Debevoise & Plimpton LLP and Risk Management Association

U.S. Climate Regulatory Guide for Banking Organizations

As of March 10, 2023

Table of Contents

Background

This Guide focuses on key legal and regulatory developments in the United States related to climate change and their impact on banking organizations. It also touches on related developments in environmental, social and governance ("ESG") issues, particularly as they relate to climate change regulation, and briefly addresses key international developments.

U.S. legal and regulatory activity in the climate and ESG space increased dramatically in 2022. For example, the Securities and Exchange Commission ("SEC") proposed a set of mandatory climate-related disclosures based on recommendations for voluntary climate-related disclosures previously issued by the Task Force on Climate-Related Financial Disclosures ("TCFD"). Further, the Federal Bank Regulators (as defined herein) proposed guidance related to how banking organizations should manage climate-related financial risks.

The private sector has voluntarily engaged on issues related to climate change prior to the regulatory developments of 2022, including with respect to disclosure, risk management and sustainability targets. For example, numerous companies, including banking organizations, have voluntarily disclosed climate-related information in public reports consistent with the TCFD framework or have disclosed greenhouse gas ("GHG") emissions information through other voluntary disclosure initiatives. Many financial institutions have also voluntarily set net-zero targets and signed on to global carbon-reduction commitments, such as the United Nation's Net-Zero Banking Alliance ("NZBA"), a group of more than 125 banking organizations "committed to aligning their lending and investment portfolios with net-zero emissions by 2050."[1]

This past year, however, saw a dramatic shift toward policymakers in the U.S. and EU mandating disclosures and legally requiring (or otherwise encouraging) the private sector, including banking organizations, to adopt ESG initiatives with respect to, among other topics, climate change and the move toward a carbon-neutral future. In the EU, this included not only disclosure and risk management initiatives, such as adopting the comprehensive Corporate Sustainability Reporting Directive ("CSRD") disclosure regime and conducting a climate risk stress test for banks, but also legal requirements aimed at promoting action toward a greener future, such as the Corporate Sustainability Due Diligence Directive ("CS3D"), which proposes to penalize companies for adverse environmental effects that come about through their direct and indirect business relationships.

In the United States, President Biden made his administration's ESG focus clear with Executive Order 14030, which directed federal agencies to adopt a "comprehensive, government-wide strategy regarding: the measurement, assessment, mitigation and disclosure of climate-related financial risk to the federal government programs, assets, and liabilities."[2] Democratic majorities in the U.S. Congress ("Congress") through 2022 and President Biden's administrative appointees both advanced the administration's ESG priorities. As mentioned above, the SEC issued a broad proposal on mandatory climate-related disclosures, and Congress passed the Inflation Reduction Act ("IRA"),[3] which creates financial incentives for private actors to undertake green projects. Signed into law by President Biden on August 16, 2022, the IRA is said to be the most consequential climate change bill to be passed by Congress to date, allocating $369 billion to climate-focused spending.

Climate-related regulatory developments in the U.S. also reflect trends from Europe and international bodies. For example, the Federal Bank Regulators' (as defined herein) proposed principles for climate-related financial risk management and the SEC's proposed disclosure rule broadly align with or draw heavily from international frameworks, including those of the Basel Committee on Banking Supervision ("Basel Committee") and the TCFD.

Even as they propose climate-related rules and guidance, U.S. financial regulators have continually messaged that their mandates with respect to climate change are narrow and limited by statute. For example, the Federal Reserve Board ("FRB") and other Federal Bank Regulators have consistently stated that their mandates are limited to addressing how

---

1 UN Env't. Programme Fin. Initiative, *Net-Zero Banking Alliance* (last visited Mar. 10, 2023).

2 Executive Order 14030, *Climate Related Financial Risk*, 99 Fed. Reg. 27967 (May 25, 2021).

3 Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 2305 (2022).

climate change may affect the safety and soundness of regulated banking organizations or financial stability, and do not extend to climate policymaking.[4] Similarly, SEC Chair Gensler has characterized the SEC's role as limited, "driven by the needs of investors and issuers" and responsive to investor "demand for consistent and comparable information that may affect financial performance."[5]

By contrast, many European regulators have much broader mandates. For example, the European Central Bank ("ECB"), which regulates leading Eurozone banks, has a mandate to, in addition to promoting price stability, "support the general economic policies in the [EU] with a view to contributing to the achievement of the [EU's] objectives," including "a high level of protection and improvement of the quality of the environment."[6] In line with these mandates, European regulators have pursued broader climate-related goals. Because foreign regulators may take a more active role in climate-related financial policymaking, differences in regulatory approaches to climate change and ESG are likely to pose compliance challenges for banking organizations operating in multiple jurisdictions.

* * *

As mentioned above, and consistent with the Biden Administration's focus on ESG issues, Federal Financial Regulators[7] introduced draft guidance and rule proposals providing, for the first time, insight into the contours of the evolving mandatory climate regulatory regime for banking organizations in the United States.[8] Key developments that we discuss in this Guide include the following:

- Since November 2021, the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC") and, most recently, the FRB (together with the OCC and FDIC, "Federal Bank Regulators"), have each issued for public comment substantively similar draft principles for climate-related financial risk management. Furthermore, the New York Department of Financial Services ("NYDFS") also released draft climate-related financial risk management guidance in December 2022 ("NYDFS Proposal"), which shares a number of similarities to the principles released by the Federal Bank Regulators.

---

4 *See e.g.*, Jerome Powell, FRB Chair, Panel on "Central Bank Independence and the Mandate—Evolving Views" at the Symposium on Central Bank Independence, Sveriges Riksbank (Jan. 10, 2023); Michael J. Hsu, Acting Comptroller of the Currency, Remarks at Annual Washington Conference for Institute of International Bankers, at 3 (Mar. 7, 2022).

5 Gary Gensler, SEC Chair, "Statement on Proposed Mandatory Climate Risk Disclosures" (Mar. 21, 2022).

6 ECB, *Monetary Policy—Introduction* (last visited on Mar. 9, 2023); *Treaty on EU*, at Article 3 titl. 1 (May 9, 2008).

7 For the purposes of this Guide, "Federal Financial Regulators" refers to the Federal Bank Regulators, the SEC and the CFTC, as such terms are defined herein.

8 Unless indicated otherwise, "banking organizations" includes foreign banking organizations' U.S. operations.

- In September 2022, the FRB announced that six of the eight U.S. global systemically important banking organizations ("U.S. GSIBs") would participate in a pilot climate scenario analysis exercise. The exercise launched in January 2023.

- In March 2022, the SEC released its long-awaited landmark proposed rule on the "Enhancement and Standardization of Climate-Related Disclosures for Investors" ("SEC Climate Proposal"), representing arguably the most significant new public company disclosure requirements in decades.

- The SEC then released two ESG-related rule proposals in May 2022 that would apply to investment advisers and investment companies. The SEC Division of Enforcement's Climate and ESG Task Force also brought several high-profile actions against asset managers for alleged ESG-related misconduct regarding misstatements in disclosures and compliance issues concerning ESG strategies.

Other agencies with financial industry-related oversight mandates took action, or signaled future action, on climate change and ESG. For example, the U.S. Department of Labor finalized a rule permitting consideration of ESG factors in investment decisions by plan fiduciaries.[9] The Commodity Futures Trading Commission ("CFTC") is also expected to release climate-related action (such as guidance, interpretations, policy statements or regulations) following a Request for Information on climate-related financial risks.

The U.S. climate regulatory framework is expected to become clearer this year. A number of proposed regulations and guidelines are expected to be finalized, including the sweeping SEC Climate Proposal, and we expect to see the results of the FRB's first pilot climate scenario analysis exercise. Further, the implementation of the IRA over the next ten years is expected to increase green opportunities.[10]

At the same time, we expect financial institutions will face increased litigation and other legal risk on multiple fronts. In the United States, political headwinds opposing the consideration of climate change and ESG issues by the financial industry are creating a new legal risk for financial institutions.[11] After winning a majority of the U.S. House of Representatives in the November 2022 midterm elections, Republicans are expected to carry out various congressional investigations into ESG practices. Legislators' wariness of ESG poses challenging conflicts for financial institutions facing growing pressure from opposing

---

9 As discussed further below, both chambers of Congress passed a resolution to overturn the rule. President Biden issued a veto to strike down the resolution on March 20, 2023.

10 *See U.S. Inflation Reduction Act: A Catalyst for Climate Action*, CREDIT SUISSE (Nov. 30, 2022).

11 *See* Patrick Temple-West & Brooke Masters, *Wall Street titans confront ESG backlash as new financial risk*, FIN. TIMES, Feb. 28, 2023 ("A dozen big US financial companies including BlackRock, Blackstone, KKR and T Rowe Price added language to annual reports filed in the past month cautioning that pressures such as 'divergent views' or 'competing demands' on [ESG] investing could hurt financial performance.").

constituencies and stakeholders. Republican state-level actions restricting financial services' consideration of ESG have proliferated, with the enactment and implementation of "anti-ESG" legislation in several states and civil investigations initiated by many attorneys general, often acting in concert. Between January 2020 and March 1, 2023, 15 ESG-related bills have been enacted by various state legislatures, while 75 proposed laws are currently pending and 44 bills failed to make it through the state legislative processes.[12]

At the same time, financial institutions are likely to face increased litigation from proponents of climate change action. The SEC Division of Enforcement's Climate and ESG Task Force activity under the Biden administration has signaled increased attention to representations regarding ESG- and climate change-related practices and put pressure on companies with respect to their ESG-related marketing. If the SEC Climate Proposal is finalized, it will give shareholders an opportunity to sue for material misstatements and other purported breaches in climate-related disclosure. The CS3D in Europe, which, due to its proposed extraterritoriality, would have impacts in the United States, creates a right of action for private actors to sue companies for their failure to comply with the directive's due diligence and climate mitigation requirements. We expect this trend in ESG-related litigation to continue in the coming years.

[12] For more information, see State-Level ESG Investment Developments Tracker, DEBEVOISE ESG RES. CTR. (last visited Mar. 6, 2023), available here [hereinafter "State-Level ESG Investment Tracker"].

Roadmap for the Guide

This Guide is organized in four parts.

- **Part I: Federal Bank Regulatory Developments—Climate-Related Financial Risk Management** provides an overview of, and key takeaways from, the Federal Bank Regulators' proposed climate-related financial risk management guidance for large banks and the FRB's pilot scenario analysis exercise. Appendix A outlines the proposed risk management principles issued by the Federal Bank Regulators and the NYDFS. Appendices B and C provide high-level comparisons of international regulatory developments on climate-related risk management, disclosures and scenario analysis and stress testing.

- **Part II: SEC Proposed Rule on Climate-Related Disclosures** analyzes the key components of the SEC Climate Proposal, highlights possible legal challenges to a final rule and reviews the proposal against international developments in climate and ESG disclosure frameworks. Appendix D provides an overview of the SEC Climate Proposal's various disclosure categories, including on GHG emissions disclosures (Appendix D-1), climate risk governance and risk management (Appendix D-2), climate-related targets (Appendix D-3) and financial statement metrics (Appendix D-4). Part II also discusses international disclosure frameworks, including the TCFD and the International Sustainability Standards Board ("ISSB"), as well as the EU's newly adopted CSRD and draft reporting standards. Appendix E provides a high-level comparison of certain disclosure items in the SEC Climate Proposal against select international frameworks.

- **Part III: SEC Focus on Greenwashing** briefly reviews the SEC's proposed rules relating to ESG practices by registered funds and investment advisers, as well as enforcement actions in connection with ESG-related misconduct regarding misstatements in disclosures and compliance issues concerning ESG strategies.

- **Part IV: Federal & State ESG Developments** reviews political treatment of ESG in the United States, including federal- and state-level developments restricting ESG investing, with a particular focus on issues affecting financial institutions and asset managers.

Throughout the Guide, we identify resources providing additional information on each of the topics discussed.

I. Federal Bank Regulatory Developments—Climate-Related Financial Risk Management

On December 2, 2022, the FRB issued proposed principles for climate-related financial risk management by supervised banking organizations with more than $100 billion in total consolidated assets ("FRB Proposal").[13] The FRB Proposal followed substantively similar proposed principles issued first by the OCC in December 2021 ("OCC Proposal")[14] and the FDIC in March 2022 ("FDIC Proposal")[15] (together with the OCC Proposal and the FRB Proposal, "Draft Principles").

The Draft Principles are intended to provide a "high-level framework" for the management of climate-related financial risks and to "make progress toward incorporating climate-related financial risks into financial institutions' risk management frameworks in a manner consistent with safe and sound practices."[16] The Draft Principles are narrowly focused on how banking organizations should assess and manage their exposure to climate-related financial risk, consistent with the Federal Bank Regulators' narrower mandate to address how climate change may affect the safety and soundness of regulated banking organizations or financial stability.

The FRB Proposal makes a limited number of modifications to the OCC's and FDIC's versions of the Draft Principles by, among other things, further distinguishing the roles of the board and management and emphasizing that banking organizations should implement responses that are commensurate with their risk profiles and activities. The FRB Proposal indicates that the FRB developed the proposal in coordination with the OCC and FDIC, and the agencies have expressed interest in finalizing the Draft Principles jointly.[17]

---

13 FRB, *Principles for Climate Related Financial Risk Management for Large Financial Institutions*, 87 Fed. Reg. 75267 (Dec. 8, 2022) [hereinafter "FRB Proposal"].

14 OCC Bull. 2021-62, *Principles for Climate Related Financial Risk Management for Large Banks* (Dec. 16, 2021) [hereinafter "OCC Proposal"].

15 FDIC, *Statement of Principles for Climate Related Financial Risk Management for Large Financial Institutions*, 87 Fed. Reg. 19507 (Apr. 4, 2022) [hereinafter "FDIC Proposal"].

16 FRB Proposal, *supra* note 13, at 75268.

17 For statements regarding federal regulators' intent to issue interagency guidance, see Michael J. Hsu, Acting Comptroller of the Currency, Statement on "Climate Related Financial Risk" at the Financial Stability Oversight Council (Dec. 16, 2022) ("I look forward to continuing to work with our interagency colleagues on this and other initiatives to assist supervised institutions in addressing climate-related financial risk.") and Martin J. Gruenberg, FDIC Acting Chair, Remarks on "The Financial Risks of Climate Change" at the American Bankers Association Annual Convention (Oct. 3, 2022) ("The FDIC intends to continue to work on an interagency basis with the OCC and Federal Reserve and, as appropriate, will provide further guidance for climate-related financial risk management, especially for large banks."); FRB, SUPERVISION AND REGULATION

The Draft Principles are broadly consistent with the principles finalized by the Basel Committee ("Basel Principles"),[18] although, as discussed in more detail in **Part I.B**, there are notable distinctions. The Basel Principles, and the approaches being developed by prudential regulators abroad (*e.g.*, Canada and Europe), contemplate both banking organizations' use of scenario analysis exercises and prudential stress testing, which typically impact capital obligations. By contrast, the Draft Principles encourage banking organizations' use of scenario analysis exercises as an internal risk management tool and expressly distinguish such exercises from regulatory stress testing. In January 2023, the FRB launched a pilot climate scenario analysis exercise for six U.S. GSIBs and issued instructions for the pilot participants that provide further insight into the objectives of the exercise, the FRB's focus on scenario analysis over regulatory stress tests and the FRB's current supervisory approach to climate-related financial risk.[19]

In this **Part I**, we provide an overview of, and key takeaways from, the Draft Principles, prioritizing the FRB Proposal.[20] We also discuss the FRB's pilot climate scenario analysis exercise and compare the Federal Bank Regulators' approach to climate scenario analysis and stress testing to those of foreign bank regulators. The accompanying tables in Appendices A through C outline the Federal Bank Regulators' guidance and the proposed risk management guidance issued by the NYDFS and compare international climate regulatory activity.

A. Key Takeaways from the Draft Principles

Content and Organization of the Draft Principles

The Draft Principles cover: (i) board and senior management oversight and governance structures; (ii) policies and procedures; (iii) strategic planning; (iv) systems to identify, measure, monitor and report risks; and (v) scenario analysis. The Draft Principles also describe considerations for the management of climate-related financial risk within traditional risk pillars, including credit, liquidity, market, operational and legal/compliance risks. (*See* Appendix A for a summary of the key provisions of the Draft Principles.)

REPORT (Nov. 2022) ("[T]he Federal Reserve Board intends to develop interagency guidance on the financial risks of climate change for large banks.").

18 Basel Committee, *Principles for the Effective Management and Supervision of Climate Related Financial Risks* (June 2022) [hereinafter "Basel Principles"].

19 *See* OCC and Basel Committee Issue Separate Proposed Principles for the Management of Climate-Related Financial Risks, DEBEVOISE IN DEPTH (Jan. 5, 2022), available here.

20 Unless indicated otherwise, any quoted language is from the FRB's version of the Draft Principles.

Climate-Related Financial Risk Management Principles The Draft Principles are organized by general principles and risk assessment principles.	
General Principles	**Risk Assessment Principles**
✓ Governance ✓ Policies, Procedures and Limits ✓ Strategic Planning ✓ Risk Management ✓ Data, Risk Measurement and Reporting ✓ Scenario Analysis	✓ Credit Risk ✓ Liquidity Risk ✓ Other Financial Risk ✓ Operational Risk ✓ Legal/Compliance Risk ✓ Other Nonfinancial Risk

The FRB Proposal Compared to the FDIC's and OCC's Proposals

The FRB Proposal, which would apply to U.S. banking organizations and the U.S. operations of foreign banking organizations ("FBO") subject to FRB supervision and regulation that have more than $100 billion in total consolidated assets, makes a limited number of modifications to the FDIC Proposal and OCC Proposal.[21] Compared to the earlier proposals, the FRB Proposal:

- further delineates the roles of the board of the directors and management;
- includes a new provision, substantively similar to a provision in the Basel Principles, that advises boards to consider whether climate-related risk may merit changes to compensation policies;
- more explicitly encourages banking organizations to implement climate-related financial risk management responses that are commensurate with their risk profiles and activities;
- suggests more clearly that banking organizations incorporate climate risk management processes into their existing risk management frameworks; and
- includes a brief discussion of the potential risks posed by climate change to the financial sector and financial system.

21 Language in the FRB proposal regarding its applicability to FBOs has raised questions regarding what the FRB's proposed metric is for determining applicability and at what level(s) of an FBO's U.S. operations the guidance is intended to apply (*e.g.*, combined U.S. operations, intermediate holding company, U.S. branch or agency).

The NYDFS's Proposed Climate Guidance for Regulated Organizations

As we note below, the NYDFS Proposal is broadly consistent with the Draft Principles.[22] The guidance would apply to New York State-licensed branches and agencies of FBOs, and New York State-regulated mortgage bankers and mortgage servicers ("Regulated Organizations") of all sizes. The following discussion draws comparisons to the NYDFS's proposal to highlight features of the Draft Principles. (*See* Appendix A for a summary of the NYDFS Proposal.)

Key Takeaways

The following are key takeaways from the Draft Principles.

