

New in RegTech:

ALL SEC EDITION: Climate Disclosure Rule; What a Trump Victory Would Mean for the SEC Agenda

by:

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SEC Adopts Climate Reporting Rule, Satisfying No One

Making [headline news](#) in ESG regulation, the SEC on March 6th adopted its [Final Rule](#) for climate-related reporting by issuers. These disclosures must appear in various filings with the SEC such as annual and quarterly reports, and Securities Act registration statements, submitted by U.S. public companies and foreign private issuers.

Compared to the SEC's [previously proposed version](#), reporting companies are seeing some relief in this Final Rule, such as:

the removal of Scope 3 GHG emissions disclosures

later compliance dates, including Scopes 1 and 2 GHG emissions reporting which will apply to:

- fiscal year 2026 for “large accelerated filers” (i.e. public float ≥ \$700 million)
- fiscal year 2028 for certain “accelerated filers” (public float ≥ \$75 million)

emissions disclosures being required only if “material” to a company’s business

the removal of GHG emissions reporting for smaller companies

The SEC’s [fact sheet](#) and [text](#) of the Rule provide more details. See also the SEC’s [summary](#) of the new Rule and its purpose, its importance to investors, and relevant enforcement. Reactions to the Rule, from stakeholders to legal experts, can be found in FundFire’s piece [“Climate Rule Had ‘No Chance in Court’ sans Materiality: Ex-SEC Exec”](#).

If, as the saying goes, a properly negotiated outcome is when no one walks away satisfied, the SEC appears to have achieved that. Criticizing the Rule as an insufficient, watered-down effort given the urgency of the climate crisis, many environmental groups oppose it (the Sierra Club last week having [sued the SEC](#), and [stated that](#) the Rule insufficiently protects investors).

Meanwhile, a coalition of U.S. States and business interests say the Rule goes too far, in straying outside the SEC’s mandate as a government agency. At last count, 22 U.S. States have joined [lawsuits against the Rule](#), as has the [U.S. Chamber of Commerce](#) among other trade groups as well as energy companies (two fracking companies even persuading the Fifth Circuit Court of Appeals to [halt](#) the Rule pending the outcome of their lawsuit).

The earliest compliance date for the Rule applies to reporting by large accelerated filers, covering their activities in fiscal year 2025 (such reporting therefore to be made in 2026). Remaining obligations kick in during subsequent years, depending on the requirement and company type, until the final compliance date covering fiscal year 2033.

- Greg Hotaling, Regulatory Content Manager at Confluence

“The rules will provide investors with consistent, comparable, and decision-useful information, and issuers with clear reporting requirements.”

- Greg Gensler, SEC Chair

The Rules of Rulemaking: What a Trump Victory Would Mean for the SEC's Agenda

As investment managers adjust their compliance workflows and harness more data in response to the SEC's fulsome [agenda](#), they're also keeping an eye on its fate. Some of the SEC's rules are on a collision course with rulemaking skeptics, as we have seen with lawsuits covered in this and [last month's](#) edition, and it remains to be seen whether those rules emerge intact.

That skepticism will become even more consequential if a change of Presidential administration occurs in January 2025. Would the more [contentious measures](#) adopted by the SEC (or for that matter, by other federal agencies) survive a Trump win?

Congressional action

A recently issued agency regulation can be nullified by Congress, under the [Congressional Review Act \(CRA\)](#). The House and the Senate must each vote for it, whereupon they would issue a "joint resolution of disapproval". (Under the CRA the [filibuster](#), which forces a three-fifths vote to pass laws, may not be used; hence simple majorities can repeal regulations under the CRA.) If the President vetoes such a repeal, Congress must override the veto with a two-thirds vote.

During the current Biden administration, it's clear that most regulations issued during his tenure are unlikely to be successfully repealed under the CRA: the Senate currently [tips slightly Democratic](#) (when including the few Independents who tend to vote with Democrats), and anyway neither chamber is likely to muster a two-thirds vote needed to override a Biden veto of any such attempt at repeal. This has not stopped Congress from [trying](#), however (including with respect to SEC rules such as [climate-related disclosures](#) and [cybersecurity risks](#)). In fact [Biden has been forced to veto](#) more CRA resolutions than any other President.

