

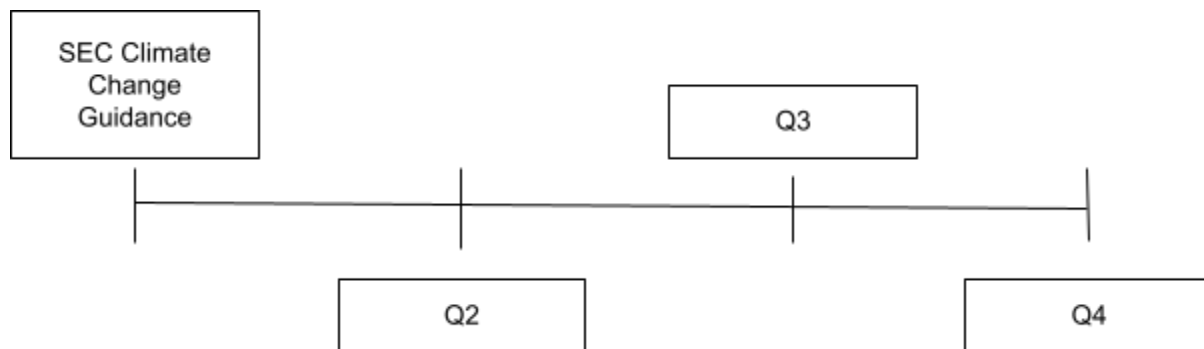
## “Now We’re Talking”

*Jamila Piracci*

On March 6 of this year, the SEC adopted climate related disclosure rules (Final Rules)<sup>1</sup> after a long and bumpy ride,<sup>2</sup> which has become more circuitous as litigation checks the SEC’s approach. While it is uncomfortable to wade through murky and unsettled regulatory waters, democratic values support a real conversation about the rule of law, the authority of administrative agencies and, in this case, the obligations of public companies to their investors. Because of the political and cultural forces surrounding climate-related topics, corporations and citizens alike have guarded their remarks. Until now.

Below are timelines of key milestones that tell the story of this moment:<sup>3</sup>

### 2010



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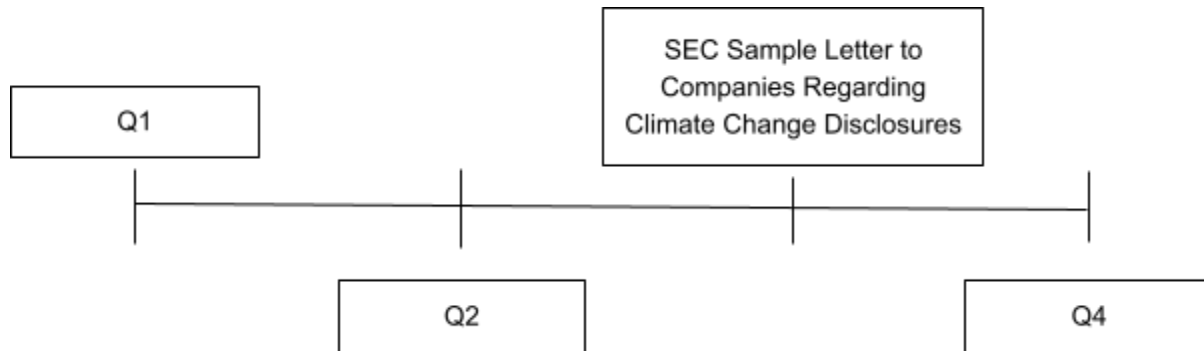
<sup>1</sup> “SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors,” <https://www.sec.gov/news/press-release/2024-31>

<sup>2</sup> In late 2023, California also passed laws that will require public and private companies with revenue over specified thresholds, that do business in California, to disclose greenhouse gas emissions and climate-related financial risks beginning in 2026. In response several complaints were filed in the Central District of California.

