

## SEC's New Climate Disclosure Rule Excludes Asset-Backed Issuers

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Earlier this month, the United States Securities and Exchange Commission ("SEC") finalized a long-awaited rule that mandates climate-related disclosures by public companies and in public offerings. See [here](#). The rule does not apply to public asset-backed securities ("ABS") issuers and the SEC has stated that it will continue to review climate disclosures related to these issuers.

### Background

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The SEC first provided guidance on climate-related disclosures in 2010. That guidance recommended that affected registrants include general information about climate change-related risks and opportunities in disclosures related to the registrant's business description, risk factors, legal proceedings, and management discussion. According to the SEC, climate-related risk disclosures made pursuant to this guidance were fragmented and inconsistent and companies provided most of their climate-related information outside of Commission filings.

To address these concerns, the SEC issued a proposed rule in March 2021 seeking to impose more robust climate disclosures (the "*Proposed Rule*"). The Proposed Rule would have required registrants to disclose specific information on climate-related risks and the impact of climate-related events and transition activities on the registrant's financial statements. The Proposed Rule also called for disclosure of greenhouse gas ("*GHG*") emission metrics that could help investors assess climate risks, including the registrants' direct GHG emissions (Scope 1), indirect GHG emissions from purchased energy sources (Scope 2), and GHG emissions from upstream or downstream in a registrant's value chain (Scope 3) if such emissions are material or where the registrant has set goals related to Scope 3 emissions. The SEC considered thousands of comments before issuing a final rule.

Those comments both opposed and advocated for inclusion of ABS issuers. For example, in its comments, the Structured Finance Authority ("SFA") stated that climate change is an important topic for the industry and that its members "want a consistent, comparable, and reliable climate change disclosure and reporting framework" across the securitization market. That said, the SFA asserted that due to the unique nature of the market, any ABS climate disclosure requirements must be targeted to different asset classes. The SFA commented that "[w]hile we believe a harmonized approach for disclosures would make sense in areas where there is overlapping risks between both corporate securities and ABS, the structure of ABS is vastly different from corporate securities." The SFA also emphasized the establishment of its own voluntary ESG reporting initiative (the ABS Climate Disclosure Framework) in support of its position that ABS issuers should be excluded from any final climate disclosure rule.

Other commenters encouraged the SEC to require disclosure from ABS issuers because such issuers are subject to the same climate risks as other issuers and thus require similar disclosure.

### Final Rule

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The SEC considered these comments in issuing its final rule, entitled *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (the "*Final Rule*"). The Final Rule requires that companies (other than asset-backed securities issuers) provide significant new climate-related disclosures in their annual reports and registration statements.

In excluding asset-backed issuers from the Final Rule's climate disclosure requirements, the SEC stated that "[a]lthough we recognize that . . . climate-related risks may be relevant for some of the pooled assets that comprise certain asset-backed securities, we believe that adoption of climate-related disclosure requirements for certain types of securities, such as asset-backed securities, should consider the unique structure and characteristics of those securities, consistent with other Commission disclosure requirements applicable to asset-backed securities issuers.

Accordingly, while the Commission may consider climate-related disclosure requirements for asset-backed securities issuers in a future rulemaking, we decline to adopt such requirements as part of this rulemaking.”

Although the SEC has not yet considered climate disclosure requirements specific to ABS issuers, the requirements set forth in the Final Rule may be informative. The Final Rule’s requirements track with the Task Force on Climate-Related Financial Disclosures (TCFD) and require disclosure of climate-related risks. More particularly, the Final Rule calls for disclosure of, among other things:

- (i) climate-related risks that have had or are reasonably likely to have a material impact on the registrant;
- (ii) the registrant’s activities and strategies to mitigate, adapt or manage climate risks;
- (iii) oversight by the company’s board of directors of climate-related risks and the role of management in assessing and managing such risks;
- (iv) the process the registrant uses to assess and manage climate risks;
- (v) any targets or goals that have materially affected or are reasonably likely to materially affect the registrant’s business, results of operations, or financial condition; and
- (vi) the effects of severe weather events and other natural causes on the company’s financial statements.

Unlike the Proposed Rule, which provided for the disclosure of Scope 1 and Scope 2 emissions for all filers, the Final Rule requires the disclosure of Scope 1 and Scope 2 emissions *only* for certain larger registrants and *only* when those emissions are material. Large and accelerated filers that are not otherwise exempted will have to disclose material Scope 1 and Scope 2 emissions along with an attestation report on a phased-in basis. Notably, the SEC refrained from requiring the disclosure of Scope 3 emissions for any registrant in the Final Rule. The Final Rule will create a new subpart 1500 of Regulation S-K and Article 14 of Regulation S-X.

## Legal Challenges

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The Final Rule is facing multiple challenges in federal courts across the country from states, affected companies, and environmental groups and, as such, the fate of the Final Rule and the timing of its implementation remains to be seen.

## For More Information

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We are available at any time to answer questions, discuss scenarios, and provide guidance. If you would like further information concerning the matters discussed in this article, please contact Kristin Parker or the Chapman attorney with whom you regularly work.

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