

U.S. and Canadian climate-change disclosure update: SEC final rules and proposed CSSB standards

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On March 6, the U.S. Securities and Exchange Commission (SEC) adopted rules (Final Rules)^{[1](#)} that will require most U.S. reporting companies to report detailed climate-related information. While the Final Rules include changes to some of the most burdensome aspects of the proposed rules the SEC had published for comment in 2022 (Proposed Rules), the Final Rules still represent a significant increase in the disclosure for U.S. reporting companies in their annual reports and registration statements.

On March 13, the Canadian Sustainability Standards Board (CSSB) published its proposed climate-related disclosure standards (CSDS 2) and launched a comment and consultative period closing on June 10, 2024. The CSA has announced its intention to publish revised Canadian climate-related disclosure rules for comment following finalization of, and reflection on, the CSDS 2 standards.

What you need to know

- **SEC Final Rules**

- **Canadian MJDS issuers exempt:** As anticipated, the Final Rules will not apply to Canadian companies that report under the multijurisdictional disclosure system (MJDS).
- **Scaled back from the Proposed Rules:** The SEC scaled back some of its earlier proposals. Among other things, the Final Rules drop the proposed requirement for companies to disclose Scope 3 greenhouse gas (GHG) emissions and limit the requirement to disclose Scope 1 and Scope 2 GHG emissions to larger issuers, and only when material.
- **Safe harbour for certain forward-looking disclosures:** The Final Rules introduce a safe harbour from civil liability for certain disclosures, other than historic facts, relating to companies' transition plans, scenario analysis, internal carbon pricing, and targets and goals.
- **Phased-in compliance:** The SEC has extended the phase-in period for compliance with certain requirements, such as those relating to disclosure of GHG emissions, certain financial statement disclosures and third-party attestation reports concerning GHG metrics.
- **Rules have been challenged:** Multiple petitions have already been filed in the U.S. in opposition to the Final Rules, including by a group of attorneys general representing ten states in the U.S. Court of Appeals for the Eleventh Circuit asking the Court to vacate the Final Rules. The environmental group the Sierra Club has also filed a petition in the U.S. Court of Appeals for the D.C. Circuit, arguing that the Final Rules do not go far enough and fail to meet the SEC's statutory mandate to protect investors. On March 15, the U.S. Court of Appeals for the Fifth Circuit took the first court action in respect of the Final Rules, granting an administrative stay pending the Court's review of a petition filed by oilfield companies Liberty Energy and Nomad Proppant Services.

- **Proposed CSSB Standards**

- **Largely adopts IFRS S2 Standard:** The CSDS 2 standards proposed by the CSSB are based on, and largely adopt, the IFRS S2 climate-change-related disclosure standards published by the International Sustainability Standards Board (ISSB) in 2023² (IFRS S2), with very minor modifications designed to take into account the Canadian public interest, primarily related to the planned effective date and transition relief.
- **Focus on scenario analysis and Scope 3 emissions:** The CSSB is seeking comments in particular on whether transition relief or guidance would assist companies in the preparation of scenario analysis disclosure and whether a two-year transition period for disclosing Scope 3 GHG emissions is sufficient. The comment period closes on June 10, 2024.
- **Not binding on Canadian entities:** CSDS 2 will not be binding on reporting issuers in Canada unless adopted by the Canadian Securities Administrators (CSA) or if otherwise mandated by Canadian legislation or accounting or regulatory requirements.
- **Revised CSA climate-change disclosure rules to come:** The CSA will be reviewing the feedback that the CSSB receives and intends to publish revised Canadian climate-related disclosure rules for comment following finalization of, and reflection on, the CSDS 2 standards.

Applicability of the SEC's proposed rules to domestic and foreign U.S. reporting companies

Consistent with the Proposed Rules, the Final Rules will apply to U.S. reporting companies³, including SEC reporting foreign issuers other than Canadian MJDS filers, and will require such issuers to include prescribed climate-related disclosures in specified registration statements for securities offerings (Forms F-1, S-1, F-3 and S-3) and M&A transactions (Forms F-4 and S-4), annual reports on Forms 10-K (for domestic U.S. reporting companies) and 20-F (for foreign non-MJDS issuers), and audited financial statements. Consistent with the Proposed Rules, the Final Rules do not amend Form 40-F, the annual reporting form that Canadian MJDS issuers use.

Once the Final Rules come into effect, a Canadian issuer planning to go public in the U.S. that is not eligible to use the southbound MJDS system will be required to provide climate-related disclosures in its initial SEC registration statement and in its annual reports thereafter, unless and until it becomes MJDS-eligible. By contrast, an MJDS-eligible Canadian company completing a cross-listing in the U.S. will not have to comply with the Final Rules in connection with its initial SEC registration or thereafter (unless and until MJDS status is lost).

The Final Rules introduce certain climate-related disclosure requirements in respect of M&A transactions where securities are issued pursuant to a registration statement filed with the SEC in connection with the transaction. However, in a change from the Proposed Rules, the Final Rules will not apply to private companies that are parties to M&A transactions involving a securities offering registered on Form F-4 or S-4.

