The Continued Need for SEC Action on Climate-Related Disclosures

How New California and E.U. Requirements Reinforce the Economic Case for the SEC's Proposed Rule

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Introduction

On March 21, 2022, the Securities and Exchange Commission (SEC) proposed a rule that would require SEC registrants[1] (both domestic and foreign) to provide climate-related disclosures in certain SEC filings (SEC Proposal).[2] The SEC Proposal draws on the recommendations[3] of the Task Force on Climate-Related Financial Disclosures (TCFD),[4] which have become the leading climate-related disclosure framework around the world.[5] The proposal's primary benefits are increased consistency, comparability, and reliability of climate-related disclosures, which enable investors to make better-informed investment decisions.

Since the release of the SEC Proposal in March 2022, other jurisdictions, including California and the European Union, have adopted climate-related disclosure regimes. These new disclosure regimes are similar to the SEC Proposal in that all three largely align with the TCFD recommendations. Many of the entities subject to these new disclosure regimes would also be subject to the SEC Proposal.

Like many federal rules, the SEC Proposal included an assessment of its costs and benefits. This report examines how the California and E.U. disclosure regimes may affect the baseline for that cost-benefit analysis and, consequently, the SEC's assessment of the incremental costs and benefits of its proposal. Overall, we find that the new disclosure regimes do not undermine the economic case for the SEC Proposal; if anything, they bolster it.

Most notably, the SEC Proposal's baseline analysis expressly anticipated that, independent of further SEC action, SEC registrants would increasingly be subject to TCFD-aligned disclosure requirements in other jurisdictions, much like the new California and E.U. disclosure regimes. Of course, this does not mean that the new regimes have no effect on the incremental costs and benefits of the SEC Proposal. Many (but not all) SEC registrants are subject to the new California and E.U. disclosure regimes. Because the SEC Proposal is substantially similar to these regimes (as well as other foreign TCFD-aligned disclosure regimes), such registrants will now face a substantially lower cost of compliance with the SEC Proposal. But applying the SEC Proposal to all SEC registrants will still yield significant incremental benefits for investors. The purpose of the SEC Proposal is to ensure not just that all registrants disclose their climate-related financial risks but that they do so in a consistent format that enables investors to easily *compare* risk across companies. Because not all SEC registrants are subject to the California and E.U. disclosure regimes, finalizing the SEC Proposal will still increase the comparability and consistency of climate-related disclosures relative to the baseline. In addition, while disclosure on company websites suffices for compliance with the California regime, the SEC Proposal requires disclosure in more formal SEC filings that presumably receive heightened attention from registrants. Accordingly, the SEC Proposal will still enhance the reliability of disclosures.

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[1] Registrants include (but are not limited to) all companies whose securities are publicly traded on a U.S. exchange. *See What does it mean to be a public company?*, U.S. Sec. & Exch. Comm'n (June 26, 2023), https://www.sec.gov/education/capitalraising/building-blocks/what-does-it-mean-be-a-public-company [https://perma.cc/33NG-7SEV].

[2] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/2ARP-LELB]; The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) [hereinafter "SEC Proposal"].

[3] Task Force on Climate-Related Financial Disclosures, Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017), https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf [https://perma.cc/UKA6-U559] [hereinafter "TCFD Recommendations"].

[4] SEC Proposal, *supra* note 2, at 21,345.

[5] At least 3,723 companies and 237 organizations (including industry associations and governments) across the globe have expressed support for the TCFD recommendations, and governments increasingly incorporate the TCFD's recommendations into regulations and guidance. Task Force on Climate-Related Financial Disclosures, 2022 Status Report 98, 100–03 (Oct. 2022), https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf [https://perma.cc/EFC7-R77N].

I. The SEC Proposal

This section first outlines the SEC Proposal, comparing it to the TCFD recommendations and explaining that it largely follows them. The section next summarizes the original cost-benefit analysis for the SEC Proposal. Notably, the SEC's baseline accounted for trends in state and foreign climate-related disclosure regimes and voluntary reporting practices. In its cost-benefit analysis, the SEC acknowledged that its proposal would impose additional compliance costs on registrants, but it expected these costs to decrease over time as companies developed the infrastructure to disclose climate-related information. On the other side of the ledger, the SEC Proposal's main benefits were consistent, comparable, and reliable climate-related disclosures that would enable investors to make better-informed decisions.

A. Overview of the Proposal

The SEC Proposal largely aligns with the TCFD recommendations. Like the TCFD recommendations, it requires climate-related disclosures in the areas of governance, strategy, risk management, and metrics and targets.[6] For certain climate-related disclosures, the TCFD recommendations suggest that "companies should determine materiality . . . consistent with how they determine the materiality of other information included in their financial filings."[7] In line with this suggestion, the SEC Proposal uses the SEC's established definition of materiality for many disclosures, including climate-related risks and Scope 3 greenhouse gas (GHG) emissions.[8] The TCFD recommendations also propose several other disclosures, including those related to governance and risk management, that registrants must make regardless of materiality.[9] The SEC Proposal adopts these disclosures too.[10]

The SEC Proposal differs from the TCFD recommendations in a few ways; where they differ, the SEC Proposal is generally less demanding than the TCFD recommendations. For example, unlike the TCFD recommendations,[11] the SEC Proposal does not require registrants to disclose climate-related opportunities[12] or to conduct "scenario analysis,"[13] though registrants that voluntarily use scenario analysis must describe their analysis.[14]

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6 *See* TCFD Recommendations, *supra* note 3, at v, 14; SEC Proposal, *supra* note 2, at 21,343, 21,345, 21,457.

7 TCFD Recommendations, *supra* note 3, at 33–34.

8 *See* SEC Proposal, *supra* note 2, at 21,345, 21,351. In the SEC context, information is generally considered material "if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote." *Id.* at 21,351. For financial impacts of severe weather events, other natural conditions, and transition activities, however, the proposed rule specifies that the disclosure threshold lies at 1% of the relevant financial statement line item; for expenditures to mitigate severe weather events and other natural conditions and for expenditures associated with transition activities, the threshold is 1% of total annual expenditure. SEC Proposal, *supra* note 2, at 21,464.

9 *See* TCFD Recommendations, *supra* note 3, at 14, 33–34.

10 *See* TCFD Recommendations, *supra* note 3, at 14, 33–34. *See* SEC Proposal, *supra* note 2, at 21,345; TCFD Recommendations, *supra* note 3, at 14.

11 *See* TCFD Recommendations, *supra* note 3, at 14, 25.

12 *See* SEC Proposal, *supra* note 2, at 21,345, 21, 351, 21,353 (noting that disclosures relating to climate-related opportunities are optional).

