Proskauer

Special Report:

Primarily Non-Financial Corporate Reporting:

Climate Change

Proskauer

Table of Contents

Proskauer Special Report

Primarily Non-Financial Corporate Reporting for U.S. Companies – Where to Start?

A wave of new legislation and regulation in the U.S. and Europe has the potential to significantly impact the non-financial (and some financial) reporting obligations of U.S. companies. With the myriad of requirements overlaid with varying timelines, it can be challenging to understand what is required and when, particularly for international groups. These obligations are likely to require substantial resources to meet the reporting requirements, as applicable.

Provided below is a high-level overview and comparison table of three such developments for U.S. companies:[1]

- the Climate Corporate Data Accountability Act (**SB 253**) and the Climate-Related Financial Risk Act (**SB 261**), which are known as the Climate Accountability Package (together, the "**California Rules**");
- the European Union's ("**EU**") Corporate Sustainability Reporting Directive ("**CSRD**"), including its extra-territorial reach to U.S. companies; and
- the U.S. Securities and Exchange Commission ("**SEC**") Climate-Related Disclosure Rules proposed by way of amendments to the rules under the Securities Act 1933 and the Securities Exchange Act 1934.

Momentum behind the California Rules, CSRD and SEC Rules

California Rules (SB 253 and SB 261)

On October 7, 2023, California Governor Gavin Newsom signed into law the California Rules, making California the first state in the U.S. to impose requirements on greenhouse gas ("GHG") emissions disclosure and mandate reporting on climate-related financial risks. The California legislature's stated purpose in adopting this legislation is to address the impact of climate change on the state's residents and economy to increase corporate transparency and informed decision making, to standardize climate-related disclosure, and to increase corporate accountability in the effort to move toward a net-zero carbon economy. If implemented as adopted, these bills are likely to result in significant costs for a broad swath of U.S. companies doing business in California.

In his signing message, Governor Newsom expressed his concerns about the infeasibility of the implementation timelines under the California Rules and noted that the reporting protocol under SB 253 in particular could result in inconsistent reporting among the applicable reporting entities. As a result, he directed his administration to work with the legislature to seek amendments via new legislation in 2024, so it is very likely the implementation deadlines will be extended and the reporting protocols clarified. Nevertheless, we have set out in our comparison table the timetables as set out in the California Rules as signed.

---

[1] This alert does not cover the sustainability disclosure standards published by the International Sustainability Standards Board ("**ISSB Standards**"), but dependent on whether the ISSB Standards are adopted by government (whether within or outside the U.S.). This is a further set of non-financial reporting standards that U.S. companies may need to monitor.

For a deep dive on the California Rules, please see our client alert here: California – First State to Enact Climate Reporting Legislation - Insights - Proskauer Rose LLP.

CSRD

Background

CSRD is part of the EU's Green Deal, a set of proposals adopted by the European Commission which has the ultimate aim of achieving net zero GHG emissions by 2050.

The breadth and depth of the CSRD reporting requirements vastly expand the existing EU non-financial reporting requirements, with requirements phased in from financial year 2024 onwards. For U.S. companies, there is extra-territorial reach of the CSRD, which could either directly bring a U.S. company in scope to meet the reporting obligations or alternatively, U.S. companies may be brought within scope as a result of certain requirements to report on a consolidated group basis. Some market estimates indicate that at least 10,000 companies outside the EU will need to comply with CSRD and a third of those will be in the U.S.[2] Establishing whether an entity or group is in scope may be a complex exercise as there are a variety of triggers for reporting, including: any listing of transferable securities on an EU regulated market, turnover size, balance sheet size and/or number of employees. Please see our blog post for a deeper dive on CSRD applicability for further information.

Of note, even if it can be determined that a U.S. entity or group is out of scope for CSRD and there is no direct regulatory obligation, there may be CSRD-related reporting information requested of that entity or group where it is part of another entity's "value chain", as this is another key area for which reporting is required.

Beyond the scoping exercise, there is further complexity as some of the CSRD requirements need to be reported on a mandatory basis with the remainder subject to a "double materiality" test, covering both financial and impact materiality on over 1,000 data points.

Insofar as CSRD is an EU "directive", EU Member States will have to determine how to implement it. It is possible that national legislation implementing the directive in an EU Member State adds to or clarifies requirements; however, given the complexity of CSRD, our expectation is that the EU Member States are likely to implement CSRD "as is".