- **The Draft Principles recognize that climate risk management capabilities are evolving and do not specify a timeline for conformance with the guidance.** The Draft Principles acknowledge that "expertise in climate risk and the incorporation of climate-related financial risks into risk management frameworks remains under development in many financial institutions and will continue to evolve over time."[23] The Draft Principles also state that the "incorporation of material climate-related financial risks into various planning processes will be iterative, as measurement methodologies, models, and data for analyzing these risks continue to mature."[24]

- **The FRB proposal, in particular, provides for banking organizations to implement the guidance in a manner commensurate with their risks.**

    - The Draft Principles suggest banking organizations should implement climate-related financial risk management practices in a manner that is commensurate to their respective size, complexity, risk profile and scope of operations.

    - The FRB Proposal is the most explicit in this regard, stating that "[e]ffective risk management practices should be appropriate to the size of the financial institution and the nature, scope, and risk of its activities."[25] The FRB Proposal further states that the FRB "anticipates that differences in financial institutions'

---

[22] *See* NYDFS, *Proposed Guidance for New York State Regulated Banking and Mortgage Organizations Relating to Management of Material Financial Risks from Climate Change* (Dec. 21, 2022) [hereinafter "NYDFS Proposal"]. The NYDFS Proposal follows a 2020 letter to all NYDFS-regulated financial institutions outlining NYDFS's expectations related to addressing financial risks from climate change, and NYDFS's 2021 *Guidance for New York Domestic Insurers on Managing the Financial Risks from Climate Change. See* NYDFS, *Insurance Circular Letter No. 15* (Sept. 22, 2020); NYDFS, *Guidance for New York Domestic Insurers on Managing the Financial Risks from Climate Change* (Nov. 15, 2021).

[23] FRB Proposal, *supra* note 13, at 75268.

[24] *Id.* at 75268–69.

[25] *Id.* at 75268.

complexity of operations and business models will result in different approaches to addressing climate-related financial risks."[26]

- The Basel Principles and the NYDFS Proposal also promote proportionality, and similarly acknowledge that addressing climate-related financial risk is not a one-size-fits-all approach. The NYDFS Proposal states that Regulated Organizations should account for their "size, complexity, geographic distribution, business lines, and investment strategies," among other considerations in developing their climate-related financial risk management responses.[27] Encouraging proportionality is all the more relevant in the NYDFS Proposal since it would apply to banks of any size, not just those having more than $100 billion in total consolidated assets.

- **The Draft Principles build on the Federal Bank Regulators' existing guidance on risk management frameworks and risk governance.**
  - As the Draft Principles suggest, the guidance is generally "consistent with the existing risk management frameworks" described in existing rules and guidance.[28] The proposed climate risk governance and risk management processes generally align with the OCC's *Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of Regulations* and the "Corporate and Risk Governance" booklet in the Comptroller's Handbook.[29]
  - Board-level responsibilities in the FRB's proposal also generally align with the expectations outlined SR 21-3/CA 21-1: Supervisory Guidance on Board of Directors' Effectiveness ("Board Effectiveness Guidance"). Citing to the Board Effectiveness Guidance, the FRB states that "[t]he principles are intended to supplement existing risk management standards and guidance on the role of boards and management."[30]

---

26 *Id.*

27 NYDFS Proposal, *supra* note 22, at ¶ 7.

28 FRB Proposal, *supra* note 13, at 75268.

29 *See* OCC, *Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of Regulations*, 79 Fed. Reg. 54518 (Sept. 11, 2014); OCC, COMPTROLLER'S HANDBOOK: CORPORATE AND RISK GOVERNANCE (July 2019).

30 FRB Proposal, *supra* note 13, at 75268. *See also* FRB, *SR 21-3/CA 21-1: Supervisory Guidances on Board of Directors' Effectiveness* (Feb. 26, 2021).

- **The Draft Principles contemplate an engaged board of directors.**
  - The FRB Proposal, similar to the OCC's and FDIC's respective proposals, emphasizes the importance of the board gaining a sufficient understanding of climate-related financial risks to discharge its oversight responsibilities. The board should "understand the effects of climate-related financial risks on the financial institution in order to . . . oversee the financial institution's risk-taking activities and hold management accountable for adhering to the risk governance framework . . . [and] acquire sufficient information to understand the implications of climate-related financial risk across various scenarios and planning horizons."[31]
  - As previewed above, the FRB indicates in the FRB Proposal that "[r]eferences to the board and senior management should be understood in accordance with their respective roles and responsibilities, and is not intended to conflict with existing guidance from the [FRB] regarding the roles of board and senior management or advocate for a specific board structure."[32]
  - As noted above, the FRB Proposal further distinguishes the responsibilities of the board and management that are outlined in the OCC's and FDIC's respective proposals and removes mention of the board in several places where the OCC and FDIC proposals assigned responsibilities to both the board and management. For example, the FRB Proposal made clear that management, rather than both the board and management, is responsible for "climate-related financial risks into the financial institution's risk management systems, including internal controls and internal audit."
  - However, the FRB Proposal assigns new responsibilities to the board, including by suggesting that the guidance is designed to help not only the banking organization or management, but also the board, make progress on climate risk programs, and advises banking organization to regularly communicate climate-related scenario analysis results to the board in addition to "all relevant individuals within the financial institution."[33] The FRB Proposal also retains the guidance from the earlier proposals that boards, in addition to management, assure that a banking organization's public statements about climate strategies and commitments are consistent with its internal strategies and risk appetites.

---

[31] FRB Proposal, *supra* note 13, at 75269.

[32] FRB Proposal, *supra* note 13, at 75268 n.7.

[33] *Id.* at 75270.

- Federal Bank Regulators' focus on the role of the board in a banking organization's climate response was discussed in great detail by Acting Comptroller Hsu during public remarks made in November 2022, a few weeks before the OCC issued its draft principles. In his remarks, Acting Comptroller Hsu detailed five probing questions that boards of large banking organizations should ask senior management "to help board members promote and accelerate improvements in climate risk management practices at their banks."[34] The SEC Climate Proposal, discussed in **Part II**, requires detailed governance disclosures, including with respect to the climate-related expertise of directors and the process and frequency for the board's oversight of climate-related financial risks. (*See* Appendix A for a summary of the responsibilities assigned to the board in the FRB Proposal.)

- **The FRB Proposal incorporates a provision on compensation policies that appears in the Basel Principles**. The FRB Proposal states that "[t]he board should consider whether the incorporation of climate-related financial risks into the financial institution's overall business strategy and risk management frameworks may warrant changes to its compensation policies, taking into account that compensation policies should be aligned with the business, risk strategy, objectives, values, and long-term interests of the financial institution."[35] Although the expectation in the Basel Principles is similar, the Basel Principles place responsibility to consider the changes on both the board and senior management and focus on "*material* climate-related financial risks."[36] The Basel Principles were finalized on June 15, 2022, after the OCC and FDIC issued their proposals.

- **The Draft Principles encourage exploratory scenario analysis rather than regulatory stress testing**. The Draft Principles encourage the use of exploratory scenario analysis exercises; stress testing is referenced only to distinguish it from scenario analysis. The Draft Principles note that scenario analysis should be subject to oversight, validation and quality control standards, and instruct that scenario analysis results should be communicated with information necessary to effectively convey the assumptions, limitations and uncertainty of results. Developments in bank regulatory scenario analysis are discussed below in **Part I.B.**

- **The Draft Principles address potential impacts of climate change on low-to-moderate income ("LMI") communities**. The Draft Principles indicate that climate change and banking organizations' climate risk mitigation efforts may

---

[34] Michael J. Hsu, Acting Comptroller of the Currency, Speech titled "Five Climate Questions Every Bank Board Should Ask" (Nov. 8, 2021).

[35] FRB Proposal, *supra* note 13, at 75269.

[36] Basel Principles, *supra* note 18, ¶ 13 (emphasis added).

disproportionately impact LMI and other disadvantaged households and communities by reducing their access to bank products and services. In discussing legal and compliance risks related to climate change, the Draft Principles identify potential fair lending concerns.

The FDIC Proposal advises subject banking organizations that climate-related risk management efforts should "seek to reduce or mitigate the impact that management of these risks may have on broader aspects of the economy, including the disproportionate impact of risk on LMI and other disadvantaged communities."[37] The FRB Proposal does not include similar language; rather, it indicates that the FRB will "continue to encourage financial institutions to manage climate-related financial risks in a manner that will allow them to continue to prudently meet the financial services needs of their communities."[38] It goes on to encourage "financial institutions to take a risk-based approach in assessing the climate-related financial risks associated with individual customer relationships and take into consideration the financial institution's ability to manage the risk."[39]

The Federal Bank Regulators have also taken action outside this guidance in seeking to address the potentially disproportionate impacts of climate change. Proposed interagency amendments to the regulations implementing the Community Reinvestment Act ("CRA") would add new categories of activities eligible for CRA credit, including disaster preparedness and climate resiliency activities that benefit or serve residents of targeted census tracts.[40]

- **The Draft Principles caution against "greenwashing."** The Draft Principles address concerns regarding greenwashing, tasking boards and management with ensuring that public communications regarding climate-related strategies and commitments are consistent with internal strategies. We discuss the SEC's initiatives against greenwashing in **Part III**, below.

- **The Draft Principles suggest smaller institutions may have material climate-related financial risk exposures**. The Draft Principles suggest that, although not the focus of the guidance, institutions with $100 billion or less in total consolidated assets may have "material exposures to climate-related financial risks."[41] However, in

37 FDIC Proposal, *supra* note 15, at 19509.

38 FRB Proposal, *supra* note 13, at 75269.

39 *Id*.

40 OCC, FRB & FDIC, *Community Reinvestment Act*, 87 Fed. Reg. 33884 (June 3, 2022). Such "targeted census tracts include low- and moderate-income census tracts, as well as distressed or underserved nonmetropolitan middle-income census tracts." *Id*. at 33903.

41 OCC Proposal, *supra* note 14, at 1; FDIC Proposal, *supra* note 15, at 19509; FRB Proposal, *supra* note 13, at 75268.

a March 7, 2022 speech, Acting Comptroller Hsu indicated that it would be several years before midsize and community banks were examined on climate risk management expectations.[42]

B. FRB Pilot Climate Scenario Analysis Exercise

On September 29, 2022, the FRB announced that six U.S. GSIBs would participate in a pilot climate scenario analysis exercise intended to "assist firms and supervisors in understanding how climate-related financial risks may manifest and differ from historical experience."[43] The FRB launched the exercise on January 17, 2023, reiterating that "[c]limate scenario analysis is distinct and separate from bank stress tests" and that the pilot is "exploratory in nature and does not have capital consequences."[44]

Through the pilot, the FRB aims to both "learn about large banking organizations' climate risk-management practices and challenges [and] enhance the ability of both large banking organizations and supervisors to identify, measure, monitor, and manage climate-related financial risks."[45] Results of the quantitative exercises and answers to the qualitative questions that accompany the pilot (discussed below) are due to the FRB by July 31, 2023. The FRB intends to publish aggregated results of the pilot exercise at the end of 2023.[46]

The exercise asks participants to separately consider loan level credit risk impacts of climate change related physical risks, based on GHG trajectories from the Intergovernmental Panel on Climate Change and transition risks based on scenarios from the Network of Central Banks and Supervisors for Greening the Financial System ("NGFS").[47] We note that while the ECB's climate stress tests used NGFS scenarios as a starting point, the ECB added overlays to calibrate the NGFS scenarios and also used a flood risk scenario based in part on "flood risk data collected for the purposes of the ECB economy-wide climate stress test."[48] For its part, the Canadian Office of the Superintendent of Financial Institutions ("OSFI"), which regulates federally registered financial institutions ("FRFIs"), "developed its own

---

42 *See* Hsu, Remarks at Annual Washington Conference for Institute of International Bankers, *supra* note 4, at 5.

43 Press Release, FRB, Federal Reserve Board announces that six of the nation's largest banks will participate in a pilot climate scenario analysis exercise designed to enhance the ability of supervisors and firms to measure and manage climate-related financial risks (Sept. 29, 2022).

44 Press Release, FRB, Federal Reserve Board provides additional details on how its pilot climate scenario analysis exercise will be conducted and the information on risk management practices that will be gathered over the course of the exercise (Jan. 17, 2023).

45 FRB, PILOT CLIMATE SCENARIO ANALYSIS EXERCISE PARTICIPANT INSTRUCTIONS, at iii (Jan. 2023) [hereinafter "Pilot Instructions"].

46 *Id.* at 2.

47 *Id.* at 6–7.

48 ECB, MACRO-FINANCIAL SCENARIOS FOR THE 2022 CLIMATE RISK STRESS TEST, at 4.

scenarios" for its scenario analysis exercise that launched in November 2020, building upon and aligning with the NGFS.[49]

The physical risk module asks each bank to model credit risk parameters on their U.S. northeast real estate loan portfolio using a common shock along with another real estate portfolio chosen by the bank with an idiosyncratic shock over a one-year period.[50] The transition risk module asks each bank to model credit risk parameters for their corporate loans and commercial real estate loans based on two scenarios designed by the NGFS, one with minimal transition risk and one with moderate transition risk.[51]

The quantitative exercises are accompanied by qualitative questions, which ask, among other things:[52]

- "What governance practices were applied specifically for this exercise for the scenario analyses performed within the physical and transition risk modules?
- "What governance practices, if any, are in place more broadly to oversee the banking organization's management of climate-related financial risks?
- "What additional approaches or tools, if any, beyond scenario analysis does the banking organization use in business-as-usual risk management to measure and monitor climate-related financial risks?
- "How, if at all, does the banking organization identify and evaluate climate-related financial risks within its business-as-usual risk identification process?
- "How, if at all, does the banking organization currently use climate scenario analysis to inform business decisions?"

The emphasis on governance in the qualitative component of the pilot exercise may underscore the importance of appropriate processes by which banking organizations manage their climate-related financial risk.

With respect to scenario analysis generally, U.S. banking regulators, more so than their counterparts abroad, have repeatedly distinguished climate-related scenario analysis from prudential stress testing, which can have capital consequences.[53] (*See* Appendix B and C for

---

49 BANK OF CANADA & OSFI, USING SCENARIO ANALYSIS TO ASSESS CLIMATE TRANSITION RISK, at 11 (Jan. 14, 2022).

50 PILOT INSTRUCTIONS, *supra* note 45, at 12–15.

51 *Id.*, at 22–23, 26.

52 *Id.* at 35.

53 For example, the PILOT INSTRUCTIONS state that "[t]he [Federal Reserve] Board views climate scenario analyses as distinct and separate from regulatory stress tests. The Board's stress tests are designed to assess whether large

an outline of international developments on stress testing and scenario analysis.) In contrast, while the ECB stated that its 2022 climate risk stress test would not have "any direct capital implications,"[54] the ECB later reported that climate stress test results were reflected in its annual Supervisory Review and Evaluation Process, and could indirectly impact Pillar 2 capital requirements.[55] Similarly, while OSFI's climate scenario analysis exercise "was not a climate stress-testing or a capital adequacy prudential exercise,"[56] OSFI's guidelines on climate-related financial risk management advise Canadian federally regulated financial institutions to "maintain sufficient capital and liquidity buffers for [their] climate-related risks."[57] In addition, the Bank of England ("BoE") indicated it would share insight from its scenario analysis exercise with the government of the United Kingdom ("UK") and other central banks to drive discussion on climate-related financial risk management, including capital requirements for banks and insurers.[58] Finally, we note that the Basel Committee recently released Frequently Asked Questions discussing how climate-related financial risks could be integrated into the existing Basel capital framework.[59]

As discussed in the **Background**, one difference between U.S. and other regulators is that foreign financial regulators typically have broader authority to regulate climate activity than their U.S. counterparts. They also have been more active, and earlier, than the United States in implementing climate-related regulation. (*See* Appendix B for a high-level comparison of international regimes on climate-related risk management and disclosures). For example, the ECB expects banks to progressively meet all climate-related supervisory expectations by the end of 2024. By contrast, FRB Chair Powell, in a recent speech on central bank independence, noted his view that the FRB has "narrow, but important, responsibilities regarding climate-related financial risks . . . tightly linked to [its] responsibilities for bank supervision" and that it would be "inappropriate for [the FRB] to use [its] monetary policy or supervisory tools to promote a greener economy or to achieve other climate-based goals."[60] Similarly, the OCC has noted that its "focus on climate-related financial risk is

---

banking organizations have enough capital to continue lending to households and businesses during a severe recession. The pilot CSA exercise, on the other hand, is exploratory in nature and does not have consequences for bank capital or supervisory implications." *Id.* In his re-nomination hearing, FRB Chair Powell stated: "I think it's very likely that climate stress scenarios, as we like to call them, will be a key tool going forward. I would stress that those are very different from the regular stress tests which affect capital." *Hearing on the Nomination of the Honorable Jerome Powell Before the S. Comm. On Banking, Hous., & Urb. Affs.* 116th Cong. (2022) (statement of Jerome Powell, FRB Chair).

54 ECB, 2022 CLIMATE RISK STRESS TEST, at 4 (July 2022).

55 ECB, WALKING THE TALK: BANKS GEARING UP TO MANAGE RISKS FROM CLIMATE CHANGE AND ENVIRONMENTAL DEGRADATION, at 5 (Nov. 2022).

56 BANK OF CANADA & OSFI, *supra* note 49, at 4.

57 OSFI, *Guideline B-15: Climate Risk Management*, at ch. 1, princ. 5 (Mar. 2023).

58 BOE, RESULTS OF THE 2021 CLIMATE BIENNIAL EXPLORATORY SCENARIO ("CBES") (May 24, 2022).

59 Basel Committee, *Frequently Asked Questions on Climate-Related Financial Risks* (Dec. 8, 2022).

60 Jerome Powell, FRB Chair, Panel on "Central Bank Independence and the Mandate—Evolving Views" at the Symposium on Central Bank Independence, Sveriges Riksbank (Jan. 10, 2023).

firmly rooted in [the OCC's] mandate to ensure banks operate in a safe and sound manner" and that the OCC is "committed to staying in [its] safety and soundness lane."[61]

[61] OCC, 2022 ANNUAL REPORT, at 17.

II. SEC Proposed Rule on Climate-Related Disclosures

On March 21, 2022, the SEC released for public comment its long-awaited SEC Climate Proposal.[62] The SEC Climate Proposal would apply to all SEC registrants,[63] including public companies, and is intended to produce "consistent, comparable, and decision-useful information" regarding registrants' climate-related risks.[64] If adopted as proposed, the rule would represent one of the most dramatic changes ever to SEC disclosure requirements. The SEC Climate Proposal has generated more than 14,000 comment letters, and the final rule is expected to face legal challenges. According to the Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, a final rule is anticipated in April 2023,[65] although this date is expected to be pushed back. We note that the EU has already finalized its equivalent disclosure framework, the CSRD, which significantly expands the type of information companies will have to report under EU law on both climate and ESG more broadly.

The SEC Climate Proposal would add new, often prescriptive, climate-related disclosure requirements to Regulation S-K, which primarily governs qualitative disclosures, and Regulation S-X, which governs financial statements and other financial disclosures. The new disclosures would appear in periodic reports (*e.g.*, forms 10-K, 20-F and 10-Q) and registration statements (*e.g.*, forms S-1, S-3 and S-4). In general, the SEC Climate Proposal would address various climate-related risks to registrants' business, operations and financial condition and require disclosure of registrants' GHG emissions.