In the scenario of a Trump election victory – which could also result in Republican control of the House and Senate – leveraging the CRA becomes much more plausible.

The CRA requires agencies, before a rule takes effect, to [send to Congress](#) a copy of the rule, and gives Congress "60 days" thereafter to introduce any [joint resolution of disapproval](#). "60 days" means days when Congress is in continual session, which can mean several months in real time. So, while a newly elected, majority-Republican Congress starting in January 2025 could not simply repeal any past regulation under the CRA (as it would exceed the "60 day" deadline for most regulations), it could still repeal regulations recently adopted. (Moreover, upon taking office, under the CRA the new Congress is entitled to a [renewed](#) "60 day lookback" period, to submit its resolution.)

Take for example 2017, the year Trump previously took office as President. Despite the CRA's nullification provision having been employed successfully only once since its passage in 1996, in 2017 the Republican-controlled Congress invoked it successfully to [overturn more than a dozen rules](#) that had been issued by [a variety of agencies](#) under Obama's tenure, including the SEC. When Biden then took office in 2021, the Democratic-controlled Congress used the CRA to successfully [overturn three rules](#) made by agencies under Trump.

Consequently, under the current Biden administration, the SEC and other federal agencies benefit from “[CRA-proofing](#)” their rules from Republican attacks. They do so by finalizing their rules by around [May of 2024](#) (depending on variables that determine passage of 60 elapsed “legislative days” of Congress being in session). This would make any CRA-enabled attempt at repealing such rules, by a hypothetical Republican-controlled Congress starting in January 2025, too late.

Hence firms with a stake in the SEC’s [rulemaking agenda](#) can better gauge the ultimate fate of those proposals, in the event of a Republican-controlled Congress next year, by knowing what rulemaking stage they are in, and by trying to ascertain when they will be adopted. The SEC’s [searchable page](#) on its rulemaking activity has the latest information.

Agency action

Even without Congressional action under the CRA to rescind an agency’s regulation, the agency itself [could effectively do so](#), by issuing a new (and counter-acting) regulation. But it would take time, bound by the usual rulemaking procedures such as a Notice of Proposed Rulemaking and a comment period. In the case of the SEC, nevertheless, for a Trump administration that process could somewhat benefit from a three-out-of-five Republican slate of Commissioners as permitted under federal law. (Each of the five Commissioners serving staggered five-year terms, and thus one Commissioner’s term ending on June 5th every year. To ensure that the SEC [remains “non-partisan”](#) as an independent agency, no more than three of the five Commissioners may belong to the same party.)

Regulations Not Yet Final

The requirements for the overturning of a regulation, by an agency or by Congress, can also [depend on its status](#): proposed, final, published, or effective. In short, the less advanced it is, the easier it is to repeal. In the event of an SEC once again under Trump, this would determine what administrative steps would need to be taken to nullify a rule.

Perhaps stating the obvious, future regulation would likely be curtailed as well, in a new Trump era. The prior Trump administration proved its willingness to immediately roll back regulations on many fronts (for example upon taking office in 2017, by issuing an [Executive Order](#) requiring federal agencies to [repeal two regulations for every one proposed](#)), and few doubt that the same would happen in 2025.

“This is the most important election in our lifetime”, uttered by American politicians seemingly every four years, is a phrase that has been both [mocked](#) and [psychoanalyzed](#). But given the prolificacy of SEC rulemaking under Biden, standing in stark contrast to Trump’s proven commitment to undo rulemaking, the phrase could ring somewhat true for investment managers and others affected significantly by policies of the SEC and other federal agencies.

- Greg Hotaling, Regulatory Content Manager at Confluence

“Based on the current schedule issued by the House Majority Leader, May 22, 2024 is the next CRA deadline, meaning that any rules published in the Federal Register after that date would likely be eligible for CRA review at the beginning of the next Congress.”

- *National Law Review, “Federal Agencies Face Looming Congressional Review Act Deadline”*


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