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PH ESG Comparative Analysis of the SEC Climate Rule and EU CSRD & ESRS

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1. Duty-bearers		
SEC Climate Rule	**EU CSRD & ESRS**	**PH ESG Comment**
(i) US domestic companies and foreign private issuers that file Exchange Act reports and (ii) US domestic companies and foreign private issuers that are not emerging growth companies ("EGCs") conducting an IPO in the United States (collectively, "US Reporting Companies").	Certain listed and unlisted private companies, including non-EU businesses with a footprint in Europe that generate more than EUR 150 mn revenue in the EU for two preceding financial years.	Both regimes will capture: ▪ US Reporting Companies that generate **more than EUR 150 mn revenue in Europe** and have (I) at least one subsidiary in the EU with more than EUR 50 mn revenue, EUR 25 mn balance sheet total and/or 250 employees[1] and/or (II) a branch in the EU with more than EUR 50 mn revenue and/or (III) an EU subsidiary that is listed on an EU regulated market (a **large non-EU company**) or have a subsidiary that is (i) listed on an EU regulated market and/or (ii) a large EU company and/or (iii) a branch in the EU with more than EUR 50 mn revenue.

2. Scope of data-gathering		
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1. For everyone in scope: – **Material climate-related risks** and their **impact** on the registrant's business; – Activities to **mitigate or adapt** to such risks (including **material expenditures**); – board of **directors' oversight** of climate-related risks and **management's role** in managing material climate-related risks; – processes for identifying, assessing and managing material climate-related risks; – **climate-related targets or goals that are material** to the registrant's business, results of operations or financial condition; and – any **costs, expenditures, charges and losses** incurred as a result of severe weather events and/or related to certain carbon offsets and renewable energy credits. 2. Large accelerated filers and accelerated filers will be required to disclose Scope 1 and/or	General and topic-specific disclosure standards on greenhouse gas emissions require a business to disclose its impacts on climate change, and information necessary to understand how climate change affects the business' development, performance and position ("**double materiality**"). On greenhouse gas emissions[2], detailed disclosures will be required in respect of **governance, strategy and metrics & targets** that address multiple topics including[3]: ▪ how the business affects climate change, in terms of **material positive and negative actual and potential** impacts and the business' past, current, and future mitigation efforts in line with a 1.5°C temperature rise scenario; ▪ the **plans and capacity** of the business to adapt its strategy and business model; ▪ any **other actions** taken by the business, and the result of such actions to prevent, mitigate or remediate actual or potential negative impacts, and to address risks and opportunities[4]; ▪ the **nature, type and extent** of the business' material **risks[5] and opportunities** arising from the business'	Large accelerated filers and accelerated filers with a prescribed footprint in Europe will need to make disclosures based on the double materiality principle (albeit with less detailed disclosure requirements under the SEC Climate Rule). The SEC Climate Rule will require disclosure of Scope 1 and/or Scope 2 greenhouse gas emissions that are deemed material to investor decisions; the EU will require disclosure of gross total Scope 1, 2 and 3 emissions data where greenhouse gas emissions are deemed material from both a financial and impact perspective. Otherwise, there is significant overlap between the other topics covered by the SEC Climate Rule and EU rules on climate change, save that the EU rules are significantly more prescriptive in terms of the level of detail required to address the impact of climate change on a business' governance, strategy and metrics & targets (and a business' impact on climate change) – including over multiple time horizons.

