

Texas Environmental Superconference 2024

SEC and California Climate Disclosure Rules and Anticipated Updates to FTC Green Guides

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I. Introduction

This paper summarizes recent federal and California actions related to addressing climate change issues. Particularly, these actions focus on new rules governing disclosure of information related to climate risks and how those risks impact businesses, investors, and consumers. Given the controversy surrounding climate change, it is not surprising that these rules have been met with considerable debate and legal challenges. With recent Supreme Court decisions and an upcoming presidential election, the fate of certain of these rules remains unclear.

II. U.S. SEC Climate-Related Disclosure Rules

a. The Proposed Rules

In March 2022, the U.S. Securities and Exchange Commission ("SEC") proposed rule changes that required SEC registrants² to include certain climate-related disclosures in registration statements and periodic reports (including information on climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition) and certain climate-related financial statement metrics in a note to audited financial statements.³

Specifically, the proposed changes required registrants to disclose information about (i) the registrant's governance of climate-related risks and relevant risk management processes, (ii) how any climate-related risks identified by the registrant have had, or are likely to have, a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term, (iii) how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook, and (iv) the impact of climate-related events (severe weather events and other natural conditions) and transition activities on the line items of a registrant's consolidated financial statements, as well as on the financial estimates and

¹ The authors would like to thank summer associates Nawaal Zareef and Thomas Davidson for their contributions to this paper.

² SEC registrants generally include companies listed on a U.S. securities exchange, companies that are not listed but are considered to be widely-held in the U.S. (unless an exemption applies), and companies that register U.S. public offerings of securities with the SEC.

³ SEC, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>.

assumptions used in the financial statements.⁴ The proposed rules required disclosure of the effect on each line item unless the effect of the environmental factor was less than 1% of that line item.⁵

Notably, the proposed rules also required the mandatory disclosure and reporting of a registrant's greenhouse gas ("GHG") emissions.⁶ The required GHG reporting information included, direct GHG emissions (Scope 1), indirect emissions from purchased electricity or other forms of energy (Scope 2), and GHG emissions from upstream and downstream activities in the value chain (Scope 3).⁷ The proposed rules did include a safe harbor for liability from Scope 3 emissions disclosure and an exemption from the Scope 3 emissions disclosure requirement for "smaller reporting companies."⁸

The proposed rules also included a phase-in period for all registrants, with the compliance date dependent on the registrant's filing status, with an additional phase-in period for the Scope 3 emissions disclosure.⁹

The rules drew over 24,000 comments, including over 5,000 letters.¹⁰ Most comments were directed towards the Scope 3 disclosure requirements, the 1% line item disclosure threshold, the industry-specific metrics, potential costs of compliance, and the SEC's statutory authority to mandate disclosures.¹¹ Specifically, many comments focused on the costs and consequences of Scope 3 filings, including the impact on smaller reporting companies and the requirement of disaggregated financial reporting on the impact of climate-related factors.¹² During the initial comment period, a group of twenty four State Attorneys General drafted a comment letter alleging that the proposed rules were outside of the SEC's authority, violative of the First Amendment, and arbitrary and capricious.¹³

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ SEC, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46>. A company is a "smaller reporting company" if it has a public float (total value of shares held by non-affiliates) of less than \$250 million or less than \$100 million in annual revenues and either no public float or a public float less than 700 million.

⁹ *Id.*

¹⁰ See SEC, *SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, (Mar. 6, 2024) <https://www.sec.gov/news/press-release/2024-31>.

¹¹ See, e.g. Lee Reiners & Morgan Smith, *Summary of Comment Letters for the SEC's proposed Climate Risk Disclosure Risk*, DUKE FIN. ECONS. CTR., <https://econ.duke.edu/dfc/climate-risk/2022/08/summary-comment-letters-secs-proposed-climate-risk-disclosure-rule>; Cynthia Williams & Robert Eccles, *Review of Comments on SEC Climate Rulemaking*, HLS F. ON CORP. GOV., Nov. 23, 2022, <https://corpgov.law.harvard.edu/2022/11/23/review-of-comments-on-sec-climate-rulemaking/>.

¹² See Reiners & Smith, *Summary of Comment Letters*, *supra* note 10. See Williams & Eccles, *Review of Comments*, *supra* note 10.