13 Scenario analysis is "a process for identifying and assessing the potential implications of a range of plausible future states under conditions of uncertainty." TCFD Recommendations, *supra* note 3, at 25. A key scenario "lays out a pathway and an emissions trajectory consistent with holding the increase in the global average temperature to 2°C above pre-industrial levels." *Id.* at 27. The TCFD recommends that organizations use a 2°C or lower scenario as well as two or three additional scenarios that they deem most relevant to their organization. *See id.* at 27–28; Accounting for Sustainability, TCFD Climate Scenario Analysis 3, 11, 22, https://www.accountingforsustainability.org/content/dam/a4s/corporate/home/KnowledgeHub/Guide-pdf/A4S%20Guide%20to%20TCFD%20Climate%20Scenario%20Analysis.pdf.downloadasset.pdf [https://perma.cc/4LBM-3XK7] (last visited Oct. 13, 2023).

14 *See* SEC Proposal, *supra* note 2, at 21,356–57.

The SEC Proposal and the TCFD recommendations also differ slightly in their reporting requirements for GHG emissions. In line with the TCFD recommendations, the SEC Proposal mandates disclosure of Scope 1 and Scope 2 emissions,[15] regardless of materiality.[16] The TCFD also recommends disclosure of Scope 3 emissions "if appropriate,"[17] but the SEC Proposal requires disclosure only if Scope 3 emissions are material or "if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions."[18] Unlike the TCFD recommendations, the SEC Proposal exempts smaller reporting companies[19] from the conditional requirement to disclose Scope 3 emissions[20] and creates a safe harbor from fraud liability if a registrant discloses Scope 3 emissions with a reasonable basis and in good faith.[21] Finally, although the TCFD recommends that companies calculate their emissions in line with the Greenhouse Gas Protocol (GHG Protocol),[22] the SEC Proposal does not require companies to follow any specific methodology.[23]

The SEC Proposal requires registrants to make their climate-related disclosures in their registration statements and annual reports—relatively formal filings with heightened liability risk for false or misleading statements.[24] It also mandates that registrants include audited climate-related financial-statement metrics and related disclosures in a note in their financial statements.[25] In addition, accelerated[26] and large accelerated filers[27] must provide initially limited but eventually reasonable assurance for Scope 1 and Scope 2 disclosures, but not for Scope 3 disclosures.[28] Finally, registrants must electronically tag their disclosures in Inline XBRL, making the disclosures machine-readable.[29]

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[15] Scope 1 emissions are "direct GHG emissions that occur from sources owned or controlled by the company"; Scope 2 emissions are those "primarily resulting from the generation of electricity purchased and consumed by the company"; and Scope 3 emissions are indirect emissions that are "a consequence of the company's activities but are generated from sources that are neither owned nor controlled by the company." SEC Proposal, *supra* note 2, at 21,344–45.

[16] *See* TCFD Recommendations, *supra* note 3, at 14; SEC Proposal, *supra* note 2, at 21,377.

[17] *See* TCFD Recommendations, *supra* note 3, at 14, 22.

[18] *See* SEC Proposal, *supra* note 2, at 21,377–78. The SEC may be considering dropping Scope 3 emissions disclosures from its final rule. *See, e.g.*, Jordan Wolman, *Gensler hints at pullback on climate disclosure rule*, Politico Pro (Oct. 27, 2023), https://subscriber-politicopro-com.proxy.library.nyu.edu/article/eenews/2023/10/27/gensler-hints-at-pullback-on-climate-disclosure-rule-ee-00123918 [Permalink unavailable].

[19] A smaller reporting company is an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that (1) had a public float of less than $250 million or (2) had annual revenues of less than $100 million and either (i) no public float or (ii) a public float of less than $700 million. *See* SEC Proposal, *supra* note 2, at 21,346 nn. 143.

[20] *See id.* at 21,346.

[21] *See id.* at 21,390–91.

[22] *See* TCFD Recommendations, *supra* note 3, at 22; World Business Council for Sustainable Development & World Resources Institute, The Greenhouse Gas Protocol (March 2004). The GHG Protocol provides a uniform methodology to "measure and report the seven greenhouse gases covered by the Kyoto Protocol," and it introduced the idea of scope emissions used by the TCFD, SEC, and other climate-related disclosure regimes. *See* SEC Proposal, *supra* note 2, at 21,344–45.

[23] *See* SEC Proposal, *supra* note 2, at 21,377.

[24] *See id.* at 21,345.

[25] *Id.* at 21,346.

[26] An accelerated filer is an issuer that (i) has a public float of $75 million or more, but less than $700 million; (ii) has been subject to Section 13(a) or 15(d) of the Exchange Act for at least twelve months; (iii) has filed at least one annual report; and (iv) is not a smaller reporting company. *Id.* at 21,345 nn.122.

[27] A large accelerated filer is an issuer that (i) has a public float of $700 million or more; (ii) has been subject to Section 13(a) or 15(d) of the Exchange Act for at least twelve months; (iii) has filed at least one annual report; and (iv) is not a smaller reporting company. *Id.* at 21,345 nn. 123.

[28] *Id.* at 21,346.

[29] *Id.*; *Inline XBRL*, U.S. Sec. & Exch. Comm'n (Feb. 9, 2023), https://www.sec.gov/structureddata/osd-inline-xbrl.html [https://perma.cc/FBK8-YWLE]. Requiring this information in a machine-readable format "mak[es] the disclosures more readily available and easily accessible to investors, market participants, and other users for aggregation, comparison, filtering, and other analysis, as compared to requiring a non-machine readable data language." SEC Proposal, *supra* note 2, at 21,410.

B. The SEC Proposal's Cost-Benefit Analysis

When promulgating a new rule, the SEC must consider the rule's effects on "efficiency, competition, and capital formation."[30] D.C. Circuit case law interprets this obligation as requiring a cost-benefit analysis, which is subject to arbitrary and capricious review under the Administrative Procedure Act.[31] SEC internal guidance thus requires SEC rules to contain (1) a baseline, or projection of the world as it would exist absent any agency action, and (2) an evaluation of the rule's costs and benefits (quantitative and qualitative) relative to the baseline.[32] In the SEC Proposal, the SEC prepared a baseline analysis and evaluation of costs and benefits consistent with this internal guidance and relevant case law.[33]

The Baseline

To project what the world would look like absent the SEC Proposal, the SEC's baseline must address other relevant regulatory regimes.[34] In describing this landscape with respect to climate-related disclosures, the SEC Proposal's analysis discussed existing state, federal, and foreign requirements.[35] It also emphasized that many registrants not subject to existing climate-related disclosure regimes nonetheless voluntarily disclose climate-related information,[36] albeit with large variations in form and quality.[37] Importantly, the SEC predicted that the disclosure landscape would shift as governments adopt new climate-related disclosure requirements and as more registrants voluntarily disclose climate-related information.[38]

More specifically, the SEC explained that many foreign jurisdictions had already enacted or proposed TCFD-aligned climate-related disclosure regimes.[39] It noted that, as of September 2021, companies regulated by eight foreign jurisdictions, including the European Union, already needed to provide TCFD-aligned disclosures or would need to start

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[30] *See, e.g.*, 15 U.S.C. § 77b(b); 15 U.S.C. § 80a-2(c).

