SEC MANDATES CLIMATE-RELATED DISCLOSURE FOR SEC REPORTING COMPANIES: A VICTORY FOR INVESTORS DESPARATE FOR CONSISTENT, COMPARABLE, DECISION-USEFUL CLIMATE DISCLOSURE – UPDATED

- Domestic registrants and foreign private issuers will be subject to mandatory climate-related disclosure obligations. The objective is to provide investors with consistent, comparable and decision-useful information.
- Final rules scale back the proposed requirements in certain key respects, including elimination of the requirement to provide Scope 3 GHG emissions data.
- Large accelerated filers/accelerated filers must disclose Scope 1 and Scope 2 data, if material.
- Other textual disclosure requirements cover climate-related risks; material impacts of climate-related risks on strategy, business model and outlook; mitigation/adaptation activities and use of transition plans, scenario analysis or internal carbon price to manage climate-related risk; risk management processes for material climate risks; governance and oversight of material climate-related risks; and material climate targets/goals.
- Financial statement disclosure requirements cover impact of severe weather events and other natural conditions, roll-forward of carbon offsets and renewable energy credits, and impact on estimates and assumptions of severe weather events and other natural conditions as well as disclosed targets/goals and transition plans.
- Safe harbor extended for certain climate-related disclosures.

The SEC has approved and published its long-awaited climate-related disclosure rules. Disclosure will be required in registration statements and annual reports filed with the SEC by domestic registrants and foreign private issuers. The rules require information about climate-related risks that have materially impacted, or are reasonably likely to have a material impact on, business strategy, results of operations or financial condition, as well as information related to severe weather events and other natural conditions, which will be required to be included in notes to the audited financial statements.

In a much-anticipated rollback from the proposed rules, the requirement to disclose Scope 1 and Scope 2 GHG emissions data (together with an attestation report) will only apply to certain large registrants, and then only on a phased-in basis and also only if the emissions are material. The overall disclosure requirements will be phased in based on the status of a registrant (large accelerated filer ("LAF"), accelerated filer ("AF"), small reporting company ("SRC") and emerging growth company ("EGC")) and the content of the disclosure.

On April 4, the SEC issued an order staying compliance with the final rules pending the completion of judicial review of the challenges that have been consolidated by the Eighth Circuit. That order follows an administrative stay issued by the Fifth Circuit in response to the filing of a series of petitions challenging the final rules. The stay issued by the SEC is limited to the final rules that have been challenged in the consolidated Eighth Circuit petitions. Petitions include challenges asserting the SEC went too far, as well as challenges asserting the SEC did not go far enough. Thus, for example, the SEC's climate-related guidance issued in 2010 remains in effect. Note that the first annual reports subject to the

final rules would not have been due until March 3, 2026 (in respect of fiscal years beginning on or after January 1, 2025, for a large accelerated filer).

Principal Disclosure Requirements

The climate-related disclosure requirements are set forth in new subpart 1500 of Regulation S-K and Article 14 of Regulation S-X.

Definitions of climate-related risks and climate-related opportunities

A registrant will need to disclose climate-related risks that have had or are reasonably likely to have a material impact on the registrant's business strategy, results of operations or financial condition, both in the short-term and in the long-term [Items 1500 and 1502(a)]. Climate-related conditions and events can present risks related to the physical impacts of climate ("physical risks," which can be acute (event-driven related to shorter-term extreme weather events) or chronic (tied to longer-term weather patterns and related effects)) and risks related to a potential transition to a lower carbon economy ("transition risks"), such as those posed by regulatory, technological and market changes to address mitigation/adaptation.

The SEC made clear that it views current risk factor disclosure rules as insufficient, and that new Item 1502(a) is responsive to investors' need for decision-useful information regarding material climate-related risks and helps ensure that investors receive more consistent, comparable and reliable disclosures around climate-related risks. Moreover, the SEC views the adoption of standardized definitions and reliance on TCFD recommendations as contributing overall to more consistent and comparable information for investors.

To make the determination of whether a registrant is exposed to material climate-related risks less burdensome, the SEC eliminated from the definition of climate-related risks reference to "negative impacts on the value chain." This change means that a climate-related risk involving a registrant's value chain would generally not need to be disclosed except where the risk has materially impacted or is reasonably likely to materially impact the registrant's business, results of operations or financial condition. A similar change was made to the definition of "transition risks." The SEC also removed from the definition of climate-related "physical risks" acute risks or chronic risks to "the operations of those with whom a registrant does business" (acute or chronic risks are relevant but only to the business operations of the registrant).

The SEC was not persuaded by commenters who opposed Item 1502 on the basis that registrants would find it difficult to distinguish between climate-related physical risk and ordinary weather risk or between a business activity in response to transition risk and one that forms part of routine business strategy. The SEC reiterated guidance in Item 1502(a)(2) that registrants with significant operations in jurisdictions that have made commitments to reduce GHG emissions should consider whether they may be exposed to material transition risk by reason of implementation of the commitment.

In a change from the proposed rule, the temporal standard was revised to focus on short-term (in the next 12 months) and long-term (beyond the next 12 months) – consistent with MD&A standards. Registrants are free to break down a description of risks reasonably likely to

manifest beyond the next 12 months into components that may include medium- and longer-term risks, if that is consistent with the registrant's assessment and management of the climate-related risks.

The SEC, in its discussion of determinations of material impact in light of the temporal standards, likened the analysis to that required under existing MD&A guidance and interpretations, and reminded registrants that they are to rely on traditional notions of materiality (a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote, or such a reasonable investor would view omission of the disclosure as having significantly altered the total mix of information made available). The "reasonably likely" component of the rules requires management to evaluate the consequences of a risk as it would any "known trend, demand, commitment, event or uncertainty."

