# SEC CLIMATE DISCLOSURE RULES

## Final Rules & Next Steps

March 12, 2024

GIBSON DUNN

# AGENDA

# OVERVIEW & CONTEXT

01

# Key Considerations

## Many Climate Disclosures Now Qualified by Materiality

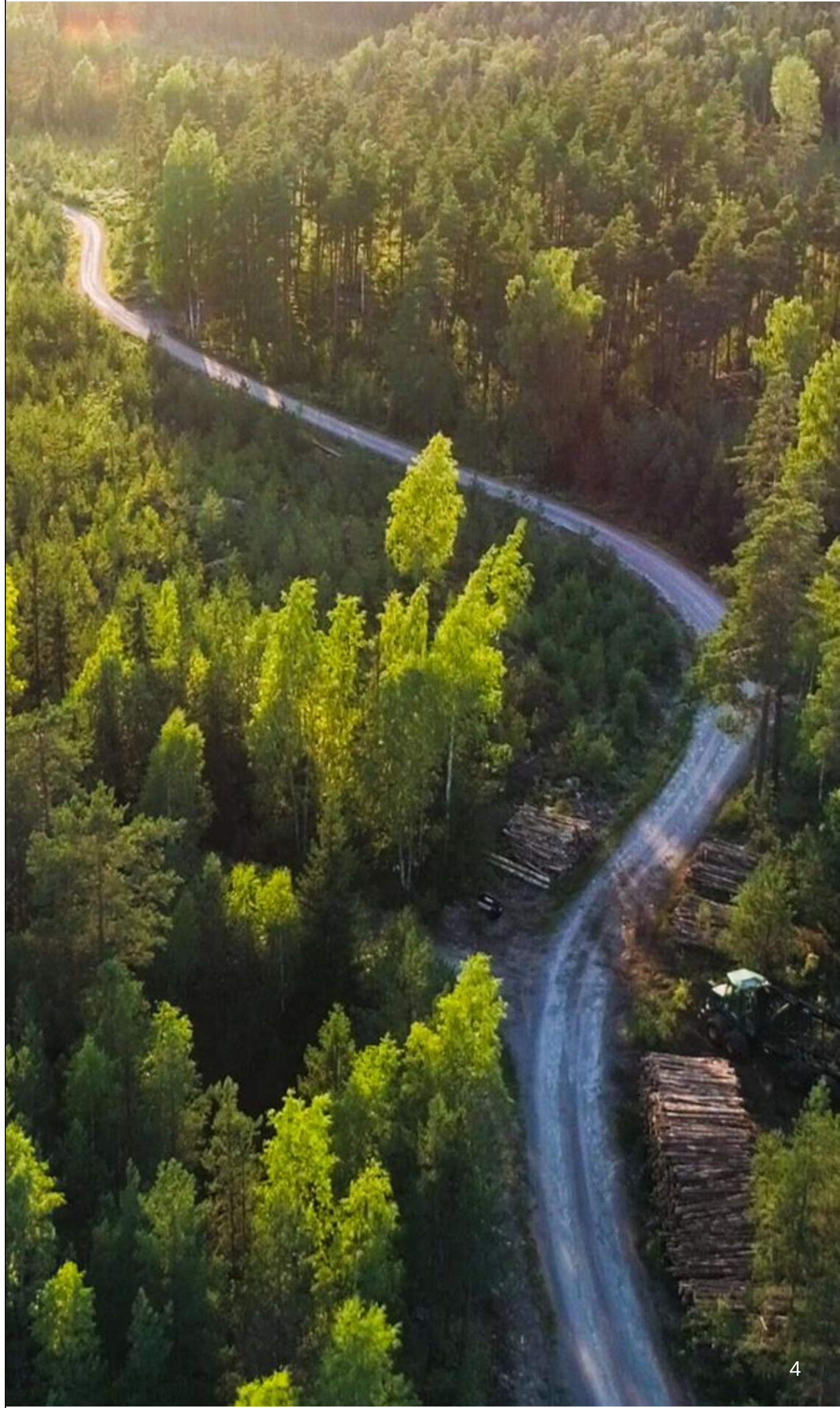
- Rule states that "traditional notions of materiality" will apply to new disclosure requirements:  substantial likelihood that a reasonable investor would consider the information to be important to a voting or investment decision; omission of the information would be viewed as having significantly altered the total mix of information made available
- "Double materiality" does not apply – i.e., impact of the company's activities on climate or environment – but be thoughtful as you begin to prepare CSRD disclosures, if applicable
- Impact on investment portfolio as a whole is not a relevant consideration for materiality. The rule proposal posited this view, which the final rule does not repeat