¹³ W. Va. Off. of the Att'y Gen., *Comment Letter on Proposed Rules on The Enhancement and Standardization of Climate-Related Disclosures*, 2 (June 15, 2022), <https://ago.wv.gov/Documents/Q0658792.pdf>.

b. The Final Rules

On March 6, 2024, the SEC issued the final climate-related disclosure rules in a split 3-2 vote.¹⁴ The final rules added new Subpart 1500 (Items 1500 to 1508) of Regulation S-K¹⁵ and a new Article 14 to Regulation S-X.¹⁶ The final rules require disclosure of, among other things: climate-related risks that have had, or are reasonably likely to have, a "material" impact on business strategy, results of operations, or financial condition; assessment, management, board oversight, and mitigation of climate-related risks; Scope 1 and 2 GHG emissions for large accelerated filers and accelerated filers if those emissions are material, including an independent attestation report; and financial statement disclosures, such as costs and losses, related to both the effects of severe weather events and other natural conditions and carbon offsets and renewable energy credits if material to a registrant's plans to achieve climate-related targets or goals.¹⁷

The final rules apply to registrants on a phased-in basis, with the first compliance deadline for "Large Accelerated Filers"¹⁸ in 2026 for fiscal year 2025 annual reports.¹⁹

c. Key Differences Between the Proposed and Final Rules

i. Scope 3 GHG Emissions Reporting Requirements

While the proposed rules included a requirement to disclose Scope 3 emissions, the SEC's final rules removed Scope 3 reporting and only required Scope 1 and 2 reporting where it is "material" to Accelerated and Large Accelerated Filers.²⁰ In response to concerns raised in comments to the proposed rule, SEC Chair Gary Gensler signaled the removal of Scope 3 reporting requirements from the final rule as early as November 2023, stating that "the calculations are less developed" and that fewer companies disclose Scope 3 emissions.²¹ In his Statement on the Final Rules on March 6, 2024, Chairman Gensler explained that the removal of Scope 3 from the rules was in response to public feedback.²² The removal may have also been motivated by the potential

¹⁴ See Amanda Iacone, *SEC Unveils Higher Threshold for Reporting on Climate Costs*, BLOOMBERG L. NEWS, (Mar.6, 2024), <https://news.bloomberglaw.com/esg/sec-unveils-higher-threshold-for-reporting-on-climate-costs>.

¹⁵ Regulation S-K outlines how registrants should disclose material qualitative descriptors of their business on registration statements, periodic reports, and any other filings.

¹⁶ Regulation S-X outlines the form and content of, including requirements for, financial statements.

¹⁷ 89 Fed. Reg. 21668 (Mar. 28, 2024).

¹⁸ An "Accelerated Filer" is an issuer that has been subject to the disclosure requirements of the Exchange Act Section 13(a) or 15(d) for a period of at least twelve calendar months, has filed at least one annual report under those sections, does not meet the definition of "smaller reporting company" defined in Rule 12b-2, and has a public float of \$75 million or more. A Large Accelerated Filer has the same requirements but a public float of \$700 million or more.

¹⁹ See Press Release, SEC, FACT SHEET: The Enhancement and Standardization of Climate-Related Disclosures: Final Rules (Mar. 6, 2024) <https://www.sec.gov/files/33-11275-fact-sheet.pdf>.

²⁰ *Id.*

²¹ Jarrett Renshaw, Isla Binnie, & Douglas Gillison, *US Securities Regulator Signals It May Curb Climate Rule Ambitions*, REUTERS, (Nov. 20, 2023) <https://www.reuters.com/business/environment/us-securities-regulator-signals-it-may-curb-climate-rule-ambitions-2023-11-20/>.