Material impacts of climate-related risks

To facilitate an understanding of resiliency to impacts of climate-related risks, a registrant will need to disclose the actual and potential material impacts of any climate-related risks identified and disclosed pursuant to Item 1502(a) on the registrant's strategy, business model, and outlook, including any material impacts on a non-exclusive list of items [Item1502(b)]. To avoid confusion and to address concerns about the lack of a materiality qualifier in Item 1502(b), the SEC has clarified that disclosure of material impacts is only required in respect of material risks identified pursuant to Item 1502(a). The *non-exclusive* list includes:

- business operations;
- products/services;
- suppliers, purchasers or counterparties to material contracts (to the extent known or reasonably available) – here the SEC removed "other parties in the value chain";
- mitigation and adaptation activities, including adoption of new technologies or processes; and
- R&D expenditures.

A registrant will also need to discuss whether and how it considers any of these material impacts as part of strategy, financial planning and capital allocation, including whether these material impacts have been integrated into business model or strategy (including whether and how resources are used to mitigate climate-related risks) and how targets disclosed under Item 1504 or in a disclosed transition plan relate to business model or strategy [Item 1502(c)]. These disclosures are intended to facilitate an assessment of resiliency to the impacts of climate-related risks, and in particular how management considers these impacts.

A registrant also will need to discuss how climate-related risks have materially impacted or are reasonably likely to materially impact business, results of operations or financial condition (as proposed, the impact would have been in respect of the financial statements) [Item 1502(d)(1)].

If, as part of its strategy, a registrant has undertaken activities to mitigate or adapt to a material climate-related risk (both physical risks and transition risks), it will need to provide a quantitative and qualitative description of material expenditures (capitalized or expensed)

incurred and material impacts on financial estimates and assumptions that in "management's assessment" directly result from such mitigation or adaptation activities [Item 1502(d)(2)]. This disclosure provides a useful financial metric for assessing management of the disclosed risk as well as assessing the financial impact of such activities; the link to management's assessment is intended to align disclosure with how a registrant actually evaluates material climate-related risk.

The SEC noted that the financial statement note disclosure requirements (described below) do not extend to financial impacts caused by transition risks – only the textual requirement (Item 1502(d)(2)) covers material expenditures related to activities engaged in for the mitigation of, and adaptation to, climate-related risks. The SEC also explained the delay in phase-in for Item 1502(d)(2) disclosure in light of the expected need for registrants to develop new systems and adjust disclosure control and procedures to track and report these material expenditures and material impacts on financial estimates and assumptions that directly result from climate-related mitigation or adaptation activities.

Mitigation/adaptation

A registrant will need to provide specified disclosures regarding a registrant's activities, *if any*, to mitigate or adapt to a material climate-related risk, including the use, if any, of transition plans [Item 1502(e)], scenario analysis [Item 1502(f)] or internal carbon prices [Item 1502(g)].

Transition plans

Among other things, if (and only if) a registrant has adopted a transition plan to manage material transition risk (specifically, a strategy and implementation plan to reduce climate-related risks, which may include reduction of GHG emissions in line with internal commitments or commitments of a jurisdiction within which significant operations are located), it will need to describe the plan. The rules do not mandate adoption of any such plan. The SEC declined to make this disclosure voluntary.

This disclosure will have to be updated each year to cover actions taken under the plan, including how any such actions have impacted business, results of operations or financial condition. Initially and as part of any update, the registrant will need to include quantitative and qualitative disclosure of material expenditures incurred (capitalized or expensed) and material impacts on financial estimates and assumptions as a direct result of actions taken under the plan (*e.g.,* for climate-related R&D) [Item 1502(e)(2)].

Note, in contrast to Item 1502(d), the Item 1502(e)(2) requirement does not make reference to "management's assessment." As under Item 1502(d), when responding to Item 1502(e), a registrant will have flexibility to explain qualitatively the nature of a material expenditure or material impact on its financial estimates or assumptions and how it directly resulted from the disclosed actions taken under the plan. The SEC noted that if individual expenditures do not appear to be material, registrants should consider whether overall expenditures related to actions under the plan are material in the aggregate and, if so, should provide appropriate disclosure. Similar to Item 1502(d)(2), Item 1502(e)(2) has a phased-in effective date.

In a change from proposed Item 1502(e)(2), the final rules do not refer to physical risk, making the disclosure requirement for transition plan disclosure more consistent with voluntary disclosures based on TCFD recommendations. A registrant that faces material physical risk nonetheless will be required to disclose how it is managing that risk as part of its Item 1503 risk management disclosure. Like the proposed requirement, the final rules do not require disclosure of climate-related opportunities included in a transition plan; it is optional (cognizant of antitrust concerns).

A material transition plan need not be approved by the Board to be subject to disclosure.

Scenario analysis

Scenario analysis is not mandated by the new rules. Item 1502(f) provides that, if a registrant *does use* 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 scenario analysis, it determines that a climate-related risk is reasonably likely to have a material impact on its business, results of operations or financial condition, then it 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, under each such scenario. The addition of the "brief" qualifier is intended to assuage concerns about having to disclose confidential business information.

The SEC eliminated language from the proposed rule to describe resilience of strategy in light of potential future changes in climate-related risks on the theory that use of scenario analysis by definition tests resilience of strategies under varying future scenarios. No "other analytical tools" (meaning no tools other than scenario analysis) are picked up by Item 1502(f). The final rules do not contemplate any particular form of scenario analysis – a registrant can select the preferred model(s) it believes best fits its sector/business or climate risk assessment approach.