## Fewer Prescriptive Requirements, But Still a Significant Lift

The final rules pare back some of the prescriptive details from the proposed rules, including to make clear that certain items are "non-exhaustive," but issuers will likely require significant time and resources to prepare the required disclosures

## Two Years Too Late?

The global reporting landscape for climate and other matters has significantly changed since the rules were proposed, and companies will be navigating the SEC's rules alongside (or after) disclosure requirements in California, the EU and UK—at least if the rules survive legal challenges



# REGULATION S-K AMENDMENTS

02

# REG. S-K – Item 1501

# Climate Governance

## Climate-Related Risk Oversight & Management

- **Board-level oversight** of climate-related risks:
  - ➢ Board committee/subcommittee responsible for such risks
  - ➢ Processes by which they are informed about such risks
  - ➢ For disclosed climate-related targets/goals or transition plans, whether/how board oversees progress on such targets/goals or plans
  - ➢ No materiality trigger

- **Management's role** in assessing/managing climate-related risks:
  - ➢ Management positions/committees responsible for risk assessment/management & their relevant expertise
  - ➢ Processes by which they assess/manage such risks
  - ➢ Whether they report about such risks to the Board or a Board committee or subcommittee
  - ➢ No materiality trigger

# REG. S-K – Item 1502

# Climate Strategy

## Climate-Related Risks and Impacts

- **Climate-related risks with material impacts** on company, strategy, results of operations, or financial condition
- **Actual/potential impacts of such identified risks** on strategy, business model, and outlook
- **Whether/how company considers such impacts** as part of its strategy, financial planning, and capital allocation
- **How climate-related risks identified** materially impact company's business, results of operations, or financial condition
- **Material expenditures incurred and material impacts on** financial estimates/assumptions resulting from disclosed activities to mitigate or adapt to climate-related risks

# REG. S-K – Item 1502

# Transition Plans, Scenario Analyses & Internal Carbon Pricing

## Climate-Related Risks and Impacts (cont'd)

- **Describe any transition plan(s) adopted** to manage material transition risk
- **Describe each scenario analysis *IF*** one is used to assess climate-related risk impacts on the business, results of operations, or financial condition ***AND*** company determined a climate-related risk is reasonably likely to have a material impact on its business, results of operations, or financial condition
- **Disclose internal carbon price(s) if material** to the company's evaluation and management of an identified climate-related risk

# REG. S-K – Items 1503

# Risk Management

## Risk Process Disclosure

- **Processes for identifying, assessing, and managing** material climate-related risks, including how the company identifies, responds to, or prioritizes such risks

- Whether/how the **processes are integrated into overall risk management** processes or systems

# REG. S-K – Items 1505 & 1506

# Emissions Reporting

## GHG Emission Metrics & Assurance

- Disclose **Scope 1 and Scope 2 GHG emissions, if material,** and if an accelerated or large accelerated filer
- Emissions for last fiscal year can be filed with the corresponding Form 10-K or delayed to:
  - the next Q2 Form 10-Q or
  - a Form 10-K/A filed by the Q2 Form 10-Q deadline
- "Limited assurance" attestation required for Scope 1 and 2 GHG emissions in the third fiscal year after the compliance date
- Large accelerated filers must transition to "reasonable assurance" attestation in the seventh fiscal year after the compliance date
- Attestation report is filed as new Exhibit 27
- No <u>express</u> Scope 3 requirement but….