SEC Rules

For background, in the U.S., the SEC has proposed extensive new disclosure requirements related to climate change, primarily for companies' annual reports on Form 10-K and Form 20-F for "foreign private issuers," with the goal of standardized disclosures across industries and companies. The disclosure requirements would cover risks and material impacts on the business, strategy and outlook caused by climate change, data on GHGs, limited financial metrics and board oversight and management oversight over climate risk matters. The SEC's adoption of the proposed rules has been significantly delayed, and the SEC has indicated that it intends to soften the proposed rules, such as with respect to Scope 3 GHGs. We expect that the SEC will adopt the rules, likely with material modifications, but the timing is unclear. We do expect that the SEC will allow a one-year transition period for the largest, most mature filing companies, and more time for other companies. Thus, if the SEC adopts the rules in 2025, we

[2] At Least 10,000 Foreign Companies to Be Hit by EU Sustainability Rules - WSJ

expect the requirements will apply for fiscal year 2025 for the larger companies to be reported in companies' annual reports filed in 2026.

Comparison table

Below is a summary and side by side comparison of the key components of each regulatory regime[3]:*

California Rules	CSRD	SEC Rules (in the current drafting)
Who needs to disclose		

SB 253: Applies to:
- partnerships, corporations, limited liability companies or other business entities formed under the laws of California or any other U.S. state or the District of Colombia or under an act of the U.S. Congress
- with total annual revenues exceeding $1 billion (determined based on the reporting entity's revenue for the prior fiscal year);** and
- "doing business" in California (currently defined as engaging in any transaction for the purpose of financial gain within California, being organized or commercially domiciled in California, or having California sales), property or payroll exceed specified amounts: being $610,395, $61,040 and $61,040 respectively as of 2020.
- Note: covers both public and private companies.
SB 261: Applies to:
- partnerships, corporations, limited liability companies or other business entities formed under the laws of California or any other U.S. state or the District of Colombia or under an act of the U.S. Congress (same as SB 263);
- total annual revenues of at least $500 million (determined based on the reporting entity's revenue for the prior fiscal year);** and
- and "doing business" in California. (Same definition as applicable under SB 261).
** The California Air Resources Board ("CARB") likely will need to clarify whether annual revenue requirements for entities is applied: (i) on a gross rather than net basis; (ii) with respect to world-wide revenue (not just California); and (iii) on a consolidated basis for all affiliates of the entity.
	The factors that bring entities within the scope of CSRD are complex and include whether there is an admission of securities on an EU regulated market or through EU subsidiaries and the applicability of a myriad of thresholds based on turnover, balance sheet and number of employees. We have provided a deeper dive into CSRD applicability in our separate blog post and here list only who is captured under two categories: non-EU and EU.
	Non-EU thresholds (group or solo)
	- Minimum €150 million EU-derived turnover with:
	  ▪ an EU subsidiary in scope of CSRD; or
	  ▪ or a branch with a minimum of €40 million turnover.
	- Listed on an EU regulated market.
	EU thresholds (group or solo)
	- Large entities, meaning meeting two out of three of:
	  ▪ Balance sheet of at least €25 million;
	  ▪ Net turnover of at least €50 million; and
	  ▪ 250 employees.
	- Public interest entities.
	- Listed on an EU regulated market.
	Overall, the CSRD thresholds are lower than those proposed under the California Rules.
		Publicly traded companies in the U.S., both U.S. and non-U.S. companies, and other companies that have public reporting obligations even if they do not have exchange-traded equity or debt.
		Based on the current draft issued in March 2022, domestic and foreign registrants would be required to include extensive climate-related disclosures in their annual reports and in registration statements.

[3] As currently drafted and may be modified following further regulatory review or through the adoption of further legislation/guidance.