[31] *See* Chamber of Commerce of the U.S. v. SEC, 412 F.3d 133, 142–44 (D.C. Cir. 2005) (referring to the SEC's "statutory obligation to determine as best it can the economic implications of the rule it has proposed"); Bus. Roundtable v. SEC, 647 F.3d 1144, 1149–51 (D.C. Cir. 2011) (finding that the SEC "neglected its statutory obligation to assess the economic consequences of its rule"); Timpinaro v. SEC, 2 F.3d 453, 457–60 (D.C. Cir. 1993); Am. Equity Inv. Life Ins. v. SEC, 613 F.3d 166, 176–79 (D.C. Cir. 2010); John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L.J. 882, 914 (2015) (describing *Chamber of Commerce* as "interpret[ing] the requirement that the SEC 'consider' a rule's effects on 'efficiency' to imply a very specific [cost-benefit analysis] mandate"); Robert J. Jackson, Jr., *Comment: Cost-Benefit Analysis and the Courts*, 78 Law & Contemp. Probs. 55, 62 (2015) (noting that "the D.C. Circuit made clear [in *Chamber of Commerce*] that it intends to read the law" as obligating the SEC to conduct a cost-benefit analysis).

[32] *See* Memorandum from RSFI and OGC to Staff of the Rulewriting Divisions and Offices on Current Guidance on Economic Analysis in SEC Rulemakings 4 (Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf [https://perma.cc/S35K-QQ7V].

[33] If another court hears a challenge to the SEC Proposal, D.C. Circuit case law would provide only persuasive authority.

[34] *See Am. Equity Inv. Life Ins.*, 613 F.3d at 178 (finding that the SEC's economic analysis was improper because "it did not assess the baseline level of price transparency and information disclosure under state law").

[35] *See* SEC Proposal, *supra* note 2, at 21,413–24.

[36] *See id.* at 21,415–24.

[37] For example, SEC staff reviewed 6,644 annual reports submitted from June 27, 2019, to December 31, 2020, for mention of key words related to climate change, finding that 33% of annual reports included some relevant disclosures. Foreign issuers, large accelerated filers, and those in industries such as maritime transportation, oil and gas, and steel manufacturing were most likely to provide these reports. *Id.* at 21,415. In addition, the SEC cited an analysis of 524 U.S. companies that the Carbon Disclosure Project deemed "high impact" based on market capitalization and GHG emissions. The analysis revealed that 402 of these companies disclosed their emissions through the Carbon Disclosure Project system in 2021, with only 22.1% disclosing their Scope 3 emissions. *Id.* at 21,422. The SEC also discussed a U.S. Chamber of Commerce survey sampling 436 public U.S. companies, which found that the majority of firms that disclose climate-related information do not do so in regulatory filings. *Id.*

[38] *See id.* at 21,414–15 (expressly highlighting likely future changes in foreign governments' climate-related disclosure requirements and implicitly acknowledging the possibility of similar changes in the requirements of U.S. states).

[39] *Id.*

doing so between 2022 and 2025.[40] The SEC thus contemplated that registrants with foreign operations may already be complying with, or preparing to comply with, disclosure requirements similar to those in the SEC Proposal.[41]

Critically, the SEC also highlighted that other jurisdictions had recently proposed but not yet finalized similar TCFD-aligned disclosure requirements or signaled support for the TCFD recommendations.[42] As explained below, since the release of the SEC Proposal in March 2022, various jurisdictions have adopted or expanded their climate-related disclosure requirements, just as the SEC predicted in its baseline analysis.

In addition, the SEC's baseline analysis acknowledged existing state laws that mandated climate-related disclosures by insurance companies and federal and state regulations that required certain GHG emissions disclosures.[43] In discussing this second set of requirements, the SEC highlighted the Environmental Protection Agency's reporting mandate for certain facility-level emissions and GHG reporting regimes in various states.[44] The SEC concluded that, because of these requirements, some registrants "may already have in place certain processes and systems to measure and disclose their emissions."[45]

Costs and Benefits

As explained in its analysis, the SEC Proposal's direct costs are increased compliance burdens for registrants.[46] For example, registrants may need to make staffing changes, collect new types of data, and develop new software or reporting systems.[47] The SEC Proposal also identifies possible indirect costs, such as the disclosure of proprietary information and increased litigation.[48]

But the SEC noted that compliance costs will likely decline after companies have incurred the fixed costs of developing climate-related disclosures for the first time.[49] For these companies, establishing a standardized framework for climate-related disclosures could also reduce third-party information requests and uncertainty about whether and how to disclose climate-related information.[50] In addition, the SEC explained that companies that already comply with foreign disclosure regimes or voluntarily provide climate-related information will face lower compliance costs, especially because the SEC Proposal largely aligns with the TCFD recommendations.[51] Finally, the SEC predicted that, independent of its proposed rule, investor demand would lead more registrants to disclose climate-related information over time so that the "incremental costs for complying with the proposed rules [will] become lower for an increasing number of firms."[52]

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[40] *Id.* at 21,414–15.
[41] *Id.* at 21,415.
[42] *Id.*
[43] *Id.* at 21,413–14.
[44] *Id.* at 21,414. In particular, the SEC noted that the Environmental Protection Agency's 2009 Mandatory Reporting of Greenhouse Gases Rule, which obligates large direct emitters and suppliers to disclose GHG emissions at the facility level, may contribute to registrants' Scope 1 and Scope 3 emissions disclosures. *Id.*
[45] *Id.*
[46] *Id.* at 21,439.
[47] *Id.*
[48] *Id.* at 21,443–44.
[49] *See id.* at 21,444.
[50] *See id.*
[51] *See id.* at 21,442–43.
[52] *Id.* at 21,443.

The SEC Proposal's primary benefits are increased consistency, comparability, and reliability of climate-related disclosures, which will enable investors to make better-informed investment decisions.[53] The proposal thus addresses the SEC's concern that "the existing disclosures of climate-related risks do not adequately protect investors," given increased investor demand for climate-related information and current disparities in the type, completeness, and location of climate-related disclosures.[54]

Other benefits include addressing market failures and improving the resilience of the capital markets.[55] The SEC emphasized that the proposal mitigates information asymmetry and agency problems between firm management and shareholders.[56] According to the SEC, reduced information asymmetry may also improve liquidity, lower capital costs, and increase asset prices.[57] Incorporating climate-related information into asset prices would also lead to more efficient risk allocation and therefore a more resilient financial system.[58]

Finally, the SEC highlighted the value of requiring registrants to file climate-related disclosures in their registration statements and annual reports, rather than simply providing this information in exhibits to their filings or posting it online.[59] The SEC maintained that integrating climate-related information into formal filings will increase the information's reliability, improve investor confidence, lower investor search costs, and improve information-processing efficiencies.[60]

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[53] *See id.* at 21,429.