# REG. S-K – Item 1504

# Climate-Related Goal Setting

## Targets, Goals & Transition Plans Disclosures

- Disclose **climate-related targets or goals** that materially affect the company's business, financial condition, or results of operations, including information needed to understand material impacts from the target/goal
- Report on **progress, including how achieved**
- Disclose **material impacts and expenditures** from such targets or goals (or actions related thereto)
- Disclose **carbon avoidance, reduction or removal** from carbon offsets or renewable energy certificates if used as a material component of the company's plan to achieve climate-related targets or goals

# REG. S-K – Item 1507

# Safe Harbor

## Applies to Certain Climate-Related Disclosures

- Statements made regarding transition plans (in 1502(e)), scenario analyses (in 1502(f)), internal carbon pricing (in 1502(g)) and climate-related targets and goals (in 1504), except historical facts

- Forward-looking statements made in connection with an initial public offering, rollup transaction, and certain securities offerings

- Statements made when company is not subject to Section 13(a)/15(d) of Exchange Act

# REGULATION S-X AMENDMENTS

03

# REG. S-X – Rules 14-01 & 14-02

# What is Required?

## New Financial Statement Footnote

- Report aggregate expenditures, charges, and losses incurred "as a result of" severe weather events and other natural conditions that are 1% or more of either net income before tax and/or stockholders' equity, depending on whether such amounts are expensed or capitalized
- Report costs, expenditures and losses related to carbon offsets and renewable energy credits if they are a material component of a company's plan to achieve its disclosed climate-related targets or goals
- Disclose whether any estimates/assumptions used to produce the financial statements were materially impacted by exposures to risks and uncertainties associated with, or known impacts from, (1) severe weather events and other natural conditions or (2) any climate-related targets or transition plans, and if so, how

## Scope of Disclosure

- On a prospective basis only, starting with most recently completed fiscal year

## Other Quantitative Data to be Disclosed Outside of Financial Statements

- Material expenditures related to mitigation activities, transition plans and targets and goals are required to be disclosed outside of financial statements

# REG. S-X

# Changes From the Proposed Rules

## Proposed Regulation S-X Requirements

- Financial impacts of severe weather events and other natural conditions if more than 1% of any relevant line item in financial statements
- Financial impacts related to transition activities if more than 1% of any relevant line item in financial statements
- Expenditures expensed and capitalized costs incurred to mitigate risks of severe weather events and other natural conditions, if more than 1% of total expenditures expensed and capitalized costs for the fiscal year
- Expenditures expensed and capitalized costs incurred to reduce GHG emissions or otherwise limit exposure to transition risks, if more than 1% of total expenditures expensed or capitalized costs for the fiscal year
- Financial estimates and assumptions impacted by severe weather events and other natural conditions
- Financial estimates and assumptions impacted by transition activities
- Impact of identified client-related risks and opportunities

## Comments – Corporate community highly critical of Regulation S-X proposal

- Reg. S-X proposal would be difficult to implement and require registrants to make costly and burdensome adjustments to controls, procedures and to accounting records
- Result in a potentially overwhelming volume of information that would be immaterial

# NEXT STEPS FOR PUBLIC COMPANIES

04

# Next Steps for Public Companies

**Reexamine climate-related risk oversight practices**

→ Understand current state and areas of improvement because these will be disclosed in detail

**Evaluate disclosure controls and procedures and internal controls**

→ The rule requires a robust control environment over the new disclosures

**Assess accounting / tracking systems for required analysis and disclosures**

→ Reg. S-X disclosures will require the right system to track expenditures / costs / capital spend

**Perform disclosure gap analysis / consider intersection with other disclosure regimes**

→ Overlay the new rule against your current mandatory and voluntary disclosures

**Consider materiality**

→ The rule does overlay notions of materiality, but the SEC takes a broad view of that concept