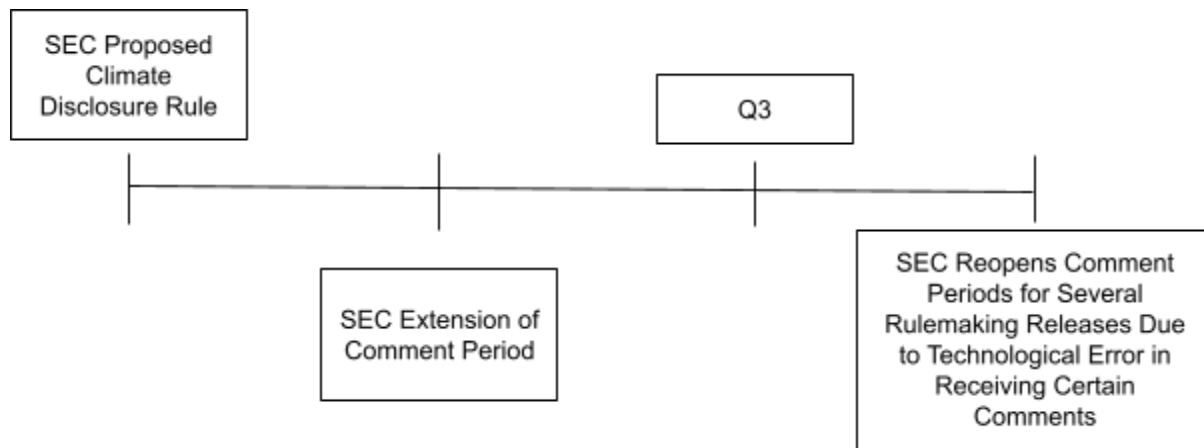
(<https://eelp.law.harvard.edu/2024/02/litigation-updates-on-californias-new-climate-disclosure-laws/>)

<sup>3</sup> [SEC Climate Change Guidance](#); [SEC Sample Letter to Companies Regarding Climate Change Disclosures](#); [SEC Proposed Climate Disclosure Rule](#); [SEC Extension of Comment Period](#); [SEC Reopens Comment Periods for Several Rulemaking Releases Due to Technological Error in Receiving Certain Comments](#); [SEC Adopts Final Climate Related Risk Disclosure Rule](#); [States file a petition with the US Court of Appeals \(11th\) to block the SEC’s rule](#); [US Chamber of Commerce files petition against the SEC with US Court of Appeals \(5th\)](#); [Sierra Club files petition in the US Court of Appeals \(DC\)](#); [SEC orders a stay of the rules pending consolidated Eighth Circuit judicial review](#)

## 2021

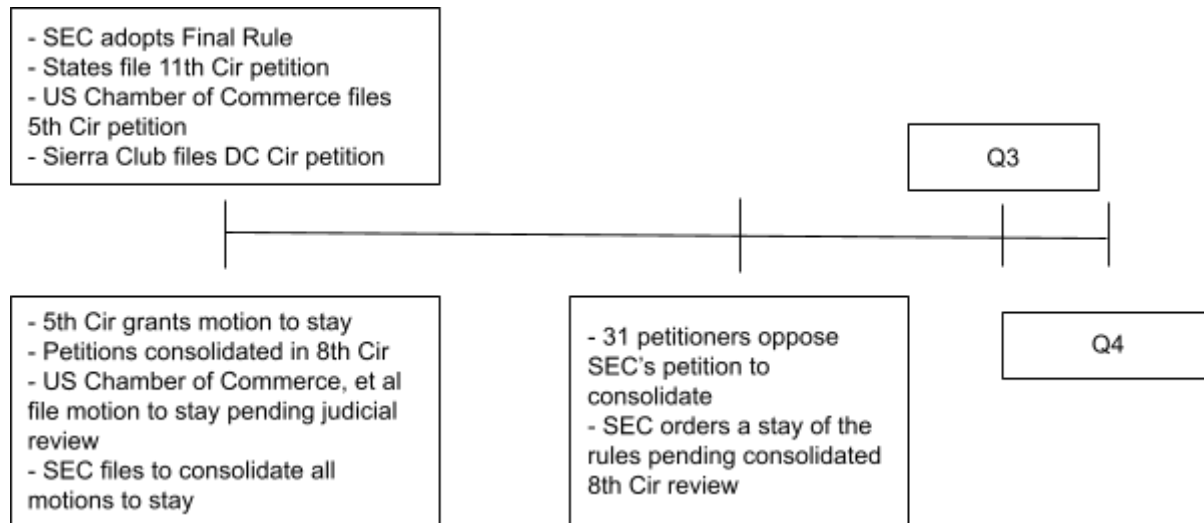


## 2022



[24,000 comment letters later . . .](#)

## 2024



### Overview of the Final Rule

The [SEC's Final Rules](#) would require SEC registrants to disclose certain climate-related information in registration statements and annual reports. Key disclosable elements include:

- Material climate-related risks, as well as activities to mitigate or adapt to those risks
- Information about the board's oversight of the registrant's climate-related risks and management's role in managing material climate-related risks; and
- Information on material climate-related targets or goals.

