECS.

Companies must separately identify where the above items appear on the income statement and balance sheet, and they must state their accounting policy for carbon offsets and RECs.

Preparing for What's Next

Notwithstanding our expectation that the Final Rule will be subject to extensive and lengthy litigation, there are steps U.S.-listed companies should take now in anticipation of these new requirements. This is particularly true for companies that determine climate-related events may materially affect business operations and long-term strategic considerations, or where a company operates in jurisdictions that may have adopted climate-related disclosure requirements. These include:

- **Reviewing the Board's and Management's Role in Climate Oversight:** Consider the board's role in overseeing the governance and risk management of, and management's role in assessing and managing, the company's climate-related risks and opportunities. Consider board membership and expertise related to climate-related risks. Evaluate whether any related changes should be made to board committees or management positions, as well as committee charters.
- **Evaluating Existing Disclosures:** Many companies already release information about their GHG emissions and include climate-related risks and opportunities in their SEC reports and voluntary ESG or sustainability reports. Evaluate existing company disclosures and identify areas requiring potentially significant lead times or accounting or reporting infrastructure to comply with the Final Rule (or other relevant disclosure requirements and/or guidelines). Consider ways to leverage the methodology and processes already used to make existing climate-related disclosures portable to SEC reports.
- **Revisiting Climate Goals and Net Zero Plans:** Consider whether the company has developed plans and milestones for achieving previously announced climate goals and net zero plans. Where applicable, look to prominent existing target-setting and disclosure frameworks, such as those published by ISSB, for guidance on how to make accurate and sensible climate-related disclosures, including quantifying emissions throughout the value chain, where material.
- **Assessing Reporting Needs:** Consider whether the company has sufficient in-house staff with relevant experience in evaluating climate-related risks and implementing related plans of action. Educate decision makers and in-house counsel new to evaluating climate risk on how it may be material to a business and ensure that the company considers the full range of climate-related risks, including both physical risks (e.g., loss or damage to property, sourcing and supply chain issues) and transition risks (e.g., business and regulatory changes that establish new market or legal challenges).
- **Engaging Experts:** Consider whether to engage additional third-party climate consultants and counsel to evaluate the company's climate risk profile and advise on scenario analysis methodologies, annual climate-related disclosure and the need to obtain an attestation report covering emissions disclosures.
- **Beginning Dialogues with Auditors and Legal Advisors:** Discuss the Final Rule with your independent auditor and legal advisors.

If you have questions about this client alert, please contact any Akin lawyer or advisor below:



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¹ The SEC in the adopting release refers to recent rulemaking initiatives by foreign and state regulatory authorities in relation to the disclosure of climate related risks, including announcements by several countries of their intention to adopt laws or regulations implementing climate reporting standards developed by the International Sustainability Standards Board (which we wrote about [here](#)) and climate-related disclosures requirements enacted by the state of California (which we wrote about [here](#)). We note that California’s climate-disclosure rules are currently subject to challenge in federal court.

² The States represented include Alabama, Alaska, Georgia, Indiana, New Hampshire, Oklahoma, South Carolina, Virginia, West Virginia and Wyoming.

³ For purposes of the Final Rule, “operational boundaries” means the boundaries that determine the direct and indirect emissions associated with the business operations owned or controlled by a registrant. See 17 CFR 229.1500.

⁴ For these purposes, “attestation and professional engagement period” means the period of the engagement to attest to the company’s GHG emissions or to prepare a report filed with the SEC. Such period begins when the provider signs an initial engagement letter or other agreement to attest to a company’s GHG emissions or begins performing attestation procedures, whichever is earlier.