**Assess internal expertise**

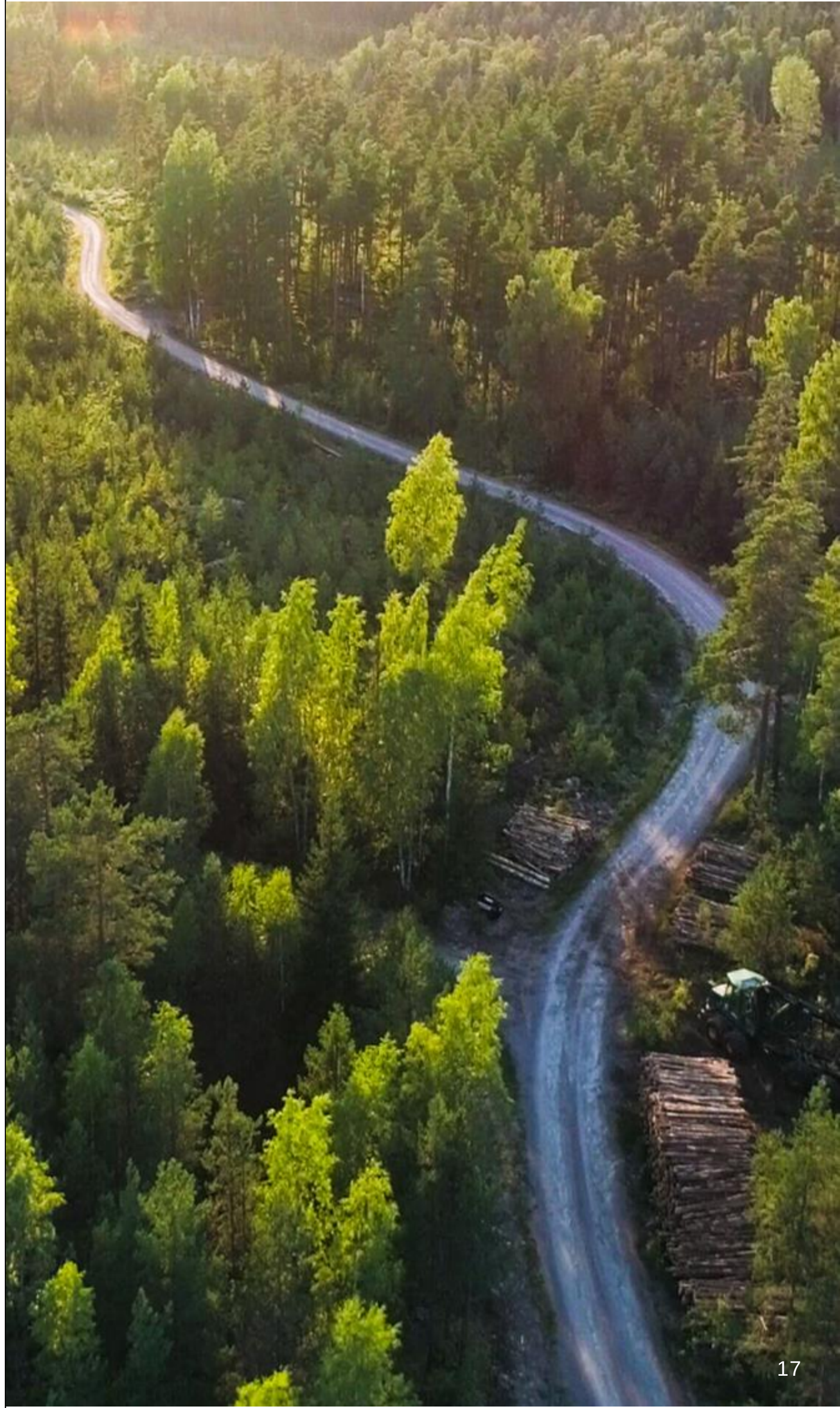
→ Assess that you have the right internal talent / experience to make the required disclosures

