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INSIGHTS

Hurdles Ahead for the SEC's New Climate Disclosure Proposal

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On March 21, 2022, the Securities and Exchange Commission (SEC) released its much-anticipated proposed rule on climate-related disclosure and accounting, "Enhancement and Standardization of Climate-Related Disclosures for Investors." The scope and obligations of the ***140-page proposal*** are gradually becoming clearer—and leave no doubt about its extraordinary implications. (Bracewell's outline of the proposal can be found ***here***.)

Attention now has turned to evaluating the potential impacts of the proposal and plotting the path forward on engaging with the SEC as it works towards a final rule. Below we summarize the milestones and advocacy that we expect over the course of this rulemaking process.

So Much To Do, So Little Time

With the publication of the proposal in the *Federal Register* on April 11, the public comment period is scheduled to close on May 20, 2022. We expect interested stakeholders to ask the SEC to extend the public comment period, and the SEC may find it prudent to grant these requests given the significance and size of this rulemaking package and to avoid subsequent arguments that interested parties lacked sufficient time to adequately review the proposal and provide meaningful comment to the SEC.

Congress Will Have Its Say

With a proposal of this significance, Members of Congress will not stand on the sidelines or limit their participation to the public comment process. Instead, expect Congress to use the full suite of tools to perform oversight over the SEC and register feedback—through confirmation hearings, oversight hearings, letters and more. Already Senator Kevin Cramer (R-ND) has led a group of Republican colleagues on the Senate Banking Committee and Environment and Public Works Committee in a ***letter*** calling on the SEC to withdraw the proposal.

The White House recently announced its intention to nominate Jaime Lizárraga (a senior advisor to House Speaker Nancy Pelosi and long-time SEC staffer) for the open Democratic seat on the Commission and Mark Uyeda (SEC staffer on detail to the Senate Banking Committee) for the open Republican seat. As the confirmation process moves forward, including a confirmation hearing before the Senate Banking Committee and one-on-one meetings with each Senator on the Committee, the climate proposal and the nominees' positions on climate will be a focal point for opposition. Although the SEC can move forward in finalizing the proposal without these seats filled, a failure to confirm these nominees would be yet ***another signal*** from Senate Democrats that the Biden Administration climate agenda has gone too far.

Senator Sherrod Brown (D-OH), Chairman of the Senate Banking Committee, which has primary jurisdiction over the SEC, has signaled his ***support*** for the SEC addressing climate risks. As such, a full committee oversight hearing on the SEC's proposal before the Senate Banking Committee is unlikely at this stage. However, it is undisputed that the proposal's requirements to report greenhouse gas emissions and climate-related risks fall squarely into the jurisdiction of the Senate Energy and Natural Resources Committee and the Senate Environment and Public Works Committee. In fact, Senator Joe Manchin (D-WV), Chairman of the Senate Energy and Natural Resources Committee, took little time in ***registering*** his concerns that the proposal targets energy companies. What remains to be seen is how far these Committees will take this nexus to assert jurisdiction over the SEC's proposal.

Eyes on the End of the Year

A rulemaking process of this size can take years to finalize. But there is reason to think that the SEC will make every effort possible to finalize the proposal by the end of the year. The SEC states as much in the proposal, "assuming that the effective date of the proposed rules occurs in December 2022."

By finalizing the rule in 2022, the SEC can require swift implementation and action taken in response to the rule. As proposed, registrants subject to the rule would first file required disclosures in 2024—disclosures containing required metrics data for fiscal year 2023. This means that registrants subject to the rule would need to have the necessary internal processes in place to be able to make these disclosures for 2023 operations and, consistent with the Biden Administration's broader intent, an incentive to decrease greenhouse gas emissions starting in 2023. If it holds, this timing puts pressure on public companies to begin preparations now in early 2022. (More Bracewell thoughts on what some companies' preparation should involve can be found ***here***.)

The upcoming mid-term elections give the SEC more reason to move quickly and finalize the rule by the end of the year to avoid oversight from a Republican-controlled House or Senate.

Race to the Courthouse

Not many things are certain in Washington, D.C. But it is certain that if the SEC promulgates a final rule on climate-related disclosures along the lines proposed, it will be challenged in court in short order. The variety of potential claimants and their arguments will be foreshadowed in the comments filed on the proposed rule, since some of the key claims are likely to require participation in the rulemaking process.

The prospect of a legal challenge is unlikely to diminish the SEC's zeal to issue a final rule. And even if a court stayed the rule's effectiveness while the case proceeds, many registrants will find it prudent to plan now for the heightened shareholder expectations that the proposed rule has already raised.

Insights on SEC Climate Disclosure Proposal

Read Bracewell's series of Insights on the SEC Climate Disclosure Proposal:

Attestation: Practical Reflections on What the SEC Climate Proposal Will Require
April 12, 2022

Summary Outline of SEC's Proposed Rule on Climate-Related Disclosure and Accounting
April 11, 2022

The SEC's Proposed Rules on Climate-Related Disclosures – What to Do Now: A Guide for In-House Counsel Facing the Proposed Rules
April 6, 2022