²² Gary Gensler, *Statement on Final Rules Regarding Mandatory Climate Risk Disclosures*, SEC, Mar. 6, 2024, <https://www.sec.gov/news/statement/gensler-statement-mandatory-climate-risk-disclosures-030624>.

risk of the rule being challenged and related litigation.²³ SEC Commissioner Hester M. Peirce remained critical even after the change, arguing that the final rules would likely still require that companies demand climate-related risk information from their suppliers, exacerbating the same concerns at issue with respect to the previous Scope 3 reporting requirement.²⁴

ii. Financial Reporting and Bright-line Disclosure Thresholds

The SEC's final rules removed the line-item reporting requirement and reduced certain of the severe weather and other natural conditions-related financial reporting requirements.²⁵ The new Article 14 of Regulation S-X requires registrants to disclose, in a note to the audited financials, expenditures expensed as incurred and losses resulting from severe weather events and other natural conditions subject to a bright-line threshold. The disclosure is required if the aggregate amount is less than the greater of one percent of the absolute value of the registrant's income or loss or \$100,000 for the relevant fiscal year.²⁶ Capitalized costs and charges related to these impacts must also be reported if the aggregate amount is less than the greater of one percent of the absolute value of stockholders' equity or deficit at year end or \$500,000 for the relevant fiscal year.²⁷ These disclosures are relate to aggregated amounts before income tax. Additionally, registrants may now "opt-in" to financial statement disclosures for carbon offsets and renewable energy credits, with mandatory disclosure required only if those items are material to the company's voluntarily stated climate plans or goals.²⁸ This change was reportedly motivated by "many" of the commenters being unsupportive of the line-item reporting requirement, with SEC Chief Accountant Paul Munter stating that the burden on filers led the agency to adopt a "significantly narrower set of requirements."²⁹

iii. Materiality Threshold

The final rules add a materiality qualifier to nearly every substantive portion of rules.³⁰ SEC Commissioner Caroline Crenshaw defended the SEC's statutory authority to regulate on the

²³ Andrew Ramonas and Clara Hudson, *Ten States Sue to Block the SEC's Emissions Disclosure Rules*, BLOOMBERG L. NEWS, (Mar. 6, 2024) <https://news.bloomberglaw.com/esg/republican-ags-pledge-to-sue-sec-over-emissions-disclosure-rules>.

²⁴ Hester M. Peirce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures*, SEC, Mar. 6, 2024, https://www.sec.gov/news/statement/peirce-statement-mandatory-climate-risk-disclosures-030624#_ftnref1.

²⁵ See SEC, *SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, (Mar. 6, 2024) <https://www.sec.gov/news/press-release/2024-31>.

²⁶ See Vadim Avdeychik, et. al., *US SEC Adopts New Climate-Related Disclosure Requirements*, March 2024, <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/03/US%20SEC%20adopts%20new%20climate-related%20disclosure%20requirements.pdf>.

²⁷ *Id.*

²⁸ Gary Gensler, *Statement on Final Rules Regarding Mandatory Climate Risk Disclosures*, SEC, Mar. 6, 2024, <https://www.sec.gov/news/statement/gensler-statement-mandatory-climate-risk-disclosures-030624>.

²⁹ Lamar Johnson, *SEC Reiterates No Scope 3 in Final Climate Rule*, ESGDIVE, (Apr. 9, 2024), <https://www.esgdive.com/news/sec-official-reiterates-no-scope-3-in-final-climate-risk-disclosure-rule/712695/>

³⁰ Compare 87 Fed. Reg. 21334 (Apr. 11, 2022) with 89 Fed. Reg. 21668 (Mar. 28, 2024).

matter without a strict requirement to include a materiality qualifier, while Chair Gary Gensler emphasized that the inclusion of the qualifier mirrors Supreme Court precedents.³¹ It's likely that the addition of materiality qualifiers throughout the final rules was likely motivated by anticipated challenges and litigation, with the hope that inclusion of "materiality" would increase the likelihood that the final rules would survive a challenge.

d. Legal Challenges and Current Stay

In April 2024, the SEC voluntarily stayed the implementation of the final rules, pending the outcome of the consolidated litigation challenging the rules. In total, twenty-five States, energy companies, and business advocates have challenged the final rules since their release, with Iowa leading a consolidated lawsuit in the U.S. Court of Appeals for the Eighth Circuit.³² Eighteen States and the District of Columbia sued to intervene in that consolidated lawsuit in support of the SEC.³³ Challenges have generally been based on four major theories: *Ultra vires*³⁴, the Major Questions Doctrine³⁵, compelled speech, and the standard of review under the Administrative Procedure Act ("APA")³⁶ as well as the impacts from the overturning of the *Chevron* doctrine.

