

# SEC cybersecurity and climate rules: Where are they now?

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Back when the Securities and Exchange Commission (SEC) released its 2022 and 2023 Examination Priorities Reports, the Commission indicated that under the banner of “Information Security and Operational Resiliency” it would be focusing on issues related to cybersecurity and climate risk in the coming years.

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As part of this focus, the SEC subsequently proposed and finalized two major (and controversial) new sets of regulations over the next two years. These rules require reporting companies to disclose detailed information about material cybersecurity incidents (“Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure” – SEC.gov) and about climate-related risks and greenhouse gas emissions (“The Enhancement and Standardization of Climate Related Disclosures for Investors” – SEC.gov).

We are now in a period where we’re seeing these initiatives come to fruition — with varying results so far.

## Cybersecurity safeguards and disclosures

In May 2022 (<https://bit.ly/4biosVI>), we looked at the SEC’s attempts to heighten cybersecurity efforts and mandate disclosure of cyber incidents through a new set of rules. These incidents can include occurrences such as cyber breaches by malicious actors or accidental data leaks.

The rules require registered companies to report material cybersecurity incidents within a certain time frame and to make disclosures pertaining to the company’s cybersecurity protocols and risk management strategies. The rules were adopted on July 26, 2023, with most companies required to begin compliance in December 2023.

From Dec. 15, 2023, to May 1, 2024, 15 companies — including Microsoft, Hewlett Packard, UnitedHealth Group, and Dropbox —

have disclosed cybersecurity incidents (<https://bit.ly/3WGwK5o>) under Item 1.05 of Form 8-K through the SEC’s Electronic Data Gathering, Analysis, and Retrieval system (EDGAR).

The SEC rules dictate that these cyber disclosures should be made within four business days of the *company’s determination that a cyber incident is material*. The reporting window is structured this way so that companies can have a reasonable amount of time after the detection of a cyber incident to conduct a materiality analysis of its impact.

Once an incident is determined to be material, the rules mandate that the companies must report “the material aspects of the nature, scope, and timing of the incident, and the material impact or reasonably likely material impact on the registrant, including its financial condition and results of operations.”

However, in looking more closely at these particular 15 disclosures, many of the companies disclosed incidents quite soon after they were detected, often within only a few days. Perhaps because of this early disclosure, many of the Form 8-K descriptions stated that it was too early to know whether the cyber incident would have a material effect on the company’s financial condition and results of operations.

In some other instances, the disclosures stated that the cyber incident would likely *not* have a material effect on business operations at all. This could suggest a couple of things: that companies are disclosing too soon, before they can truly assess to what extent an event is material; that out of an abundance of caution, companies are voluntarily disclosing events that aren’t necessarily material; that companies are interpreting the term “material” in different ways.

When faced with the difficult task of assessing an incident’s materiality and its potential consequences, it may be that companies are preferring to err on the side of caution, opting to over-disclose even when details are not forthcoming.

After the first of these disclosures was filed by V.F. Corporation, the SEC issued a comment letter (<https://bit.ly/4dxKju1>) encouraging the company to file an amendment to its disclosure once it had more specific details about the material impacts of the cyber incident. For the time being, however, the “report first, give details later” approach appears to be somewhat of an emerging pattern in these types of filings.

Seven of the 15 companies that disclosed cyber incidents have filed at least one additional amendment with the SEC. This is perhaps a sign that reporting companies may require additional guidance from the SEC regarding what factors should be weighed when determining whether a cyber event and its impacts are “material.”

### SEC climate disclosure requirements face pushback

In September 2022 (<https://bit.ly/4ald9Lp>), we wrote about the SEC’s plans to tamp down on the effects of so-called “greenwashing,” i.e., when a company misrepresents the extent to which it (or a product, process, operation, etc.) is environmentally conscious, resilient, or sustainable.

Part of this effort to stem the tide of greenwashing was an SEC rule that would require reporting companies to include detailed climate-related disclosures in their registration statements and periodic reports. These disclosures would need to include information such as greenhouse gas emissions, updates on any publicly set climate goals, climate-related risks that could affect company operations, and risk management policies.

The rules were formally adopted on March 6, 2024. Notably, the final rules differed from the original proposed rules in that they dropped the requirement to disclose “Scope 3” greenhouse gas emissions, which are indirect emissions generated both upstream and downstream in an organization’s value chain. These could include emissions from activities such as production and transportation of purchased goods, business travel, waste disposal, and use of sold products.

However, the new rules have been — at least temporarily — sidelined by litigation challenges. Shortly after the rules were finalized, a slew of lawsuits were lodged against the SEC in a variety of courts of appeals across the country and have now been consolidated for review in the 8th U.S. Circuit Court of Appeals.

The petitioners challenging the SEC’s climate disclosure rules are doing so from opposite standpoints: Some parties are suing because they believe the SEC is exceeding its regulatory scope while other parties believe the SEC isn’t doing enough to elicit meaningful climate disclosures.

Proponents of the first school of thought include the U.S. Chamber of Commerce, several state attorneys general, and organizations

in the energy sector. Liberty Energy, Inc., which originally filed suit in the 5th U.S. Circuit Court of Appeals, stated in its petition for administrative stay that “there is no clear authority for the SEC to effectively regulate the controversial issue of climate change” and that the rules violate the First Amendment by “mandating controversial disclosures using controversial frameworks and effectively mandating discussions about climate change.” (See *Liberty Energy, Inc., et al. v. SEC*, No. 24-60109).

Proponents of the second school of thought — namely environmental agencies such as the Sierra Club and the Natural Resources Defense Council — argue that the final rules are too watered down and that the SEC should require even more climate-related information to be disclosed to investors.

In a March 13 press release posted on its website, the Sierra Club stated, “In its final rule, the SEC capitulated to industry lobbyists by rolling back emissions disclosure requirements. The final rule arbitrarily removed Scope 3 emissions disclosure requirements ... and weakened Scope 1 and 2 emissions disclosure requirements ... Investors need complete information about a company’s exposure to climate-related financial risks through a full accounting of their greenhouse gas (GHG) emissions ...”

Several of the petitioning parties sought a stay of the rules pending judicial review in the 8th Circuit; however, the SEC announced on April 4 that it would voluntarily delay implementation of the rules until the petitions in the 8th Circuit could be resolved.

### Conclusion

Two of the SEC’s most extensive regulatory regimes are now both in their respective states of limbo. The merits of the SEC’s climate rules, and the Commission’s authority to implement such rules, look like they are set to be hashed out in the 8th Circuit — with implementation of the rules delayed indefinitely.

And while the cybersecurity rules have certainly seen the light of day and are in full effect, it may take some time and additional guidance on the part of the SEC for reporting companies to figure out how to comply in a way that aligns with what the SEC envisioned when creating the regulations.

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