Significant changes to proposed rules

Despite representing a significant milestone in the move towards sustainability reporting, the Final Rules significantly scale back many of the more burdensome aspects of the Proposed Rules and are not modelled on IFRS S2. Most notably, the Final Rules differ from the Proposed Rules in the following ways:

- **GHG emissions reporting:** The Final Rules remove the requirement for companies to report on Scope 3 GHG emissions, representing those emissions originating in their value chains, outside of their direct operations. Scope 1 and 2 GHG emissions reporting will only be required for “large accelerated filers” and “accelerated filers” that are not otherwise exempt, and only when determined to be material. The Final Rules also contain an accommodation that will allow Scope 1 and/or Scope 2 GHG emissions disclosure to be filed on a delayed basis, effectively allowing companies to file that information at the time Q2 reports are required to be filed. Foreign private issuers wishing to take advantage of this delayed disclosure option will be able to do so by filing an amendment to their annual report on Form 20-F.
- **Governance, risk management and strategy:** The Final Rules take a more generalized and less prescriptive approach than the Proposed Rules, adding materiality qualifiers throughout, and no longer requiring a discussion of climate-related opportunities or their impacts.
- **Safe harbour for forward-looking information:** The Final Rules introduce a new safe harbour provision providing that disclosures (other than historic facts) relating to transition plans, scenario analysis, the use of internal carbon pricing, and targets and goals constitute “forward-looking information” for the purposes of the U.S. Private Securities Litigation Reform Act (PSLRA). The SEC also made it clear that these safe harbours will apply to these forward-looking statements even in connection with certain transactions (such as initial public offerings) and disclosure by certain issuers (such as partnerships), notwithstanding that such transactions or issuers are excluded from the PSLRA safe harbours by specified provisions in the Securities Act of 1933 and/or the Securities Exchange Act of 1934.

- **Extended phase-in period:** The Final Rules extend a number of the compliance deadlines initially proposed, as well as introduce additional phase-in periods for certain requirements and certain filers. For example:
 - Most of the Final Rules will apply starting with fiscal year beginning in 2025 for large accelerated filers, fiscal year beginning in 2026 for accelerated filers and fiscal year beginning in 2027 for non-accelerated filers, emerging growth companies and smaller reporting companies.
 - Large accelerated filers will be required to provide Scope 1 and 2 emissions metrics starting with the fiscal year beginning in 2026. Third-party attestation reports with respect to GHG emissions disclosures would be required at the limited assurance level for the fiscal year beginning in 2029 and at the reasonable assurance level for the fiscal year beginning in 2033.
 - Accelerated filers will be required to provide Scope 1 and 2 emissions metrics starting with the fiscal year beginning in 2028. Third-party attestation reports with respect to GHG emissions disclosures will be required at the limited assurance level beginning in fiscal year 2031.

Proposed CSSB standards

Subsequent to the publication of the final ISSB standards in 2023, the CSSB was established to work towards advancing the adoption of sustainability disclosure standards in Canada, with a goal of developing Canadian standards that align with the global baseline standards developed by the ISSB but with modifications to reflect the particularities of the Canadian market. On March 13, the CSSB published CSDS 2 and launched a comment and consultative period closing on June 10, 2024.

CSDS 2 largely adopts the standards contained in IFRS S2 with very minor modifications designed to take into account the Canadian public interest:

- **Effective date:** Although CSDS 2 will not be binding on reporting issuers in Canada unless mandated by the CSA or other Canadian legislative or regulatory authorities, the effective date of the standard has been extended by one year from fiscal 2024 in IFRS S2 to fiscal 2025. However, the CSSB does acknowledge that Canadian regulators and legislators will determine whether CSDS 2 should be mandated and, if so, to whom the standards would apply and over what time frame.
- **Transition relief for GHG emissions reporting:** The proposed CSDS 2 provides a two-year phase-in period for entities to provide Scope 3 GHG emissions data, specifying that for the first two annual reporting periods in which an entity applies the CSDS 2 standards, it will not be required to disclose Scope 3 GHG emissions. While CSDS 2 mandates the use of the GHG Protocol for measuring GHG emissions, it permits an entity to use an alternative method for the first annual reporting period.

While these modifications to the IFRS S2 standards are quite modest, the CSSB acknowledges that concerns have been raised on other provisions within IFRS S2 and notes that it intends to explore these concerns further based on the feedback and insights it receives during the comment period. The CSSB also notes its intention to consider whether additional requirements should be introduced to reflect Canadian circumstances over time and whether interpretive guidance may further support the Canadian public interest. Finally, the CSSB has signaled its intention to collaborate with Indigenous Peoples to explore how best to address their rights in the context of the standards.

In addition to welcoming comments on all aspects of the proposed standards, the CSSB is particularly interested in feedback on the standards requiring a climate-resiliency assessment (scenario analysis) and Scope 3 GHG emissions reporting. With respect to scenario analysis, the CSSB indicates its support for the global baseline requirements on climate resilience established by IFRS S2 and that, in its view, scenario analysis forms an integral part of identifying alternatives that may significantly alter the basis for “business-as-usual” assumptions and strategies that may be required to mitigate climate-related risks.

However, the CSSB is interested in feedback on whether transition relief might be required and if further guidance would be necessary or helpful to entities applying the standard. With respect to Scope 3 GHG emissions reporting, the CSSB emphasizes that Scope 3 GHG emissions reporting is critical for investors to understand an entity's exposure to climate-related risks and opportunities given that they make up a significant part of the entity's total GHG emissions. However, the CSSB also acknowledges that concerns have been raised about measurement uncertainty along with challenges related to processes and capacity to deliver disclosures concurrently with general-purpose financial reports. The CSSB is, therefore, seeking feedback on whether the proposed transition relief of two years is adequate and, if not, what other relief might be appropriate.

The CSSB has previously communicated its intention to publish final standards at the end of Q3 2024.

In response to the proposed CSDS 2 standards, the CSA issued a press release on March 13, noting its interest in reviewing the feedback that the CSSB receives and its intention to publish revised Canadian climate-related disclosure rules for comment following finalization of, and reflection on, the CSSB standards.

FOOTNOTES

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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