[54] *See id.* at 21,335, 21,429.

[55] *See id.* at 21,413, 21,430–31.

[56] *See id.* at 21,430. According to the SEC, "[a]gency problems could occur when management act opportunistically in their own self-interest at the expense of shareholders by disclosing only certain climate-related information at their discretion." *Id.*

[57] *See id.* at 21,430–31.

[58] *See id.* at 21,413.

[59] *See id.* at 21,429.

[60] *See id.*

II. New California and E.U. Climate-Related Disclosure Requirements

Since the SEC Proposal's release, both California and the European Union have adopted climate-related disclosure regimes that generally align with the proposal. This section compares the SEC Proposal with each of these new climate-related disclosure regimes. It also briefly discusses other foreign climate-related disclosure frameworks adopted since the SEC proposed its rule.

A. California

In October 2023, California enacted two laws[61] that require large U.S. companies doing business in California[62] to disclose their climate-related financial risks and GHG emissions.[63]

Under California's Climate-Related Financial Risk Act (SB 261), U.S. companies[64] that do business in California and have total annual revenues exceeding $500 million[65] must publish biennial climate-related financial risk reports on their company websites beginning on January 1, 2026.[66] These reports must include (1) disclosures about the company's material climate-related financial risks and (2) any measures adopted to reduce and adapt to these risks.[67] The law exempts

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[61] *See* Climate Corporate Data Accountability Act (SB 253) (legislative counsel's digest), ch. 382, sec. 2, § 38532 (2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB253 [https://perma.cc/SEM8-845V]; Climate-Related Financial Risk Act (SB 261) (legislative counsel's digest), ch. 383, sec. 2,, § 38533 (2023), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB261 [https://perma.cc/TB46-F4Z8].

[62] Neither law explicitly defines what it means to do business in California. *See id.* But other state regulations define this phrase to mean "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit [within California]." Cal. Rev. & Tax. Code (RTC) § 23101(a). Being organized or commercially domiciled in California or having California sales, property, or payroll exceeding specified amounts satisfies the definition. Cal. Rev. & Tax. Code (RTC) § 23101(b)(1)–(4). Legal observers expect the new laws to conform to the Revenue and Tax Code definition. *See, e.g.*, Sara Dewey, *Signs of Progress on Corporate Climate Disclosure Ahead of SEC's Final Rule*, The Harvard Law School Environmental & Energy Law Program, nn. 4 (Sept. 19, 2023), https://eelp.law.harvard.edu/2023/09/signs-of-progress-on-corporate-climate-disclosure-ahead-of-secs-final-rule/#_ftn4 [https://perma.cc/3KHS-V683]; *California Legislature Passes Landmark Climate Disclosure Bills*, Kirkland & Ellis, nn. 5 (Sept. 21, 2023), https://www.kirkland.com/publications/kirkland-alert/09/california-legislature-passes-landmark-climate-disclosure-bills [https://perma.cc/389U-5AK6].

[63] In signing the bills into law, Governor Gavin Newsom instructed his administration to work with the legislature to resolve his concerns related to the feasibility of the bills' implementation timelines. He also expressed concern over the financial impact of the bills and SB 253's potential promotion of inconsistent scope emissions reporting practices. *See* Governor Newsom, Senate Bill 261 Signing Statement to the Members of the California Senate (Oct. 7, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-261-Signing.pdf [https://perma.cc/9DCQ-3Z6L]; Governor Newsom, Senate Bill 253 Signing Statement to the Members of the California Senate (Oct. 7, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-253-Signing.pdf [https://perma.cc/9W8F-XZAS].

[64] This category includes corporations, partnerships, and limited liability companies incorporated or formed in the United States. This definition excludes insurance companies. *See* ch. 383, sec. 2, § 38533(a)(4).

[65] Applicability is based on revenue for the prior fiscal year. *See id.* At least one law firm has highlighted several ambiguities related to this revenue threshold, including whether it refers to gross or net revenue and whether it reflects the consolidated revenues of all of an entity's affiliates. *See* Tim Duncheon, et al., *California Legislature Passes Landmark Climate Disclosure Laws: Spotlight on SB 261*, Inside Energy & Environment (Sept. 18, 2023), https://www.insideenergyandenvironment.com/2023/09/california-legislature-passes-landmark-climate-disclosure-laws-spotlight-on-sb-261/?_gl=1*dfz0ec*_ga*NTM4MjU4MTYyLjE2OTY5OTI1MjI.*_ga_KSNMJSN08X*MTY5NzIyNjMzMy4yLjEuMTY5NzIyNzUxMS4wLjAuMA [https://perma.cc/8E8P-KBTT].

[66] *See* ch. 383, sec. 2, § 38533(a)(4), (b)(1)(A), (c)(1).

[67] *See* ch. 383, sec. 2, § 38533(a)(2), (b)(1)(A)(i)–(ii). Although the statute does not expressly adopt all of the TCFD's recommendations, the general reference to the TCFD's entire set of recommendations suggests that the California Legislature intended to do so. Many commenters interpret the statute as having done so. *See, e.g.*, Ernst & Young, *Technical Line: How the climate-related disclosures under the SEC proposal, the ESRS and the ISSB Standards compare*, EY Accounting Link 17 (Sept. 20, 2023), https://www.ey.com/en_us/assurance/accountinglink/

companies that already publish compatible biennial disclosures voluntarily or in compliance with another mandatory reporting regime.[68] SB 261 also requires the California Air Resources Board (CARB) to contract with a nonprofit climate reporting organization to prepare a biennial public report analyzing companies' disclosures and identifying any deficiencies.[69]

Because both the SEC Proposal and SB 261 draw on the TCFD recommendations, their disclosure requirements should generally align. Both regimes require different disclosures depending on materiality. For example, companies need only disclose material climate-related financial risks,[70] but they must disclose other information, like how they manage these risks, regardless of materiality.[71] The key differences between the SEC Proposal and SB 261 concern the form and frequency of reporting: registration statements and annual reports for the SEC Proposal, and biennial reports for SB 261.[72]

California's Climate Corporate Data Accountability Act (SB 253) complements SB 261 by requiring U.S. companies[73] doing business in California[74] and with total annual revenues exceeding $1 billion[75] to disclose their annual Scope 1, Scope 2, and Scope 3 GHG emissions to an emissions reporting organization that contracts with CARB.[76] Although CARB's implementing regulations remain pending,[77] the law requires that disclosures be publicly reported, independently audited, and in conformance with the GHG Protocol standards.[78]

Regarding GHG emissions disclosures, SB 253 differs from the SEC Proposal in three key respects; where they differ, the SEC Proposal is less demanding than SB 253. First, SB 253 requires the disclosure of all Scope 3 GHG emissions for all companies subject to the law.[79] By contrast, the SEC Proposal mandates that registrants disclose Scope 3 emissions only if material or if the registrant has set an emissions reduction target or goal that includes Scope 3 emissions.[80] It also exempts smaller companies from this requirement altogether.[81] Second, SB 253 requires companies to obtain third-party assurance for Scope 1, Scope 2, and Scope 3 disclosures, while the SEC limits this requirement to its largest registrants'

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technical-line---how-the-climate-related-disclosure-proposals-fr [https://perma.cc/Z3UD-EX3T] [hereinafter "Ernst & Young Report"].

