LippesMathias LLP
ATTORNEYS AT LAW

Climate Change Reporting: The Basic Requirements under the SEC's Proposed Rule

By Christina D. Bonanni, Ian A. Shavitz

April 25, 2022 | **CLIENT ALERTS**

On March 21, 2022, the U.S. Securities and Exchange Commission (SEC) issued a Notice of Proposed Rulemaking on the "Enhancement and Standardization of Climate-Related Disclosure for Investors" (Proposed Rule). Per the SEC's press release, the effect of the Proposed Rule would be to "require registrants to include certain climate-related disclosures in their registration statements and periodic reports." The requirements would apply to public companies with the goal of providing investors with more reliable and standardized data about climate-related risks and how climate change is likely to affect a company's business. The Proposed Rule would require disclosure outside a company's financial statements of information concerning Climate-Related Risks, Greenhouse Gas (GHG) Emissions; and Governance, Oversight, and Risk Management of Climate-Related Risks.

Physical and Transition Climate-Related Risks

The Proposed Rule would require a company to disclose:

- The impact of physical climate-related risks, including extreme weather events and conditions such as wildfires, hurricanes, and drought, acute and chronic, on the company's operations and assets and on the line items in its consolidated financial statements and the financial estimates and assumptions used in the financial statements.
- How such risks have had, or are likely to have, a material impact on the company's business and consolidated financial statements in the short-, medium-, or long-term;
- How the risks have affected or are likely to affect strategies, business models, and outlook; and
- Transition risks (i.e., the impacts associated with transitioning to satisfy lower carbon commitments and requirements).

GHG emissions

The Proposed Rule would also require companies to disclose information about both direct GHG emissions (Scope 1) and indirect GHG emissions from purchased electricity or other forms of energy (Scope 2). Companies *would be required to* disclose Scope 1 emissions separately from Scope 2 emissions, and disclose both in the disaggregate (*i.e.*, by each constituent greenhouse gas) and the aggregate (as CO2 equivalent). Companies would also be required to disclose Scope 3 GHG emissions, which are emissions from upstream and downstream activities in their value chains, if such emissions are material or if the company has set a GHG emissions target or goals that include such emissions. The Proposed Rule would provide a safe harbor for liability for Scope 3 disclosures and an exemption for smaller companies.

Many companies already provide disclosures based on protocols that are similar to the Proposed Rule's Scope 3 disclosures, but the Proposed Rule would shift what have been voluntary corporate pledges to mandatorily disclosed obligations. Modeled on the Task Force on Climate-Related Financial Disclosures ("TCFD") framework, which was developed by the G20 Financial Stability Board to inform investors about ways companies are mitigating climate risks, the Proposed Rule states that, because investors have experience using TCFD disclosures, the framework is expected to reduce the burden on companies required to disclose under the Proposed Rule. However, according to the TCFD's recently published 2021 Status Report, many companies using the TCFD framework may not be fully implementing its recommendations, and therefore, the Proposed Rule's requirements may prove more burdensome than intended. Moreover, all of the proposed climate-related disclosures required by the Proposed Rule would be treated as "filed" if included or incorporated by reference into a Securities Act registration statement, which makes a registrant subject to potential liability under Section 18 of the Exchange Act and Section 11 of the Securities Act. This heightened liability will drive registrants to be even more thorough and to carefully review the information in their SEC filings.

Governance, Oversight, and Risk Management of Climate-Related Risks

Finally, the Proposed Rule would require disclosure of companies' governance, oversight, and risk management of climate-related risks specifically, including: (i) any assessment and risk management efforts by the company's leadership concerning climate-related risks and the role the board plays in the oversight of such risks; (ii) what committee or board members are involved in the oversight; and (iii) anyone serving on the board who has expertise in a climate-related area.

Attorney Advertising. Prior results do not guarantee a similar outcome.

Compliance with the Proposed Rule will occur under a phased-in approach, with disclosures other than Scope 3 GHG Emission disclosures followed by Scope 3 disclosures, if required, submitted first from large, accelerated companies, and later from accelerated and nonaccelerated filers and smaller companies.

The SEC is accepting comments until either May 20, 2022 or 30 days after its publication in the Federal Register, whichever is later. For questions regarding this client alert, or for assistance in submitting comments, please contact Lippes Mathias' Environment & Energy Team, Ian Shavitz at ishavitz@lippes.com, Counsel Barbara M. R. Marvin at bmarvin@lippes.com, or, Christina Bonanni at cbonanni@lippes.com.

Attorney Advertising. Prior results do not guarantee a similar outcome.