The first major theory relates to *ultra vires* or an alleged exceedance of SEC statutory authority. In June 2022, twenty-five State Attorneys General drafted a comment letter contending that SEC has statutory authority over public disclosures (e.g., those "necessary or appropriate in the public interest or for the protection of investors") but that power is not limitless and does not cover the topics in the proposed rules.³⁷ Other challengers similarly conceded that the SEC has statutory authority to require disclosure of information necessary or appropriate in the public interest or for the protection of investors but have interpreted that clause to cover only material financial disclosures.³⁸

Challengers have also argued the final rules run afoul of the major questions doctrine, noting *West Virginia v. EPA*, where the Supreme Court found that federal agencies cannot regulate

³¹ Caroline Crenshaw, *A Risk by Any Other Name: Statement on the Enhancement and Standardization of Climate-Related Disclosures*, SEC, Mar. 6 2024, https://www.sec.gov/news/statement/crenshaw-statement-mandatory-climate-risk-disclosures-030624#_ftn14, Gary Gensler, *Statement on Final Rules Regarding Mandatory Climate Risk Disclosures*, SEC, Mar. 6, 2024, <https://www.sec.gov/news/statement/gensler-statement-mandatory-climate-risk-disclosures-030624>.

³² Lamar Johnson, *SEC to Face All Climate Rule Challenges in U.S. 8th Circuit Court of Appeals*, ESGDIVE, (Mar. 22, 2024) <https://www.esgdive.com/news/sec-climate-disclosure-rule-legal-challenges-consolidated-eighth-circuit-court-appeals/711136/>.

³³ Clark Mindock, *Democratic AGs Can Defend SEC Climate Disclosure Rule*, REUTERS, (Apr. 29, 2024)

<https://www.reuters.com/legal/government/democratic-ags-can-defend-sec-climate-disclosure-rule-2024-04-29/>.

³⁴ *Ultra Vires* (Latin for "beyond the powers") describes an act that exceeds the scope of legal authority of the actor, thus making the act invalid as a matter of law.

³⁵ The Major Questions Doctrine, articulated in *West Virginia v. EPA*, requires Congress to make a clear statement that the agency in question is intended to handle a specific "major question." See *W. Va. v. EPA*, 597 U.S. 697, 699 (2022).

³⁶ Petitioners' Joint Opening Brief, *Chamber of Com. of the U.S.A v. SEC*, No. 24-1628 (8th Cir. Mar 22, 2024), See also W. Va. Off. of the Att'y Gen., Comment Letter on Proposed Rules on The Enhancement and Standardization of Climate-Related Disclosures, at 12 (June 15, 2022), <https://ago.wv.gov/Documents/Q0658792.pdf>.

³⁷ See W. Va. Off. of the Att'y Gen., Comment Letter on Proposed Rules on The Enhancement and Standardization of Climate-Related Disclosures, at 7-12 (June 15, 2022), <https://ago.wv.gov/Documents/Q0658792.pdf>.

³⁸ Petitioners' Joint Opening Brief at 46, *Chamber of Com. of the U.S.A v. SEC*, No. 24-1628 (8th Cir. Mar 22, 2024).

issues of economic or political importance (or controversial topics, such as climate change) without express authorization from Congress.

Challengers have also argued that the SEC has departed from its prior rules that require disclosure of matters that have material financial impacts and made a veiled attempt to direct firm behavior or otherwise require certain action, which the SEC disputes. Opponents of the SEC's climate-related disclosure rules also contend that the rules are speculative and unjustified and thus do not meet the standards outlined in *National Association of Manufacturers v. SEC*, which dealt with compelled speech in the context of conflict minerals labeling.³⁹ The Supreme Court's decision in *Zauderer v. Off. of Disciplinary Council* addressed the compelled speech doctrine in the corporate context. *Zauderer* upheld disclosure requirements that required the disclosure of "purely factual and uncontroversial information" provided the disclosure were not "unjustified or unduly burdensome" and reasonably related to a legitimate government interest.⁴⁰

Lastly, a common theory of challenge has been under the arbitrary and capricious standard of review under the Administrative Procedure Act. This challenge requires proving that the SEC acted without "consideration of the relevant factors" and made "a clear error of judgement."⁴¹ The challenge is bolstered by statements from dissenting SEC Commissioners, who argued that the SEC lacks the authority to require disclosure of environmental, social, and governance ("ESG")-related impacts.⁴² Recent remarks by Chairman Gensler attempted to forestall that argument by pointing to the SEC's historical authority of requiring disclosure of material information.⁴³ The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, overturning the *Chevron* Doctrine, may have the most pronounced impact on this challenge.