68 This exemption covers disclosures made "[p]ursuant to a law, regulation, or listing requirement issued by any regulated exchange, national government, or other governmental entity" and pursuant to voluntary frameworks consistent with the TCFD recommendations. SB 261 further specifies that the International Sustainability Standards Board's International Financial Reporting Standards is a suitable alternative framework. *See id.* at § 38533(b)(4).

69 *See id.* at § 38533(b)(3), (d)(1). The act permits companies to provide these disclosures "to the best of [their] ability" and to describe any reporting gaps and steps they will take to provide complete disclosures. *See* ch. 383, sec. 2, § 38533 (b)(1)(B).

70 *See* SEC Proposal, *supra* note 2, at 21,345; ch. 383, sec. 2, § 38533(a)(2), (b)(1)(A)(i). SB 261 defines climate-related financial risk as "material risk of harm to immediate and long-term financial outcomes due to physical and transition risks, including, but not limited to, risks to corporate operations, provision of goods and services, supply chains, employee health and safety, capital and financial investments, institutional investments, financial standing of loan recipients and borrowers, shareholder value, consumer demand, and financial markets and economic health." ch. 383, sec. 2, § 38533(a)(2).

71 *See* SEC Proposal, *supra* note 2, at 21,345; ch. 383, sec. 2, § 38533(b)(1)(A).

72 *See* SEC Proposal, *supra* note 2, at 21,345; ch. 383, sec. 2, § 38533(b)(1)(A), (c)(1).

73 This category includes corporations, partnerships, limited liability companies, and other business entities incorporated or formed in the United States. ch. 382, sec. 2, § 38532(b)(2).

74 Regarding the "doing business in California" criterion, SB 253 contains the same ambiguity as SB 261. *See supra* note 62.

75 As with SB 261, applicability is based on prior fiscal year revenue. ch. 382, sec. 2, § 38532(b)(2).

76 *See id.* at § 38532(c)(1)(A)(i).

77 CARB has until January 1, 2025, to promulgate implementing regulations. *Id.* at § 38532(c)(1).

78 *See id.* at § 38532(c)(1)(A)(i)–(ii), (F)(1).

79 *See id.* at § 38532(c)(1).

80 *See* SEC Proposal, *supra* note 2, at 21,377–78.

81 *See id.*

Scope 1 and Scope 2 emissions.[82] Finally, SB 253 states that disclosures must conform to the GHG Protocol standards and related guidance; the SEC Proposal does not require adherence to any particular protocol.[83]

In terms of similarities, for companies that must obtain assurance for Scope 1 and Scope 2 emissions, both regimes initially require limited assurance, later transitioning to reasonable assurance.[84] In addition, both regimes provide a safe harbor for Scope 3 emissions disclosures made with a reasonable basis and in good faith. [85]

B. The European Union

The European Union's Corporate Sustainability Reporting Directive (CSRD) took effect on January 5, 2023.[86] It replaced the Non-Financial Reporting Directive, which applied only to large public interest companies[87] with over 500 employees.[88] The CSRD applies more broadly to (1) large[89] European Union-based companies (publicly listed or not), (2) all companies, except certain companies exempted based on their small size, listed on a European Union-regulated market, and (3) European Union-based parent companies of large groups.[90] The CSRD also applies to non-E.U. companies that undertake "significant activity" in the European Union.[91]

Companies subject to the CSRD must report their disclosures in line with the European Sustainability Reporting Standards (ESRS and, collectively with the CSRD, the E.U. framework) and complementary standards expected by June 2024 or with yet-to-be-identified alternative standards that the European Commission deems equivalent.[92] The

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[82] *See* ch. 382, sec. 2, § 38532(c)(1); SEC Proposal, *supra* note 2, at 21,346.

[83] *See* ch. 382, sec. 2, § 38532(c)(1)(A)(ii); SEC Proposal, *supra* note 2, at 21,377.

[84] *See* SEC Proposal, *supra* note 2, at 21,346; ch. 382, sec. 2, § 38532(c)(1)(F)(ii).

[85] *See* ch. 382, sec. 2, § 38532(f)(2)(B).

[86] European Commission, *Corporate Sustainability Reporting*, European Commission, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en#:~:text=On%205%20January%202023%2C%20the,that%20companies%20have%20to%20report [https://perma.cc/YY6Z-9WB9] (last visited Oct. 13, 2023) [hereinafter "European Commission, *Corporate Sustainability Reporting*"].

[87] Public interest companies are European Union-governed companies with securities listed on a European Union-regulated market, certain European Union-based credit institutions and insurance companies, and companies designated as public interest companies by an E.U. member state. *See Directive 2013/34/E.U. of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC*, Art. 2(1), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0034 [https://perma.cc/GF2D-RWGV] [hereinafter "Directive 2013/34/EU"]. *See also* Nora Hanh-Kamper Vandebulcke, *Briefing: Non-financial Reporting Directive*, European Parliamentary Res. Serv. 7 (Jan. 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf [https://perma.cc/G4GR-SDG7].

[88] *See Directive 2014/95/E.U. of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/E.U. as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, Art. 1(1), 1(3), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095 [https://perma.cc/L3FL-Z6CG]. *See also* European Commission, *Corporate sustainability reporting*, *supra* note 86.

[89] "Large" means that the entity in question meets at least two of the following in the European Union: (1) more than 250 employees; (2) a net turnover of more than €40 million; or (3) total assets of more than €20 million. *See* Skadden, Arps, Slate, Meagher & Flom LLP, *Q&A: The E.U. Corporate Sustainability Reporting Directive*, Skadden (Oct. 9, 2023), https://www.skadden.com/insights/publications/2023/10/qa-the-eu-corporate-sustainability-reporting-directive [https://perma.cc/8R3F-QECU] [hereinafter "Skadden Report"].

[90] *See Directive (EU) 2022/… of the European Parliament and of the Council of… amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting*, at 17, https://data.consilium.europa.eu/doc/document/PE-35-2022-INIT/en/pdf [https://perma.cc/YY88-NPZC] [hereinafter "CSRD"].