The SEC declined to follow a recommendation that disclosure of scenario analysis should only be required when integrated with, and material to. a publicly announced climate-related strategy or initiative.

Internal carbon price

Item 1502(g)) requires a registrant that uses internal carbon pricing to disclose certain information about the internal carbon price, if such use is material to how it evaluates and manages a climate-related risk that, in response to Item 1502(a), it has identified as having materially impacted or is reasonably likely to have a material impact on it, including on its business strategy, results of operations or financial condition. If multiple internal carbon prices are used, disclosure will be required for each price and of the reasons for the use of different prices. This disclosure is expected to be particularly useful for investors (in respect of registrants that use carbon pricing to evaluate and manage a material climate-related risk, especially transition risk) in understanding the assumptions and analyses made by such registrants when determining and managing the likely financial impacts of such risks on such registrants.

To minimize investor confusion, if the scope and operations involved in the use of a described internal carbon price is materially different from the organizational boundaries used for the purpose of calculating GHG emissions, the registrant must briefly describe this difference. To streamline the disclosure, the SEC eliminated the proposed requirement to describe how internal carbon price is used to evaluate and manage climate-related risk. It also added a materiality qualifier.

Board/management oversight

A registrant will be required to disclose any oversight by the board of directors of climate-related risks [Item 1501(a)] and any role by management in assessing and managing the registrant's material climate-related risks [Item 1501(b)]. The SEC stressed that these are disclosure rules, and are not intended to shift governance behavior (including board practices and composition) or the ways in which registrants manage climate-related risk. No disclosure is required at the board level if there is no board oversight of climate-related risks, and the same is true for management oversight of climate-related risk.

If there is a target or goal disclosed under Item 1504 or a transition plan disclosed under Item 1502(e)(1), a registrant will be required to address whether and how the board oversees progress against the target/goal or plan. A registrant will be required to describe the processes by which the board or a committee/subcommittee is informed about climate-related risks. There is no materiality qualifier for this portion of the final rules (with the SEC recognizing that if directors determine to oversee a particular risk, the fact of that oversight is likely to be material to investors). In contrast, management will likely oversee many matters, some of which may not be material.

Instruction 1 to Item 1501 addresses foreign private issuer board structures (*i.e.,* supervisory boards and boards of auditors).

A registrant will be required to describe the relevant expertise of management responsible for assessing and managing material climate-related risks. The rule includes a non-exclusive list of the types of disclosures that should be included when describing management's role. This includes the process by which members of management are informed about and monitor climate-related risks and whether management reports to the board/subcommittee on these risks. The SEC noted that the addition of a materiality qualifier should mitigate concerns that the obligation to disclose relevant expertise would compel registrants to hire management with relevant expertise. And, of course, if a registrant has not identified a material climate-related risk, no disclosure is required. Said another way, if the risk is material, management should have the expertise.

Risk management

A registrant will be required to disclose any processes it has for identifying, assessing and managing material climate-related risks and, if the registrant is managing those risks, whether and how any such processes are integrated into its overall risk management system or processes [Item 1503]. It should address how it identifies whether it has incurred or is reasonably likely to incur a material physical or transition risk, how it decides whether to mitigate, accept or adapt to the particular risk and how it prioritizes whether to address the

risk. The SEC emphasized that these rules (in fact the entire regime) is intended to allow registrants to tailor disclosure to their particular facts and circumstances.

The addition of the materiality qualifier and removal of several prescriptive elements should assuage concerns that providing risk management disclosure would trigger undue cost. If a registrant has not identified a material climate-related risk, no disclosure is required. This was of particular concern given the wide range of risks that registrants manage as a matter of course as part of their operations.

The SEC confirmed that a registrant is not required to speculate in its disclosure about future restructurings, write-downs or impairments related to climate risk management. A registrant must disclose whether and how any of these processes have been integrated into overall risk management systems or processes.

Targets and goals

A registrant will be required to provide information about its climate-related targets or goals, if any, that have materially affected or are reasonably likely to materially affect its business, results of operations or financial condition [Item 1504(a)].

A registrant will need to provide additional information necessary to understand the material impact or likely material impact of a target/goal [Item 1504(b)]. Disclosure would include, based on a non-exclusive list,

- scope;
- unit of measurement;
- time horizons for achievement and whether the time horizon is based on one or more goals set by treaty, law, regulation, policy or organization;
- if baselines for targets/goals have been established, the defined time period and the means by which progress will be tracked; and
- in qualitative terms, how the registrant intends to meet the targets/goals.

The SEC eliminated the proposed reference to "emissions" in its list, as that would likely be covered by scope, and eliminated the proposed reference to "absolute or intensity-based," as that would likely be covered by unit of measurement. It also eliminated the proposed requirement to disclose interim targets. As noted above, a registrant will need to address how it intends to meet its targets/goals, but this discussion of prospective activities need only be qualitative. It is up to the registrant to determine what specific factors to highlight as part of that qualitative description.

A registrant will need to address its progress in meeting a target/goal and the extent of the progress [Item 1504(c)]. It will also need to update the disclosure each year by describing actions taken to achieve the target/goal, as is the case for updates regarding transition plans. As part of the requirement to discuss progress, a registrant will need to address material impacts on business, results of operations or financial condition as a direct result of a target/goal or actions to make progress toward meeting such target/goal [Item 1504(c)(1)]. It will also need to provide quantitative and qualitative disclosure of material expenditures and material impacts on financial estimates and assumptions as a direct result of the target or goal

or actions taken to make progress toward meeting such target or goal [Item 1504(c)(2)]. Overall expenditures during a relevant period that in the aggregate would be material would be subject to disclosure.

