Proposed legislation and policy affecting GHG emissions in the U.S.

By Colette D. Honorable, Jennifer Smokelin, Debra A. Palmer and Randa Lewis

Takeaways

- Proposed rule targets Scope 3 emissions
- The SEC's final rule will probably face challenges under the APA
- U.S. federal agencies are addressing concerns over GHG emissions and climate change

On March 21, 2022, the U.S. Securities Exchange Commission (SEC) released a proposed rulemaking package to require climate-related disclosures. One such requirement relates to Scope 3 emissions.

The SEC recognizes three categories of emissions: (1) Scope 1 emissions, which are direct emissions from sources owned or controlled by a company, (2) Scope 2 emissions, which are emissions primarily resulting from the generation of electricity consumed by a company, and (3) Scope 3 emissions, which refer to "all other indirect emissions not accounted for in Scope 2 emissions," meaning emissions from sources outside a company's control. Companies are typically able to calculate Scope 1 and 2 emissions without much difficulty; however, estimating Scope 3 emissions presents challenges, as Scope 3 emissions occur from other processes and entities outside the company's control that serve the company's value chain.

Reporting under the proposed rule

For registrants that do not qualify as a smaller reporting company (SRC), the proposed rule will require disclosure of Scope 3 emissions and their intensity if they are "material" or the registrant set a GHG emissions reduction goal that includes Scope 3 emissions. Thus, the proposed rule does not require reporting of all Scope 3 emissions. A company's reporting obligation would depend on a number of specific factors, which you can read more about in our blog post here.

Scope 3 calculation methodology

Although the proposed rule adopts many features of the GHG Protocol, a key difference between the two is the proposed rule's leniency on how companies calculate GHG emissions, which includes Scope 3 emissions. The proposed rule indicates that this deviation is an opportunity for companies to choose the methodology that best suits their portfolio and financing activities.

Safe harbors

While the proposed rule introduces sweeping changes to climate-related disclosures, it also includes key provisions aimed at lessening compliance burdens, including the exemption for SRCs, discussed above, a delayed compliance start date for Scope 3 emissions reporting, and a safe harbor provision that insulates a company from certain securities law liabilities for Scope 3 emissions disclosures.

The proposal includes a safe harbor provision related to liability for Scope 3 emissions that were disclosed under the proposed rule in a document filed with the SEC. This limitation on liability would deem a Scope 3 disclosure to not be fraudulent unless it was made or reaffirmed without a reasonable basis or disclosed other than in good faith.

The proposed rule's future

The proposed rule is subject to a notice and comment period, which is set to end on June 17, 2022. During this time, the SEC will accept public comments on its proposed rule. In March 2021, the SEC requested information on climate change disclosures and received approximately 600 comments in response. The SEC will likely receive substantially more comments on the proposed rule, which it must consider and address before the rule can be finalized and enforced. This process will likely take months to complete.

The SEC's final rule, to the extent it predominantly reflects the proposed rule, will likely be challenged under the Administrative Procedure Act (APA). One possible basis for a challenge would be the Scope 3 disclosures. Industry groups will likely try to stay the regulations pending litigation by arguing that any reporting associated with Scope 3 disclosures are outside the scope of the SEC's authority or that the SEC was only permitted to require disclosure of "material" emissions.

If industry groups challenge the rule under the APA, it is possible that a court will find that the public interest and balance of equities weigh in favor of granting an injunction, just as the Louisiana district issued a preliminary injunction that barred use of the Biden administration's social cost of carbon figure.

If the final rule faces challenges in court, its implementation may well be delayed. And with the possibility of a new administration being elected for the next term, this rule faces much uncertainty.

Counting the cost of carbon

President Joseph Biden issued Executive Order 13990 immediately after his inauguration in January 2021. The executive order requires federal agencies to "capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account."

Since then, U.S. federal agencies have enacted various measures to address concerns of the GHG emissions and climate change, and are facing contentious debate over how much to charge for carbon emissions.

EO 13990 established an Interagency Working Group on the Social Cost of Greenhouse Gases (IWG). The IWG defines the social cost of carbon (SCC) as the estimated cost to society of releasing one ton of carbon dioxide into the atmosphere. The SCC's value has varied from the Obama to the Trump and the Biden administrations, with the Biden administration using the Obama-era estimates adjusted for inflation. Although several states have objected to the Biden administration's use of the SCC, the U.S. Court of Appeals for the Fifth Circuit rejected the states' efforts to preclude the Biden administration's efforts (see the March 16 ruling in State of Louisiana v. Biden). There the court decided that the SCC policies may remain, because objecting states had not demonstrated standing.