[91] *See id.* at 19. Significant activity exists where a non-E.U. company generates a net turnover of over €150 million per year and has either (1) a European Union-based subsidiary that qualifies as a large undertaking or as a small or medium-sized undertaking, except micro undertakings, with securities listed on a European Union-regulated market or (2) a European Union-based branch with a net turnover of over €40 million. *Id.*

[92] *See id.* at 60, 139; European Commission, *Corporate Sustainability Reporting*, *supra* note 86.

European Commission adopted the first set of ESRS in July 2023.[93] The E.U. framework requires companies to include sustainability information, including climate-related disclosures, in company management reports.[94]

Like the SEC Proposal and the TCFD recommendations, the E.U. framework requires disclosures related to governance, strategy, risk management, and metrics and targets.[95] But the E.U. framework differs from the SEC Proposal in several notable respects; yet again, where they differ, the SEC Proposal is generally less demanding than the E.U. framework. The SEC Proposal uses a version of financial materiality as a threshold for certain disclosures.[96] By contrast, the E.U. framework adopts a double materiality principle:[97] The E.U. framework uses both financial materiality and "impact materiality," which refers to the human and environmental impacts of an entity's activities.[98] In addition, unlike the SEC Proposal but similar to the TCFD recommendations, the E.U. framework requires companies to disclose material climate-related opportunities and to use scenario analysis (considering at least a 1.5°C global warming scenario).[99]

The E.U. framework and the SEC Proposal also differ in their GHG emissions reporting requirements; here, too, the SEC Proposal is generally less demanding. The E.U. framework mandates reporting of Scope 3 emissions.[100] As noted, the SEC Proposal requires disclosure of Scope 3 emissions only if material or if the registrant has included Scope 3 emissions in a GHG emissions reduction target or goal.[101] In addition, the E.U. framework requires companies to obtain initially limited but eventually reasonable assurance for all sustainability reporting, including Scope 3 emissions.[102] As noted, the SEC Proposal requires only certain companies to obtain initially limited but eventually reasonable assurance for Scope 1 and Scope 2, but not Scope 3, emissions.[103] Unlike the SEC Proposal,[104] the E.U. framework does not provide a safe harbor for Scope 3 disclosures.[105] Finally, while neither the E.U. framework nor the SEC Proposal requires companies to follow the GHG Protocol in calculating emissions, the E.U. framework aligns more closely with the TCFD recommendations by requiring companies to consider the "principles, requirements, and guidance" in the Protocol.[106]

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93 European Commission, *Corporate Sustainability Reporting*, *supra* note 86.

94 *See Annex to the Commission Delegated Regulation (EU) …/… supplementing Directive 2013/34/E.U. of the European Parliament and the Council as regards sustainability reporting standards*, at 16–17, COD (2021) 5303 final – ANNEX 1 (Aug. 30, 2023), https://ec.europa.eu/finance/docs/level-2-measures/csrd-delegated-act-2023-5303-annex-1_en.pdf [https://perma.cc/62JW-WXGN] [hereinafter "ESRS"].

95 *See* TCFD Recommendations, *supra* note 3, at v, 14; SEC Proposal, *supra* note 2, at 21,343, 21,345, 21,457; ESRS, *supra* note 94, at 3–4.

96 *See supra* note 8 and accompanying text.

97 *Id.* at 5.

98 *See* ESRS, *supra* note 94, at 7.

99 *See* TCFD Recommendations, *supra* note 3, at 14, 25; SEC Proposal, *supra* note 2, at 21,345, 21, 351, 21,353, 21,356–57; ESRS, *supra* note 94, at 2–5, 70, 82–83.

100 *See* ESRS, *supra* note 94, at 74–75, 92–93.

101 *See* SEC Proposal, *supra* note 2, at 21,377–78

102 *See* CSRD, *supra* note 90, at 66–67, 76, 131, 151 (requiring assurance for sustainability reporting).

103 *See* SEC Proposal, *supra* note 2, at 21,346.

104 *See id.* at 21,390–91.

105 *See generally* ESRS, *supra* note 94. *See also* Ernst & Young Report, *supra* note 67.

106 *See* SEC Proposal, *supra* note 2, at 21,377; ESRS, *supra* note 94, at 90.

C. A Note on Other Foreign Requirements

In addition to California and the European Union, several other jurisdictions have introduced or strengthened climate-related risk disclosure regimes since the SEC Proposal's release in March 2022. These include government entities in the United Kingdom, Canada, and Japan, as well as Hong Kong's regulated stock exchange.[107] Many countries have also signaled that they might adopt the International Sustainability Standards Board's voluntary reporting standards released in June 2023.[108] But these changes will affect far fewer SEC registrants than the California and E.U. disclosure regimes.[109]

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[107] In April 2022, two new U.K. regulations entered into force, requiring many U.K. companies and limited liability partnerships to make TCFD-aligned disclosures as part of their annual reporting. *See* The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022, SI 2022/31, https://www.legislation.gov.uk/uksi/2022/31/contents/made [https://perma.cc/26R6-UXJD]; The Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022, SI 2022/46, https://www.legislation.gov.uk/uksi/2022/46/contents/made [https://perma.cc/625Q-4RKN]. *See also* Greg Norman et al., *Q&A: New Climate-Related Disclosure Regulations for UK and LLPs*, Skadden (Apr. 19, 2022), https://www.skadden.com/insights/publications/2022/04/qa-new-climate-related-disclosure-regulations [https://perma.cc/76W8-3EQF]. In March 2023, Canada's Office of the Superintendent of Financial Institutions published guidance recommending that covered institutions make annual TCFD-aligned disclosures. *See* Office Of the Superintendent of Financial Institutions, *Climate Risk Management* (Mar. 2023), https://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/b15-dft.aspx [https://perma.cc/T2SG-FCVX]; Office of the Superintendent of Financial Institutions, *OFSI issues new Guidance on Climate Risk Management* (Mar. 7, 2023), https://www.osfi-bsif.gc.ca/Eng/osfi-bsif/med/Pages/b15-nr.aspx [https://perma.cc/E7K3-REKJ]. The Japan Financial Services Agency proposed an amendment to existing regulations that will require additional environmental, social, and governance disclosures by companies listed in Japan. Tomoko Fuminaga and Kyoko Nagano, *Japan Introduces Mandatory ESG Disclosures for Public Companies*, Morgan Lewis (Dec. 22, 2022), https://www.morganlewis.com/pubs/2022/12/japan-introduces-mandatory-esg-disclosures-for-public-companies [https://perma.cc/9BKC-428D] [hereinafter "Fuminaga and Nagano"]. In April 2023, Hong Kong's regulated stock exchange proposed amendments to its current disclosure framework that would require listed companies to annually file TCFD-aligned disclosures. *See* Stock Exchange of Hong Kong Limited, *Enhancement of Climate-related Disclosures Under the Environmental, Social and Governance Framework* (Apr. 2023), https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/April-2023-Climate-related-Disclosures/Consultation-Paper/cp202304.pdf [https://perma.cc/XZ6C-JR5F]; Stock Exchange of Hong Kong Limited, *Exchange Publishes Consultation Paper on Enhancement of Climate Disclosure under its ESG Framework* (Apr. 14, 2023), https://www.hkex.com.hk/News/Regulatory-Announcements/2023/230414news?sc_lang=en [https://perma.cc/PFB4-CH2L].