Scope 2 greenhouse gas emissions that are deemed material to investor decisions.	▪ **impacts and dependencies** on climate change, and how the business manages them; and ▪ the **financial effects** on the business over the **short-, medium- and long-term** of risks and opportunities arising from the business' **impacts and dependencies** on climate change.	
3. Applicable timelines		
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▪ The first disclosure items (including governance and risk management disclosures, and certain disclosures related to climate-related risks, strategies, targets and goals by the new Regulation S-K and all Regulation S-X items) will be required from large accelerated filers for annual disclosures related to the **fiscal year beginning 2025** (i.e., to be included in a Form 10-K for the fiscal year ended December 31, 2025, filed in 2026) and the last disclosure required (reasonable assurance on GHG emissions for large accelerated filers) will be phased in related to annual disclosure for the fiscal year beginning 2033. ▪ US domestic companies and foreign private issuers conducting IPOs will be required to comply with the new rules in registration statements that are required to include	Large listed EU companies will be required to gather data from 1 January 2024 and report from 1 January 2025. Large EU companies will be required to gather data from 1 January 2025 and report from 1 January 2026. Listed SMEs will be required to gather data from 1 January 2026 and report from 1 January 2027. Large non-EU companies will be required to gather data from 1 January 2028 and report from 1 January 2029 as part of their annual report. In all cases, these data will be published as part of their annual report (time for publication of which will depend on their individual annual reporting cadence).	International companies captured under both regimes should review the relevant timelines and map out a compliance project that enables data to be gathered and assessed on both sides of the Atlantic well in advance of disclosure deadlines. Where such companies could benefit from exemptions (see below), legal advice should be taken on staging such compliance projects accordingly.

financial information for the full fiscal year in which the annual disclosure is required.		
4. Treatment of Scope 3 emissions		
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Excluded from reporting obligations.	Where deemed material to an in-scope business and **on a comply or explain basis**, disclosures on climate change mitigation shall include **Scope 3 greenhouse gas emission reduction targets** and **gross Scope 3 greenhouse gas emissions** from each significant Scope 3 category.	Given the focus of the EU rules on both a business' own operations **and its value chain**, including its products and services, its business relationships and its supply chain, the inclusion of Scope 3 emissions disclosures remains a critical element of sustainability reporting for businesses with a footprint in Europe.
5. Role for transition plans		
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Final rule provision (Item 1502(e)) will require a registrant to describe a transition plan if it has adopted the plan to manage a material transition risk: ▪ The final rules do not mandate that registrants adopt a transition plan; if a registrant does not have a plan, no disclosure is required. ▪ The final rule does not list the types of transition risks and factors related to those risks that must be disclosed, if applicable. Instead, registrants are given flexibility to provide disclosure that addresses the particular facts and circumstances of its material transition risk.	In-scope businesses shall disclose their transition plan for climate change mitigation that will include an explanation of how the business' greenhouse gas emission reduction targets are compatible with a 1.5 degree temperature rise scenario.	Where climate change is deemed a material risk under the EU rules, a transition plan must be developed. Such requirement does not exist under the SEC Climate Rule, however, if such a transition plan does exist at the group level, US Reporting Companies will need to describe the transition plan and keep related disclosures updated on it (subject to the safe harbour on private liability).

A registrant shall update its annual report disclosure about the transition plan each fiscal year by describing any actions taken during the year under the plan. The update also must include quantitative and qualitative disclosure of material expenditures incurred and material impacts on financial estimates and assumptions as a direct result of the disclosed actions taken under the plan. A registrant's transition plan disclosure will be subject to a safe harbour from private liability.		
6. Role of scenario analysis		
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Final rule provision (Item 1502(f)) will require a registrant to disclose its scenario analysis if it uses it to assess the impact of climate-related risks on its business, results of operations, or financial condition: ▪ The final rules do not mandate that registrant include scenario analysis in their climate risk reporting. If a registrant does not conduct scenario analysis, no disclosure is required. ▪ The final rules do not mandate a specific analytical tool or risk management model that registrants must use in their scenario analysis. If, based on the results of scenario analysis, a registrant determines that a climate-related risk is reasonably likely to have a material impact on its business, results of operations, or financial	CSRD requires that in-scope businesses assess climate-related risks and opportunities using scenario analysis. Climate risks and opportunities should be identified by taking a range of possible futures into account, including a 'best case,' a rapid, low-carbon transition where global warming is limited to 1.5°C, as well as a 'worst case', high physical impact scenario of +4°C warming by 2100.	Although the SEC Climate Rule does not mandate companies to use scenario analysis, the disclosure requirement for scenario analysis under the CSRD means that any international company captured under both regimes must conduct scenario analysis and disclose under both US and EU rules.