California Rules	CSRD	SEC Rules (in the current drafting)
What to Disclose		
SB 253: Reporting is required on Scope 1, Scope 2 and Scope 3 GHG emissions in compliance with the Greenhouse Gas Protocol standards. **SB 261:** Reporting is required on (i) climate-related financial risks in accordance with the Final Report of Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD); and (ii) measures the entity has taken to mitigate and adapt to the disclosed climate-related financial risks. Note: If a covered entity cannot provide all the required disclosures, it should provide as much information as possible, explain any gaps in reporting and outline the steps it will take to provide complete disclosures.	The reporting requirements for CSRD are set out in the European Sustainability Reporting Standards (ESRS). These consist of: > Cross-cutting standards – general principles, setting out the mandatory concepts and principles for reporting under CSRD (ESRS1) and general disclosures, setting out disclosures applicable to all in-scope entities regardless of their sector/activity (ESRS2). > Ten topical standards – the disclosure under these standards is dependent on whether they are material, following a materiality assessment carried out by the in-scope entity – climate change (ESRS E1), pollution (ESRS E2), water and marine resources (ESRS E3), biodiversity and ecosystems (ESRS E4) and resources use and circular economy (ESRS E5), own workforce (ESRS S1), workforce in value chain (ESRS S2), affected communities (ESRS S3) and consumers and end-users (ESRS S4) and disclosure of corporate strategy, approach and governance processes in respect of business conduct that give rise to material impacts, risks and opportunities (ESRS G1). > Sector specific standards – these are yet to be published, but will set out specific disclosures required of companies operating in particular sectors. The structure of the disclosures for the general disclosures and topical disclosures broadly follows the same structure to cover: a) governance; b) strategy; c) impact, risk and opportunity management; and d) metrics and targets. This structure will be familiar to those who currently report under TCFD Recommendations.	Scope 1 and Scope 2 GHG emissions which are subject to assurance requirements, and Scope 3 GHG emissions if they are material or included in the company's targets. In contrast to CSRD, there are no social-focused disclosure requirements. There are, however, requirements to disclose on the governance of climate-related risks. Oversight and governance of climate-related risks by the company's board and management. Climate-related risks that have had, or are likely to have, a material impact on the business or consolidated financial statements, in the short, medium and long terms. How such climate risks have affected or are likely to affect the company's strategy, business model or outlook. The company's process for identifying, assessing, and managing climate-related risks. The impact of severe weather events and transition activities on the financial statement line items and disclosure of financial estimates and assumptions impacted by such events and activities. The company's climate-related targets or goals and transition plan, if any. Financial metrics in the company's financial statements involving financial impact, expenditure metrics and financial estimates and assumptions.
When to disclose		
SB 253: Public disclosure on Scope 1 and 2 GHG emissions starting in 2026 (on a date to be determined) and annually thereafter, and on Scope 3 GHG emissions within 180 days after publicly disclosing its Scope 1 and Scope 2 GHG emissions. **SB 261:** Reporting on climate-related financial risks on or before January 1, 2026 and biennially (every other year) thereafter.	A phased approach to CSRD applies with different entities expected to report for different financial years depending on the applicability. Please see our deeper diver on CSRD applicability below for further information.	Implementation is currently delayed of the previously published timetable of SEC Rule adoption by the end of 2022 with a phase-in period between 2023-2026.

California Rules	CSRD	SEC Rules (in the current drafting)
Where to disclose		
SB 253: Reports will need to be uploaded to a state-wide digital emissions platform to be developed by CARB. **SB 261:** Reports need to be made publicly available on the covered entity's website. Reports can be consolidated at parent company level even if a subsidiary of a parent company qualifies on its own as an entity covered under SB 261.	Whether the CSRD report is prepared on a solo or consolidated basis for a group or sub-group will be fact-specific and not always linked to how financial reports are prepared. Of particular relevance for U.S. companies, if within scope as an issuer on an EU regulated market, then the management report must comply with the full sustainability reporting required under CSRD. In contrast, if the company is within scope as a result of having the requisite EU turnover and in-scope EU subsidiary and/or EU branch with €40 million turnover, there will be separate, presumed simplified reporting standards, the details of which will be published at a later date. It is also the EU subsidiary or branch that has the responsibility for publishing the sustainability report.	The proposal sets out that the climate-related disclosures will be set out in annual reports on Form 10-K or 20-F, subject to the Exchange Act, and registration statements. As a result, the expectation is that it would be prepared on the same basis and cover the same entity/entities covered by this annual report.
Materiality basis		
Under SB 253: Single materiality – what is material enough to impact the organization financially. **Under SB 261:** Single materiality – what is material enough to impact the organization financially.	Double materiality is applied under CSRD, which is a key distinguishing feature in comparison to other non-financial reporting regimes. This means that there are two lenses of materiality that need to be applied to be considered "material". A risk opportunity or impact may be material in both regards or just one to: > "Impact materiality" applies to the material impacts of operations and value chains on the environmental and people (which may not yet be financially material but relate to longer-term enterprise value). > "Financial materiality" applies to the sustainability-related risks and opportunities that could reasonably be expected to affect the company's cash flows, access to financing or cost of capital over the short, medium or long-term. Any in-scope entities or groups will need to decide what their thresholds for materiality are, which in itself will be a significant exercise. Where there is consolidated group reporting for CSRD, there may need to be a disaggregation exercise to fully understand the material impacts, risks and opportunities in specific entities vs. as a group.	The SEC states that its focus is on materiality to investors and what a "reasonable investor" may consider as material. This is the traditional "materiality" analysis blessed by the SEC and the U.S. courts and is from a financial perspective. However, many of the disclosures that would be required under the proposed rules appear to seek information beyond what would be required under the traditional materiality analysis, and we expect the SEC to provide additional clarity in the rules upon adoption.