III. California Climate Disclosure Laws

In October 2023, California enacted the Climate Corporate Data Accountability Act (Senate Bill ("SB")-253), the Climate Related Financial Risk Act (SB-261), and the Voluntary Carbon Market Disclosures Business Regulation Act (Assembly Bill ("AB")-1305).⁴⁴ There are certain commonalities between these laws and the SEC's climate-related disclosure requirements, discussed above, but there are also notable differences. In enacting these laws, the California

³⁹ See W. Va. Off. of the Att'y Gen., Comment Letter on Proposed Rules on The Enhancement and Standardization of Climate-Related Disclosures, at 23 (June 15, 2022), <https://ago.wv.gov/Documents/Q0658792.pdf>; Petitioners' Joint Opening Brief at 61, *Chamber of Com. of the U.S.A v. SEC*, No. 24-1628 (8th Cir. Mar 22, 2024).

⁴⁰ W. Va. Off. of the Att'y Gen., Comment Letter on Proposed Rules on The Enhancement and Standardization of Climate-Related Disclosures, at 23 (June 15, 2022), <https://ago.wv.gov/Documents/Q0658792.pdf>; *Zauderer v Off. Of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626 (1985).

⁴¹ See *D.H.S. v Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

⁴² See, e.g. Hester M. Pierce, *We Are Not The Securities and Environment Commission – At Least Not Yet*, SEC, Mar. 21, 2022, https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321#_ftnref64; Mark T. Uyeda, *A Climate Regulation Under the Commission's Seal*, SEC, Mar. 6, 2024, <https://www.sec.gov/news/statement/uyeda-statement-mandatory-climate-risk-disclosures-030624>.

⁴³ See Akiko Fujita and Jennifer Schonberger, *SEC Chair: How New Climate Disclosure Rule Benefits Investors*, YAHOO! FIN. (Mar 8, 2024) <https://finance.yahoo.com/video/sec-chair-climate-disclosure-rule-172153772.html>.

⁴⁴ SB-253 and SB-261 are known as the "Climate Accountability Package."

legislature observed that the current voluntary system for climate emissions disclosure and the unregulated nature of the Voluntary Carbon Offsets ("VCO") industry lacks the necessary "transparency and consistency" for individuals and regulators to fully comprehend climate risks.

a. SB-253

SB-253 imposes Scope 1, 2, and 3 GHG emissions disclosure requirements on entities that "do business in California" and have an annual revenue of \$1 billion or more based on the prior fiscal year.⁴⁵ The California Air Resources Board ("CARB").⁴⁶ is tasked with establishing implementing regulations requiring public disclosure and third-party assurance for Scope 1, 2, and 3 GHG emissions annually, regardless of location. It is estimated that approximately 5,300 U.S. corporations will fall under the purview of SB-253's reporting requirements.⁴⁷

In enacting SB-253, California legislators argued that Scope 3 emissions should be included in the reporting requirements to address a loophole whereby companies may externalize their emissions by outsourcing production and procurement (thereby manipulating Scope 1 and 2 emissions to procure materials from outside suppliers and remove production emissions from reporting).⁴⁸ By mandating the disclosure of Scope 3 GHG emissions, legislators argued that companies can be held accountable for the emissions from their entire value chain.⁴⁹ SB-253 also takes into account existing climate reporting regimes and attempts to minimize duplicative reporting by allowing entities to submit reports prepared to meet "other national and international" requirements, provided that the report otherwise fulfills the requirements of SB-253.⁵⁰

SB-253's first reporting period deadline is January 1, 2026. Scope 3 GHG emissions, however, are required to be publicly disclosed beginning in 2027. CARB is authorized to impose fines on companies failing to comply with these deadlines with a maximum yearly penalty of \$500,000.⁵¹

b. SB-261

SB-261 has a lower reporting threshold than SB-253. It mandates that business entities who do business in California and have an annual revenue of greater than \$500 million in the prior fiscal year are required to publicly disclose information relating to its climate-related financial

⁴⁵ Cal. Health & Saf. Code § 38532(c)(1).