**Discuss implications with your outside auditor**

→ Begin dialogue now to understand how these new requirements will impact your audit

**Remember that the new rule is meant to raise the risk of liability**

→ One purpose of the rule is to increase the risk of liability, so important that companies accurately report



# Implementation Timeline – Large Accelerated Filers

| Disclosure Items | Report for FY Beginning in: | 12/31 Year End | 6/30 Year End | 10/31 Year End |
|---|---|---|---|---|
| Reg. S-K & S-X requirements (other than the below): | 2025 | **10-K filed in 2026** for FY ended 12/31/25 | **10-K filed in 2026** for FY ended 6/30/26 | **10-K filed in 2026** for FY ended 10/31/26 |
| → Certain quantitative & qualitative disclosures | 2026 | **10-K filed in 2027** for FY ended 12/31/26 | **10-K filed in 2027** for FY ended 6/30/27 | **10-K filed in 2027** for FY ended 10/31/27 |
| → Scope 1 & 2 GHG emissions | 2026 | **Q2 10-Q filed in 2027** for FY ended 12/31/26 | **Q2 10-Q filed in 2028** for FY ended 6/30/27 | **Q2 10-Q filed in 2028** for FY ended 10/31/27 |
| → Limited assurance of emissions | 2029 | **Q2 10-Q filed in 2030** for FY ended 12/31/29 | **Q2 10-Q filed in 2031** for FY ended 6/30/30 | **Q2 10-Q filed in 2031** for FY ended 10/31/30 |
| → Reasonable assurance of emissions | 2033 | **Q2 10-Q filed in 2034** for FY ended 12/31/33 | **Q2 10-Q filed in 2035** for FY ended 6/30/34 | **Q2 10-Q filed in 2035** for FY ended 10/31/34 |
| Inline XBRL Tagging for Reg. S-K Requirements** | 2026 | **10-K filed in 2027** for FY ended 12/31/26 | **10-K filed in 2027** for FY ended 6/30/27 | **10-K filed in 2027** for FY ended 10/31/27 |

** Scope 1 and 2 GHG emissions for the most recent fiscal year, as well as the related assurance, may be reported in the Form 10-K, in the Q2 Form 10-Q, or in an amendment to the Form 10-K by the Q2 Form 10-Q filing deadline*

*** Reg. S-X requirements will be tagged with the first disclosure*

# Implementation Timeline – Accelerated Filers

***(other than Smaller Reporting Companies or Emerging Growth Companies)***

| Disclosure Items | Report for FY Beginning in: | 12/31 Year End | 6/30 Year End | 10/31 Year End |
|---|---|---|---|---|
| Reg. S-K & S-X requirements (other than the below): | 2026 | **10-K filed in 2027** for FY ended 12/31/26 | **10-K filed in 2027** for FY ended 6/30/27 | **10-K filed in 2028** for FY ended 10/31/27 |
| → Certain quantitative & qualitative disclosures | 2027 | **10-K filed in 2028** for FY ended 12/31/27 | **10-K filed in 2028** for FY ended 6/30/28 | **10-K filed in 2029** for FY ended 10/31/28 |
| → Scope 1 & 2 GHG emissions | 2028 | **Q2 10-Q filed in 2029** for FY ended 12/31/28 | **Q2 10-Q filed in 2030** for FY ended 6/30/29 | **Q2 10-Q filed in 2030** for FY ended 10/31/29 |
| → Limited assurance of emissions | 2031 | **Q2 10-Q filed in 2032** for FY ended 12/31/31 | **Q2 10-Q filed in 2033** for FY ended 6/30/32 | **Q2 10-Q filed in 2033** for FY ended 10/31/32 |
| → Reasonable assurance of emissions | — | — | — | — |
| Inline XBRL Tagging for Reg. S-K Requirements** | 2026 | **10-K filed in 2027** for FY ended 12/31/26 | **10-K filed in 2027** for FY ended 6/30/27 | **10-K filed in 2028** for FY ended 10/31/27 |