Target/goal disclosure can be included in the discussion of a transition plan or of the material impacts of climate-related risks on business model or strategy. It could also be included in the risk management discussion. As is the case for Items 1502(d)(2) and 1502(e)(2), Item 1504(c)(2) disclosure is subject to phase-in.

The key determinant is materiality. Disclosure of material targets or goals is required whether or not they have been publicly announced and whether or not they have been formally adopted by the board or CEO, or otherwise. Internal targets/goals that are not material are not required to be disclosed.

The disclosure requirement extends beyond GHG emissions targets or goals, and encompasses all material climate-related targets/goals. For this reason, the SEC eliminated the parenthetical reference to the following examples: GHG emissions and energy usage, water usage or revenues from low-carbon products. The rule is agnostic when it comes to the particular issue a target/goal is designed to address and, therefore, the SEC declined to make specific reference to targets/goals related to mitigation of impacts on local communities or that concern human capital management. Registrants are free to voluntarily disclose additional information (not part of a target/goal) that is related to mitigation of climate-related risks.

Carbon offsets and renewable energy credits or certificates ("RECs")

A registrant will need to address its use of carbon offset and RECs, but only if they have been used as a material component of a registrant's plan to achieve climate-related targets or goals [Item 1504(d)]. The registrant will need to make a determination, based upon specific facts and circumstances, about the importance of such carbon offsets and RECs to the overall transition plan and provide disclosure accordingly.

If carbon offsets or RECs have been used as a material component of a plan to achieve climate-related targets or goals, then the registrant will be required to disclose:

- the amount of carbon avoidance, reduction or removal represented by the offsets (avoidance and removal were added to the final rules) or the amount of generated renewable energy represented by the RECs;
- the nature (added to the final rules) 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

GHG emissions disclosure – generally seen as a key measure and indicator of exposure to transition risk, a useful tool for assessing a registrant's management of transition risk and a useful tool for measuring progress towards achievement of climate-related targets/goals – has been scaled back. LAFs and AFs that are not otherwise exempted (*i.e.,* SRCs and EGCs) will

be required on a phased-in basis to provide information about material Scope 1 emissions and/or material Scope 2 emissions [Item 1505].

The test for materiality is the traditional federal securities measure and, therefore, is not determined solely by the amount of the emissions. If Scope 1 is material but Scope 2 is not material, then only Scope 1 emissions need to be disclosed, and vice versa. If both categories are material, they both must be disclosed.

The SEC notes that Scope 1 or Scope 2 emissions may be material because their calculation and disclosure are necessary to understand whether their significance will subject the registrant to transition risk that is material to the business, results of operations or financial condition on a short-term or long-term basis. GHG emissions may also be material if their calculation and disclosure are necessary to understand progress towards achieving a climate-related target/goal or transition plan that the registrant is required to disclose. The SEC also noted that exposure to a material transition risk for reasons other than GHG emissions (*e.g.*, new laws or regulations that restrict sale of products based on the technology used) would not trigger disclosure of the emissions under Item 1505, but could trigger disclosure under other provisions of the new rules.

The SEC withdrew the requirement to present emissions on a disaggregated basis; emissions are to be expressed in the aggregate in terms of CO_{2e}. If a registrant is required to disclose Scope 1 and/or Scope 2 emissions, and any constituent gas is individually material (*e.g.,* if methane is included in an emissions reduction target that the registrant is required to disclose under Item 1504(a)), it must disclose such constituent gas disaggregated from other gases.

A registrant that is required to disclose its Scope 1 and/or Scope 2 emissions will be required to disclose those emissions in gross terms by excluding the impact of any purchased or generated offsets. In addition, a registrant will be required to describe the methodology, significant inputs and significant assumptions used to calculate its disclosed GHG emissions. The SEC has introduced some flexibility, for example, by allowing a registrant to disclose on the basis of organizational boundaries that differ from the scope of consolidation in the financial statement, provided it includes a brief explanation of the differences in scope as between the two, and the method used to determine the organizational boundaries. (A registrant could, for example, use a method for determining control as provided in the GHG Protocol.)

The methodology disclosure requirement has been streamlined. The description of the approach to categorization of emissions and emission sources should be brief. Similarly, the description of the calculation approach should be brief, covering the protocol or standard used to report emissions, including the calculation approach, the type and source of emissions factors and any calculation tools used to calculate emissions. The SEC withdrew the requirement to disclose emissions in terms of intensity.

The SEC declined to extend disclosure requirements to Scope 3 emissions.[1] The SEC recognizes that disclosure of Scope 3 emissions, including upstream emissions from suppliers

[1] According to the World Resources Institute, citing data from CDP, Scope 3 emissions account for an average of three-quarters of emissions by any given company. Scope 3 can approach 100%, for

and downstream emissions from customers and consumers, or at least from elements of the value chain with significant emissions, would provide investors with a broader view of a registrant's transition risk exposure and facilitate comparisons of investment risk across an industry or sector. That said, the proposed inclusion of Scope 3 emissions proved a bridge too far. Any Scope 3 disclosure a registrant chooses to provide will, for SEC purposes be voluntary, though registrants that also are subject to California and/or EU disclosure standards will be providing Scope 3 disclosures under California rules (subject to pending litigation) and the EU Corporate Sustainability Reporting Directive ("CSRD"), respectively.