Beyond the mandate of disclosures in registration statements and annual reports, the Final Rules would require disclosure of Scope 1 and/or Scope 2 greenhouse gas (GHG) emissions, based on the SEC's stated aspiration to facilitate investors' assessment of certain climate-related risks. In terms of compliance periods, the Final Rules would take a phased approach, starting with larger registrants with "material" emissions.

The SEC suggests that the Final Rules are "a continuation of the Commission's efforts to respond to investor need for more consistent, comparable, and reliable information about the financial effects of climate-related risks on a registrant's business . . . ." <sup>4</sup> While the SEC certainly has been following a trajectory of guiding firms toward disclosures relating to climate risks, it has been unclear why that particular disclosure topic area is different from other areas of materiality for which firms have disclosure obligations. Moreover, it is notable that the ability to measure climate-related risks remains nascent at best, severely outpaced by cultural and political movements.

<sup>4</sup> "The Enhancement and Standardization of Climate-Related Disclosures: Final Rules," <https://www.sec.gov/files/33-11275-fact-sheet.pdf>, p. 1.

The dialogue around climate-related goals has been bereft of significant input from risk professionals until recently. Therefore, companies have made commitments, and in many jurisdictions there are regulatory obligations to disclose risks that are only beginning to be quantitatively measured on an individual basis or in a manner that has comparability across firms or sectors. As investors ostensibly make use of various disclosure rules, they may not be comparing apples to apples, even within a single sector, let alone across a diversified portfolio.

This issue leads to one of the substantive arguments posed by petitioners against the SEC - that is, that the rules would force registrants to report information that is suggested to be political rather than objective or factual.

### **Challenges to the SEC in light of pushback against the “administrative state”**

For some time, the administrative bodies of the executive branch have stepped beyond their clear authority into activities that are arguably legislative and judicial tasks.<sup>5</sup> The US voting public, at least as reflected in Congressional action, has not developed a consensus on what the law of the land should be regarding climate issues. Instead, executive administrations may embrace particular goals and slip into instructing administrative agencies to achieve those ends, sometimes justified as filling the void left by lawmakers.

That trend is on the ropes, though, and the judiciary is now being asked to judge whether the SEC has exceeded its authority. Commissioner Hester Peirce’s statement in disagreement with the SEC’s issuance of its proposed climate disclosure rule said it best: “We Are Not the Securities and Environment Commission - At Least Not Yet.”<sup>6</sup> The litigation surrounding the adopted rules suggests that she was and is not alone in this assessment.

Even while the SEC Final Rules are batted about, the Supreme Court is also due to rule on whether the “Chevron deference” (referring to Chevron U.S.A. v. Natural Resources Defense Council, Inc.<sup>7</sup>) to administrative proceedings, should stand. The Chevron deference subordinates a court’s interpretation to “a reasonable interpretation made by the administrative agency.”<sup>8</sup> With only one quarter of 2024 fully under our belts, this appears to be the year of valuable, full throated debate about the power wielded by administrative agencies.

### **What can risk officers do?**

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<sup>5</sup> See, for example “The Administrative State: The Lawmakers No One Votes For,” Lathan Watts, May 15, 2023 (<https://adfllegal.org/article/administrative-state-lawmakers-no-one-votes>)

<sup>6</sup> “We are Not the Securities and Environment Commission - At Least Not Yet,” <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>

<sup>7</sup> Chevron U.S.A. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984) (<https://www.law.cornell.edu/supremecourt/text/467/837>)

<sup>8</sup> “Chevron deference,” Cornell Law School, Legal Information Institute ([https://www.law.cornell.edu/wex/chevron\\_deference](https://www.law.cornell.edu/wex/chevron_deference))

1. Connect now and regularly with management, finance, sustainability, regulatory and other teams regarding climate-related goals.
2. Ascertain what climate-related risks and timelines your firm has committed to manage and on what basis.
3. If your firm has a footprint in non-US jurisdictions or in US states that have climate-related risk disclosure requirements, identify inputs that are needed for materials that your firm may produce for external parties.
4. Adjust existing risk measurement tools and tracking to accommodate your firm's climate-related risks, if needed.
5. Be transparent and vocal about risks that may be unquantifiable for some time.
6. Get involved in the CCRO and its Energy Transition Working Group!