The SEC Climate Proposal builds on the TCFD framework, a widely adopted, voluntary climate-related reporting framework, and the Greenhouse Gas Protocol ("GHG Protocol"), a comprehensive, global framework for measuring and managing emissions from private and public sector operations, value chains, products and cities.[66] However, the SEC Climate Proposal would exceed the TCFD framework requirements, including by requiring

---

62 *See* SEC, *The Enhancement and Standardization of Climate Related Disclosures for Investors*, 87 Fed. Reg. 21334 (Apr. 11, 2022) [hereinafter "SEC Climate Proposal"]. For an in-depth summary and analysis of the proposal, see U.S.: SEC Issues Proposed Climate Change Disclosure Rule, DEBEVOISE ESG WEEKLY UPDATE (Mar. 24, 2022), available here.

63 The SEC Climate Proposal would apply to all foreign private issuers except Canadian issuers that are Form 40-F filers. However, the SEC seeks comment on whether Canadian filers (i) should be required to comply with the proposed climate-related disclosures and (ii) should be permitted to comply with Canadian climate-related disclosure requirements in lieu of the Proposed Rule, and if so, under what conditions. *See* SEC Climate Proposal, *supra* note 62, at 21408–09.

64 *Id.*, at 21413.

65 Off. of Info. & Regul. Affs., *Climate Change Disclosure*, Unified Regulatory Agenda (Fall 2022).

66 *See* World Resources Institute, *Initiatives: Greenhouse Gas Protocol* (last visited Mar. 10, 2023). The GHG Protocol introduced the Scope 1, 2 and 3 categorizations for GHG emissions based on source, creating what would become a widely used nomenclature convention.

quantitative financial statement metrics on a line-item basis and disclosure of material Scope 3 GHG emissions. (*See* Appendix E for a summary comparison of the SEC Climate Proposal and the TCFD framework, among other international frameworks.) The SEC Climate Proposal also contemplates climate-related risk management and governance practices at a level of detail that far exceeds the Draft Principles. While the Draft Principles acknowledge that building out climate programs will be iterative and do not specify a timeline for conformance with the guidance, a company's disclosures under the SEC Climate Proposal would be more prescriptive and immediate, which could expose registrants to potential securities law liability for material misstatements and omissions in the disclosure. Furthermore, the SEC Climate Proposal would require disclosure of scenario analysis if used by a registrant to assess climate-related risks. Disclosures related to scenario analysis could pose issues with respect to confidential supervisory information and liability as banks continue or begin to engage in exploratory scenario analysis, as currently encouraged by the Federal Bank Regulators in the Draft Principles.

In this **Part II**, we provide an overview of the SEC Climate Proposal and key takeaways for banking organizations. We also review the potential bases for legal challenges to a final rule. We conclude this **Part II** by briefly reviewing the SEC Climate Proposal in the context of the TCFD and ISSB international frameworks, as well as the EU's CSRD.

A. Summary of Proposed Amendments to Regulation S-K & Regulation S-X

The following table identifies the key disclosure items included in the rule proposal.

Key Proposed Disclosure Items
Regulation S-K The SEC Climate Proposal would add a new, separately captioned "Climate-Related Disclosure" section of Regulation S-K, which primarily governs qualitative disclosures outside a registrant's financial statements.
GHG emissions • **Scope 1** emissions, which are defined as direct emissions from facilities owned or activities controlled by registrant. • **Scope 2** emissions, which are defined as indirect emissions from the generation of purchased energy consumed by the registrant.   o **Independent, third-party attestation** of Scope 1 and Scope 2 emissions for accelerated and large accelerated filers. • **Scope 3** emissions, which are defined as emissions generated from all upstream and downstream activities (**"financed emissions"**), must be disclosed for accelerated and large accelerated filers if material to the registrant or if included in a registrant's climate-related targets or goals. (*See* Appendix D-1 for a graphic of the proposed disclosure item.)

Material climate-related **risks and impacts**, including qualitative and quantitative information on the following, if used by a registrant to inform business strategy or assess resilience: • Any analytical forecasting tools, such as **scenario analysis.** • Maintenance of an **internal carbon price**. • **Carbon offsets** or **renewable energy certificates**.
Governance and risk management of climate-related risk. (*See* Appendix D-2 for a table of the proposed disclosure item.)
Climate-related **targets and goals**, if any, including **any transition plans and progress**. (*See* Appendix D-3 for a graphic of the proposed disclosure item.)
Regulation S-X The SEC Climate Proposal would add new disclosures in the notes to financial statements. Such disclosures would be subject to internal control over financial reporting ("ICFR") and Sarbanes-Oxley Act ("SOX") controls.
Financial statement metrics, including line-item **financial impact metrics and expenditure metrics** related to climate events and transition activities, if they exceed a **materiality threshold of 1%** of the related line item. (*See* Appendix D-4 for a graphic of the proposed disclosure item.)

Compliance Timelines

Compliance dates outlined in the SEC Climate Proposal assumed adoption of a final rule in December 2022. The SEC Climate Proposal would phase in and extend compliance dates for certain disclosure requirements and standards based on registrant size.

Registrant Type	All Proposed Disclosure Items Except Scope 3 Emissions & Attestation	Scope 3 Emissions	Attestation on Scope 1 & Scope 2 Emissions Disclosures
Large Accelerated Filer	2023 (filed in 2024)	2024 (filed in 2025)	Limited assurance by 2024 Reasonable assurance by 2026
Accelerated Filer	2024 (filed in 2025)	2025 (filed in 2026)	Limited assurance by 2025 Reasonable assurance by 2027
Smaller Reporting Company	2025 (filed in 2026)	Exempted	Exempted

B. Key Takeaways from the SEC Climate Proposal

Outlined below are key components of the SEC Climate Proposal.

GHG Emissions

- Scope. The SEC Climate Proposal would require registrants to disclose their GHG emissions, including those from outsourced activities, for the most recently completed fiscal year and for the historical fiscal years included in their consolidated financial statements in the filing (to the extent historical GHG emissions data is reasonably available).[67]

- Methodology. For all disclosures of GHG emissions metrics, registrants would be required to disclose their calculation methodology, as well as the significant inputs and assumptions used in their calculations.[68] Registrants may use "reasonable estimates" when disclosing GHG emissions, provided that they also describe the assumptions underlying, and their reasons for using, the estimates.[69]

- Scopes 1, 2 and 3. The SEC Climate Proposal would require all registrants to disclose Scope 1 and Scope 2 emissions separately, regardless of whether the emissions are material, while only registrants meeting certain criteria would be required to disclose Scope 3 emissions (as discussed further below).[70]

- Scope 1 and Scope 2 Attestation Requirement. Accelerated and large accelerated filers would be required to include third-party attestations with their filings covering their Scope 1 and Scope 2 emissions disclosures,[71] as well as information about the attestation service provider.[72] The attestation provider would need to be an expert in GHG emissions and independent of the registrant but need not be an auditor.[73] The attestation requirement departs from the SEC's typical practice for disclosures required under Regulation S-K, which, unlike financial statements submitted in accordance with Regulation S-X, are not audited or attested to by an independent third party.

- Phase-In of Attestation Requirements and Standard. The SEC Climate Proposal would phase in the compliance timeline for providing attestations on Scope 1 and

---

67 SEC Climate Proposal, *supra* note 62, at 21468 (introducing Proposed Rule 17 C.F.R. § 229.1504(a)).

68 *Id.* at 21385–88; *id.* at 21469 (introducing Proposed Rule 17 C.F.R. § 229.1504(e)(1).

69 *Id.* at 21469 (introducing Proposed Rule 17 C.F.R. § 229.1504(e)(4)).

70 *Id.* at 21468 (introducing Proposed Rule 17 C.F.R. § 229.1504(b)(1)).

71 *Id.* at 21470 (introducing Proposed Rule 17 C.F.R. § 229.1505(c)). The attestation report must include the assurance level and be publicly available, among other requirements.

72 *Id.* at 21470 (introducing Proposed Rule 17 C.F.R. § 229.1505(b)).

73 *Id.* at 21470 (introducing Proposed Rule 17 C.F.R. § 229.1505(b)).

Scope 2 emissions based on registrant size. Initially, registrants would have to provide attestations with "limited assurance" (*i.e.*, assurance that no material misstatement of fact or omission was found after a review, which is equivalent to the level of assurance provided over a registrant's interim financial statements included in a Form 10-Q) and eventually would be required to provide "reasonable assurance" (*i.e.*, the level of assurance that is equivalent to that of an audit of financial statements included in a Form 10-K).[74] The SEC's anticipated timeline suggested that a large accelerated filer would need to provide limited assurance in its second and third fiscal years beginning after the effective date of the final rule, and reasonable assurance for the fourth fiscal year and beyond.[75] Accelerated filers would receive one additional year on top of the compliance timeframes given to large accelerated filers to comply with each of the limited assurance and reasonable assurance standards.

Scope 3 Disclosures

- Applicability. The SEC Climate Proposal would require registrants, other than smaller reporting companies, to disclose Scope 3 emissions if "material" or if the registrant has set a GHG emissions reduction target or goal that includes Scope 3 GHG emissions.[76] In the preamble, the SEC suggests that both qualitative and quantitative factors would comprise the determination of materiality,[77] further noting that Scope 3 GHG emissions may be considered material if they (i) comprise a relatively significant portion of a registrant's overall GHG emissions or (ii) represent a significant risk, are subject to significant regulatory focus or would be considered important by a reasonable investor.[78]

  Although the SEC Climate Proposal does not impose a threshold for what constitutes a "relatively significant" portion of a registrant's GHG emissions, the SEC sought comment on whether the disclosure item should use a quantitative materiality threshold (25%, 40% or 50%) for Scope 3 emissions,[79] and notes that some companies use a threshold such as 40% when assessing materiality of Scope 3 emissions.[80] The SEC also specifically identified banks among industries that produce the highest percentage (81%) of downstream emissions relative to their

---

74 *Id.* at 21469 (introducing Proposed Rule 17 C.F.R. § 229.1505(a)(1)). Note that the SEC did not propose definitions of the terms "limited assurance" or "reasonable assurance" but rather expects that the terms will be understood as they are within industry. *See id.* at 21392 n.564, 21397, ¶ 141.

75 *Id.* at 21392.

76 *Id.* at 21468 (introducing Proposed Rule 17 C.F.R. § 229.1504(c)(1)).

77 *Id.* at 21377–81.

78 *Id.* at 21378.

79 *Id.* at 21379, 21381.

80 *Id.* at 21379.

total emissions, largely due to financing the emissions of other companies through debt and equity financing (defined as "financed emissions").[81]

- Safe Harbor and Phase-In for Scope 3 Disclosures. The SEC Climate Proposal acknowledges that Scope 3 GHG emissions are based largely on third-party data[82] and further states that it may be difficult to obtain activity data from suppliers and other third parties in a registrant's value chain or to verify the accuracy of such information.[83] In recognition of such limitations, the SEC proposed certain accommodations. First, in addition to the use of "reasonable estimates" already permitted for all GHG emissions disclosures, the SEC proposed to allow registrants to present such estimates in terms of a range for Scope 3 emissions, provided that the reasons for using the range and the underlying assumptions are also disclosed.[84] Second, the SEC Climate Proposal would implement a safe harbor for Scope 3 emissions disclosures. The proposed safe harbor is intended to mitigate potential liability concerns associated with providing Scope 3 emissions disclosures based on third-party information by making clear that registrants would only be liable for such disclosure if made without a reasonable basis or disclosed other than in good faith.[85] Finally, Scope 3 emissions disclosure requirements would be phased in on a delayed basis based on registrant size, with the SEC initially proposing that large accelerated filers would need to comply by the second fiscal year beginning after the effective date, while accelerated filers would need to comply by the third fiscal year beginning after the effective date.[86]

Risk Management

- Scope. The SEC Climate Proposal would require registrants to describe their process for identifying, assessing and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system or procedures.[87] For both the identification and management of climate risks, registrants would disclose whether their climate-risk processes are integrated into their overall risk management systems or handled by a separate board or committee, as well as the details of such arrangements.[88]

- Identifying Climate Risk. Registrants would be required to disclose detailed information regarding their risk identification processes, including how they

---

81 *Id.* at 21435 n.885.
82 *Id.* at. 21381.
83 *Id.* at 21390.
84 *Id.* at 21469 (introducing Proposed Rule 17 C.F.R. § 229.1504(e)(4)(i), (ii)).
85 *Id.* at 21391. *See also id.* at 21469 (introducing Proposed Rule 17 C.F.R. § 229.1504(e)(9)).
86 *Id.* at. 21444 n.954. *See also id.* at 21412.
87 *Id.* at 21468 (introducing Proposed Rule 17 C.F.R. § 229.1503).
88 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1503(b)).

determine and consider: (i) the relative significance of climate-related risks compared to other risks; (ii) existing or likely regulatory requirements or policies (such as GHG emissions limits) when identifying climate-related risks; (iii) shifts in customer or counterparty preferences, technological changes or changes in market prices in assessing potential transition risks; and (iv) the materiality of climate-related risks, including how they assess the potential scope and impact of an identified climate-related risk.[89]

- Managing Climate Risk. Registrants also would be required to disclose their process for managing identified climate-related risks, including how they (i) decide whether to mitigate, accept or adapt to a particular risk; (ii) prioritize certain climate-related risks; and (iii) determine high-priority risks.[90] Registrants that utilize insurance or other financial tools to mitigate climate risk exposures may be required to disclose the use of such tools.[91]

Impact of Climate-Related Risks on Strategy, Business Model and Outlook

- Description of Identified Climate-Related Risks. The SEC Climate Proposal would require qualitative disclosure of any climate-related risks identified by registrants that are reasonably likely to have a material impact on their business and consolidated financial statements. Registrants would need to categorize each of these risks (i) as a physical or transition risk[92] and (ii) as a risk manifesting over a short-, medium- or long-term time horizon.[93] While the SEC provides certain descriptions and examples of physical and transition risks,[94] registrants would need to describe how they have individually defined short-, medium- and long-term time horizons, including how such time horizons take into account any climate-related planning processes and goals.[95] In the preamble, the SEC stated that the proposed approach would allow registrants to select time horizons that are appropriate for their circumstances.[96]

- Actual and Potential Impacts of Climate-Related Risks. Registrants would be required to describe the actual or potential impacts of identified climate-related risks on their strategy, business model and outlook, including impacts on business operations, products or services, as well as on suppliers and other parties in

---

89 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1503(a)(1)).
90 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1503(a)(2)).
91 *Id.*, at 21361.
92 *Id.* at 21467 (introducing Proposed Rule 17 C.F.R. § 229.1502(a)(1)).
93 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1502(a)).
94 *See id.* at 21466 (introducing Proposed Rule 17 C.F.R. § 229.1500(c)(1)–(4)).
95 *Id.* at 21467 (introducing Proposed Rule 17 C.F.R. § 229.1502(a)(2)).
96 *Id.* at 21351.

registrants' value chain.[97] As with the disclosure of climate-related risks, each climate risk-related impact must be described as occurring on a short-, medium- or long-term time horizon, as defined by the particular registrant.[98] The SEC Climate Proposal also would provide registrants with the option of discussing actual or potential impacts of any climate-related opportunities. Registrants would need to discuss whether and how such impacts factor into their business strategy, financial planning and capital allocation, including how resources are being used to mitigate such risks. Furthermore, registrants would need to describe whether and how any climate-related risks have affected or are reasonably likely to affect their consolidated financial statements.[99]

- Cross-Referencing Metrics and Targets Disclosures. Within this qualitative disclosure, registrants would be required to describe how the GHG emissions metrics, financial statement metrics, and targets and goals they disclose relate to their business model or strategy.[100] The SEC Climate Proposal also would require registrants to include a narrative describing any financial statement metrics disclosures that demonstrate that the identified climate-related risks discussed under this disclosure have had a material impact on reported financial condition or operations.[101]

- Internal Carbon Price. The SEC Climate Proposal would require registrants that maintain an internal carbon price to disclose: (i) the price per metric ton of carbon dioxide equivalent; (ii) the total price and how it is estimated to change over time; (iii) the boundaries for measurement of overall carbon dioxide emissions (if different from those used in the GHG emission disclosures); (iv) a registrant's rationale for selecting the internal carbon price applied; and (v) a description of how registrants use any internal carbon price disclosed to evaluate and manage climate-related risks.[102]

- Scenario Analysis. The SEC Climate Proposal would require registrants to disclose qualitative and quantitative information regarding any analytical tools, such as scenario analysis, being used to assess the impact of climate-related risks on their business and consolidated financial statements and to support the resilience of their strategy and business model.[103] For registrants using scenario analysis, the disclosure would include information on the scenarios used, including the parameters,

---

97 *Id.* at 21467 (introducing Proposed Rule 17 C.F.R. § 229.1502(b)).

98 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1502(b)(2)).

99 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1502(d)).

100 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1502(c)).

101 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1502(d)).

102 *Id.* (introducing Proposed Rule 17 C.F.R. § 229.1502(e)(1)–(2)).

103 *Id.* at 21468 (introducing Proposed Rule 17 C.F.R. § 229.1502(f)).

assumptions and analytical choices, and projected principal financial impacts on the registrant's business strategy under each scenario.[104] As proposed, there is no materiality threshold or separate safe harbor for the information that would be provided under this disclosure, although the general safe harbor for forward-looking statements would still apply. As discussed in **Part I** above, the FRB has indicated it is developing scenario analysis guidance and has recently launched a pilot scenario analysis exercise for six U.S. GSIBs. Some commentators have noted that disclosure of information relating to a banking organization's scenario analysis exercises in connection with prudential scenario analyses may implicate questions of confidential supervisory information.

- Carbon Offsets and RECs Impacting Business Strategy. Registrants using carbon offsets and renewable energy certificates ("RECs") would be required to provide information regarding their use and impact on climate-related business strategy.[105]

Climate-Related Targets and Goals

- Scope. The SEC Climate Proposal would require disclosure of any climate-related targets or goals set by a registrant, and the actions taken by the registrant in the past year to achieve its targets and goals, as well as data to indicate their progress.[106] The scope of the disclosure requirement would cover all targets or goals established in accordance with climate-related treaties, laws, regulations and policies of all scopes, including, for example, smaller business unit-level or product-level goals and long-term targets such as 2050 net-zero goals. The impact of this disclosure requirement on banks is expected to be significant given the growing number of climate targets being set within the industry. For example, 125 banks globally (including six U.S. GSIBs) representing 41% of global banking assets have committed to achieving net-zero GHG emissions across their lending and investment activities by 2050 or sooner.[107] The SEC notes that such information is intended to mitigate cases of "greenwashing" and help investors understand the potential impacts on a registrant associated with pursuing its climate-related goals and assess the registrant's management of its identified climate-related risks.[108]

  The disclosures would include, as applicable: (i) descriptions of the scope of activities and emissions included in the target;(ii) the unit of measurement (including whether the target is absolute or intensity-based); (iii) the defined time horizon by which the

---

104 *Id*. (introducing Proposed Rule 17 C.F.R. § 229.1502(f)).