If a registrant is required to disclose Scope 1/Scope 2 emissions, it must disclose those emissions for its most recently completed fiscal year and, to the extent previously disclosed in an SEC filing, for the historical fiscal years covered by the financial statements in that filing. A registrant that has not previously disclosed Scope 1/Scope 2 emissions in an SEC filing for a particular historical fiscal year will not be required to estimate and report those emissions for such period.

To address delays in measuring and reporting emissions as of fiscal year ends in time to be included in annual reports, a domestic registrant may forward incorporate by reference the disclosures in the registrant's quarterly report for the second fiscal quarter following the year to which the disclosure relates. A foreign private issuer may include its Item 1505 disclosure in an amendment to its Form 20-F annual report (but not in a Form 6-K), provided the amendment is filed no later than 225 days after the fiscal year-end. A registrant taking advantage of this accommodation must include a separate statement in its annual report indicating its intention to incorporate by reference/amend its filing. Similar accommodations are available for 1933 Act registration statements.

Attestation for GHG emissions disclosure

The final rules provide that those registrants required to disclose Scope 1 and/or Scope 2 emissions will also need to provide an assurance report at the "limited assurance" level, which, for an LAF, following an additional transition period, then will need to be at the "reasonable assurance" level [Item 1506]. The SEC posited that prescribing a minimum level of assurance, together with minimum requirements for the attestation provider [Item 1506(b)] and the engagement [Item 1506(a)(2) and (c)], will enhance comparability and consistency in an area that today is fragmented. A registrant will not be required to include the attestation report in a separately captioned "Climate-Related Disclosure" section, as proposed.

Item 1506(d) sets out additional disclosure requirements in respect of attestations, including whether the engagement and the attestation provider are subject to any oversight inspection program and whether there is a change in, and disagreement with, the attestation provider. AFs and LAFs subject to Item 1506(a) will need to disclose certain information when the registrant's GHG emissions attestation provider resigns (or indicates that it declines to stand for re-appointment after completion of the attestation engagement) or is dismissed. This

example for financial services companies. Other studies they say (see Net-Zero Challenge: The supply chain opportunity) show that supply chains of eight sectors account for 50% of global GHG emissions.

disclosure is not required if an AF or LAF is not required to disclose its GHG emissions (and therefore is not required to obtain an attestation report) because the AF or LAF determines that its GHG emissions are not material for a particular fiscal year. Also, Item 1506(d)(2) does not apply to registrants that voluntarily obtain assurance over their GHG emissions disclosure and provide certain information about the engagement pursuant to Item 1506(e).

The SEC addressed voluntary attestations, including for registrants subject to GHG disclosure requirements during the phase-in period as well others not subject to such rules, providing as follows:

	After the Compliance Date for GHG Emissions Disclosure but before the Compliance Date for Assurance	**After the Compliance Date for Assurance**
LAFs and AFs subject to Items 1505 and 1506(a)-(d) (*i.e.,* registrants that are required to disclose GHG emissions and obtain assurance)	Any voluntary assurance over any GHG emissions disclosure must comply with the disclosure requirements in Item 1506(e).	Any voluntary assurance obtained over GHG emissions disclosures that are not required to be assured pursuant to Item 1506(a) (*e.g.,* voluntary Scope 3 disclosures) must follow the requirements of Item 1506(b)-(d), including using the same attestation standard as the registrant's required assurance over Scope 1 and/or Scope 2 disclosure.
Registrants not subject to Items 1505 or 1506(a)-(d) (*i.e.,* registrants that are not required to disclose GHG emissions)	Any voluntary assurance over any GHG emissions disclosure must comply with the disclosure requirements in Item 1506(e).	Any voluntary assurance over any GHG emissions disclosure must comply with the disclosure requirements in Item 1506(e).

Safe harbor

The final rules address protection for forward-looking statements" for purposes of the Private Securities Litigation Reform Act ("PSLRA") safe harbors (1933 Act Section 27A and 1934 Act Section 21E) in two respects.

First, the SEC has confirmed that information covered by subpart 1500, other than historical fact, that should otherwise be covered by the PSLRA remains protected, provided the PLSRA requirements, including the need for meaningful cautionary statements, are met. The SEC singled out forward-looking statements pertaining to transition plans, scenario analysis, internal carbon pricing and targets/goals because they likely will involve a complex mix of assumptions and estimates (some of which will be based on a mix of facts and projections),

Second, for purposes of the PSLRA, the SEC has extended the safe harbor to forward-looking statements required by subpart 1500 that pertain to transition plans, scenario analysis, internal carbon pricing and targets/goals (other than historical fact), to specific scenarios that otherwise are not covered by the PSLRA: blank check company offerings, the business or operations of penny stock companies, rollup transactions and initial public offerings, as well as to offering by, or operations of, partnerships, limited liability companies and direct

participation investment programs [Item 1507]. The balance of the PLSRA requirements, including the need for meaningful cautionary statements, continue to apply.

The safe harbor does not extend to statements consisting solely of historical facts. The SEC declined to include Scope 1/Scope 2 disclosures within the ambit of the safe harbor or to extend the safe harbor to SEC enforcement actions (on the ground that 1933 Act Rule 175 and 1934 Act Rule 3b-6 protections suffice).