** Scope 1 and 2 GHG emissions for the most recent fiscal year, as well as the related assurance, may be reported in the Form 10-K, in the Q2 Form 10-Q, or in an amendment to the Form 10-K by the Q2 Form 10-Q filing deadline*

*** Reg. S-X requirements will be tagged with the first disclosure*

# Implementation Timeline – Other Filers

## Non-Accelerated Filers | Smaller Reporting Companies | Emerging Growth Companies

| Disclosure Item | Report for FY Beginning in: | 12/31 Year End | 6/30 Year End | 10/31 Year End |
|---|---|---|---|---|
| Reg. S-K & S-X requirements (other than the below): | <u>2027</u> | **10-K filed in 2028** for FY ended 12/31/27 | **10-K filed in 2028** for FY ended 6/30/28 | **10-K filed in 2029** for FY ended 10/31/28 |
| → Certain quantitative & qualitative disclosures | <u>2028</u> | **10-K filed in 2029** for FY ended 12/31/28 | **10-K filed in 2029** for FY ended 6/30/29 | **10-K filed in 2030** for FY ended 10/31/29 |
| → Scope 1 & 2 GHG emissions | — | — | — | — |
| → Limited assurance of emissions | — | — | — | — |
| → Reasonable assurance of emissions | — | — | — | — |
| Inline XBRL Tagging for Reg. S-K Requirements* | <u>2027</u> | **10-K filed in 2028** for FY ended 12/31/27 | **10-K filed in 2028** for FY ended 6/30/28 | **10-K filed in 2029** for FY ended 10/31/28 |

** Reg. S-X requirements will be tagged with the first disclosure*

# LITIGATION CONSIDERATIONS

05

# Notable Cases

## Current Cases:

- *Liberty Energy v. SEC*, No. 24-60109 (5th Cir.) (filed 3/6)
- *Louisiana v. SEC*, No. 24-60109 (5th Cir.) (filed 3/7; added to *Liberty Energy* docket 3/11)
- *West Virginia v. SEC*, No. 24-10679 (11th Cir.) (filed 3/6)

**Tomorrow, March 13**: SEC response due to stay motion in *Liberty Energy*

**Saturday, March 16**: Plaintiffs request court ruling on stay request

**The "Lottery":** 28 U.S.C. § 2112(a)(1), (3)

## Legal Issues:

- Statutory Authority
- Major Question Doctrine
- First Amendment
- "Arbitrary and Capricious"
- Efficiency, Competition, and Capital Formation
- "Logical Outgrowth"

# ATTORNEY BIOGRAPHIES

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Beth Ising is a partner in Gibson Dunn's Washington, D.C. office and Co-Chair of the firm's Securities Regulation and Corporate Governance and its ESG (Environmental, Social & Governance) practices. She advises clients, including public companies and their boards of directors, on corporate governance, securities law, and ESG and sustainability matters and executive compensation best practices and disclosures. Representative matters include advising on Securities and Exchange Commission reporting requirements, proxy disclosures, SASB and TCFD disclosures, director independence matters, proxy advisory services, board and committee charters and governance guidelines and disclosure controls and procedures. Ms. Ising also regularly counsels public companies on shareholder activism issues, including on shareholder proposals and preparing for and responding to hedge fund and corporate governance activism. She also advises non-profit organizations on corporate governance issues.