⁴⁶ The California Air and Resources Board operates under the umbrella of the California Environmental Protection Agency and is responsible for public protection against air pollutants.

⁴⁷ Sen. Third Reading, Analysis of S.B. 253, Sept 7, 2023 at 2.

⁴⁸ Assembly Comm. on Nat'l Res., Analysis of S.B. 253 (2023-2024 Reg. Sess.) June 30, 2023 at 7-8.

⁴⁹ Assembly Comm. on Nat'l Res., Analysis of S.B. 253 (2023-2024 Reg. Sess.) June 30, 2023 at 7-8.

⁵⁰ § 38532(c)(1)(D)(i).

⁵¹ § 38532(f)(1)(2)(A).

risks, and its plans to mitigate such risks biannually.⁵² Entities will be required to collect and report on qualitative and quantitative data on their GHG emissions. Beyond the reporting requirement, SB-261 also requires that the findings related to climate-related risks be posted on an entity's website starting in January 2026.⁵³ The primary objective of SB-261 is to integrate the global standards for climate-related financial risk disclosures into the operational practices of businesses in California, including by drawing on the guidelines provided by the Task Force on Climate-Related Financial Disclosure (TCFD).

SB-261's first reporting deadline is January 1, 2026. CARB is authorized to impose fines on companies failing to comply with this deadline with a maximum yearly penalty of \$500,000.⁵⁴

c. AB-1305

AB-1305 mandates business entities that market or sell voluntary carbon offsets ("VCOs")⁵⁵ provide detailed information about the carbon offset project on their website. The information must include mechanisms for measuring "emission reductions or removal benefits," project location, timeline, start date, the durability period, independent/third-party verification information, among other specifics outlined in the bill.⁵⁶ Entities that purchase or use VCOs claiming "net zero emission," "carbon neutrality," or make other, similar assertions are also required to disclose information about these programs on their website. Furthermore, AB-1305 compels business entities to purchase offsets with durability matching the atmospheric life of carbon dioxide and it mandates the sellers and purchasers of VCOs to disclose the durability of the offset and explain how this aspect is considered when asserting carbon neutrality.⁵⁷

Additionally, should a VCO project fail to achieve the anticipated "emissions reductions or removal benefits," then the responsible business entity must disclose details about accountability measures in place.⁵⁸ Disclosure is also mandated for entities making claims about "significant reduction" in carbon dioxide or GHG emissions.⁵⁹

Non-compliance with these disclosure requirements, including disclosure of inaccurate information, exposes a business entity to a civil penalty of \$2,500 per day and a maximum of

⁵² Cal. Health & Saf. Code § 38533(a)(4). CARB will accept consolidated reports from parent companies, reliving the need for subsidiaries to prepare their own reports.

⁵³ § 38533(c).

⁵⁴ § 38532(f)(1)(2)(A).

⁵⁵ "Voluntary Carbon Offset" is defined as any product available for sale or marketed within California that is represented as a GHG emissions offset, a "voluntary emissions reduction," a "recital offset," or any similar expression, suggesting that the product embodies or equates to a decrease in atmospheric GHGs or an avoidance of the release of such gases that would have been emitted otherwise. *See* §44475(d)(3)(A).

⁵⁶ Cal. Health & Saf. Code § 44475(a).

⁵⁷ Sen. Comm. on Env't Quality, Analysis of A.B. 1305 (2023-2024 Reg. Sess.) June 28, 2023 at 6.

⁵⁸ § 44475(b).

⁵⁹ § 44475.2.

\$500,000.⁶⁰ Disclosures are required to be updated "no less than annually," and a November 2023 letter from Assemblymember Gabriel (the author of the law), states that it was the intent of the law that the initial deadline for disclosure be January 1, 2025.

d. Concerns and Legal Challenges

Although Governor Gavin Newsom signed these bills into law, the Governor himself expressed concerns about them. In an October 2023 letter to the members of the California State Senate, Newsome noted that the implementation deadlines in SB-253 seemed "likely infeasible" and "the reporting protocol specified could result in inconsistent reporting across businesses subject to the measure."⁶¹ Governor Newsom also worried about the overall financial impact of the bill.⁶² The Governor directed his administration and the legislature to work through these issues and CARB to closely monitor cost impacts and provide recommendations on streamlining mechanisms.⁶³ Governor Newsome expressed similar concerns regarding SB-261. Given these concerns, in July 2024, the California Department of Finance proposed delaying the implementation of SB-253 and SB-261 by two years, until 2028.⁶⁴

The United States Chamber of Commerce, California Chamber of Commerce, and American Farm Bureau Federation have brought a legal challenge in federal court against CARB and the California Attorney General, seeking a declaratory judgment and permanent injunction to prevent SB-253 and SB-261 from taking effect.⁶⁵ There are two primary theories in the challenge: compelled speech (similar to challenges to the SEC rules) and the dormant commerce clause.