Financial statement disclosures (S-X Article 14)

The SEC moved away from requiring disclosure of its proposed Financial Impact Metrics and pared back the scope of its proposed Expenditure Metrics and Financial Estimates and Assumptions. A registrant will be required to disclose in notes to its annual financial statements:

- The capitalized costs, expenditures expensed, charges and losses (excluding recoveries) incurred "as a result of" severe weather events and other natural conditions, such as hurricanes, tornadoes, flooding, drought, wildfires, extreme temperature and sea level rise, subject to applicable 1% (of the absolute value of income/loss before income tax expense/benefit or shareholders' equity/deficit, as applicable) and *de minimis* ($100,000 for the income statement and $500,000 for the balance sheet) disclosure thresholds (Rules 14-02(c) and (d)).
- The capitalized costs, expenditures expensed and losses related to carbon offsets and RECs if used as a material component of a registrant's plans to achieve its disclosed climate-related targets or goals (not subject to any threshold, but benefits from the materiality qualifier) (Rule 14-02(e)). The beginning and ending balances of capitalized carbon offsets and RECs on the balance sheet will need to be disclosed.
- If the estimates and assumptions a registrant uses to produce the financial statements were materially impacted by risks and uncertainties associated with severe weather events and other natural conditions or any disclosed climate-related targets or transition plans, a qualitative description of how the development of such estimates and assumptions was impacted (Rule 14-02(h)).

A registrant will be required to disclose any recoveries resulting from severe weather events and other natural conditions to reflect the net effect that severe weather events and other natural conditions have on a registrant's financial statements (Rule 14-02(f)). A registrant will be required to disclose separately where on the balance sheet and income statement these capitalized costs, expenditures expensed, charges and losses are presented. The same applies in respect of carbon offset and REC disclosures. No disclosure is required of any impact on the statement of cash flows (as was proposed).

The SEC expects that there will be significant overlap between severe weather events and natural causes identified for purposes of Article 14 and types of physical risks (*i.e.,* acute risks, including severe weather events, and chronic risk) identified for subpart 1500 purposes. The final rules clarify that a registrant is not required to make any determination that a severe weather event/natural condition results from climate change to trigger disclosure for Article 14 or subpart 1500 purposes.

A registrant is required to comply with the financial statement notes disclosure even if it does not have any information to disclose under subpart 1500 as long as the applicable filing requires the registrant to comply with subpart 1500. By reason of being included in the financial statement notes, these disclosures will be subject to the same audit and internal control over financial reporting (ICFR) requirements as other financial statement disclosures.

The SEC included an attribution principle in the final rules that requires a registrant to attribute a cost, expenditure, charge, loss or recovery to a severe weather event or other natural condition and disclose the entire amount of the expenditure or recovery when the event or condition is a "significant contributing factor" in incurring the cost, expenditure, charge, loss, or recovery (Rule 14-02(g)).

The SEC declined, as it did for the subpart 1500 requirements, to apply Article 14 requirements only to companies in certain industries on the ground that any public company regardless of sector or industry could be subject to severe weather events or other natural conditions. Article 14 requirements also apply to SRCs and EGCs.

While the SEC declined to adopt its proposed Financial Impact Metrics, it reminded registrants of their obligations under GAAP to consider material impacts on the financial statements, and the fact that the impact is driven by climate-related matters does not negate those obligations.

Although the final Article 14 rules do not require disclosure in the financial statements of costs and expenditures incurred to reduce GHG emissions or otherwise mitigate exposure to transition risks, the final rules under subpart 1500 will require quantitative and qualitative disclosure of material expenditures in certain circumstances, which should result in the disclosure of some of the information for expenditures related to transition activities that the SEC would have expected to be disclosed under the proposed rules, albeit outside of the financial statements. Requiring the disclosure of these expenditures outside of the financial statements and subject to materiality rather than a bright-line threshold, among other things, should mitigate the compliance burden.

The SEC declined to adopt proposed rules related to the disclosure of opportunities for purposes of Article 14, as unnecessary for various reasons, including that Rules 1402(c) and (d) do not make the distinction set out in the proposal between "risk" and "opportunities." Similarly, disclosure under Rule 14-02(h) on impacts of severe weather and other natural conditions on estimates and assumptions is not intended to be limited to negative impacts.

Location of disclosure

The final rules require a registrant (including a foreign private issuer) to:

- file the climate-related disclosure in registration statements and annual reports;
- provide the Regulation S-K mandated climate-related disclosures either in a separate, appropriately captioned section of its registration statement or annual report (*e.g.,* a "Climate-Related Disclosures" section) or in another appropriate section of the filing, such as Risk Factors, Description of Business or MD&A, or, alternatively, by incorporating such disclosure by reference from another filing as long as the disclosure meets the electronic tagging requirements of the final rules (leaving it up to

registrants to decide where to place the Regulation S-K disclosure as they see fit – the Regulation S-X disclosure must be in the financial statement notes); and

- electronically tag climate-related disclosures in Inline XBRL.

Departures from the proposed rules

In response to public comments, the SEC modified a number of requirements included in the proposing release (*see* generally, my earlier March 2022 briefing note on the proposed rules).

The SEC adopted a less prescriptive approach to certain of the final rules, including, for example,