Ms. Ising was recognized as a member of *Lawdragon's Green 500: Leaders in Environmental Law* guide for the second year in a row due to her work in ESG compliance and disputes (2023, 2024). For the third year, Ms. Ising was also named in *Lawdragon's 500 Leading Dealmakers in America* guide, which recognizes lawyers who "set the pace for lawyering in the financial world," in recognition of her work in Corporate Governance and Securities Regulation (2021, 2022, 2024). *BTI Consulting* named Ms. Ising an MVP to its 2018 and 2019 *BTI Client Service All-Stars* lists, recognizing the "lawyers who truly stand out as delivering the absolute best client service time and time again" as determined by a poll of corporate counsel. *Chambers USA* has recognized Ms. Ising as a top Securities: Regulation attorney in each of the last six years. She also has been named to *The Best Lawyers in America* list annually since 2018. Ms. Ising was named to the 2016, 2017, and 2023 editions of *Who's Who Legal: M&A and Governance,* a guide based on independent client and peer surveys. In 2017, Ms. Ising was elected as a fellow of the American College of Governance Counsel. She is a member of the Advisory Board of Northwestern University's Securities Regulation Institute, is a member of the Advisory Board of the John L. Weinberg Center for Corporate Governance at the University of Delaware and previously was named a "Rising Star of Corporate Governance" by Yale School of Management's Center for Corporate Governance and Performance.

Ms. Ising served as a member of the Board of Directors of the Society for Corporate Governance from 2020 to 2023 and currently serves as a member of the Board of Trustees at McLean School of Maryland, a K-12 school that specializes in educating college-bound students with challenges like dyslexia and ADHD.

**EDUCATION**

**University of North Carolina**
**Juris Doctor**

**James Madison University**
**Bachelor of Science**

**EDUCATION**

**Harvard University**
**Juris Doctor**

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Thomas J. Kim is a partner in the Washington D.C. office of Gibson, Dunn & Crutcher, LLP, where he is a member of the firm's Securities Regulation and Corporate Governance Practice Group. Mr. Kim focuses his practice on a broad range of SEC disclosure and regulatory matters, including capital raising and tender offer transactions and shareholder activist situations, as well as corporate governance, environmental social governance and compliance issues. He also advises clients on SEC enforcement investigations – as well as boards of directors and independent board committees on internal investigations – involving disclosure, registration, corporate governance and auditor independence issues.

Mr. Kim has extensive experience handling regulatory matters for companies with the SEC, including obtaining no-action and exemptive relief, interpretive guidance and waivers, and responding to disclosures and financial statement reviews by the Division of Corporation Finance.

Mr. Kim served at the SEC for six years as the Chief Counsel and Associate Director of the Division of Corporation Finance, and for one year as Counsel to the Chairman. As Chief Counsel, Mr. Kim was responsible for the Division's no-action, interpretive and exemptive positions. He also led several rulemaking initiatives including eliminating the prohibition on general solicitation in Rule 506 and Rule 144A offerings, the concept release on the U.S. proxy system, and the interpretive release on the use of company websites. In recent years, because of his SEC experience on the question of what is a security, he has advised many cryptocurrency companies on whether their particular digital assets constitute securities.

Before joining Gibson Dunn, Mr. Kim was a partner with Sidley Austin LLP. Prior to his tenure at the SEC, Mr. Kim served as Corporate and Securities Counsel for General Electric.

Mr. Kim has been recognized by *Chambers USA* in the Securities Regulation: Advisory category since 2015. He is also recognized by *The Best Lawyers in America®, Who's Who Legal,* and the *NACD Directorship 100* and is a Fellow of the American College of Governance Counsel. Mr. Kim is the Chair of the Northwestern Pritzker Law School's Annual Securities Regulation Institute. He also chairs the ABA's Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee. As a past member of the ABA's Committee on Corporate Laws, he edited two editions of the ABA's *Corporate Director's Guidebook*.

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## Partner / Washington, D.C.

Eugene Scalia is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher and co-chair of the firm's Administrative Law and Regulatory Practice Group. He returned to the firm after serving as U.S. Secretary of Labor from 2019 to 2021.

Mr. Scalia has a nationally-prominent practice in two areas: Labor and employment law, and advice and litigation regarding the regulatory obligations of federal administrative agencies. He also has extensive appellate experience. Federal regulatory actions he has challenged include the SEC's "proxy access" rule; the CFTC's "position limits'" rule; MetLife's designation as "too big to fail" by the Financial Services Oversight Council; the Labor Department's "fiduciary" rule; and OSHA's "cooperative compliance program." He has brought seven successful challenges to SEC regulations.