The U.S. Federal Energy Regulatory Commission (FERC) and the Bureau of Land Management (BLM) are considering analyzing the SCC when issuing certificates or permits for energy infrastructure projects.

FERC is considering the issuance of a policy statement that will modify the standards used to evaluate applications by interstate natural gas pipelines to construct new facilities in order to address greenhouse gas emissions associated with the new facilities. The regulated community is weighing in.

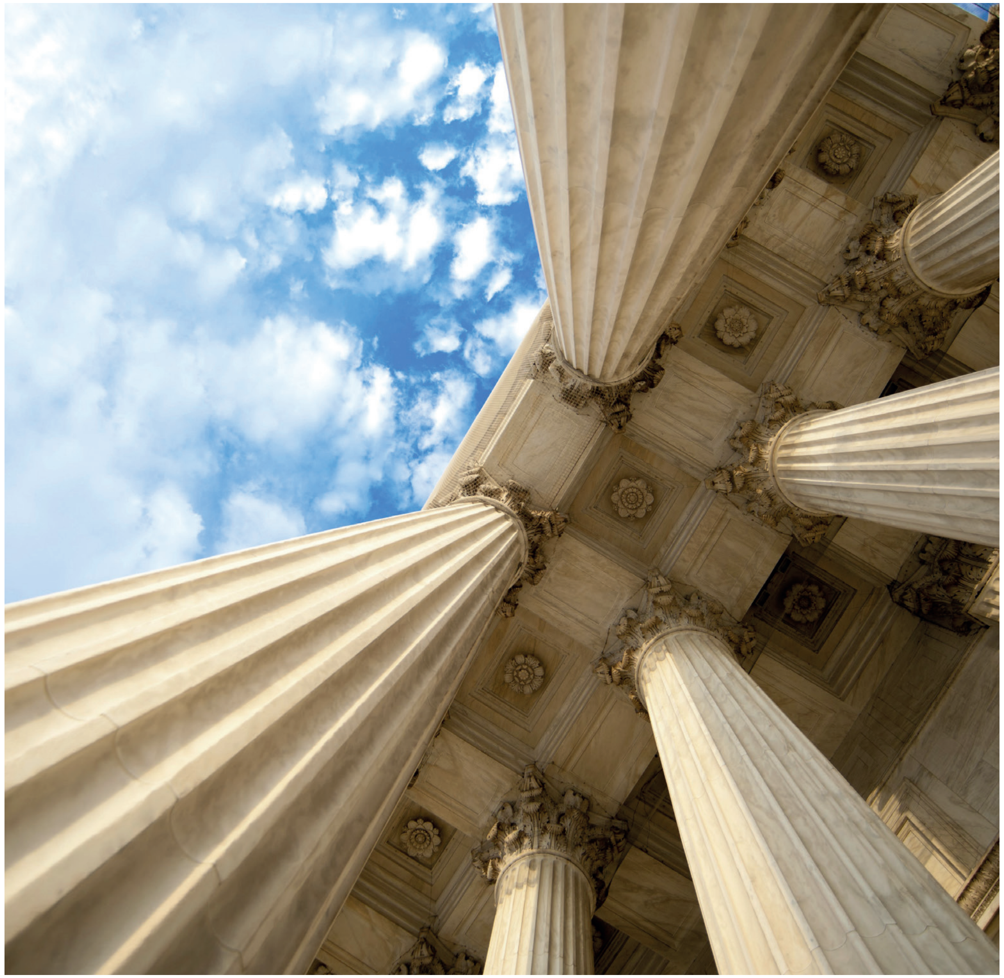
In response to objections from numerous parties, a March 24 order reclassified two policies – the Updated Policy Statement on Certification of New Interstate Natural Gas Facilities and the interim Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews – into “draft policy statements,” thereby reopening them for public comment.