- the climate-related risk disclosure – *e.g.,* the SEC eliminated from Item 1502(c) the requirement to:
    - describe how financial statement metrics or GHG emissions metrics relate to business model or strategy;
    - address forward-looking disclosures; and
    - disclose what role the use of carbon offsets and RECs played in strategy (as part of targets/goals disclosure, registrants will need to provide disclosure regarding use of carbon offsets and RECs if they represent a material part of the plan to achieve climate-related targets/goals);
- transition plan descriptions – *e.g.,* the SEC eliminated the types of transition risks and factors related to those risks that must be disclosed;
- scenario analysis disclosure – *e.g.,* the SEC removed the proposed provision stating that disclosure should include both quantitative and qualitative information (recognizing that scenario analysis practices are still evolving, and in early stages disclosure is likely to be qualitative only, while as use of scenario analysis becomes more sophisticated, disclosure of results of scenario analysis are likely to be more quantitative, particularly when discussing the expected material financial impacts on strategy under each considered scenario, which under the rule must be addressed should a registrant be required to disclose use of scenario analysis);
- carbon price disclosure – *e.g.,* disclosure is now tied to use of pricing that is material to how identified climate-related risks are evaluated and managed;
- board oversight disclosure – *e.g.,* the SEC eliminated requirements to disclose the identity of specific directors responsible for climate-related oversight, whether any director has expertise in climate-related risks, how frequently the board is informed of such risks and information as to whether and how the board sets climate-related targets or goals (identification will nonetheless be required of board committees or subcommittees responsible for climate-related risk oversight and descriptions will be required as to whether and how the board oversees progress against targets and goals, or transition plans);
- management oversight disclosure – *e.g.,* the SEC eliminated references to management's role in assessing and managing climate-related opportunities, for the reasons cited above.

- risk management disclosure requirements – *e.g.,* the SEC added a materiality qualifier for processes for identifying, assessing and managing climate-related risks and removed several prescriptive elements, including how: relative significance of risk is determined, regulatory requirements are factored in, shifts in customer or counterparty preferences, technological changes or changes in market practices in assessing transition risk are considered, or materiality is determined.

The SEC qualified the requirements to provide certain climate-related disclosures based on materiality, including, for example, disclosures regarding impacts of climate-related risks, use of scenario analysis, and maintained internal carbon price.

The SEC eliminated the proposed requirement to describe board members' climate expertise.

In respect of GHG emissions, the SEC

- eliminated the proposed requirement for *all registrants* to disclose Scope 1 and Scope 2 emissions and instead requires such disclosure only for LAFs and AFs, on a phased in basis, and only when those emissions are material and with the option to provide the disclosure on a delayed basis;
- exempted SRCs and EGCs from the Scope 1 and Scope 2 emissions disclosure requirement;
- modified the proposed assurance requirement covering Scope 1 and Scope 2 emissions for AFs and LAFs by extending the reasonable assurance phase-in period for LAFs and requiring only limited assurance for AFs; and
- eliminated the proposed requirement to provide Scope 3 emissions disclosure (which the proposal would have required in certain circumstances).

In respect of financial statement disclosure, the SEC:

- removed the requirement to disclose the impact of severe weather events and other natural conditions and transition activities on each line item in the consolidated financial statements;
- focused the required disclosure of financial statement effects on capitalized costs, expenditures expensed, charges, and losses incurred as a result of severe weather events and other natural conditions; and
- required disclosure of material expenditures directly related to climate-related activities as part of a registrant's strategy, transition plan and/or targets and goals disclosure requirements under subpart 1500 of Regulation S-K rather than under Article 14 of Regulation S-X.

The SEC eliminated the proposal to require a private company that is a party to a business combination transaction registered on Form S-4/F-4 to provide the subpart 1500 and Article 14 disclosures. It also eliminated the proposed requirement for disclosure of any material change to the climate-related disclosures provided in a registration statement or annual report in a Form 10-Q (or, in certain circumstances, Form 6-K for a registrant that is a foreign private issuer that does not report on domestic forms).

The SEC also extended certain phase-in periods.

Noteworthy points in the adopting release

The SEC, very much aware of the broader controversies surrounding climate-related disclosure, went to great lengths to highlight what it was intending to do and equally what it was not doing. It noted, for example, that the rules advance investor protection, market efficiency and capital formation objectives, and do not address climate-related issues more broadly. Where the SEC refers to its bedrock disclosure principle of materiality, consistent with past practice, it means material in the context of investment and voting decisions in respect of a particular registrant, not in the context of climate-related issues beyond those decisions. The SEC uses the phrase "investment and voting decisions" of investors thirteen times in the adopting release. The SEC emphasized that it "remains agnostic about whether or how registrants consider or manage climate-related risks."

Ever mindful of its authority, the SEC noted that there is significant alignment between the new disclosure rules and the TCFD recommendations (which it used as its model in framing the rules), where consistent with SEC objectives, authority and public comments. Similarly, the SEC has relied on concepts developed by the GHG Protocol as it is the leading reporting standard for GHG emissions.

The SEC called out other disclosure-related developments, including:

- the formation of the International Sustainability Standards Board ("ISSB") and the issuance of IFRS S-1 and IFRS S-2 (which incorporate TCFD recommendations) (see my June 2023 briefing note);
- plans by various jurisdictions to adopt, apply or be informed by the ISSB standards;
- the adoption by the European Union of the CSRD and the European Sustainability Reporting Standards (see my January 2024 briefing note and August 2023 briefing note); and
- the adoption of the California Climate-Related Financial Risk Act and the Climate Corporate Data Accountability Act (*see* my September 2023 briefing note).

The SEC noted that to the extent registrants are subject to these other requirements, the disclosure required by the latter will appear outside SEC filings and, therefore, will not be subject to the same liability provisions, disclosure controls and procedures and other protections under the federal securities laws. They may serve different purposes and apply different materiality standards. What was not highlighted (except in relation to links between executive compensation and climate-related risk management considerations) is that these other regimes are broader than the SEC rules, and in certain key instances call for disclosure of information that the SEC has declined to require (*e.g.*, mandating Scope 1 and Scope 2 data regardless of materiality or size of company, and mandating Scope 3 data).

Applicability

The new rules apply to domestic registrants and foreign private issuers filing annual reports (Form 10-K and 20-F) and 1933 and 1934 Act registration statements (Form 10, Form S-1/F-1, Form S-11 and, except as noted above, Form S-4/F-4). The SEC declined to provide an exemption or transitional relief for initial public offerings.