The First Amendment compelled speech argument asserts that climate change has been acknowledged by the Supreme Court of the United States as controversial, and by enforcing SB-253 and SB-261, California is compelling companies to engage in controversial speech which violates the First Amendment.⁶⁶ The plaintiffs argue that information required under these laws to be disclosed is not purely factual nor uncontroversial because climate change is controversial and a company's evaluation of risks to financial outcomes from various events is a topic of reasonable

⁶⁰ § 44475.3.

⁶¹ *Letter from Gov. Gavin Newsom to Members of California State Senate*, Oct. 7, 2023, available at <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-253-Signing.pdf>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Debra Kahn, *Newsome administration proposal: Delay corporate climate reporting for two years*, PoliticoPro, July 1, 2024, <https://subscriber.politicopro.com/article/2024/07/newsom-administration-proposal-delay-corporate-climate-reporting-for-two-years-00166049>.

⁶⁵ *Chamber of Com. of the U.S. v. Cal. Air Res. Bd.*, in the U.S. District Court for the Central District of California, case No. 2:24-cv-00801.

⁶⁶ Compl. ¶ 64.

debate and not pure fact.⁶⁷ Moreover, the plaintiffs cited the financial impact concerns that Governor Newsom highlighted at the time of signing the bills.

The plaintiffs also contend that the laws are preempted by the Clean Air Act ("CAA"), rendering them void under the dormant commerce clause and federalism principles.⁶⁸ They asserted that the CAA curtails a state's ability to regulate interstate GHG emissions.⁶⁹ According to the principle of equal sovereignty among states, the laws of one State should not have "extraterritorial reach."⁷⁰ The plaintiffs highlight that CAA entrusts the federal government with the regulation of GHG emissions and limits a state's power to commenting on proposed rules and regulating within its own borders.⁷¹ The plaintiffs argue that the California laws are not limited to reporting emissions produced in California, but instead, companies are required to disclose emissions and risks including those that occur in other states or foreign countries, thus overstepping state boundaries.⁷² While the plaintiffs concede that the laws do not explicitly require reductions in GHG emissions, they argue that the laws indirectly aim to pressure companies to reduce emissions nationally and globally, infringing on the federal government's exclusive jurisdiction over GHG emissions regulation and contravening Congress's authority over interstate commerce.⁷³ In a motion to dismiss, California argued that the plaintiff's dormant commerce clause argument is void because the laws are not discriminating against out-of-state businesses, nor do they impose a disproportionate burden, as they apply uniformly to all companies meeting the "neutral criteria," irrespective of location.⁷⁴ California also noted that the laws could disfavor California-based entities, as they are more likely to conduct business within the state.⁷⁵

California's motion to dismiss also requests dismissal on the grounds that these laws are not regulating emissions, but rather require disclosure of emissions.⁷⁶ They maintain that the CAA has four provisions with preemptive force and the defendants did not identify any source that precludes states from requesting information about out-of-state activities.⁷⁷

This litigation is ongoing, and it is not clear how the recent proposal for delay of implementation by the Governor's administration will impact the litigation.

⁶⁷ Compl. ¶ 66 & 68.

⁶⁸ Compl. ¶ 84.

⁶⁹ Compl. ¶ 84.

⁷⁰ Compl. ¶ 84.

⁷¹ Compl. ¶ 86.

⁷² Compl. ¶ 87.

⁷³ Compl. ¶ 88-91.

⁷⁴ Defs' Mot. to Dismiss at 18.

⁷⁵ Defs' Mot. to Dismiss at 19.

⁷⁶ Defs' Mot. to Dismiss at 13.

⁷⁷ Defs' Mot. to Dismiss at 15.