But the U.S. Court of Appeals for the District of Columbia Circuit has issued a number of orders indicating that FERC must consider GHG emissions when approving proposals to construct facilities for the interstate transportation of natural gas. For example:

- *Food & Water Watch v. FERC*;
- *Vecinos Para el Bienestar de la Comunidad Costera v. FERC*; and
- *Sierra Club v. FERC*.

FERC has proposed, over the objections of certain commissioners and industry participants, to analyze not only the direct GHG effects of pipeline construction proposals, but also the upstream GHG effects associated with the production of the gas to be transported over the new facilities and the downstream GHG effects when the gas is consumed by the ultimate end-user. FERC is also considering applying the SCC to the GHG emissions that will result from new pipeline projects. FERC’s proposals in this regard have been highly controversial, but it hopes to issue final rules in the near future.

Similarly, BLM has stated that it will incorporate the SCC of greenhouse gases, including carbon, nitrous oxide, and methane) into its environmental analysis of fossil fuel leasing and development on federally-owned lands. BLM has developed a report that estimates annual GHG emissions from coal, oil, and gas development on federal lands and a longer-term assessment of GHG emissions and their climate change impacts.



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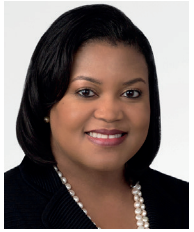
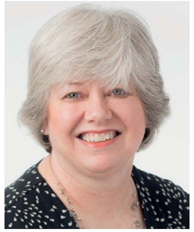


Colette leads the firm's Energy Regulatory group and is a member of the firm's executive committee. She is also a member of the firm's ESG group and is resident in the Washington, D.C., office. Colette is a highly regarded thought leader and strategist in domestic and international energy sectors. Colette recently served as Commissioner at the Federal Energy Regulatory Commission (FERC). She was nominated by President Barack Obama in August 2014, and unanimously confirmed by the U.S. Senate, serving from January 2015 until her term expired in June 2017. At the firm, Colette is a trusted advisor and counselor to several Fortune 500 energy companies, investor-owned utilities, renewable energy and technology companies. In this capacity, she provides strategic advice and counsel in a number of areas, including ratemaking matters, clean energy integration, performance-based ratemaking, achieving ESG goals and environmental justice issues. In her work, Colette supports clients working to mitigate the impacts of climate change, and also advises clients on the development and execution of inclusion strategies.

Jennifer Smokelin

Jennifer is a partner based in the Pittsburgh office. She is a thought leader on environmental and emerging energy issues, greenhouse gas legislation, and related environmental issues, with particular experience in Pennsylvania, the mid-Atlantic, California, and the European Union. Jennifer represents clients in a broad range of environmental and energy issues including environmental civil enforcement and litigation matters, as well as regulatory and transactional issues for energy and manufacturing companies. She has a particular focus on the environmental aspects of ESG, assisting clients with carbon footprint assessments, net zero plans, climate-related corporate reporting, ESG compliance, carbon offsetting and neutrality objectives, green energy, and renewables and alternative/sustainable fuels regulation.

Debra A. Palmer



Debra is based in the Washington, D.C., office. Her practice focuses on energy regulatory matters, with an emphasis on matters involving the Federal Energy Regulatory Commission (FERC), state public utility commissions, and the federal courts. She has more 30 years of experience with federal regulatory issues facing the energy industry, and has assisted her clients in pursuing their goals before FERC, state regulatory agencies, and the federal appellate courts. Debra advises clients with varied interests in the energy & natural resources sector, including natural gas companies, local distribution companies, oil and gas pipeline companies, and electric utilities. Her ability to understand regulators' goals and present her clients' interests accordingly has helped her become a leading advocate for energy firms across the United States. Deb understands the interrelationship between operational, business, and regulatory concerns faced by the energy industry. She has cultivated a deep knowledge in these areas, earning a reputation as a trusted advisor in the planning, operating, financial, regulatory and reliability issues facing the rapidly changing natural gas and electric industries.

Randa Lewis

Randa is an associate in the Pittsburgh office and focuses her practice on environmental transactions, regulations, and litigation. As part of the firm's global environmental, social and governance (ESG) practice, she advises clients on topics such as: drafting climate-related disclosures for public company filings, climate change-related risk management, renewable energy compliance matters, energy efficiency standards, and environmental sustainability issues. Randa has counseled clients on projects related to repurposing and redevelopment of traditional power sites like power plants and coal mines into renewable energy hubs.