As set out in the proposed rules, the final rules do not apply to Canadian registrants that use the MJDS and file annual reports on Form 40-F or to asset-backed securities issuers. Foreign private issuers (and domestic registrants subject to non-US requirements) cannot substitute compliance by relying on disclosures made in response to requirements in other jurisdictions. The SEC suggested that they will observe how reporting under non-US rules develops before moving to a substitute compliance regime (if at all). The rules apply to SRCs and EGCs except to the extent outlined above in respect of Scope 1/Scope 2 disclosures.

Initial filings by registrants that are not SRCs or EGCs and that determine that they have material Scope 1 and/or Scope 2 emissions will only be required to provide emissions data for one year because they will not have previously provided such disclosure in an SEC filing.

Climate-related disclosures will be treated as "filed." Climate-related disclosures will therefore be subject to potential liability under 1934 Act Section 18 and, if included or incorporated by reference into a 1933 Act registration statement, 1933 Section 11 as well.

Phase-in dates

The final rules will become effective 60 days following publication of the adopting release in the *Federal Register*.

The following highlights the phase-in dates.

Type	**Disclosure and Financial Statement Effects Audit**		**GHG Emissions/Assurance**			**Tagging**
	All Reg. S-K and S-X disclosures, other than as noted in this table	Item 1502(d)(2), Item 1502(e)(2), and Item 1504(c)(2)	Item 1505 (Scope 1 and Scope 2 GHG emissions)	Item 1506 - Limited Assurance	Item 1506 - Reasonable Assurance	Item 1508 - Inline XBRL tagging for subpart 1500
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 and EGCs	FYB 2027	FYB 2028	N/A	N/A	N/A	FYB 2027
	"FYB" refers to any fiscal year beginning in the calendar year listed.					

Severability

With an eye on potential challenges, the SEC stated that while it believes that all of the provisions included in the final rules will be upheld, if any provisions are held to be invalid, the SEC intends that that such invalidity will not affect the balance of the provisions or the application thereof.

Concluding Thoughts

The SEC now joins the European Union in mandating climate-related disclosure by companies subject to its regulatory oversight. (Incidentally, both regimes have extra-

territorial reach.) The process in the United States has been incredibly slow; the proposed rules were announced two years ago, which represented the first meaningful focus by a US regulator on climate disclosure since 2010.

And the process regrettably has become fraught, caught up in the toxic web of culture-war led politics. The SEC has been attacked from both sides (see "'Not a climate activist': Gensler clashes with allies over new rule") – which is unprecedented. A coalition of ten Republican states launched a lawsuit to block the new rules only hours after the new rules were adopted, which meant that no consideration could have been given to the text of the new rules nor the detailed explanations set out over 593 pages of the myriad ways in which the SEC modified, or withdrew altogether, elements of its proposed rules or incorporated into its final rules proposals advanced in the public comment process (which generated over 4,500 unique comment letters and over 18,000 form letters) and intense lobbying on both sides of the proposition. Never mind, the gist of the complaint is that the rules are "illegal and unconstitutional." That said, a working group of leading academics, former SEC officials, leading practitioners and market participants set out in a June 2022 comment letter the group's conclusion that the SEC has clear statutory authority to mandate these new rules and "there is no legal basis" to doubt that authority.

Admittedly, the new rules are scaled back in significant ways, including in respect of GHG emissions, but this is a sea change for public companies and the impact of these new rules will be manifold. Compliance will by no means be a box-ticking exercise or an exercise in rolling out boilerplate disclosures.

The reality is that many public companies report GHG emissions data and provide other climate-related disclosures (albeit largely in separate sustainability reports),[2] and in the absence of mandatory rules the patchwork of methodologies and approaches deprives the market of the one thing it craves: consistent, comparable, decision-useful disclosure. That is what the SEC promised, and that is what it hoped it could deliver. That process though was beset by significant backlash from business groups, concerns over the Supreme Court's willingness to uphold challenges to federal agency power to regulate and the toxicity unleashed by culture war attacks on ESG.

The other element of the mosaic is the global overlay of the CSRD and the California disclosure standards (the Climate-Related Financial Risks Act and the Climate Corporate Data Accountability Act, both of which currently are subject to litigation). The Climate Corporate Data Accountability Act and CSRD mandate Scope 3 disclosure, as well as Scope 1/Scope 2 across the board. The ISSB standards are likely to incorporate Scope 3 disclosure requirements.

And finally, there is investor demand. In her statement in support of the rulemaking, Commissioner Caroline Crenshaw reminded us that the rules are intended to benefit investors, and they have been calling for that consistent, comparable, decision-useful disclosure for years as the risks of climate change become more apparent and examples of the

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2 It is estimated that approximately 60% of Russell 3000 companies and 90% of Russell 1000 companies provide some form of climate-related disclosure, and nearly 60% of Russell 1000 companies disclose Scope 1 and Scope 2 emissions data.

palpable impact of climate change dominate news headlines. Institutional investors will likely continue to demand the climate-related information that they can feed into their investment models, though the more standardized, the easier it is for them.

Attention will now turn to the courts as challenges from both sides seek judicial intervention. In the meantime, registrants have a clear roadmap for providing the climate-related disclosure that the markets long for. While neither climate activists nor business groups got all they wanted, and conservatives are apoplectic that any climate rules saw the light of day, the final rules represent a rational compromise. Over time, I suspect that as registrants gain experience with the rules, and in particular the disclosure of Scope 1/Scope 2 emissions, we ultimately will see Scope 3 disclosure emerge.

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