105 *Id*. at 21471 (introducing Proposed Rule 17 C.F.R. § 229.1506(d)).

106 *Id*. (introducing Proposed Rule 17 C.F.R. § 229.1506(c)).

107 UN Env't. Programme Fin. Initiative, *Members of Net-Zero Banking Alliance* (last visited Mar. 9, 2023).

108 SEC Climate Proposal, *supra* note 62, at 21406–07; *id*. at 21471 (introducing Proposed Rule 17 C.F.R. § 229.1506(d)).

target is intended to be achieved; (iv) the defined baseline time period and baseline emissions against which progress will be tracked; (v) any interim targets set; and (vi) how the registrant intends to meet its climate-related targets and goals.[109] If used as part of a plan to achieve climate-related goals, this disclosure would include detailed information regarding registrants' transition to lower-carbon products, purchase of carbon offsets or RECs and engagement in carbon removal and carbon storage.[110]

- Transition Plan. If a registrant has a transition plan in place to mitigate or adapt to climate-related risks, the SEC Climate Proposal would require certain disclosures regarding the plan, as well as an annual update describing the actions taken during the year to achieve the transition plan's targets or goals.[111]

Board Oversight and Management Responsibility over Climate-Related Risks

- Scope. The proposal would require registrants to disclose information about the oversight and governance of climate-related risks by both their board of directors and management.

- Board Oversight. Disclosures regarding the board's role would include: (i) the identity of any board members or board committee responsible for the oversight of climate-related risks;[112] (ii) any relevant board member qualifications and expertise in climate-related risks; (iii) board oversight processes (including the manner and frequency of board discussions on climate-related risk); (iv) whether and how the board or board committee considers climate-related risks as part of its business strategy, risk management and financial oversight; and (v) whether and how the board sets climate-related targets or goals (including interim ones) and its oversight of progress against set targets or goals.[113] It is unusual for the SEC to require disclosure of board expertise with respect to a particular risk area; however, this requirement follows the SEC's proposed rule regarding cybersecurity risk management, which similarly would require a disclosure of whether any member of the board has expertise in cybersecurity and, if so, the nature of such expertise.[114] The proposed cybersecurity disclosure requirements are expected to be adopted into a final rule in April 2023.[115]

---

[109] *Id.* at 21406; *id.* at 21471 (introducing Proposed Rule 17 C.F.R. § 229.1506(b)).
[110] *Id.* at 21406; *id.* at 21471 (introducing Proposed Rule 17 C.F.R. § 229.1506(d)).
[111] *Id.* at 21468 (introducing Proposed Rule 17 C.F.R. § 229.1503(c)).
[112] *Id.* at 21359.
[113] *Id.* at 21467 (introducing Proposed Rule 17 C.F.R. § 229.1501(a)(1)).
[114] SEC, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, 87 Fed. Reg. 16590, 16593 (Mar. 23, 2022).
[115] Off. of Info. & Regul. Affs., *Cybersecurity Risk Governance*, Unified Regulatory Agenda (Fall 2022).

- Management Responsibilities. Disclosures regarding management's role would include: (i) the identity of any management positions or committees responsible for assessing and managing climate-related risks and detailed descriptions of any relevant expertise of the position holders or committee members; (ii) management processes for staying informed about and monitoring climate-related risks (including the extent to which management relies on in-house experts and/or third-party consultants);[116] and (iii) board reporting processes (including the manner and frequency of board reporting on climate-related risks).[117]

Financial Statement Metrics

- Scope. The proposed Regulation S-X amendments would require line-by-line disclosure in the notes of audited financial statements of the impacts and expenditures related to severe weather events and other natural conditions, transition activities and identified climate-related risks. The disclosures would include contextual information regarding how a certain metric was derived as well as any policy decisions adopted in the calculation of the metrics.[118] In addition, the SEC Climate Proposal would require registrants to disclose whether the estimates and assumptions used to produce the consolidated financial statements were impacted by risks associated with, or known impacts from, transition activities or any climate-related targets disclosed by the registrant.[119]

- Cross-Referencing Qualitative Disclosures. Registrants also would be required to include the impact of any climate-related risks or opportunities, as identified within its qualitative disclosures, on the financial statement metrics.[120]

- Quantitative 1% Materiality Threshold. With respect to disclosing financial statement metrics, the SEC would require a registrant to disaggregate the impacts of climate-related events or transition activities for each line item of the registrant's consolidated financial statements.[121] The SEC Climate Proposal provides, however, that disclosure is not required if the aggregate impact of the event or activity is less than 1% of the total line item.[122] The SEC notes that a bright-line quantitative threshold would reduce the risk of underreporting and encourage comparability and

---

116 SEC Climate Proposal, *supra* note 62, at 21360.
117 *Id.* at 21467 (introducing Proposed Rule 17 C.F.R. § 229.1501(b)(1)).
118 *Id.* at 21363 (introducing Proposed Rule 17 C.F.R. § 210.14-02(a)). *See id.* at 21365–71 (discussing examples of contextual information for financial impact and expenditure disclosures, including specific events aggregated for the purposes of the calculation, estimation methodology used, etc.).
119 *Id.* at 21465 (introducing Proposed Rule 17 C.F.R. § 210.14-02(h)).
120 *Id.* (introducing Proposed Rule C.F.R. § 210.14-02(i), referencing 17 C.F.R. § 229.1502(a) and (c)).
121 *Id.* at 21366.
122 *Id.* at 21464 (introducing Proposed Rule 17 C.F.R. § 210.14-02(b)).

consistency over time.[123] The SEC also notes that a 1% threshold is used in other limited and specific disclosure contexts,[124] However, commentators have noted that determining whether a specific financial impact falls below the low 1% threshold would be expected to present a substantial accounting burden on registrants.

The scope of financial statement disclosures required by the SEC Climate Proposal would exceed standards that have been developed by other countries and international bodies. Notably, the TCFD, ISSB and CSRD frameworks do not require the disclosure of financial impacts on a line-item basis and do not impose a quantitative materiality threshold for such disclosures. (*See* Appendix E.)

- Novel Accounting and Auditing Methods. The SEC Climate Proposal would require novel accounting and auditing standards for climate-related financial statement disclosures.[125] Moreover, the proposed financial impact metrics and expenditure metrics would be required to be audited[126] although there are no existing standards for auditing the required climate-related financial statement disclosures. Technology build-out also may be needed to incorporate climate-related information in ICFR and SOX control processes, as Regulation S-X disclosures are subject to such controls.

C. Legal Challenges

The SEC Climate Proposal would represent arguably the most significant new public company disclosure requirements in decades. Certain commentators have argued that such a swift and sweeping overhaul of climate-related disclosures, and the related financial and accounting burdens anticipated to be borne by affected filers, would result in legal challenges contesting the SEC's (i) cost-benefit analysis and (ii) legal authority to promulgate the rule.[127] We briefly describe these two potential grounds for challenging the

---

123 *Id.* at 21365–69.

124 *Id.* at 21366 n.347.

125 *See* CLIMATE RISK IN THE FINANCIAL STATEMENTS HANDBOOK, KPMG: ESG REPORTING, at 1 (Feb. 2023) ("Forthcoming disclosure requirements from the SEC, the European Union and the International Sustainability Standards Board are likely to set the future foundation of global ESG reporting. But the question of how climate risk affects the financial statements themselves—absent climate-specific GAAP requirements—has been harder to pin down."); *Climate Plan Puts SEC in Rare Role as Accounting Rule-Writer*, BLOOMBERG TAX (Mar. 23, 2022) ("No part of U.S. GAAP—generally accepted accounting principles—spells out accounting requirements for issues related to climate change risk. FASB leaders have repeatedly said that writing rules about things like carbon footprints isn't in its wheelhouse unless an issue affects a financial statement line item.")

126 *Id.* at 21373.

127 *See* Jacqueline M. Vallette & Kathryne M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, Harv. L. Sch. F. on Corp. Governance, May 10, 2022 ("Opposition to the [p]roposal has been swift and strong. If the [p]roposal is adopted as a final rule in its current or a substantially similar form, affected companies, trade associations, or state officials are likely to challenge the new disclosure rules.").

final rule below, as well as a recent investigation into the SEC Climate Proposal launched by the U.S. Senate.

1. Potential Challenges

Potential Challenge #1: The SEC's cost-benefit analysis did not meet its statutory mandate. The SEC has a statutory mandate to consider whether a final rule will promote efficiency, competition and capital formation.[128] This has been interpreted to include conducting high-quality cost-benefit analysis.

The D.C. Circuit court's opinion in *Business Roundtable v. SEC* (2011) is widely recognized as setting a precedent for requiring the SEC to conduct a rigorous cost-benefit analysis to meet its statutory mandate. In that case, the D.C. Circuit vacated the rule at issue as arbitrary and capricious because the SEC "failed adequately to consider the rule's effect upon efficiency, competition, and capital formation."[129]

Academics and other legal commentators recognize the high expectations set for cost-benefit analysis: "A twenty-year line of appellate cases culminating in the D.C. Circuit's devastating *Business Roundtable v. SEC* decision has set a very high bar for economic analysis in rulemaking by financial regulators such as the [SEC]."[130] With respect to the SEC Climate Proposal, challengers may argue that the SEC does not meet this high standard, given the significant economic and operational costs to produce the novel and granular climate-related disclosures that would be required as compared to its actual utility to investors.[131]

Potential Challenge #2: The SEC lack authority to promulgate the rule. In *West Virginia v. Environmental Protection Agency* (2022), the Supreme Court struck down an Environmental Protection Agency rule using the "major questions doctrine," which requires "clear congressional authorization" for an agency action that has "economic or political significance" or that broadly regulates "a fundamental sector of the economy."[132]

---

128 Securities Exchange Act of 1934, 15 U.S.C. §§ 78c(f), 80a-2(c).

129 *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

130 Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 Yale J. on Regul. 289, 290 (2013).

131 *See, e.g.*, Lawrence A. Cunningham *et al.*, Comment Letter on SEC Climate Proposal by 21 Law and Finance Professors, Geo. Wash. L. Fac. Publ'ns & Other Works (Apr. 25, 2022) ("Since disclosure is costly to companies, requiring disclosure must also confer benefits greater than their costs on those companies and their investors. Presumably this benefit is directly tied to investors being able to use the information that is disclosed. But consider two facts: (1) numerous climate models exist and none of them agree with each other and (2) take any climate model and feed in the conditions of the past, and they are unable to predict the present. In a setting so beset with inherent imprecision, it is most challenging to see how investors will benefit from such disclosure.").

132 *W. Virginia v. Envtl. Prot. Agency*, No. 20-1530, 2022 WL 2347278 (U.S. June 30, 2022).

The SEC's rulemaking authority for the SEC Climate Proposal rests on broad powers conferred in the Securities Act of 1933 and the Securities Exchange Act of 1934. In a letter to SEC Chair Gary Gensler, Senate Banking Committee Republicans alluded to a potential legal challenge to the SEC Climate Proposal based on the major questions doctrine, stating that the SEC was "[using] creative, new interpretations of existing law to pretend they have legal authority to support sweeping policy changes that Congress never intended" with respect to the SEC Climate Proposal.[133]

In short, critics have claimed that the SEC exceeded its authority in promulgating a sweeping climate-related disclosure rule under a statute that is nearly 100 years old,[134] and the recent decision in *West Virginia v. EPA* increases the likelihood that a challenge on authority grounds could succeed.

2. U.S. Senate Investigation

On February 22, 2023, various Republican senators[135] sent a demand for information to the SEC related to the SEC Climate Proposal. Emphasizing their belief that the proposed rule "exceeds the SEC's mission, expertise, and authority," the senators noted the limitations on the agency's statutory authority, citing in particular to the *West Virginia v. EPA* case discussed above.[136]

The letter demands records in connection with the SEC Climate Proposal, listing seven questions and requiring supporting documentation to be sent by March 8, 2023.[137] Notable among the inquiries are questions regarding: the impact of the rule on energy prices, First Amendment concerns raised by the rule related to "compelled speech" and whether the agency received legal advice concerning its statutory authority to promulgate the rule.[138] As of the date of this publication, the SEC has not responded.

---

133 *See* Letter from Patrick Toomey *et al.*, S, Comm. on Banking, Hous. & Urb Affs., to Gary Gensler, SEC Chair (July 21, 2022).

134 *See* Adam Lowenstein, *Republicans plan legal assault on climate disclosure rules for public companies*, Guardian, Sept. 15, 2022 ("Some opponents claim that requiring companies to publish climate-related information infringes on their right to free speech. Others (often the same ones) say that the rule exceeds the SEC's legal authority.").

135 These include Patrick McHenry (R-N.C.), chair of the House Financial Services Committee, Bill Huizenga, (R-Mich.), chair of the panel's Subcommittee on Oversight and Investigations, and Tim Scott (R-S.C.), ranking member of the Senate Committee on Banking, Housing and Urban Affairs. *See* Press Release, House Fin. Servs. Committee, McHenry, Scott, Huizenga Demand Information from Gensler on Disastrous Climate Disclosure Proposal (Feb. 22, 2023).

136 *See id.*

137 *See id.*

138 *See id.*

D. Developments in International & Foreign Disclosure Frameworks on Climate & ESG

As noted earlier, the SEC Climate Proposal draws heavily from the TCFD framework, as well as the GHG Protocol. In this section, we discuss the SEC Climate Proposal within the context of the international development of disclosure standards and the interrelationship among the various emerging standards.

International Standards

- TCFD. Created by the Financial Stability Board in 2015, the TCFD published a recommended framework for climate-related disclosures in 2017.[139] The TCFD framework includes four main disclosure pillars: governance, strategy, risk management and metrics and targets. The TCFD framework is foundational for the SEC Climate Proposal, the ISSB's draft climate-related disclosure standards and the draft standards being developed for the EU's CSRD (see ESRS below). Although the TCFD framework includes sector-specific details,[140] the SEC Climate Proposal is generally more prescriptive and granular than the TCFD framework. For example, the TCFD framework does not require an attestation to be provided with Scope 1 and Scope 2 emissions disclosures, nor does it require financial impacts to be disclosed on a line-item basis. Therefore, if the SEC Climate Proposal is adopted as currently proposed, companies that voluntarily report under the TCFD framework would still need to devote significant time and resources to prepare for SEC compliance. Certain jurisdictions, such as the UK, have adopted the TCFD framework wholesale, in which case companies that are further along in making voluntary TCFD disclosures may transition more easily into the mandatory disclosures.

- ISSB. Created by the International Financial Reporting Standards organization ("IFRS"), the ISSB is working to develop a comprehensive global baseline of sustainability-related disclosure standards. On March 31, 2022, the ISSB issued draft sustainability reporting standards, which included climate-related disclosures (the IFRS S2 Climate-related Disclosures, or "IFRS S2").[141] As noted above, the ISSB's draft climate disclosure standards align more closely with the TCFD framework than does the SEC Climate Proposal, including by incorporating the TCFD's underlying disclosure recommendations. However, the IFRS S2 introduces certain requirements not contemplated by either the TCFD framework or the SEC Climate Proposal, such as the mandatory use of scenario analysis to assess climate resilience and the disclosure of Scope 3 emissions regardless of materiality or other qualifier. Like the TCFD framework, the ISSB's international sustainability standards provide a climate

---

139 TCFD, *Recommendations of the Task Force on Climate Related Financial Disclosures* (June 2017).

140 TCFD, *Implementing the Recommendations of the Task Force on Climate Related Financial Disclosures*, at 22.

141 ISSB, *Exposure Draft—IFRS S2 Climate Related Disclosures* (Mar. 2022).

disclosure framework that may be wholly or partially adopted by specific jurisdictions or regulators. The sustainability reporting standards, including IFRS S2, are scheduled to be finalized at the end of the second quarter of 2023 and would become effective in January 2024.[142]

European Union

- CSRD. The CSRD is an EU directive issued on December 14, 2022, which was designed to strengthen the existing social and environmental disclosures required by the Non-Financial Reporting Directive.[143] The CSRD significantly expands the type of information companies will have to report under EU law, as well as the scope of companies subject to such requirements. In addition to requiring disclosures from all large EU companies (whether listed or not),[144] the CSRD also applies to any company with equity, debt or depositary receipts listed on an EU-regulated market, regardless of where such company is established (excluding certain listed microenterprises) and indirectly in case their revenues in Europe exceed certain thresholds. Companies in scope for CSRD will also have to report on sustainability matters in accordance with ESRS (as defined herein) and on alignment of their activities with the EU Taxonomy Regulation, a classification system that establishes technical standards for environmentally sustainable economic activities.[145] The extraterritorial application of the CSRD means that U.S. banking organizations could be (directly or indirectly) subject to the CSRD and, subsequently, the EU Taxonomy, depending on their activities in the EU market. Compared to the SEC Climate Proposal, which covers only climate-related disclosures, the CSRD covers a broader range of social and environmental impact and is based on a "double materiality" concept, which includes how the company is affected by external factors (outside-in materiality) and the extent to which the company generates significant effects on the environment and society (inside-out materiality).

- ESRS. Entities subject to the CSRD will be required to report in accordance with the European Sustainability Reporting Standards ("ESRS") currently being developed by the European Commission. The European Commission is required to adopt an initial set of standards by June 30, 2023 specifying the sustainability reporting standards to be required under the CSRD, which are currently being developed by the European Financial Reporting Advisory Group ("EFRAG"). The draft reporting standards on climate change published by EFRAG in November 2022, ESRS E1 Climate Change

---

142 IFRS, *ISSB ramps up activities to support global implementation ahead of issuing inaugural standards ends Q2 2023* (Feb. 17, 2023).

143 Off. J. of the EU, *Directive (EU) 2022/2464* (Dec. 16, 2022) [hereinafter "CSRD"].

144 "Large" companies defined as companies with two out of the following three criteria: more than (i) 250 employees; (ii) 40 million Euro turnover; or (iii) 20 million Euro total assets. *See id.*

145 Off. J. of the EU, *Regulation (EU) 2020/852* (June 22, 2020).

("ESRS E1"),[146] are broadly similar to the climate-related disclosures in the ISSB's IFRS S2 (discussed above) and is generally more stringent than the SEC Climate Proposal. For example, ESRS E1 follows IFRS S2, and differs from the SEC Climate Proposal, in requiring reporting entities to report Scope 3 emissions regardless of materiality or other qualifier and to use climate-related scenario analysis to assess resilience. In addition, the ESRS E1 would require independent assurance of all sustainability disclosures included in a management report and not allow the use of carbon credits or offsets to achieve GHG emission targets. Although the scope of the independent assurance requirements under the two proposals differ, both the SEC Climate Proposal and ESRS E1 contemplate an initial phase-in period where filers may provide limited assurance, followed by a second phase-in period requiring reasonable assurance. The European Commission is required to adopt a second set of reporting standards by June 30, 2024 that will specify complementary information requirements and sector-specific standards, which is also expected to be drafted by EFRAG.