IV. FTC Green Guides

The U.S. Federal Trade Commission ("FTC")'s Guides for the Use of Environmental Marketing Claims (the "Green Guides") are guidance documents aimed at helping marketers avoid environmental claims that may mislead consumers. They provide guidance to business entities and marketers on environmental marketing claims, including how such claims are interpreted, how to substantiate the claims, and how to avoid consumer deception.⁷⁸ The Green Guides were last updated in 2012. In December 2022, the FTC commenced a review of the 2012 Green Guides by seeking public comment on potential updates.⁷⁹ The comment period closed in April 2023, and the updated guides are anticipated to be published at some point in 2024.⁸⁰

The FTC specifically requested comment on potential inclusion of "carbon neutral" and "net zero" assertions in marketing and is currently considering whether to expand the Green Guides to encompass other claims not covered by the 2012 edition, such as statements pertaining to "carbon offsets" or "climate change."⁸¹ Moreover, the FTC requested comment on "recyclable" claims as well as on specific attributes that render a product "recyclable," in addition to the terms "organic" and "sustainable."⁸² Additionally, any updated FTC Green Guide is anticipated to regulate the marketing of terms such as "eco-friendly," "green," and "clean beauty" made without any additional substantiation.⁸³ There is also a possibility that the update will incorporate life-cycle assessments in substantiating claims which will consider the environmental footprint through the supply chain.⁸⁴

Though there is no specific timeline for the final update of the green guides, businesses will need to adjust their environmental claims and substantiate the claims that remain.⁸⁵ Multinational businesses are expected to make similar changes on an accelerated timeframe, as the EU Parliament passed an "anti-greenwashing" directive on January 17, 2024.⁸⁶ The likely outcome is that businesses will need to be increasingly cautious about making greenwashing claims and must continue to scrutinize their marketing tactics and language.⁸⁷

⁷⁸ *Green Guides*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/green-guides>

⁷⁹ 87 Fed. Reg. 77766

⁸⁰ <https://www.ftc.gov/news-events/news/press-releases/2023/01/federal-trade-commission-extends-public-comment-period-potential-updates-its-green-guides-use>

⁸¹ See 87 Fed. Reg. 77766 (§ III.B. Specific Claims, Question 1).

⁸² See 87 Fed. Reg. 77766 (§ III.B. Specific Claims, Question 11-12).

⁸³ Adam Freedgood, *What Brands Need To Know About The FTC's 2024 Green Guide Updates*, Third Partners (Mar. 5, 2024), <https://thirdpartners.com/blog/what-brands-need-to-know-about-the-ftcs-2024-green-guides-update/#:~:text=The%20updated%20Green%20Guides%20will, don't%20need%20real%20substantiation.>

⁸⁴ *Id.*

⁸⁵ See, e.g. Mary Foley, *Businesses Beware, Greenwashing is the New Goldmine for Litigators*, FORBES, (Apr. 23, 2024), <https://www.forbes.com/sites/maryfoley/2024/04/23/businesses-beware-greenwashing-is-the-new-goldmine-for-litigators/>

⁸⁶ Thomas Delille, Valerio Giovannini, & Nina H. Barrios, *EU Tackles Greenwashing: "Empowering Consumers Directive" and Proposals for the Future*, REUTERS, (May 16, 2024) <https://www.reuters.com/legal/legalindustry/eu-tackles-greenwashing-empowering-consumers-directive-proposals-future-2024-05-16/>

⁸⁷ <https://www.ft.com/content/2e1db10b-c992-48ff-977a-eee86336def6>

V. Conclusion

Companies must gear up to tackle climate-related disclosures, especially in light of the number of potential international, national, and state climate-related disclosure regimes. Should they survive challenge and the impact of recent Supreme Court decisions, the SEC's climate-related disclosure rules will likely result in the continued integration of climate considerations into financial reporting, while California's climate disclosure laws will encourage greater scrutiny of lifecycle emissions calculations and the risks posed by climate change. Additionally, the impending arrival of the updated FTC Green Guides reinforces that, from the largest global companies to the smallest emerging businesses, environmental considerations, particularly climate considerations, are likely to remain relevant in some form or another. Companies operating in multiple jurisdictions will need to be prepared to navigate a climate and sustainability-reporting matrix that is likely to continue to grow in complexity.