[108] Sara Feijao, *ISSB publishes final versions of first two global sustainability disclosure standards*, Linklaters (June 27, 2023), https://sustainablefutures.linklaters.com/post/102ii0r/issb-publishes-final-versions-of-first-two-global-sustainability-disclosure-stand [https://perma.cc/6ZX5-N8Q9].

[109] For example, Japan's rules apply only to companies listed on its exchanges, *see* Fuminaga and Nagano, *supra* note 108, which include only six foreign companies as of November 2, 2023, *see* Japan Exchange Group, *Number of Listed Companies/Shares*, https://www.jpx.co.jp/english/listing/co/index.html [https://perma.cc/3LLU-CYDZ] (last visited Nov. 2, 2023). But the SEC's Proposal will apply to certain foreign companies, including those based in Japan, Hong Kong, Canada, and the United Kingdom, that are subject to the SEC's reporting requirements. *See* SEC Proposed Rule, *supra* note 1, at 21,345, 21,408; U.S. Sec. and Exch. Comm'n, Accessing the U.S. Capital Markets – A Brief Overview for Foreign Private Issuers (Feb. 13, 2013), https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml#:~:text=A%20foreign%20company%20will%20qualify,of%20its%20executive%20officers%20or [https://perma.cc/QRJ7-3MLH] (explaining that if a foreign company does not qualify for foreign private issuer status, it has the same reporting obligations as domestic U.S. companies). Thus, certain foreign issuers already complying or preparing to comply with comparable climate disclosure rules in other jurisdictions will face reduced costs in complying with the SEC's rule, but investors will still benefit from being able to compare registrants' disclosures. *See* discussion *infra* Part III.B.

III. Impact of California and E.U. Climate-Related Disclosure Requirements on the SEC Proposal

This Part addresses how the changes to the climate-related disclosure regulatory landscape discussed in Part II may affect the SEC Proposal's cost-benefit analysis.

The California and E.U. climate-related disclosure requirements have not significantly affected the SEC's baseline analysis because the SEC anticipated the continued adoption of TCFD-aligned disclosure requirements in other jurisdictions and accounted for GHG reporting laws in other U.S. states. In addition, the SEC Proposal's baseline accounted for the voluntary emissions reporting practices of many of the same companies now subject to the California and E.U. requirements.

With more companies reporting substantially similar climate-related information, either in compliance with these other laws or voluntarily, net compliance costs for SEC registrants have likely declined since the SEC Proposal's release. But the SEC Proposal will still benefit investors by increasing the consistency, comparability, and reliability of these existing disclosures.

A. Impact on the SEC Proposal's Baseline Analysis

The California and E.U. regimes extend mandatory climate-related financial disclosure obligations to many public U.S. companies that would be subject to the SEC Proposal. The exact number is currently unclear. The California Assembly and Senate Floor Analyses estimate that SB 261 covers 10,000 companies, 2,000 of which are publicly traded.[110] Some researchers place the total number of public companies in the United States at around 3,750, indicating that a majority of U.S. public companies may be subject to SB 261.[111] SB 253 is estimated to reach roughly 5,300 companies, of which about 27% are public.[112] By another estimate, SB 261 and SB 253 both cover 73% (727) of Fortune 1000 companies, with SB 253 alone covering an additional 2% (24 insurance companies).[113] Financial data firm Refinitiv estimates that the E.U. framework subjects at least approximately 3,200 United States-based companies to its reporting obligations, but not all of these companies are necessarily SEC registrants.[114]

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[110] Assemb. Floor Analysis, 2 (Cal. Sept. 8, 2023), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB261 [https://perma.cc/93LL-4NHF]; S. Floor Analysis, 5 (Cal. Sept. 12, 2023) (same link).

[111] *See* Center for Research in Security Prices, LLC, US Market Update August 2023, 4, 7, 14 (Aug. 2023), https://www.crsp.org/wp-content/uploads/2023/10/CRSP_Market_Update_-_August_2023.pdf [https://perma.cc/936L-U6ZV] (*see* references in each table to the "Count" of "CRSP U.S. Total Market").

[112] S. Floor Analysis, 6 (Cal. Sept. 11, 2023), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB253 [https://perma.cc/XFG7-DB8F]; Assemb. Floor Analysis, 2 (Cal. Sept 7, 2023) (same link).

[113] Public Citizen, Americans for Financial Reform Education Fund, and Sierra Club, How might California's new climate disclosure laws impact federal rulemaking? 3 (Oct. 2023), https://www.citizen.org/article/california-sec-climate-disclosure-report/ [https://perma.cc/K6BJ-ZCVR].

[114] *See* Deiter Holger, *At Least 10,000 Foreign Companies to Be Hit by E.U. Sustainability Rules*, Wall Street Journal (Apr. 5, 2023, 4:46 AM), https://www.wsj.com/articles/at-least-10-000-foreign-companies-to-be-hit-by-eu-sustainability-rules-307a1406 [https://perma.cc/C77W-QM5V] (reporting Refinitiv's finding that about 10,400 foreign companies would be affected by the CSRD, 31% of which are American).

The California and E.U. requirements do not undermine the SEC Proposal's essential conclusion regarding the baseline. Most notably, the SEC Proposal's baseline anticipated that TCFD-aligned disclosure regimes would continue to proliferate in other jurisdictions after the SEC released its proposed rule.[115] The SEC even expressly mentioned the CSRD as an example of other jurisdictions' plans to expand preexisting disclosure requirements in line with the TCFD recommendations.[116] Especially given their alignment with the TCFD framework,[117] California's SB 253 and SB 261 are consistent with this trend.

In addition, the SEC Proposal's baseline documented that many registrants, particularly large ones, already voluntarily disclose climate-related information, including their GHG emissions.[118] For example, the SEC cited a Carbon Disclosure Project study finding that, of the 524 U.S. companies in the sample, 402 disclosed their emissions in 2021 through the Carbon Disclosure Project system, compared with 379 in 2020 and 364 in 2019.[119] The SEC noted a range in the content and detail of these voluntary disclosures, which further justified the need for consistent, comparable, and reliable disclosures from all registrants.[120] Nonetheless, the baseline accounted for the voluntary behavior of many of the same companies now subject to mandatory reporting regimes in California and the European Union.