[146] EFRAG, ESRS E1, in *Draft European Sustainability Reporting Standards* (Nov. 2022). *See also* European Sustainability Reporting Standards, the Centerpiece of CSRD, DEBEVOISE IN DEPTH (Mar. 2, 2023), available here.

III. SEC Focus on Greenwashing

The SEC has also increased its focus on addressing potential greenwashing by investment advisers and registered funds. The SEC's activity in this area surged in 2021 with the Division of Enforcement's creation of the Climate and ESG Task Force[147] and the Division of Examinations' release of a risk alert on ESG investing, which highlighted concerns surrounding portfolio management practices that are inconsistent with ESG disclosures and unsubstantiated and potentially misleading ESG investing claims that are used to market funds.[148]

Over the course of 2022, the SEC brought several high-profile actions against asset managers for alleged misrepresentations and misstatements in connection with ESG funds in 2022 and made ESG investing by advisers and funds a priority examination area in 2022 and 2023.

In May 2022, the SEC proposed rules under the Investment Advisers Act of 1940 ("Advisers Act") and the Investment Company Act of 1940 ("Investment Company Act") targeting the disclosure of investment advisers' ESG strategies and the marketing of retail ESG funds.[149]

The SEC's activities reflect growing scrutiny by regulators on investor and client-facing statements that funds and advisers make with respect to their ESG- or climate-related products.[150] They also highlight the current lack of definitional consensus around ESG and green-labeled initiatives, products and services. Notably, neither proposal would define "ESG" or similar terms,[151] instead requiring registered funds and investment advisers to disclose the ESG factors that they consider and the manner in which they are considered. However, certain market participants believe that, if finalized, the proposed rules may help

---

[147] Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021).

[148] SEC Div. of Examination, Risk Alert, *The Division of Examiners' Review on ESG Investing* (Apr. 9, 2021).

[149] As with the SEC's proposed rules, the term "fund" is used in this chapter to mean funds registered under the Investment Company Act, such as mutual funds and registered closed-end funds. The vast majority of these funds target retail investors.

[150] The EU has also sought to standardize sustainability-related disclosures and impose criteria for labelling sustainable economic activities in recent years, including through the EU Taxonomy Regulation, the Sustainable Finance Disclosure Regulation and the EU Green Bond Standard.

[151] SEC, *Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices*, 87 Fed. Reg. 36654, 36660 ¶ 1 (June 17, 2022) [hereinafter we refer to the rule proposals addressed in this release under the Advisers Act and the rule proposals under the Investment Company Act collectively as the "Proposed ESG Rule"]. For more information on the proposals generally, see SEC Proposes Rules Relating to Registered Funds' ESG Investments, DEBEVOISE IN DEPTH (July 12, 2022), available here.

to drive consensus around classifications, disclosures and marketing of climate change- and ESG-related practices, products and services. In the absence of definitional consensus, financial institutions with green-labeled products and funds may be vulnerable to the SEC's, and potentially other regulators', focus on ESG and climate change representations. Recent SEC enforcement actions highlight discrepancies and inaccuracies in ESG disclosures and the importance of strong governance and compliance procedures.

In **Section A** we briefly review the rule proposals and then discuss recent enforcement activities in **Section B**.

A. SEC Proposed Rules Relating to ESG Investments by Funds & Advisers

On May 25, 2022, the SEC proposed rules related to ESG practices by registered funds and investment advisers. The first set of rules, referred to as "Enhanced Disclosure by Certain Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices" ("Proposed ESG Rule"),[152] would classify and mandate enhanced ESG disclosures for investment advisers and registered funds, including with respect to how ESG factors and objectives are implemented. The second component of the proposal, titled "Investment Company Names" ("Proposed Names Rule"),[153] would amend the existing Names Rule[154] to restrict the use of ESG and similar terms in fund names. As noted above, the proposed rules appear intended to combat potential "greenwashing" and create consistency surrounding ESG investment claims. Although the SEC has broad flexibility to amend its agenda and modify the proposed rules, the Unified Regulatory Agenda currently reflects that final rules will be adopted by the SEC in October 2023.[155]

Proposed ESG Rule

The Proposed ESG Rule generally would require investment advisers, registered funds and business development companies to make enhanced disclosures if they offer ESG products or consider ESG factors in their investment strategies. While registered investment companies would be subject to the most enhanced disclosure requirements under the Proposed ESG Rule in their offering and reporting statements filed with the SEC, investment advisers would be subject to certain disclosure requirements with respect to ESG strategies in SEC reporting as well.

152 Proposed ESG Rule, *supra* note 151.

153 SEC, *Investment Company Names*, 87 Fed. Reg. 36594 (June 17, 2022).

154 SEC, *Investment Company Names*, 17 C.F.R. § 270.35d-1 (2023).

155 *See* Off. of Info. & Regul. Affs., *Investment Company Names*, Unified Regulatory Agenda (Fall 2022); Off. of Info. & Regul. Affs., *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices*, Unified Regulatory Agenda (Fall 2022).

- The Proposed ESG Rule is designed to help clarify what the SEC believes to be current confusion surrounding ESG products. The Proposed ESG Rule does not define "ESG" or similar terms,[156] instead requiring registered funds and advisers to disclose the ESG factors considered and how they are considered.

- The Proposed ESG Rule would classify strategies for investment adviser and fund types of funds into the three categories summarized in the table below based on the extent to which ESG factors are considered in the respective investment selection process.

Categories	Description
Integration Strategy or Integration Fund	• Strategy or fund that considers ESG factors alongside other factors of equal importance. • Integration funds are subject to the fewest disclosure requirements.
ESG-Focused Strategy or ESG-Focused Fund	• Strategy or fund that uses one or more ESG factors as a significant or main consideration in selecting investments or in their engagement strategies with portfolio companies (including through proxy voting). • Strategy or fund that has a stated strategy of primarily considering ESG factors in investment decisions.
Impact Strategy or ESG-Focused Fund (subset of ESG-Focused Funds)[157]	• Strategy or fund that seeks to achieve specific ESG impacts or impacts that generate specific ESG-related benefits. • Integration funds are subject to the most disclosure requirements.

While the disclosure required of investment advisers under the Proposed ESG Rule would not be highly technical, funds would be required to make detailed GHG disclosures if they pursue an ESG strategy. For example, ESG-focused funds that consider environmental factors in their investment strategies would be required to disclose GHG emissions metrics for their portfolios that are consistent with those of the TCFD, as well as standards set by the Partnership for Carbon Accounting Financials, an industry-led initiative enabling financial institutions to measure and disclose GHG emissions of loans and investments.[158] An integration fund that considers GHG emissions would be required to disclose

[156] Proposed ESG Rule, *supra* note 151, at 36660, ¶ 1.

[157] As currently proposed, the rule would treat an impact strategy as a subset of an ESG-focused strategy, although the SEC asked in its proposing release whether this treatment is appropriate. *See* Proposed ESG Rule, *supra* note 151, at 36669.

[158] *Id.* at 36678.

information about how the fund considers GHG emissions, including the methodology and data sources that the fund may use as part of its consideration of GHG emissions.[159] Further, funds would be required to follow a tabular approach to ESG disclosure to allow investors to compare funds.

Proposed Names Rule

Rule 35d-1 of the Investment Company Act, commonly referred to as the "Names Rule," presently requires that at least 80% of a fund's assets be invested in the industries that the fund's name suggests investment or investment focus in. The Proposed Names Rule would amend the existing Names Rule to expand the requirements beyond industry to include characteristics such as "ESG," "growth" or "value." The Proposed Names Rule requires the definition of terms used in a fund's name in fund prospectus disclosure and restricts the use of "ESG" or similar terminology in a fund name if the fund does not consider ESG any more centrally than other, non-ESG factors. The SEC noted in the Proposed Names Rule release's preamble that the rule is intended to further address potentially deceptive or misleading registered fund names, especially in the growing ESG funds space, as well as in response to other recent developments.

B. SEC Climate & ESG Task Force—Exams & Enforcement Priorities

As ESG and climate-related disclosures become more standardized and ultimately mandatory, enforcement actions provide insight into what regulators may prioritize. As noted above, because of the current lack of definitional consensus as to the meaning of ESG-related products and services, financial institutions with green-labeled products and funds may be vulnerable to the increasing focus on ESG enforcement. The SEC Division of Examinations' published priorities and recent enforcement actions brought by the SEC's Climate and ESG Task Force within the Division of Enforcement inform the focus of future exams and investigations, and highlight the importance of aligning public communication and disclosure with investment policies and maintaining adequate controls to ensure alignment is maintained.

As the below examples highlight, the SEC will carefully scrutinize disclosure for any ESG-related misstatements and will likely view them as material if they apply to multiple investments, even if the overall dollar value of the relevant investment or transaction is not quantitatively material.

---

[159] *Id.* at 36660. Note that funds may need to comply with the GHG emissions metrics disclosures under the Proposed ESG Rule, if finalized, in addition to the SEC Climate Proposal. *See* SEC Climate Proposal, *supra* note 62.

The following are examples of recent enforcement developments:[160]

- In November 2022, the SEC charged Goldman Sachs Asset Management "for policies and procedures failures involving two mutual funds and one separately managed account strategy marketed as [ESG] investments," between the period of August 2017 and February 2020. The investigation began in June 2022 and reportedly focused on whether the investments within two mutual funds matched the ESG claims made in related marketing materials. Goldman Sachs Asset Management agreed to pay a $4 million penalty to settle the charges.

- The SEC charged BNY Mellon Investment Adviser, Inc. for misstatements and omissions related to ESG considerations in making investment decisions for certain mutual funds that it managed. There was a discrepancy between the firm's ESG investment screens and disclosures, leading to inaccurate disclosures and a finding that the firm lacked reasonably designed policies and procedures to prevent misleading statements from being included in investor disclosures. The investment adviser agreed to pay a $1.5 million penalty to settle the charges in May 2022.

- In April 2022, the SEC charged Vale, a Brazilian mining company, with reporting misleading information to investors in ESG reporting, among other charges.

- In February 2022, the SEC charged robo-advisor Wahed Invest, LLC, with marketing itself as providing advisory services compliant with Islamic, or Shari'ah, law, while failing to include policies and procedures addressing how it would assure Shari'ah compliance on an ongoing basis. The company agreed, without admitting wrongdoing, to pay a $300,000 penalty and procure an independent compliance consultant, among other undertakings.

[160] *See Spotlight on Enforcement Task Force Focused on Climate and ESG Issues*, SEC.

IV. Federal & State ESG Developments

ESG has become a prominent and increasingly politicized issue in the United States, with a pronounced uptick in developments in 2022. ESG action on climate change (encompassed within the "E" of "ESG") has been a major focus for state and federal politicians and elected officials. So-called "anti-ESG" initiatives have been distinct, with several Republican-led states and Republican members of Congress targeting what has been referred to as "woke capitalism."[161] State developments of this kind have largely been aimed at restricting or prohibiting the consideration of ESG factors in the investment strategies of large banking organizations, including the U.S. GSIBs and asset managers for state and public pension funds. Commentators have posited that the wave of ESG backlash began with Texas in 2020, when fossil fuel executives argued that big banks were restricting their lending to the fossil fuel industry, drawing attention from Republican legislators and officials.[162]

These "anti-ESG" efforts have proliferated at the state level in the months since the November 2022 midterm elections, which resulted in the Republican Party regaining control of the U.S. House of Representatives. It seems likely that ESG topics will become an increasing priority for Congress. Among other areas, the House Financial Services Committee is likely to advance several bills introduced in the last Congress that would place restrictions on ESG initiatives, launch investigations of ESG practices and initiatives and incorporate questions on ESG and climate policy in periodic hearings with financial regulators and members of the financial industry.

At the same time, 19 states have put forward bills or enacted laws intended to address climate change and support ESG causes, so-called "pro-ESG" initiatives, including California and New York.[163] Cities and municipalities have also worked on their own ESG-favoring legislation; for example, in 2019, New York City passed the Climate Mobilization Act, the centerpiece of which is Local Law 97. Under Local Law 97, buildings over 25,000 square feet must meet new energy efficiency and greenhouse gas emissions limits by 2024, with stricter limits coming into effect in 2030 and an ultimate goal of reducing such emissions by 80% by 2050.[164] At the end of December 2022, the New York City Department of Buildings released

---

161 David Gelles, *How Environmentally Conscious Investing Became a Target of Conservatives*, N.Y. TIMES, Feb. 28, 2023.

162 *Id*.

163 *See California Climate Crisis Act*, CAL. HEALTH & SAFETY CODE § 38562.2 (West 2022) and S. 1953, 2023-2024 Reg. Sess. (N.Y. 2023). Between January 2020 and March 1, at least 27 bills supportive of ESG investing have been introduced across all 50 states, with at least five having been enacted. *See* State-Level ESG Investment Tracker, *supra* note 12.

164 *See* N.Y.C. Loc. L. 97.

final rules on compliance with the emissions cap, prompting city building owners to pursue implementation by 2024.[165]

Separately, a number of states have launched investigations and lawsuits concerning whether certain ESG practices violate state and federal laws. In October 2022, 19 Republican state attorneys general launched civil investigations into the ESG commitments of several U.S. GSIBs, as discussed in further detail below. In January of this year, Republican attorneys general representing 25 states sued the U.S. Department of Labor in a federal court in Texas,[166] seeking to block a rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," which expressly permits fiduciaries under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), to take ESG factors into account as long as they comply with ERISA's fiduciary duties of prudence and loyalty ("DOL Rule"). The DOL Rule was finalized in November 2022 and took effect on January 30, 2023.[167]

State comptrollers, treasurers and other officials have also been active in taking measures to limit consideration of ESG initiatives, including by blacklisting financial institutions considered to be boycotting the energy or firearms industries. In August 2022, the Texas Comptroller published a list of 10 financial institutions (as well as a number of funds) it considered to be boycotting the fossil fuel sector, with several other states also publishing "blacklists".[168] While most states have focused primarily on domestic financial institutions,[169] Texas included several FBOs (UBS Group AG; BNP Paribas S.A.; Credit Suisse Group AG; Danske Bank A/S; Jupiter Fund Management PLC; Nordea Bank Abp, Schroders

---

165 *See* N.Y.C. Dept. of Bldgs., *Final Rule—Procedures for Reporting on and Complying with Annual Greenhouse Gas Emissions for Certain Buildings* (Dec. 20, 2022).

166 Press Release, Tex. Att'y Gen., Paxton Sues Biden Administration to Stop It from Risking American Workers' Retirements by Promoting Woke ESG Goals (Jan. 26, 2023).

167 Dept. of Labor, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73822 (Dec. 1, 2022). *See also* The DOL Issues its Final Word on ESG and Proxy Voting (For Now), DEBEVOISE UPDATE (Nov. 29, 2022), available here.

168 *See* Press Release, Tex. Comptroller of Pub. Accts., Texas Comptroller Glenn Hegar Announces List of Financial Companies that Boycott Energy Companies (Aug. 24, 2022) ("Listed companies are subject to the divestment provisions outlined in Texas Government Code Chapter 809, which defines a financial company as a publicly traded financial services, banking or investment company" and which directs divestment from "financial companies that boycott certain energy companies.").

169 *See, e.g.*, Pete Schroeder, *West Virginia bars five financial firms for deemed fossil fuel 'boycotts,'* REUTERS, Jul. 28, 2022 (determining that the following financial institutions were "boycotting the fossil fuel industry": BlackRock, Inc., Wells Fargo & Co., U.S. Bancorp, JPMorgan Chase & Co. and Goldman Sachs Group Inc.); Statement, Kentucky State Treasurer, Restricted Financial Companies List (Jan. 2023) (listing several "financial institutions engaging in an 'energy company boycott'": BlackRock, Inc., BNP Paribas S.A., Citi Group Inc., Climate First Bank, Danske Bank A/S, Nordea Bank Abp, Schroders plc, Svenska Handelsbanken AB and Swedbank AB).

plc; Svenska Handelsbanken AB; and Swedbank AB),[170] showing that the landscape for FBOs is also becoming increasingly complex due to state legislative action.

Notably, both critics and proponents of ESG initiatives have primarily focused on the consideration of ESG objectives in investment strategy, particularly those involving state and public pension funds, resulting in a patchwork of state-level legal and regulatory obligations. Efforts to limit consideration of ESG pose potential challenges for targeted bank organizations subject to shareholder pressure and obligations in other jurisdictions to advance ESG and climate change issues or those that have made voluntary public carbon-reduction or ESG-related commitments. The finalization of the SEC Climate Proposal is expected to increase differences in the legal and regulatory landscape regarding climate and ESG, creating conflicting pressures for banking organizations and financial institutions. In addition to the challenges posed for banks that have asset managers and investments involving state and public pension funds, banks without asset managers should also be mindful of activity in the "anti-ESG" space. For example, banks have been investigated and otherwise targeted for their involvement in decarbonization efforts, climate alliances and social movements.[171]

In this **Part IV**, we discuss developments relating primarily to efforts to limit ESG considerations, including the uptick in investigations of ESG practices and initiatives.

A. Federal Developments Limiting ESG

On February 3, 2023, Republican members of the U.S. House of Representatives announced the creation of a new working group to coordinate a response to ESG proposals. The group's top priorities include "rein[ing] in" SEC regulations, reinforcing the materiality standard and "hold[ing] to account market participants who misuse the proxy process or their outsized influence to impose ideological preferences in ways that circumvent democratic lawmaking."[172]

The formation of the working group follows a December 6, 2022 letter that members of the House Judiciary Committee sent to the Steering Committee for Climate Action 100+ requesting information pertaining to the group's efforts. The letter asserts that participating organizations have worked to "punish disfavored industries" in a way that is harmful to

---

170 Karin Rives, *Texas bans 10 banks, 348 investment funds over fossil fuel policies*, S&P GLOB., Aug. 24, 2022.

171 Jordan Stutts & Kevin Wack, *Why the conservative backlash to banks' ESG stands gained steam in 2022*, AM. BANKER, Dec. 21, 2022.

172 *See* Eleanor Mueller, *House Republicans launch ESG working group*, POLITICO, Feb. 3, 2023.

American consumers.[173] It seems likely that additional hearings and investigations will be opened in the coming months.[174]

With respect to the working group, it is expected that a number of ESG-related proposals introduced in the House Financial Services Committee in the last Congress will be organized into a legislative package. Although the likelihood the legislative package becomes law during the term of this Congress is low given Democrats' control of the Senate and the White House, it is still expected to increase pressure on the financial industry as well as the agencies tasked with regulating it.[175] There are several leading proposals, including two bills in response to the SEC Climate Proposal:

- The Mandatory Materiality Requirement Act seeks to limit the SEC's ability to issue new disclosure requirements for public companies. (*See* **Part II**, above.)[176]
- The Protect Farmers from the SEC Act would limit the SEC's ability to mandate disclosures, specifically those related to greenhouse gas emissions connected to activities involving agricultural products.[177]

Other bills focus on asset managers and proxy advisors, including:

- The Ensuring Sound Guidance (ESG) Act would require investment advisers (such as BlackRock, State Street, Vanguard, Invesco and Fidelity) to focus on profits over ESG considerations.[178]
- The Investor Democracy is Expected (INDEX) Act would require passively managed funds to allow investors to vote their shares, rather than advisers.[179]
- The Putting Investors First Act would enhance the SEC's oversight of proxy advisory firms such as Glass Lewis and Institutional Shareholder Services Inc., with the

---

[173] *See* Letter from Dan Bishop, Member of House Judiciary Comm., *et al.*, to Mindy Lubber, Chief Exec. Officer and President, Ceres, and Simiso Nzima, Managing Inv. Dir., Global Equity, CalPERS (Dec. 6, 2022); Letter from Dan Bishop, Member of House Judiciary Comm., *et al.*, to Mindy Lubber, Chief Exec. Officer and President, Ceres (Dec. 31, 2022). *See also* A.P. Dillon, *House Judiciary Republicans probe possible antitrust violations involving ESG movement*, N. ST. J., Dec. 23, 2022.