condition, then the registrant must describe each such scenario in a "brief description" of: ▪ the parameters, assumptions, and analytical choices used; and ▪ the expected material impacts, including financial impacts, on the registrant under each such scenario.		
7. Location of disclosures		
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▪ US domestic companies to incorporate by reference into their Form 10-K from their second quarter Form 10-Q GHG emissions disclosure related to the prior fiscal year. ▪ Foreign private issuers not filing on domestic forms are able to file GHG emissions disclosure in an amendment to their Form 20-F no later than 225 days after the end of the fiscal year to which the GHG metrics disclosure relate. ▪ US domestic companies and foreign private issuers conducting IPOs that are not EGCs to include disclosures in their Form S-1 or F-1 registration statement.	Annual management report (or consolidated management report) in the electronic reporting format specified, together with the relevant financial statements. EU Member States may require businesses to make the management report available to the public on their website, free of charge and where a business does not have a website, Member States may require it to make a written copy of its management report available upon request. A large non-EU company will be required to publish and make accessible a sustainability report covering the prescribed information at the group level of that ultimate third-country parent business.	International companies captured under both regimes will be required to publish in-scope data in their annual reports published pursuant to the disclosure regimes under both the US and EU rules. Consistency of data reported at the group level will be key.
8. Definition of "materiality"		

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Scope 1 and 2 disclosure requirements are subject to materiality qualifiers. When evaluating whether any climate related risks have materially impacted or are reasonably likely to have a material impact on the registrant, registrants are to rely on "traditional notions of materiality": ▪ A matter is 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 or such a reasonable investor would view omission of the disclosure as having significantly altered the total mix of information made available. ▪ The materiality determination requires both quantitative and qualitative considerations.	CSRD does not require disclosure on greenhouse gas emissions when the in-scope business has assessed the topic as non-material[6].	Under the EU rule, where a business determines that climate change (based on the relevant disclosure requirements and data points) is not material, a detailed explanation of the reasons for that determination must be provided. Under the SEC Climate Rule, the scope of materiality is limited to the importance of information to investment and voting decisions about a particular company and not to the importance of the information to climate-related issues outside of those decisions.

9. Need for third party assurance		
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Large accelerated filers and accelerated filers provide varying levels of assurance reports on Scope 1 and/or Scope 2 emissions disclosure: ▪ Large accelerated filers –	Sustainability reports must be accompanied by an assurance opinion by a suitably approved independent assurance services provider, including those who are authorised to give an opinion on the assurance of sustainability reporting under the national law of any third-country business or of a Member State.	The European authorities will decide in due course on the interoperability of accounting standards and third country sustainability reporting standards that are used by third-country issuers. If they decide that the accounting standards or the sustainability reporting standards of a third country are not equivalent, it may allow the issuers

– Reports in filings related to the fiscal year beginning 2029 must be at a **limited assurance** level – Reports in filings related to the fiscal year beginning 2033 must be at a **reasonable assurance** level ▪ Accelerated filers– – Reports in filings related to the fiscal year beginning 2031 must be at a **limited assurance** level.	In the event that any third-country business does not provide the assurance opinion, the in-scope EU subsidiary business or branch shall issue a statement indicating that the third-country parent business did not make the necessary assurance opinion available. Further regulation on limited assurance standards and reasonable assurance standards (which are required in successive periods under the rules) will follow.	concerned to continue using such standards during an appropriate transitional period. The key point to bear in mind here is that where a parent company based in the US does not engage a third party assurance process for sustainability reporting, EU subsidiaries are required to state that fact. Assurance under the EU rules will be limited until the Commission adopts delegated acts in order to provide for reasonable assurance standards. Under the SEC Climate Rule, reasonable assurance will be required for large accelerated filers of reports relating to fiscal year 2033.
10. Opt-outs / exemptions / exceptions to emissions reporting obligations		
SEC Climate Rule	**EU CSRD & ESRS**	**PH ESG Comment**
▪ Smaller reporting companies ("SRCs") and EGCs do not need to report. ▪ Provides a safe harbor from private liability for certain climate-related disclosures, other than historic facts, in addition to the existing safe harbors for forward-looking statements available under the Securities Act and the Exchange Act.	In-scope businesses do not need to disclose where such information would be seriously prejudicial to the commercial position of the business. There are also tailored exemptions for small and medium-sized businesses, small and non-complex institutions and captive insurance and reinsurance businesses. EU-incorporated subsidiaries of large non-EU companies may be exempted from their reporting obligations where they and their subsidiary businesses are included in the consolidated management report of a parent business, drawn up in accordance with the rules.	The Commission shall adopt by 30 June 2024 a delegated act on sustainability reporting standards for third-country businesses that specify the information that is to be included in their sustainability reports.