California Rules	CSRD	SEC Rules (in the current drafting)
Supply and/or value chain[4]		
Under SB 253: A covered entity's value chain must be reported on as part of Scope 3 GHG emissions. **Under SB 261:** A covered entity must disclose the impact of climate-related risks and opportunities on its business and strategy, including with respect to both its supply chain and value chain, as applicable.	The value chain must be reported on under CSRD, which is defined as "the full range of activities, resources and relationship related to the companies' business model and the external environment in which it operates. A value chain encompasses the activities, resources and relationships the entity uses and relies on to create its products or services from conception to delivery, consumption and end-of-life." It is extremely broad in coverage, as the information on material impacts, risks and opportunities needs to be reported on with regards to both direct and indirect business relationships in its upstream and/or downstream value chain. Identifying and engaging with the relevant stakeholders will be critical to meet this requirement. There is some transitional relief for the first three years of reporting. If a company is unable to meet these requirements, it can instead explain its efforts and challenges in trying to do so and what its plans are for obtaining the information moving forward.	Value chain considerations would only be applied if this was relevant in assessing the financial materiality for the company, and the requirement to report value chain considerations may be reduced or softened in the SEC's final rules.
Transition plans		
Not applicable	CSRD stops short of requiring in-scope entities to have a transition plan which is aligned with an entity's strategy and business model supporting the limiting of global warming by 1.5 degrees Celsius, in line with the Paris Agreement. However, in-scope entities are required to disclose whether they have such a transition plan and if not, when they will adopt one. If an in-scope entity does have such a plan, there are requirements to have the plan independently verified.	One-year transition for the largest, most mature filing companies, and longer transition for other companies. Thus, rules adopted in 2024 should apply for the 2025 fiscal year to the top-level filers, with new disclosures in annual reports filed in 2026. A longer phase-in period for companies that have filing statuses reflecting that they are smaller and/or less mature filing companies. The SEC has proposed to provide all companies with longer transition periods for specific requirement where it believes a longer transition is warranted.
Assurance and audit		
Under SB 253: A qualified independent third-party assurance provider with expertise in GHG emissions accounting must provide independent verification of the disclosures. "Limited" assurance is required for Scope 1 and 2 GHG emissions starting in 2026, which gets increased to "reasonable" assurance in 2030;	Reporting is subject to limited external assurance requirements, with the expectation that this will be lifted to reasonable assurance at a later date.	The proposed rules would require the largest, most mature filers to include an attestation report covering the disclosure of its Scope 1 and Scope 2 GHG emissions, and to provide related disclosures about the attesting third-party provider.

[4] A supply chain refers to the steps needed to get a product to the consumer, and includes product development, marketing, operations, distribution, finance and customer service. A value chain refers to the process in which a business receives raw materials, adds value to them through production, manufacturing, and other steps to create a finished product, and then sells the finished product to the consumer.

California Rules	CSRD	SEC Rules (in the current drafting)
"Limited" assurance is required for Scope 3 GHG emissions beginning in 2030 (unless a higher assurance requirement has been established). **Under SB 261:** The covered entity does not have to arrange for third-party assurance. However: CARB is required to engage a climate reporting organization to prepare a public report – on a biennial basis – that evaluates the disclosure of climate-related financial risks in industry-specific reports, analyses sector-wide climate-related financial risks and identifies inadequate reports. Covered entities must pay an annual filing fee (amount to be determined) to cover CARB's cost of administering and implementing the legislation.		
Equivalency		
Under SB 253: The legislation is intended to minimize duplication of effort and allows a covered entity to submit reports prepared to meet other national and international requirements (e.g., any reports required by the federal government to be prepared), provided those reports also satisfy all of the requirements of SB 253. **Under SB 261:** Not applicable.	U.S. parent companies could be exempt from reporting if there is consolidated sustainability reporting in a manner deemed to be equivalent to CSRD. The requirement to report on a double materiality basis is likely the most significant hurdle for U.S. entities to be able to rely on the CSRD equivalency exemption, which provides there is no requirement to report under CSRD if there is already sustainability reporting on an equivalent basis, as other proposed regimes (including the SEC Rules and California Rules) apply a financial materiality test alone, instead of the double materiality test. More information on the interoperability of CSRD with other international non-financial reporting regimes will be clearer following the publication of guidance that is expected in 2024.	The proposed rules did not address this subject, but the rules upon adoption may address it.
Penalties for Non-Compliance		
Under SB 253: Up to $500,000 per reporting year; provided that for Scope 3 GHG emissions (i) until 2030, a penalty will only be imposed for no disclosure, and (ii) there is a safe harbor provision for misstatements made in good faith. Under SB 261: Up to $50,000 per reporting year. Note: Under both, CARB will consider all relevant factors in determining the penalty amount.	The consequences for non-compliance will be established in CSRD's implementation in each EU Member State. This could include public censure, conduct orders, administrative or even criminal penalties.	The penalty would be an SEC civil enforcement action, which could involve an injunction and financial penalties levied against the company as well as potentially senior officers, as well as, in the latter case, bars from serving as officers of public companies in the U.S. The SEC staff reviews filings and is expected to carefully inspect related disclosures upon the new rules becoming effective. The SEC staff issues comments to which the company must respond and possibly file amendments.