[174] For more information on the latest federal investigations into U.S. corporate ESG practices and initiatives, see State-Level ESG Investment Tracker, *supra* note 12.

[175] *See* Eleanor Mueller & Zachary Warmbrodt, *House Republicans have a playbook to fight ESG investing*, POLITICO, Jan. 27, 2023.

[176] *See* S. 5005, 117th Cong. (2023).

[177] *See* H.R. 9063, 117th Cong. (2023).

[178] *See* H.R. 7151, 117th Cong. (2023).

[179] *See* H.R. 8521, 117th Cong. (2023).

objective of "protect[ing] everyday investors from the harmful and costly agendas of special interest activists."[180]

Separately, on February 14, 2023, 27 Republican state attorneys general issued a letter calling on Congress to use its powers under the Congressional Review Act to overturn the DOL Rule.[181] As described above, the DOL Rule expressly permits fiduciaries to consider climate change and other ESG factors when selecting investments for retirement plans. On February 28, 2023, House representatives passed a resolution of disapproval in a vote supported by all House Republicans.[182] On March 1, 2023, the resolution was also passed in the Senate with support from almost all Republicans and two Democrat senators. President Biden issued a veto against the resolution on March 20, 2023, stating that the resolution would "prevent retirement plan fiduciaries from taking into account factors, such as the physical risks of climate change and poor corporate governance, that could affect investment returns."[183]

While the House has been particularly active, members of the Senate have also been vocal on ESG issues. On November 15, 2022, the Senate Committee on Banking, Housing and Urban Affairs held a hearing with representatives from the FRB, the National Credit Union Administration, the FDIC and the OCC. At the hearing, Senator Patrick Toomey (R-PA), Ranking Member of the committee, voiced his concerns over the politicization of financial regulation.[184] Senator Toomey discussed the FRB pilot climate scenario analysis exercise and argued that it is designed to measure not physical risk or transition risk but "political risk" driven by global warming concerns instead. The senator further raised concerns with the FRB, FDIC and OCC joining the Network for Greening the Financial System, an international group of financial regulators with a stated goal of, according to Senator Toomey, allocating capital away from "traditional energy companies." Finally, the senator noted his alarm that "some unelected financial regulators want to accelerate the transition

---

[180] *See* H.R. 9527, 117th Cong. (2023).

[181] *See* Letter from Sean D. Reyes, Utah Att'y Gen., *et al.*, to Mitch McConnell, Senator, *et al.*, Braun/Barr CRA Resolution—Save Americans' Retirement Savings from Political Sacrifices to ESG Investing (Feb. 14, 2023) ("Not only are these practices problematic for using people's retirement savings to advance causes they disagree with, but 'multiple studies' have found that 'ESG investing' reduces returns.").

[182] *See* Brian Croce, *House passes resolution to overturn DOL ESG rule; Biden vows veto*, PENSIONS & INVS., Feb. 28, 2023.

[183] Joseph R. Biden Jr., *Message to the House of Representatives — President's Veto of H.J. Res 30* (Mar. 20, 2023); Nancy Vu, *Congress Minutes: House Republicans failed to overturn Joe Biden's veto of their anti-ESG bill*, POLITICO, Mar. 23, 2023.

[184] *See Oversight of Financial Regulators: A Strong Banking and Credit Union System for Main Street Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 117th Cong. (2022).

to a lower-carbon economy by misusing their powers to allocate capital away from traditional energy companies."[185]

On February 22, 2023, several Senate and House Republicans jointly sent a letter to the SEC Chair demanding records and other information related to the SEC Climate Proposal and emphasizing their belief that it "exceeds the SEC's mission, expertise, and authority and, if finalized in any form, will unnecessarily harm consumers, workers, and the U.S. economy." The letter cites *West Virginia v. EPA*, arguing that in that decision "the Court held that under the major questions doctrine, a government agency must point to clear congressional authorization for its actions" and asserting that the SEC has arbitrarily interfered with business strategies and climate policies by "creat[ing] new interpretations of existing law."[186]

B. State Developments Limiting ESG

In the last few years, ESG has become increasingly polarized in the U.S., generating a complex state legislative landscape for financial institutions, asset managers and other companies to navigate.

While the rise of legislation limiting consideration of ESG has been significant, the introduction of legislation favoring ESG has been considerable and could induce backlash from the industry. For example, in January 2023, Democrat state lawmakers in California introduced two bills (S.B. 253 and S.B. 261) designed to increase environmental disclosures by companies that operate in the state. Two weeks later, the California Bankers Association announced plans to oppose the bills because they believe such legislation would present "liabilities for institutions and customers and mandate disclosures that may not be reliable or even feasible."[187]

While U.S. institutions confront a difficult operating environment, international institutions are also facing challenges in their U.S.-based operations and international commitments, particularly as more states join the fray in ESG-related legislation. In early February 2023, for example, Germany's GLS Bank exited the NZBA, stating concerns that much bigger signatories in the U.S. continue to support fossil fuel projects in emerging markets. Commentators have speculated that "an increasingly difficult political

---

185 *See id.* at 1–2 (2022) (statement of Senator Patrick Toomey, Ranking Member, S. Comm. on Banking, Housing & Urban Affairs).

186 *See* Letter from Patrick McHenry, Chair of House Fin. Servs. Comm., *et al.*, to Gary Gensler, SEC Chair (Feb. 22, 2023) ("Congress created the SEC to carry out the mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation—not to advance progressive climate policies. Instead of pursuing its clear statutory mission, the SEC, under your leadership, has chosen to flout the democratic process and pursue its progressive social agenda through the promulgation of this extraordinarily expansive climate disclosure rule.").

187 *See* Jordan Stutts, *California Bankers Association will oppose latest climate legislation*, AM. BANKER, Feb. 13, 2023.

environment in the U.S." has made the NZBA's goal of preventing global warming from going over the 1.5ºC threshold "harder to reach," especially after several Wall Street banks fought efforts to impose binding fossil-financing restrictions on members.[188]

1. Legislation

State-level action on climate change, and ESG more broadly, varies from state to state. Some states seek to promote action increasing sustainability efforts[189] but many others have blacklisted financial institutions based on alleged climate change- or ESG-related "boycotts" or are otherwise working to limit the ability of financial institutions and state funds to incorporate ESG into their investment strategies.

State legislation limiting consideration of ESG generally falls into two categories: "anti-boycott bills" and "no-ESG-investment bills." Importantly, both are different pathways to the same result: preventing companies from prioritizing or considering ESG issues in their business practices and investments.

- Anti-boycott bills target "financial institutions" that "boycott" or "discriminate against" companies in certain industries and prohibit the state from doing business with such institutions and/or from investing the state's assets (including pension plan assets) through such institutions.[190]

- No-ESG-investment bills prohibit the use of state funds for the purpose of ESG or social investment. Under this type of bill, a state is prohibited from investing in

---

188 *See* Alastair Marsh, *Wall Street's CO2 agenda drives green bank GLS to quit alliance*, AM. BANKER, Feb. 6, 2023.

189 *See*, *e.g.*, S.B. 261, 2023-2024 Reg. Sess. (Ca. 2023) (requiring, if passed, "on or before Dec. 31, 2024, and annually thereafter, a covered entity, as defined, to prepare a climate-related financial risk report disclosing the entity's climate-related financial risk and measures adopted to reduce and adapt to climate-related financial risk disclosed"); Saijel Kishan, *New York City Pensions Join State in Making Climate Pledge*, BLOOMBERG, Oct. 20, 2021 ("New York City's retirement funds pledged to reach net-zero greenhouse gas emissions across its investment portfolios by 2040, becoming one of the first cities to do so[,] doubling investments in renewable energy, energy efficiency and other climate-related solutions to more than $8 billion by 2025."); Press Release, Conn. Off. of the Treasurer, Responsible Gun Policy (Dec. 2019) ("a framework for guiding sound financial decisions and responsible corporate behavior on guns[,] the Responsible Gun Policy [also] informs and guides the State Treasurer's work related to investments, borrowing and banking transactions."). For more examples, see State-Level ESG Investment Tracker, *supra* note 12.

190 *See*, *e.g.*, Press Release, Ky. State Treasurer, Treasurer Allison Ball Announces List of Restricted Financial Companies (Jan. 3, 2023) ("Energy company boycotts hurt Kentucky which is why the Kentucky General Assembly passed SB 205 in 2022, directing the Treasurer to annually publish a list of financial companies engaged in such boycotts. All listed financial companies must stop engaging in the energy company boycott to avoid becoming subject to divestment."). For more examples, see State-Level ESG Investment Tracker, *supra* note 12.

strategies that consider ESG factors for any purpose other than maximizing investment returns.[191]

2. *Attorney General Investigations*

In October 2022, attorneys general from 19 states launched civil investigations into whether ESG practices of the six largest financial institutions are harmful to the energy industry and are, according to Missouri Attorney General Eric Schmitt, "killing American companies that don't subscribe to the woke climate agenda."[192] The banks under fire include Bank of America Corporation, Wells Fargo & Co., Morgan Stanley, JPMorgan Chase & Co., Goldman Sachs Group Inc. and Citigroup Inc. In particular, the investigation identifies antitrust concerns and targets activity related to each financial institution's membership in the NZBA.

Generally, it does not appear that many asset managers or other companies have backed down from their ESG commitments in response to these investigations.[193] In early November 2022, the Kentucky Bankers Association (along with HOPE, a Kentucky-based non-profit housing corporation) responded to their state attorney general's investigation, which demanded documents related to the banks' global climate initiatives, including not only the NZBA but also the UN Principles of Responsible Investment, TCFD and Sustainability Accounting Standards Board. The complaint filed by the Kentucky Bankers Association seeks to stop the investigation, alleging that the attorney general has "made an unreasonable and burdensome request, exceeded his authority and violated the First Amendment rights" of the association. The Institute for Energy Economics and Financial Analysis noted: "Central to the complaint is the

---

[191] *See*, *e.g.*, Press Release, Fla. Governor, Governor Ron DeSantis Eliminates ESG Considerations from State Pension Investments (Aug. 2022) (directing state to disregard ESG factors in its investment management practices, obligating managers to only weigh "pecuniary factors"); Official Opinion 2022-3, Ind. Att'y Gen., Indiana Public Retirement System and ESG Investments (Sept. 1, 2022) (concluding that, because state law mandates investing "solely in the interest of the beneficiaries," investing for ESG-related purposes is a violation of fiduciary duties); Press Release, La. State Treasurer, Schroder protects Treasury funds from ESG by divesting $794M from BlackRock (Oct. 5, 2022) ("Schroder said his action is in response to recent reports that BlackRock has urged companies to embrace 'net zero' [ESG] investment strategies that would harm our fossil fuel industry, a vital part of [the] state's economy."). For more examples, see State-Level ESG Investment Tracker, *supra* note 12.

[192] *See* Alex Newman, *Top US Banks Under Investigation Over ESG and Climate Action*, EPOCH TIMES, Oct. 27, 2022. The participating state attorneys general are from Arizona, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Tennessee, Virginia and at least five others that cannot be named due to state confidentiality policies. For more examples of state attorneys general actions in this arena, see State-Level ESG Investment Tracker, *supra* note 12, at 1–4.

[193] *See* Jonathan Wolf, *GOP War On 'Woke' Investing Elicits Shrug from Companies*, DEALBREAKER, Jan. 5, 2023 ("The response from the finance industry has largely been a shrug. ESG is not particularly controversial within publicly traded companies or amongst asset managers in charge of investment funds. BlackRock recently promised 'few changes' in its annual update on its stewardship policies, though a handful of asset managers have caved in to anti-ESG backlash.").

Kentucky Bank Association's assertion that its member organizations address ESG issues as a matter of course. Climate change is a particularly relevant and active part of investment strategy for banks and housing developers. ESG rules in general are a widely recognized set of guidelines used to make decisions." By the end of that month the Kentucky attorney general had filed a motion to dismiss the complaint.[194]

On the other hand, in February 2023, newly elected Arizona attorney general Kris Mayes announced that the state would stop participating in investigations into major American banks and other financial institutions over ESG investing practices. "The state of Arizona is not going to stand in the way of corporations' efforts to move in the right direction" said Mayes, indicating that some attorneys general may be reconsidering their "anti-ESG" commitments.[195]

---

194 *See* Tom Sanzillo, *Kentucky bankers sue state over right to classify climate risk as financial risk*, INST. FOR ENERGY ECON. & FIN. ANALYSIS, Dec. 2, 2022. The Kentucky attorney general has also launched a parallel investigation into The Vanguard Group, Inc. and State Street Corporation's ESG-related investment practices, demanding information regarding "ESG investment practices and the fiduciary responsibilities these companies have agreed to as members of the Glasgow Financial Alliance for Net-Zero, Climate 100 +, and as a signatory of Net-Zero Asset Managers." *See* Press Release, Ky. Att'y Gen., Attorney General Cameron Launches Investigation into ESG-Related Investment Practices of Vanguard, State Street Bank (Nov. 14, 2022).

195 Press Release, Off. of Ariz. Att'y Gen., Arizona Attorney General Kris Mayes Announces Exit from Investigation into ESG Investment Practices (Feb. 13, 2023).

APPENDIX A

FRB and NYDFS Proposed Guidance on Climate-Related Financial Risk Management

The following table sets out the main provisions of the FRB Proposal and the NYDFS Proposal. Except for the General Theme – Proportionality row at the top of the table, the table is organized according to the principles in the FRB Proposal, which are reproduced in the header for each section. Unless otherwise indicated, the content of the tables is directly excerpted from the FRB's Proposal, or the NYDFS's Proposal, respectively. While the OCC Proposal and FDIC Proposal are substantively similar to the FRB Proposal, there are a few notable differences which are described in the footnotes, and asterisks (*) are used to indicate where the OCC and FDIC assign a particular responsibility to both the board and management. Additionally, **bold text** is used to highlight instances when board oversight is suggested in the principles.

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
General Theme: Proportionality		
Proportionality	Effective risk management practices should be appropriate to the size of the financial institution and the nature, scope, and risk of its activities.	Regulated Organizations should take a proportionate approach to the management of the climate-related financial risks they face, appropriate to each organization's exposure to climate-related financial risks. (¶ 20).
FRB Principle: Governance		
Responsibilities of the Board	A financial institution's **board of directors** ("**board**") should understand the effects of climate-related financial risks on the financial institution in order to oversee management's implementation of the institution's business strategy, risk profile, and risk appetite. The **board** should oversee the financial institution's risk-taking activities and hold management accountable for adhering to the risk governance framework. [The] **board** should acquire sufficient information to understand the implications of climate-related financial risk across various scenarios and planning horizons. Sound governance by the **board** should include allocating appropriate resources to support climate-related financial risk management and clearly communicating to management the information the board needs to oversee the	Sound governance may include designating a **board** member or one or more committees of the **board** (or an equivalent function) to be responsible for the oversight of assessment and management of climate-related financial risks with clear and specific allocation of roles and responsibilities, as well as allocating appropriate resources, and communicating to staff regarding the financial impact of climate related risks. (¶ 28). [The] **board** and management . . . should have adequate understanding and knowledge to assess climate-related financial risks and their impact on the overall risk appetite of the organization. (¶ 28). The **board** should integrate climate-related financial risks into the organization's risk appetite framework. (¶ 29). The **board** should consider the relevant time horizons for materialization of climate-related financial risks. (¶ 30).

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
	measurement and management of climate-related financial risks to the financial institution.[196] The **board** should assign accountability for climate-related financial risks within existing organizational structures or establish new structures for climate-related financial risks.[197] The **board** should consider whether incorporation of climate-related financial risks into the financial institution's overall business strategy and risk management frameworks may warrant changes to its compensation policies, taking into account that compensation policies should be aligned with the business, risk strategy, objectives, values, and long-term interests of the financial institution.[198]	The **board** should continue to oversee the Regulated Organization's risk-taking activities. (¶ 31).
Responsibilities of Management	Management is responsible for implementing the financial institution's policies in accordance with the **board's** strategic direction and for executing the financial institution's overall strategic plan and risk governance framework. [Management is also responsible for] assuring that there is sufficient expertise to execute the strategic plan and effectively managing all risks, including climate-related financial risks.[199] [Management is also responsible for overseeing] the development and implementation of processes to identify, measure, monitor, and control climate-related financial risks within the financial institution's existing risk management framework. Management should also hold staff accountable for controlling risks within established lines of authority and responsibility.	[The] **board** and management . . . should have adequate understanding and knowledge to assess climate-related financial risks and their impact on the overall risk appetite of the organization. (¶ 28). Senior management should be responsible for executing the organization's overall strategy plan, managing material climate-related financial risks, and reporting to the **board** regularly on the level and nature of such risks. (¶ 31).

[196] The OCC Proposal and FDIC Proposal do not specifically assign this duty to anyone.

[197] The OCC Proposal and FDIC Proposal do clearly outline this as a responsibility, and further do not specifically assign this duty to anyone.

[198] The OCC Proposal and FDIC Proposal do not suggest considering changes to compensation policies.

[199] This responsibility is not contemplated in the OCC Proposal or FDIC Proposal.

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
	Management is responsible for regularly reporting to the **board** on the level and nature of risks to the financial institution, including climate-related financial risks. Management should provide the board with sufficient information for the **board** to understand the impacts of climate-related financial risks to the financial institution's risk profile and make sound, well-informed decisions. Where dedicated climate risk organizational structures are established by the **board**, management should clearly define these units' responsibilities and interaction with existing governance structures.*	
FRB Principle: Policies, Procedures and Limits		
Incorporation of Climate-Related Financial Risks into Policies, Procedures, and Limits	Management should incorporate climate-related financial risks into policies, procedures, and limits to provide detailed guidance on the financial institution's approach to these risks in line with the strategy and risk appetite set by the **board**.	Management of material financial risks from climate change should be embedded in policies and procedures and controls across all relevant functions and business units of Regulated Organizations, in line with the strategy and risk appetite set by **boards**. (¶ 32). A Regulated Organization that is part of a group of affiliated entities or a holding/parent company structure ("<u>Group</u>") may leverage the policies, procedures, and processes developed at the Group level for managing climate-related financial risks if: (1) the risks considered at the Group level include those facing the Regulated Organization; (2) the policies, procedures, and processes developed at the Group level are implemented at the level of the Regulated Organization; and (3) the Regulated Organization has appropriate access to relevant resources and expertise centralized at the Group level. If these conditions are met, references in [NYDFS Proposal] to a Regulated Organization's board may also refer to the board of the parent/holding company of the relevant Group. (¶ 21).