	Until 6 January 2030, Member States shall permit a Union subsidiary business and whose parent business is not governed by the law of a Member State to prepare consolidated sustainability reporting. Businesses or groups not exceeding on their balance sheet dates the average number of 750 employees during the financial year (on a consolidated basis where applicable) may omit the datapoints on scope 3 emissions and total GHG emissions for the first year of preparation of their sustainability statement.	
11. Potential future challenges		
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The main challenge to the SEC Climate Rule is its ability to withstand litigation. The Fifth Circuit has temporarily blocked the implementation of the Rule by issuing an emergency stay in a challenge brought by an oil and gas company.[7] Challenges have also been brought in the 6th, 8th, and 11th circuits. This includes a coalition of 10 states led by West Virginia.[8] Further, Congressional Republicans have indicated plans to overturn the SEC's Climate Disclosure Rule, potentially using the Congressional Review Act, a mechanism that allows Congress to overrule federal agency actions. To succeed, a joint resolution of disapproval must be approved by both	The main challenge to the CSRD & ESRS is that posed by other national authorities developing sustainability disclosure requirements based on the International Sustainability Standards Board (e.g. UK, Australia, and Singapore).	It remains to be seen whether the SEC Climate Rule survives litigation (and potentially legislation/CRA joint resolution). However, there remains pressure on companies in the US from investors, activists, and employees to address climate-related risks. Further, the CSRD will face potential lobbying pressures and/or litigation challenges from companies operating in jurisdictions where sustainability disclosure requirements are less demanding.

houses of Congress and signed by the President, or if there is a Presidential veto (which would be a certainty under a Biden Administration), Congress can successfully override such presidential veto. Finally, we anticipate that certain environmental groups may file suit alleging that the SEC did not go far enough.		

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] Companies captured by the criteria specified in (I) being "**large EU companies**".

[2] Defined as carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF_6) and nitrogen trifluoride (NF_3).

[3] These disclosures cover climate change mitigation and climate change adaptation, and energy-related matters, to the extent that they are relevant to climate change.

[4] This will include (i) details of significant monetary amounts of Capex and Opex required to implement actions taken or planned to the relevant line items or notes in the financial statements and (ii) greenhouse gas emission reduction targets for Scope 1, 2 and 3 greenhouse gas emissions, excluding greenhouse gas removals, carbon credits or avoided emissions as a means of achieving the targets.

[5] Such disclosures shall include the resilience of the business' strategy and model to climate change (including scenario analysis).

[6] Materiality is determined based on the outcome of the combined impact and financial materiality assessment of impacts, risks and opportunities in respect of climate change specified in the European Sustainability Reporting Standards. An example of "financial materiality" is a matter that could reasonably be expected to affect a business' financial position. An example of "impact materiality" is a matter that has an actual impact that is severe, or potential impact that is severe and likely.

[7] Fifth Circuit of Appeals, March 15, 2024 (law360.com)

[8] SEC Climate Disclosure Petition for Review.pdf (wv.gov).