California Rules	CSRD	SEC Rules (in the current drafting)
Guidance/Further Implementation Information		
Under SB253, the CARB will be responsible for developing and adopting regulations to implement this program by January 1, 2025, after considering input from various stakeholders, including contracting with an emissions reporting organization to develop a reporting program to receive and make the required disclosures publicly available. The entities in scope of SB 261 will also be required to pay an annual fee to CARB (to be set in an amount sufficient to cover CARB's cost of administering and implementing the bill), to be deposited into the Climate Accountability and Emissions Disclosure Fund, a new fund to be created to fund CARB's activities under this legislation. **Under SB 261**, there is no such requirement for CARB to establish additional regulations, and there is no requirement to report to CARB either.	Further specific guidance and standards will be published over the coming years, including on how to apply the standards for non-EU companies and for sectors in (1) Oil and Gas, (2) Coal, Quarries and Mining, (3) Road Transport, (4) Agriculture Farming and Fisheries, (5) Motor Vehicles, (6) Energy Production and Utilities, (7) Food and Beverages and (8) Textiles, Accessories, Footwear and Jewellery. Guidance will also be published regarding the application of CSRD to the financial services industry and on the interoperability of CSRD with other non-financial reporting regimes. Despite such a significant amount of guidance yet to be published, the expectation is that in-scope entities and groups will move forward with complying with CSRD.	The SEC typically provides additional guidance following adoption of the new rules in the form of informal staff interpretations, FAQs and formal public releases.

Practical next steps

Companies should take time to understand and evaluate the requirements of all proposed climate regulations (and in the case of the EU's CSRD, social too) to determine what would be applicable to them, develop a strategy for compliance and continue to monitor developments in the rulemaking process.

As an initial step, a scoping exercise is recommended to analyse carefully which parts of your group or entities may be subject to the California Rules, CSRD and the proposed SEC Rules, respectively. If there is actual or potential capture, the next step would be to understand when the reporting requirements apply.

Following the scoping and timing assessment, an analysis of the content required to be reported on can begin with an evaluation of whether any existing sustainability reporting and underlying policies and processes can be utilized, particularly for the California Rules where there is the potential to rely on other national and international sustainability reporting obligations and requirements. In particular, companies are recommended to develop or revisit existing compliance frameworks that support the calculation of their GHG emissions data in accordance with the GHG Protocol[5] and TCFD, as that component is unlikely to change even if the California Rules are to be amended, and also will be useful to leverage for any capture under CSRD and the SEC Rules.

[5] The GHG Protocol establishes comprehensive global standardized frameworks to measure and manage GHG emissions from private and public sector operations, value chains and mitigation actions.

Contact

Our U.S. and London offices are working closely on supporting clients with the applicability of these requirements. For information on a particular regime, please reach out to:

Aliza Cinamon
acinamon@proskauer.com

for further information on the California Rules

Rachel Lowe
rlowe@proskauer.com

for further information on CSRD

Frank Zarb
fzarb@proskauer.com

for further information on the SEC Rules

Glossary

Scope 1: All direct GHG emissions from sources that are owned or controlled by the reporting entity.

Scope 2: Indirect GHG emissions from consumption of purchased electricity, heat or steam.

Scope 3: Other indirect emissions, such as the extraction and production of purchased materials and fuels, transport-related activities in vehicles not owned or controlled by the reporting entity, electricity-related activities not covered in Scope 2, outsourced activities, waste disposal, etc.

Source: Calculation Tools | GHG Protocol