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
Modification of Policies, Procedures, and Limits	Policies, procedures and limits should be modified when necessary to reflect (i) the distinctive characteristics of climate-related financial risks, such as the potentially longer time horizon and forward-looking nature of the risks and (ii) changes to the financial institution's operating environment or activities.	Policies, procedures, and limits should be modified when necessary to reflect the distinctive nature of climate-related financial risks and changes, if any, to an organization's activities. (¶ 32).
FRB Principle: Strategic Planning		
Integration of Climate-Related Risks into Strategy	The **board** and management should consider material climate-related financial risk exposures when setting the bank's overall business strategy, risk appetite and capital plan.[200] As part of forward-looking strategic planning, the **board** and management should address the potential impact of climate-related financial risk exposures on the financial institution's financial condition, operations (including geographic locations), and business objectives over various time horizons. The **board** and management should also consider climate-related financial risk impacts on the financial institution's operational and legal risks, and stakeholders, including low-to-moderate income and other disadvantaged households and communities… [including] physical harm or access to the financial institution's products and services. Any climate-related strategies should align with and support the financial institution's broader strategy, risk appetite and risk management framework.	Regulated Organizations should develop and implement sound processes for understanding and assessing the potential impact of climate-related financial risks on businesses and on the environments in which they operate in the short, medium, and long term, to inform the strategy communicated to, and operationalized by, each organization's business units and product lines. (¶ 25). Any risk-mitigation strategies for climate-related financial risk should align with and support the Regulated Organization's broader strategy, risk appetite, and risk management framework. (¶ 27). In order to supplement existing risk management frameworks to accommodate climate-related financial risks, Regulated Organizations should consider questions such as: which business areas are or may in the future be exposed to these risks, what is the resiliency of their business models, what is the current or potential future materiality of the risks, and whether climate-related financial risks require considerations across all business areas and processes, or only those areas or processes that are or may be particularly exposed. (¶ 26).
Public Communications	[W]here financial institutions engage in public communication of their climate-related strategies, **boards** and management should assure that any public statements	[T]he **board** and management should ensure that any public statements about their climate-related strategies and commitments are

[200] The OCC Proposal and FDIC Proposal also include operational plans.

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
	about their institution's climate-related strategies and commitments are consistent with their internal strategies and risk appetite statements.	consistent with their internal strategies and risk appetite statements. (¶ 27).
FRB Principle: Risk Management		
Risk Management, Generally	Management should oversee the development and implementation of processes to identify, measure, monitor, and control climate-related financial risk exposures within the financial institution's existing risk management framework.	Regulated Organizations should identify, measure, monitor, and control climate-related financial risks through their existing risk management framework, including existing risk categories in line with their board-approved risk appetites. (¶ 37). The **board** and management… should establish and implement plans to mitigate and manage each organization's exposure to material climate-related financial risks and should review and assess the effectiveness of mitigation plans regularly. (¶ 42).
Incorporating Climate-Related Risk into Risk Management Framework and Systems	[Management's role includes overseeing] the development and implementation of processes to identify, measure, monitor, and control climate-related financial risks within the financial institution's existing risk management framework. Management should consider and incorporate climate-related risks into the financial institution's risk management system, including internal controls and internal audit.*	[T]his Guidance advises Regulated Organizations on how they may incorporate these novel and evolving risks into their existing risk management frameworks, consistent with established risk appetites and business strategies. (¶ 7). Regulated Organizations should incorporate climate-related financial risks into their internal control frameworks across three lines of defenses: • The first line of defense – or the risk-taking function – should assess climate related financial risks during client onboarding, credit application, and credit review processes. This requires sufficient awareness and understanding of how physical and transition risks impact clients, their business strategies, and their business environment. • The second line of defense – or the risk management function – undertaking independent climate-related financial risk assessment and monitoring, including potentially challenging the assessment conducted by the first line of defense. The compliance function should ensure adherence to relevant climate-related rules and regulations and ensure that internal policies and procedures are compliant with climate-related standards, directives, charters, or codes of conduct to which

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
		the Regulated Organization is subject, as well as applicable consumer protection laws, regulations, and guidance, including fair lending considerations. • The third line of defense—or the internal audit function—should, consistent with their role in an organization's risk management framework generally, conduct regular independent reviews of an organization's climate-related internal control framework and systems in light of changes in the methodology, business model, and risk profile of the organization, as well as in the quality of underlying data. (¶¶ 33–36).
Identifying Climate-Related Financial Risks	Financial institutions with sound risk management practices employ a comprehensive process to identify emerging and material risks related to the financial institution's business activities. The risk identification process should input from stakeholders across the organization with relevant expertise (*e.g.*, business units, independent risk management, internal audit, and legal). Risk identification includes assessment of climate-related financial risks across a range of plausible scenarios and under various time horizons.	Regulated Organizations should consider how physical and transition risks may impact specific asset classes, sectors, counterparties, or geographical locations, in order to tailor existing frameworks to account for these considerations. (¶ 38). Identification of these risk drivers should occur at the transaction, portfolio, and entity or Group level(s). (¶ 39). For larger organizations with more complex operations, the board and senior management also should identify how climate-related financial risks might influence interdependencies and correlations across portfolios and lines of business, which may amplify or mitigate risk exposures. (¶ 39).
Measuring and Monitoring Climate-Related Financial Risks	As part of sound risk management, management should develop processes to measure and monitor material climate-related financial risks and to communicate and report the materiality of those risks to internal stakeholders.[201] Material climate-related financial risk exposures should be clearly defined, aligned with the financial institution's risk	Regulated Organizations should develop appropriate key risk measurement tools or indicators for effective management of material climate-related financial risks as part of existing risk management systems. (¶ 40). Material climate-related financial risks should be clearly defined with thresholds for materiality clarified. (¶ 29).

[201] The OCC Proposal and FDIC Proposal do not specifically assign the responsibility to develop these processes to management, and rather than requiring that these findings be reported to internal stakeholders, the proposals require that they be reported to management.

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
	appetite, and supported by appropriate metrics (*e.g.*, risk limits and key risk indicators) and escalation processes.	
Risk Monitoring	Tools and approaches for measuring and monitoring exposure to climate-related financial risks include, among others, exposure analysis, heat maps, climate risk dashboards, and scenario analysis. These tools can be leveraged to assess a financial institution's exposure to both physical and transition risks in both the shorter and longer term.	Regulated Organizations should regularly monitor risk positions and exceptions to operating within established policies, limits, and risk appetite related to material climate-related financial risks. (¶ 41). Given the evolving nature of climate-related financial risks and the potential for additional risk transmission channels that might not yet be recognized, Regulated Organizations should monitor emerging risks and ensure that related risk data and metrics are updated regularly. (¶ 41). Regulated Organizations should also monitor the impacts from climate-related financial risks on outsourcing arrangements, service providers, supply chains, and business continuity planning. (¶ 41).
Consideration of Time Horizons	Outputs [of risk measurement and monitoring tools] should inform the risk identification process and the short- and long-term financial risks to a financial institution's business model from climate change.	Given the uncertainty around the timing of these risks, Regulated Organizations should take the dynamic approach to developing their risk management framework, tailored to their business models, specific activities, and specific business decisions. (¶ 30). In establishing time horizons for risk analysis and consistent with existing and evolving business strategies and risk appetites, Regulated Organizations should also consider the expected longevity of customer relationships. (¶ 30).
Considerations for FBOs Whose Risk Management Process and Control Functions Are Performed Outside of the U.S.	*[The FRB Proposal does not include specific considerations for the U.S. operations of FBOs that would be subject to the guidance.]*	[T]he FBO's oversight function, policies and procedures, and information systems should be sufficiently transparent to allow U.S. supervisors to assess their adequacy for the branch or agency in relation to the FBO's climate-related financial risks. (¶ 22). [T]he FBO [must] keep its head office apprised of the U.S. regulatory expectations pertinent to its U.S. operations, including guidance and direction on climate-related financial risks. (¶ 22). [T]he FBO's U.S. senior management needs to demonstrate and maintain a thorough understanding of all relevant risks, including climate-related financial risks affecting the U.S. operations, and the associated management information systems used to monitor and manage these risks within the U.S. operations. U.S. management

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
		should inform the FBO's head office of these risks, to the extent they are material. (¶ 22).
LMI and Other Disadvantaged Households and Communities	The adverse effects of climate change could also include a potentially disproportionate impact on the financially vulnerable, including low- to moderate-income (LMI) and other disadvantaged households and communities.[202]	Regulated Organizations should be mindful that changes to their risk management frameworks to account for climate-related financial risks must not unduly harm or disadvantage at-risk communities. (¶ 8).
FRB Principle: Data, Risk Measurement and Reporting		
Data, Risk Measurement and Reporting, Generally	Sound climate-related financial risk management depends on the availability of timely, accurate, consistent, complete, and relevant data. Effective risk data aggregation and reporting capabilities allow management to capture and report material and emerging climate-related financial risk exposures, segmented or stratified by physical and transition risks, based upon the complexity and types of exposures.	Regulated Organizations should develop risk data aggregation capabilities and risk reporting practices that are capable of monitoring material climate-related financial risks and producing timely information to facilitate board and senior management decision-making. (¶ 54). The sophistication of such monitoring and management information systems should be consistent with the nature, scale, complexity, and diversity of the organization's operations and level of exposure to climate-related financial risks. (¶ 54).
Incorporation of Data, Risk Measurement and Reporting	Management should incorporate climate-related financial risk information into the financial institution's internal reporting, monitoring, and escalation processes to facilitate timely and sound decision-making across the financial institution. Data, risk measurement, modeling technologies, and reporting continue to evolve at a rapid pace; management should monitor these developments and incorporate them into the institution's climate-related financial risk management as warranted.	As the required data for assessment of climate-related financial risks may not yet be captured by existing information technology infrastructure of financial institutions, Regulated Organizations should consider enhancing existing systems, where appropriate, to make it possible to identify, collect, and centralize the data necessary to assess material climate-related financial risks so that it can be considered alongside other dynamic risks that organizations monitor and manage. (¶55).

[202] As noted in Part I, the FDIC Proposal advised subject banking organizations that their climate-related financial risk management "also seek to reduce or mitigate the impact that management of these risks may have on broader aspects of the economy, including the disproportionate impact of risk on LMI and other disadvantaged communities." FDIC Proposal, *supra* note 15, at 19509.

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
FRB Principle: Scenario Analysis		
Scenario Analysis, Generally	For the purposes of these draft principles, climate related scenario analysis refers to exercises used to conduct a forward-looking assessment of the potential impact on a financial institution of changes in the economy, changes in the financial system, or the distribution of physical hazards resulting from climate-related financial risks. These exercises differ from traditional stress testing exercises that typically assess the potential impacts of transitory shocks to near-term economic and financial conditions. Management should develop and implement climate-related scenario analysis frameworks in a manner commensurate to the financial institution's size, complexity, business activity, and risk profile.	The development and implementation of climate scenario analysis should be commensurate with a Regulated Organization's size, complexity, business activity, and risk profile. (¶ 57).
Purpose of Scenario Analysis	An effective climate-related scenario analysis framework provides a comprehensive and forward-looking perspective that financial institutions can apply alongside existing risk management practices to evaluate the resiliency of a financial institution's strategy and risk management to the structural changes arising from climate-related risks. A climate-related scenario analysis framework can also assist management in identifying data and methodological limitations and uncertainty in climate-related financial risk management and informing the adequacy of the institution's climate-related financial risk management framework.	Similar to other forward-looking risk assessment frameworks that require an organization to evaluate its capacity to maintain a safe and sound, resilient operation while addressing the attendant challenges posed by a range of potential future conditions, climate scenario analysis can be a useful tool in identifying, anticipating, managing and measuring climate-related financial risks. (¶ 56). The relevant objectives, assumptions, time horizons, and possible responses would typically be different from those applicable in traditional stress testing exercises, however, as climate scenario analyses may not be well suited to assess the potential impacts of transitory shocks to near-term economic and financial conditions or to factor into an organization's regulatory capital requirements. (¶ 56). In the near term, a climate-related scenario analysis framework also can assist the institution in identifying data and methodological limitations and uncertainty in management of these risks and informing the adequacy of its risk management framework to address them. (¶ 57).

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
Use of Scenario Analysis	[Climate-related scenario analysis] frameworks should include clearly defined objectives that reflect the financial institution's overall climate-related financial risk management strategies, for example: • Exploring the impacts of climate-related financial risks on the financial institution's strategy and business model, • Identifying and measuring vulnerability to relevant climate-related financial risk factors including physical and transition risks, and • Estimating climate-related exposures and potential losses across a range of scenarios, including extreme but plausible scenarios.[203] Climate-related scenario analyses should be subject to oversight, validation, and quality control standards that would be commensurate to the financial institution's risk.	Regulated Organizations should consider using a range of climate scenarios based on assumptions regarding impact of climate-related financial risks over different time horizons to: • Assess the resiliency of their business models and strategies, • Identify and measure vulnerability to relevant climate-related risk factors, including physical and transition risks, • Estimate exposures and potential impacts, and • Determine the materiality of climate-related financial risks. These assumptions can be quantitative and/or qualitative in nature and should rely on forward-looking information where available. (¶ 57).
Communicating Scenario Analysis Results	Climate-related scenario analysis results should be clearly and regularly communicated to the board and all relevant individuals within the financial institution, including an appropriate level of information necessary to effectively convey assumptions, limitations, and uncertainty of results.[204]	*[The NYDFS Proposal does not explicitly address the communication of scenario analysis results.]*
FRB Principle: Management of Risk Areas		
Management of Risk Areas, Generally	A risk assessment process is part of a sound risk governance framework, and it allows management to identify emerging risks and to develop and implement appropriate strategies to mitigate those risks.	Regulated Organizations should assess the impact of physical and transition risks as drivers of their existing risk categories, to the extent material and relevant. (¶ 44).

[203] The OCC Proposal and FDIC Proposal call for institutions to consider "a range of plausible scenarios," rather than "extreme but plausible."

[204] The OCC Proposal and FDIC Proposal only require that results be communicated to all relevant individuals, rather than specifically requiring that information be communicated to the board.

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
	Management should consider and incorporate climate-related financial risks when identifying and mitigating all types of risk.*	
Credit Risk	Management should consider climate-related financial risks as part of underwriting and ongoing monitoring of portfolios.* Effective credit risk management practices could include monitoring climate-related credit risks through sectoral, geographic, and single-name concentration analyses, including credit risk concentrations stemming from physical and transition risks. As part of concentration risk analysis, management should assess potential changes in correlations across exposures or asset classes. Consistent with the financial institution's risk appetite statement, management should determine credit risk tolerances and lending limits related to these risks.*	Regulated Organizations should familiarize themselves with how physical and transition risk drivers might have a material impact on their borrowers and counterparties and should consider climate-related financial risks that exist or may arise in their underwriting and ongoing portfolio monitoring practices. (¶ 46).
Liquidity Risk	Consistent with sound oversight and liquidity risk management, management should assess whether climate-related financial risks could affect its liquidity position[205] and, if so, incorporate those risks into their liquidity risk management practices and liquidity buffers.*	Regulated Organizations should consider the impact of climate-related financial risk drivers on their ability to raise funds or liquidate assets and on their customers' demand for liquidity…. The integration of climate-related financial risks into internal liquidity assessment may be iterative and progressive, as the methodologies and data used to analyze these risks mature and analytical gaps are addressed. (¶ 51).
Other Financial Risk	Management should monitor interest rate risk and other model inputs for greater volatility or less predictability due to climate-related financial risks. Where appropriate, management should include corresponding measures of conservatism in their risk measurements and controls.	Regulated Organizations should consider the effect of climate-related risk drivers on their current and future investments, including whether and how these risks could lead to potential shifts in supply and demand for financial instruments (e.g., securities and derivatives), products, and services, with a consequent impact on their values or otherwise on the organizations' safety and soundness. (¶ 48).

[205] The OCC Proposal calls attention here to liquidity buffers, rather than liquidity position. The FDIC Proposal, on the other hand, only says "liquidity."

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
	Management should monitor how climate-related financial risks affect the financial institution's exposure to risk related to changing prices.* While market participants are still researching how to measure climate-related price risk, management should use the best measurement methodologies reasonably available to them and refine over time.*	
Operational Risk	Management should consider how climate-related financial risk exposures may adversely impact a financial institution's operations, control environment, and operation resilience.* Sound operational risk management includes incorporating an assessment across all business lines and party operations, and considering climate-related impacts on business continuity and the evolving legal and regulatory landscape.	Given the centrality of operational resilience to overall institutional health and stability, Regulated Organizations should assess the impact of physical and transition risk drivers on their operations, control environment, and key customers and counterparty relationships. Assessment should be across all business lines and operations, including third-party operations as appropriate. (¶ 50).
Legal/Compliance Risk	Management should consider how climate-related financial risks and risk mitigation measures affect the legal and regulatory landscape in which the financial institution operates [including, but not limited to] possible changes to legal requirements for, or underwriting considerations related to, flood or disaster-related insurance, and possible fair lending concerns if the financial institution's risk mitigation measures disproportionately affect communities or households on a prohibited basis such as race or ethnicity.*	Regulated Organizations should consider how climate-related financial risk and risk mitigation measures affect the legal and regulatory landscape in which they operate. This consideration includes possible changes to legal requirements or underwriting standards. They should also consider applicable consumer protection laws, such as fair lending laws and regulations. (¶ 52). Regulated Organizations [are expected] to minimize and affirmatively mitigate adverse impacts [of changing climate conditions] on [LMI] communities [and communities of color] while managing climate-related financial risks to address safety and soundness concerns. (¶ 18)
Other Nonfinancial Risk	Consistent with sound oversight, the **board** and management should monitor how the execution of strategic decisions and the operating environment affect the financial institution's financial condition and operational resilience as discussed in the strategic planning section. Management should also consider the extent to which the financial institution's activities may increase the risk of	Strategic goals developed through a Regulated Organization's governance framework should consider climate-related financial risk drivers alongside other key risk drivers, including how they might affect achievement of those goals… Given the evolving nature of climate-related financial risks and the uncertainty as to timing and magnitude of their impact, an organization's periodic reexamination and update of institutional strategic goals should account for the dynamic nature of climate-related financial risks, as part of its regular slate of considerations. (¶ 53).

Topic	Excerpts from FRB Proposal	Excerpts from NYDFS Proposal
	negative financial impact from other operational risk, liability, or litigation.[206] Management should implement adequate measures to account for these risks where material.*	

[206] The OCC Proposal and FDIC Proposal assign this responsibility to both the board and management. Furthermore, both focus on the potential negative financial impact from "reputational damage, liability, or litigation."

APPENDIX B

Climate-Related Regulatory Regimes in Key International Jurisdictions

The following table compares climate-related risk management principles and disclosure requirements under key international jurisdictions. Climate scenario analysis and stress testing, which is part of climate risk management, is discussed in Appendix C.

