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In Depth: New Climate-Related Disclosure Rules from the SEC? Here's What You Need to Watch Out For

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The SEC announced that it will consider whether to propose rules to enhance and standardize climate-related disclosures for investors at an open meeting scheduled to take place on March 21, 2022. The Commission's deliberations will be webcast at 11:00 a.m. Eastern Time on the SEC's website.

As we described previously, the SEC's announcement signals that regulatory change regarding climate risk is rapidly approaching. These rules changes, if adopted, could represent one of the largest overhauls of the corporate disclosure regime since the aftermath of the 2008 financial crisis.

What follows is a checklist of items to look for in any new climate risk disclosure rule proposal by the SEC:

1. Will the proposed rules require disclosure by reporting companies of their Scope 1 and Scope 2 greenhouse gas emissions (generally speaking, emissions from business operations and purchased energy)? Will greenhouse gas emission disclosure requirements be tiered or scaled so that larger reporting companies face more stringent disclosure requirements?
2. Will the proposed rules require disclosure of Scope 3 greenhouse gas emissions, which are generally greenhouse gases produced by a company's suppliers and by customers using its products? Given the difficulties in calculating Scope 3 greenhouse gas emissions, will compliance be preceded by a lengthy phase-in period and accompanied by a legal safe harbor from liability?
3. Will the proposed rules be incorporated as amendments into existing disclosure regulations such as Regulation S-K or Regulation S-X, or will an entirely new regulation on climate risk be proposed?
4. Will the proposed rules incorporate, explicitly or implicitly, existing voluntary sustainability disclosure recommendations from standards-setting

organizations such as the Task Force on Climate-Related Financial Disclosures?

5. Will the proposed rules attempt to establish a standardized “taxonomy” for environmentally beneficial activities, similar to the European Union’s Taxonomy Regulation? This may be an important consideration for investors with a global presence.
6. Will the proposed rules contain industry-specific standards like those promulgated by the Sustainability Accounting Standards Board? Will different climate change reporting standards apply to specific industries, such as oil and gas, real estate, or transportation?
7. Will the proposed rules offer a phased-in implementation so that smaller public companies face later compliance deadlines than larger public companies? Will the SEC give specific industries time to develop disclosure standards for industry participants? Will the proposed rules contain any exceptions for specific issuers, such as asset-backed securities issuers?
8. Will disclosures be required to be audited, or subjected to another form of assurance?
9. To what extent will the SEC lay out its analysis as to the conformity of the proposed rules to the interpretation of materiality as defined by the U.S. Supreme Court? This could be a potential basis for legal challenge to any new rule.

If the Commission votes at the meeting to propose a new rule regarding climate-related disclosures, the proposal will be available for public comment for a specified period of time. Many investors, reporting companies, market participants and trade associations are expected to submit comment letters.

In sum, there is a lot to watch out for when the SEC meets on Monday to consider proposing new climate disclosure rules. New mandatory and uniform disclosure requirements regarding climate change may soon be promulgated that will clarify what disclosures are required for climate-related risks. The SEC’s actions suggest a strong movement is underway to integrate ESG principles into the framework of financial regulations.