B. Impact on Costs and Benefits Identified by the SEC

Overall, the new California and E.U. climate-related disclosure regimes underscore a central reason for the SEC Proposal: There is an "increasing global recognition of the need to improve companies' climate-related disclosures"[121] and, relatedly, to provide consistent, comparable, and reliable information for investors.

Moreover, the new California and E.U. disclosure regimes are likely to decrease the total costs to registrants of complying with the SEC Proposal. As the SEC noted in its cost-benefit analysis, the SEC Proposal is "broadly consistent with the TCFD framework," so the SEC expects "lower incremental compliance costs for registrants that provide most or all disclosures according to the TCFD or related frameworks."[122] Thus, by increasing the number of registrants that are already providing TCFD-aligned disclosures, the California and E.U. regimes will reduce the total compliance burden attrributable to the SEC Proposal. In fact, as noted above, parts of the SEC Proposal are less onerous than its California and E.U. counterparts.[123] In other words, at least some provisions of the SEC Proposal should impose no additional information-gathering costs on companies that are already subject to the California and/or E.U. regimes.

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[115] *See* SEC Proposal, *supra* note 2, at 21,414–15. The SEC decided to align its proposed rule with the TCFD recommendations because of the growing voluntary and mandatory use of TCFD-aligned disclosure frameworks. *See id.* at 21,343–44.

[116] *See id.* at 21,343, nn. 94 and accompanying text, 21,415, nn. 750 and accompanying text.

[117] *See supra* at 8–9.

[118] *See* SEC Proposal, *supra* note 2, at 21,422.

[119] *See id.*

[120] *See id.* at 21,341–42, 21,415–24

[121] *Id.* at 21,343.

[122] *Id.* at 21,443.

[123] For example, unlike the E.U. framework, the SEC Proposal does not require scenario analysis or mandatory Scope 3 emissions disclosures regardless of materiality. *See supra* at 3–4, 10. The SEC adopted more lenient and flexible standards because it recognized that compliance could otherwise prove unduly costly or difficult for companies or expose them to undue liability. *See, e.g.*, SEC Proposal, *supra* note 2, at 21,357, 21,377, 21,449, 21,450 (discussing the costs or difficulties associated with requiring scenario analysis, mandatory Scope 3 emissions disclosures regardless of materiality, and adherence to GHG Protocol methodology, as well as with removing the Scope 3 emissions safe harbor, respectively).

An additional cost consideration is that both California and the European Union have noted that they will exempt companies from SB 261 and the E.U. framework, respectively, if they comply with an appropriate alternative.[124] Thus, if the SEC's final rule is deemed an appropriate alternative, some companies will not need to comply with multiple mandatory disclosure regimes simultaneously, further reducing costs.

At the same time, the SEC Proposal's benefits have not declined to the same degree as the associated costs. True, more or perhaps even a majority of SEC registrants will now provide TCFD-aligned disclosures due to the new California and E.U. disclosure regimes. Some may argue that this development reduces the benefits associated with the SEC Proposal because, even without the SEC Proposal, investors will now have increased access to consistent, comparable, and reliable climate-related information.

But requiring *all* SEC registrants to provide such information still provides incremental benefits. It may be difficult for investors to compare SEC registrants based on climate-related information if some are subject to mandatory disclosure regimes while others are not, as is currently the case.[125] Indeed, in explaining the need for its proposal, the SEC noted that registrants currently provide incomplete and inconsistent disclosures, increasing the costs for investors to obtain useful climate-related information and impairing investors' ability to make investment and voting decisions.[126] Requiring all SEC registrants to provide the same mandatory disclosures will thus provide consistency and comparability benefits to investors.

The SEC Proposal may also enhance the reliability of climate-related disclosures relative to other regimes. For example, unlike the California regime, the SEC Proposal requires climate-related disclosures in formal filings, rather than merely on companies' websites.[127] These filings are therefore likely subject to greater potential liability under federal securities law.[128] As a result, the SEC's required climate-related disclosures may offer additional reliability,[129] thereby increasing investor confidence.[130]

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[124] *See* ch. 383, sec. 2, § 38533(b)(4)(A) (California); CSRD, *supra* note 90, at 60, 139 (EU). Under the E.U. framework, this exemption would be available only to non-E.U. entities that fall under the CSRD because they have a qualifying E.U. branch or E.U. subsidiary. *See* CSRD, *supra* note 90, at 20.

[125] The SEC noted that, without the proposed rule, there could be an "informational gap between U.S. registrants and companies operating in foreign jurisdictions which require climate-related disclosures." *See* SEC Proposal, *supra* note 2, at 21,446–47. This status quo may create investor uncertainty when comparing U.S. registrants and foreign competitors and place U.S. companies at a competitive disadvantage. *Id.*

[126] *See id.* at 21,335.

[127] *See* ch. 383, sec. 2, § 38533(b)(1)(A), (c)(1); ch. 382, sec. 2, § 38532(c)(1); SEC Proposed Rule, *supra* note 2, at 21,334. Companies in California must report GHG emissions to a nonprofit emissions reporting organization that contracts with CARB. *See* ch. 382, sec. 2, § 38532(c)(1).

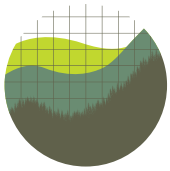
[128] *See* SEC Proposal, *supra* note 2, at 21,339. Liability for noncompliance with the CSRD will depend on how individual countries transpose the law, and California may impose administrative penalties for insufficient or inaccurate reporting. *See* Skadden Report, *supra* note 89; *see* ch. 382, sec. 2, § 38532(e)(2); ch. 383, sec. 2, § 38533 (f)(2).

[129] *See* SEC Proposal, *supra* note 2, at 21,339, 21,429 (noting that this potential liability may "cause registrants to prepare and review [their disclosures] more carefully than information presented outside SEC filings").

[130] *See id.* at 21,429 (noting that "[s]everal commentators indicated that the treatment of climate-related disclosures as filed would help improve investor confidence in the accuracy and completeness of such disclosures").

Conclusion

In summary, recent actions on climate-related disclosures in other jurisdictions have not undermined the case for finalizing the SEC Proposal. If anything, they have strengthened it. Although the California and E.U. disclosure regimes affect many SEC registrants, the SEC Proposal's baseline analysis anticipated such an increase in TCFD-aligned disclosure requirements. It also captured the voluntary reporting behavior of many of the firms that are now obliged to provide similar disclosures under California and E.U. laws. Furthermore, SEC registrants that are subject to the California and/or E.U. regimes will now face a lower incremental cost of compliance with the SEC Proposal, because they will have already gathered much of the information necessary to make the required disclosures. But the SEC Proposal will still benefit investors relative to the baseline scenario by enhancing investors' ability to compare climate-related disclosures across all SEC registrants and by increasing the reliability of the disclosed information.



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