	Risk Management	Climate-Related Disclosure
United States	The OCC, FDIC and FRB separately proposed broadly similar climate-related risk management principles for large financial institutions in December 2021, March 2022 and December 2022 respectively. The FRB is also conducting a pilot climate scenario analysis exercise with six U.S. GSIBs. The NYDFS Proposal was issued in December 2022.	The SEC Climate Proposal was released in March 2022 and would apply to all SEC registrants. The SEC is expected to adopt a final rule in April 2023.
Canada	OSFI issued high-level climate-related risk management guidance for financial institutions in March 2023.[207]	OSFI's climate-related risk management guidelines require climate-related financial disclosures for federally regulated financial institutions beginning in 2024.
European Union	The ECB published supervisory expectations relating to climate risk management and disclosure in November 2020 and a compendium of good practices for climate-related and environmental risk management in November 2022. The ECB has set deadlines for banks to progressively meet all supervisory expectations by end of 2024.[208] The EU has a prudential stress testing regime.	The SFDR imposes mandatory ESG disclosure obligations for financial markets participants. In December 2022, the EU adopted the CSRD, which will require companies to publish detailed information on sustainability matters in alignment with ESRS and the EU Taxonomy.

[207] OSFI, *Guideline B-15: Climate Risk Management* (Mar. 2023).

[208] Press Release, ECB, ECB sets deadlines for banks to deal with climate risks (Nov. 2, 2022).

	Risk Management	Climate-Related Disclosure
United Kingdom	The Prudential Regulation Authority ("PRA") published high-level supervisory expectations for banks' approaches to managing the financial risks from climate change in April 2019 and began applying these supervisory expectations in 2022.[209] On October 2022, the PRA released further guidance on these expectations, along with thematic feedback on banks' implementation process thus far. The report found that "most firms' work on climate risk management and mitigation (including capital allocation) was still maturing." In January 2023, the PRA named financial risks arising from climate change as one of its supervisory priorities for international banks active in the UK.[210] The UK has a prudential stress testing regime.	The Financial Conduct Authority ("FCA") requires premium listed and standard listed companies to state whether they have made disclosures consistent with the TCFD framework, or explain why not. As of April 6, 2022, the UK has required large companies to make climate-related disclosures aligned with the TCFD framework.[211]
Hong Kong	The Hong Kong Monetary Authority ("HKMA") finalized supervisory expectations in the Supervisory Policy Manual, Climate Risk Management, in December 2021.[212] The HKMA published a two-year plan to weave climate risk into its existing supervisory processes in June 2022. Hong Kong has a prudential stress testing regime.	The HKMA expects banks to make initial climate-related disclosures by mid-2023 and be aligned with the TCFD framework by 2025. A "comply or explain" approach may be adopted for such disclosures but must take into account the significance of operations and materiality of climate-related risks.

209 BoE, *Thematic Feedback on the PRA's Supervision of Climate Related Financial Risk and The Bank of England's Climate Biennial Exploratory Scenario Exercise* (Oct. 21, 2022).

210 Form Letter from Nathanaël Benjamin, Executive Director, & Rebecca Jackson, Director, PRA, to Banks active in the UK (Jan. 10, 2023).

211 Press Release, UK Gov't., UK to enshrine mandatory climate disclosures for largest companies in law (Oct. 29, 2021).

212 HKMA, *GS-1:Climate Risk Management* (Dec. 30, 2021).

	Risk Management	Climate-Related Disclosure
Japan	The Japanese Financial Services Agency ("JFSA") published Supervisory Guidance on Climate-Related Risk Management and Client Engagement in July 2022.[213] The Bank of Japan ("BoJ") and JFSA have generally relied on stress tests conducted by individual banks and conducted their first simultaneous stress tests on five major financial institutions in 2019. However, these stress tests do not have regulatory or capital implications for banks.[214]	JFSA requires companies listed on the Prime Market segment of the Tokyo Stock Exchange to enhance their climate-related disclosures based on the TCFD or an equivalent framework.

213 JFSA, *Supervisory Guidance on Climate Related Risk Management and Client Engagement* (July 15, 2022).

214 BoJ, *Supervisory Simultaneous Stress Testing Based on Common Scenarios* (Dec. 17, 2020).

APPENDIX C

Scenario Analysis—Developments and Requirements in Key Jurisdictions

The following table outlines the developments in climate-related scenario analysis and stress testing in key jurisdictions, as well as any discussion of potential capital consequences related to such exercises.

Jurisdiction	Current State	Capital Implications	Next Steps
United States	The Draft Principles suggest large banking institutions develop scenario analysis capabilities. The FRB is conducting a pilot climate scenario analysis exercise with six U.S. GSIBs.	Based on public statements from FRB officials, scenario analysis exercises are distinct from regulatory stress testing, which may have capital implications.	The FRB plans to publish aggregate results from its pilot climate scenario analysis exercise at the end of 2023.
Canada	In early 2022, OSFI published a report on its climate scenario analysis pilot program with six FRFIs. The report noted that participants were in the "early stages" of building climate-related risk management capabilities and that the pilot helped participants identify data gaps.[215] In March 2023, OSFI issued final guidelines related to climate risk management, which require climate scenario analysis exercises. The guidelines will come into effect beginning in 2024.[216]	While OSFI's climate-related financial risk management guidelines do not specify whether scenario analysis will impact capital requirements, the guidelines do require FRFIs to maintain sufficient capital and liquidity buffers for their climate-related risks.	OSFI guidelines taking effect in 2024 will require FRFIs to use internal climate scenarios and complete and report results based on standardized climate scenario exercises.
European Union	The ECB launched a climate risk stress test for banks in January 2022 with prescribed scenarios and published results from its exercise in July 2022. The results found relatively low quantitative impacts on banks' losses, which the ECB termed "significantly understate[d]" due to the nature of the scenarios and data and modeling limitations. In December 2022, the ECB published a report on good practices related to climate stress testing.[217]	While there is no direct capital impact on banks from the climate stress test exercise at this time, the ECB noted that the exercise could indirectly impact Pillar 2 requirements through the Supervisory Risk and Evaluation scores.	The ECB expects banks to meet its supervisory expectations with respect to climate-related financial risk management, including climate stress testing requirements, by the end of 2024.[218]

[215] News Release, OSFI, Bank of Canada/OSFI pilot helps Canadian financial sector assess climate change risks (Jan. 14, 2022).

[216] OSFI, *Guideline B-15: Climate Risk Management* (Mar. 2023); News Release, OSFI issues new Guideline on Climate Risk Management (Mar. 7, 2023).

[217] ECB, ECB REPORT ON GOOD PRACTICES FOR CLIMATE STRESS TESTING (Dec, 2022).

[218] Press Release, ECB, ECB sets deadlines for banks to deal with climate risks (Nov. 2, 2022).

Jurisdiction	Current State	Capital Implications	Next Steps
United Kingdom	The PRA and FCA jointly convened the Climate Financial Risk Forum, which published three rounds of scenario analysis guidance in June 2020, October 2021 and December 2022.[219] The BoE launched its Climate Biennial Exploratory Scenario ("CBES") exercise in 2021 with three scenarios that build on the NGFS scenarios.[220] In May 2022, the BoE published the results of the CBES exercise, which included a finding that "the overall costs to [banks and insurers] from the transition to net zero should be bearable without substantial impacts on firms' capital positions."[221]	The BoE indicated that it would not use the CBES to set capital requirements. However, the BoE appears focused on the role of capital in addressing the consequences of climate change and noted that the findings of the CBES exercise may inform future work regarding regulatory capital.	The BoE indicated it would share insight from its scenario analysis exercise with the UK government and other central banks to advance discussion on climate-related financial risk management, including the role of capital requirements for banks and insurers.
Hong Kong	The HKMA conducted a pilot climate risk stress test in January 2021 and released a report outlining results in December 2021. The results indicated that that Hong Kong's "banking sector remained resilient to climate-related shocks given the strong capital buffers built up by the banks over the years."[222]	The HKMA is considering whether and how to incorporate climate risk into its Supervisory Review Process (*i.e.*, Pillar 2 of the Basel regulatory capital framework).	The HKMA plans to conduct another round of climate risk stress testing in 2023 as part of the regular supervisor-driven stress test exercise, which is expected to be more prescriptive.
Japan	The BoJ and the JFSA launched a pilot scenario analysis exercise in 2021, with a report published in August 2022 outlining results and takeaways. The exercise found that "banks' estimated increase in annual credit costs due to transition and physical risks was considerably lower than their average annual net income."[223]	No additional capital requirements or other regulatory and supervisory measures from the exercise at this time.	The JFSA plans to work with financial institutions to identify challenges to scenario analysis utilization.

[219] Financial Conduct Authority, *Climate Financial Risk Forum (CFRF)* (last updated Dec. 19, 2022).
[220] BoE, *Key Elements of the 2021 Biennial Exploratory Scenario: Financial Risks from Climate Change* (June 8, 2021).
[221] BoE, RESULTS OF THE 2021 CBES, *supra* note 58.
[222] Press Release, HKMA, HKMA publishes the results of the pilot climate risk stress test (Dec. 30, 2021).
[223] JFSA, Pilot Scenario Analysis Exercise on Climate Related Risks Based on Common Scenarios (Aug, 2022).

APPENDIX D

APPENDIX D-1

SEC Climate Proposal—GHG Emissions Disclosures

Mandatory for all registrants

SCOPE 1 EMISSIONS

Direct emissions from facilities owned or activities controlled by registrant

e.g., combustion from company facilities & vehicles

SCOPE 2 EMISSIONS

Indirect emissions from purchased energy

e.g., purchased electricity, heating & cooling

Attestation requirement:

- Applies to accelerated & large accelerated filers
- Attested to by independent third party
- Year 2: "limited assurance" standard
- Year 4: "reasonable assurance" standard

Mandatory if emissions are material or if registrant has set GHG emissions reduction targets that include Scope 3

SCOPE 3 EMISSIONS

All other emissions from upstream and downstream activities

e.g., financed emissions (emissions generated by companies in which a financial institution invests or otherwise has exposure)

Notes on Scope 3:

- Safe harbor from liability: not deemed to be materially misleading if made with a reasonable basis and in good faith
- Delayed compliance date of one year
- No bright-line quantitative threshold for materiality

APPENDIX D-2

SEC Climate Proposal—Climate Risk Governance

Board Oversight

The SEC Climate Proposal would require disclosures regarding a board of directors' oversight of climate-related risks.

Board Oversight Disclosures
Responsibility. Identity of committees or directors responsible for oversight of climate-related risks.
Expertise. Whether any board member has expertise in climate-related risks, with sufficient detail to fully describe the nature of the expertise.
Board reporting and discussions. Processes by which the board or board committee discusses climate-related risks, including how it is informed about climate-related risks and the frequency of such discussions.
Business strategy, risk management and financial oversight. Whether and how the board or board committee considers climate-related risks as part of the board's business strategy, risk management and financial oversight.
Targets and goals. Whether and how the board sets climate-related targets or goals and how it oversees progress against those targets or goals.

SEC Climate Proposal—Climate Risk Governance

Management Oversight

The SEC Climate Proposal would require disclosures regarding management's role in assessing and managing climate-related risks. These disclosure items largely mirror the board-level disclosure items.

Management Oversight Disclosures
Responsibility. Identity of certain management positions or committees that are responsible for assessing and managing climate-related risks.
Expertise. Relevant expertise of such position holders or members, with sufficient detail to fully describe the nature of the expertise.
Information processes. Processes by which such positions or committees are informed about and monitor climate-related risks.
Board reporting. Whether and how frequently such positions or committees report to the board or a committee of the board on climate-related risks.

SEC Climate Proposal—Climate Risk Management

The SEC Climate Proposal would require disclosure of processes for identifying, assessing and managing climate-related risks.

Processes for <u>Identifying</u> and <u>Assessing</u> Climate-Related Risks
Relative significance. How a registrant determines the relative significance of climate-related risks compared to other risks.
Materiality. How a registrant determines the materiality of climate-related risks, including how it assesses the potential size and scope of any identified climate-related risk.
Regulatory impact. How a registrant considers existing or likely regulatory requirements or policies, such as GHG emissions limits, when identifying climate-related risks.
Transition risk considerations. When assessing potential transition risks, how a registrant considers shifts in: (i) customer or counterparty preferences; (ii) technological changes; or (iii) changes in market prices.

Processes for <u>Managing</u> Climate-Related Risks
Integration. Whether and how climate-related risks are integrated into a registrant's overall risk-management system or processes.
Mitigation and prioritization decisions. When describing any processes for managing climate-related risks, as applicable, how a registrant: (i) decides whether to mitigate, accept or adapt to a particular risk; (ii) prioritizes whether to address climate-related risks; and (iii) determines how to mitigate any high-priority risks.

APPENDIX D-3

SEC Climate Proposal—Climate-Related Targets & Goals

Registrants that have published GHG emissions reduction targets or other climate-related commitments must disclose:

<table>
<tr><th colspan="4">Outside Financial Statements</th></tr>
<tr><td colspan="3">Describe any climate-related targets or goals, including:</td><td rowspan="3">Note: expenditures and costs related to meeting climate-related targets and goals will need to be included in line-item metrics in financial statement disclosures.</td></tr>
<tr><td>• Scope of activities and emissions included
• Time horizon
• Evaluation metrics</td><td>• Baseline
• Assessment periods
• Interim targets
• Strategy for completion</td><td>Use of carbon offsets and renewable energy certificates as part of a registrant’s plan to achieve climate-related goals.</td></tr>
<tr><td colspan="3">Annual updates on progress toward meeting climate-related targets and goals, including actions taken during the year to achieve targets and goals.</td></tr>
</table>

APPENDIX D-4

SEC Climate Proposal—Financial Statement Metrics

The SEC Climate Proposal would require disclosure in the notes of audited financial statements on the impact of climate-related risks on business and consolidated financial statements, including:

Financial Impact Metrics	Expenditure Metrics
Line-by-line assessment of financial impact of (i) severe weather events and other natural conditions and (ii) transition activities. Required for every line item where financial impact of climate-related risk is 1% or greater.	Line-by-line assessment of amounts expensed or capitalized related to transition activities, climate-related targets and goals and other mitigation activities. Required for every line item where expenditure related to climate-related risk is 1% or greater.
Impact of climate-related events and activities on financial **estimates and assumptions**.	

Producing these disclosures would require collecting and processing the relevant data in accordance with **ICFR and SOX** controls.

APPENDIX E

Summary of Proposed & Effective Climate-Related Disclosure Requirements by Topic

	TCFD Framework[224]	ISSB/IFRS S2 (Draft)[225]	SEC Climate Proposal[226]	CSRD/ESRS E1 (Draft)[227]
Financial Disclosures	Does not contemplate a line-by-line approach to identifying financial impacts of climate-related risks.	Requires disclosure of financial impacts but does not specify that financial statement disclosures be made for each line item.	Would require disclosure of each line item for which the climate-related impact is 1% or greater.	Requires disclosure of actual and potential impacts to financial performance, financial position and cash flows but not on a line-item basis.
Climate-Related Risks & Opportunities	Recommends disclosure of both climate-related risks and opportunities	Requires disclosure of both climate-related risks and opportunities.	Requires disclosure of only climate-related risks. Disclosure of climate-related opportunities is optional.	Requires disclosure of both climate-related risks and opportunities.
Attestation for Scope 1 and Scope 2 GHG Emissions	Does not include an attestation requirement or suggestion.	Does not include an attestation requirement.	Requires an independent attestation for Scope 1 and Scope 2 GHG emissions disclosures. First phase-in period will require limited assurance and second phase-in period will require reasonable assurance.	Requires independent assurance for all sustainability disclosures included in a management report not just Scope 1 and Scope 2 emissions.[228] First phase-in period will require limited assurance, and second phase-in period will require reasonable assurance.

224 TCFD, *Recommendations of the Task Force on Climate Related Financial Disclosures*, *supra* note 139.

225 ISSB, *Exposure Draft—IFRS S2 Climate Related Disclosures*, *supra* note 141.

226 SEC Climate Proposal, *supra* note 62.

227 EFRAG, ESRS E1, *supra* note 146.

228 ESRS follows the assurance guidelines of CSRD. *See* CSRD, *supra* note 143, ¶ 60, at L 322/34-35. *See also* EFRAG, Explanatory Note of How Draft ESRS Take Account of the Initiatives and Legislation Listed in Article 1 (8) of the CSRD Adding Article 29(B)-5 to the Accounting Directive, at 10 (Nov. 2022) ("The Basis for preparation section of draft ESRS 2 covers the same areas with the exception of those aspects that are already defined in the main text of the CSRD (for example, frequency of reporting, or *level of assurance*)[.]") (emphasis added); *Get Ready for European Sustainability Reporting Standards*, KPMG, at slide 12 (Nov. 2022).

	TCFD Framework[224]	**ISSB/IFRS S2 (Draft)**[225]	**SEC Climate Proposal**[226]	**CSRD/ESRS E1 (Draft)**[227]
Scope 3 GHG Emissions	"Strongly encouraged" as of 2021.	Required.	Required if material or if included in climate-related targets or goals. Although the materiality determination would be registrant-specific, the proposing release indicates that Scope 3 emissions will be material—and therefore required—for financial institutions.	Required.
Scenario Analysis	Includes guidance on conducting and disclosing scenario analysis.	Requires use and disclosure of scenario analysis.[229]	Required if used by a registrant.	Requires use of scenario analysis.

[229] IFRS, *ISSB confirms requirement to use climate-related scenario analysis* (Nov. 1, 2022).

Authors

Caroline N. Swett
Partner, New York
cnswett@debevoise.com
+1 212 909 6432

Alison M. Hashmall
Counsel, New York
ahashmall@debevoise.com
+1 212 909 6837

Contributors

Eric T. Juergens
Partner, New York
etjuergens@debevoise.com
+1 212 909 6301

Kristin A. Snyder
Partner, San Francisco
kasnyder@debevoise.com
+1 415 738 5718

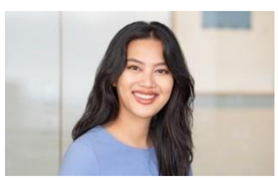
Patricia Volhard
Partner, London
pvolhard@debevoise.com
+44 20 7786 5505

Sheena Paul
Counsel, Washington, D.C.
spaul@debevoise.com
+1 202 383 8178

John Young
International Counsel, London
jyoung@debevoise.com
+44 20 7786 5459

Ulysses Smith
ESG Senior Advisor, New York
usmith@debevoise.com
+1 212 909 6038

Alexandra N. Mogul
Associate, New York
anmogul@debevoise.com
+1 212 909 6444



Tzerina Dizon
Associate, New York
tdizon@debevoise.com
+1 212 909 6055

Amanda H. Esteves
Associate, New York
aesteves@debevoise.com
+1 212 909 6669

Zoë Zissu
Associate, New York
zzissu@debevoise.com
+1 212 909 6219

Tejas N. Dave
Law Clerk, New York
tndave@debevoise.com
+1 212 909 6155

Jessica Szymeczek
Law Clerk, New York
jszymecz@debevoise.com
+1 212 909 7434