Mr. Scalia served from 2002 to 2003 as Solicitor of Labor, the Department of Labor's chief legal officer. He also served at the U.S. Department of Justice as a Special Assistant to the Attorney General, receiving the Department's Edmund J. Randolph Award in 1993. He is a Senior Fellow of the Administrative Conference of the United States, a federal agency that makes recommendations to Congress and the Executive Branch on ways to improve the administrative process.

Mr. Scalia graduated *cum laude* from the University of Chicago Law School, where he was editor-in-chief of the *Law Review*. He graduated With Distinction from the University of Virginia in 1985.

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**University of Chicago**
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David Woodcock is a partner in the Dallas and Washington offices of Gibson, Dunn & Crutcher. He is a co-chair of the firm's Securities Enforcement Practice Group, and a member of the firm's Securities Regulation and Corporate Governance, Accounting Firm Advisory and Defense; White Collar Defense and Investigations; Energy, Regulation and Litigation; Securities Litigation; and Oil and Gas Practice Groups.

Mr. Woodcock has been recognized as a leading attorney by *Chambers*, *Lawdragon* and *Super Lawyers*, among others. Most recently, he was name to *Lawdragon's* 2023 500 Leading U.S. Energy Lawyers list, which recognizes "outstanding elite" attorneys who "apply their knowledge to help old-school and new energy companies finance and build new power sources throughout the world." Additionally, Mr. Woodcock is a frequent commentator on legal issues and his most recent article includes "Using Data Analytics and Artificial Intelligence for Public Disclosures," published by the Harvard Law School Forum on Corporate Governance (Feb 4, 2024).

Mr. Woodcock's background as a CPA, senior officer at the Securities and Exchange Commission (SEC), global law firm partner, and senior in-house corporate attorney at a Fortune 10 company provides a diverse set of experiences and perspectives that are helpful in guiding clients through an array of complex matters. His practice focuses on internal investigations and SEC defense, with a particular emphasis on accounting and financial reporting, corporate compliance, and audit/special committee investigations. Mr. Woodcock regularly advises clients on corporate securities and governance, the role of the board, shareholder activism, and ESG-related issues, including the energy transition, climate disclosures, enterprise risk management practices, cybersecurity, and related U.S./European regulations. He also counsels investment advisors and private equity funds in the context of SEC examinations and investigations, ESG matters, and portfolio due diligence and compliance.

Prior to joining Gibson Dunn, Mr. Woodcock was Assistant General Counsel – Corporate at ExxonMobil Corporation, where he led all aspects of corporate, securities, ESG/sustainability, and governance. Before that, he served as Head of Litigation in the Dallas office of an AmLaw 20 law firm. Earlier in his career, Mr. Woodcock served as Director of the Fort Worth Regional Office of the Securities Exchange Commission from 2011 to 2015. In this role, he led over 120 lawyers, accountants, and examiners on all aspects of the SEC's enforcement and examination activities in four states (Texas, Oklahoma, Arkansas, and Kansas). During his tenure, Mr. Woodcock helped create, and served as chair of, the cross-office/division Financial Reporting and Audit Task Force, which was designed to enhance the SEC's detection and prosecution of violations involving accounting and false financial statements. During this time, Mr. Woodcock oversaw investigations in nearly every major area of the SEC's enforcement program, including public company disclosure and reporting; the Foreign Corrupt Practices Act (FCPA); insider trading; and investigations of SEC registrants. He also served as a member of the Enforcement Advisory Committee. Previously, Mr. Woodcock was an associate, and then partner, in the Austin office of a major law firm from 2001 to 2011.

Mr. Woodcock received his Bachelor of Science degree in Accounting from Louisiana State University in 1992. He was a CPA at Ernst & Young and Price Waterhouse for nearly five years before graduating with honors from the University of Texas School of Law in 2000. Mr. Woodcock clerked for Judge Howell Cobb in the U.S. District Court for the Eastern District of Texas from 2000 to 2001 before going into private practice.

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