

# ESG Monthly Newsletter

April 2024

This memorandum highlights key recent developments in environmental, social and governance matters of relevance to companies globally. For more information on this evolving business and legal landscape, we encourage you to reach out to your regular Sullivan & Cromwell contact or the lawyers listed on our [ESG practice website](#).

## Key Developments

### EU advances a number of ESG-related measures as legislative session draws to a close.

The Corporate Sustainability Due Diligence Directive (CSDDD), which would require certain EU and non-EU companies to implement measures to identify, prevent, bring to an end, minimize and remediate adverse human rights and environmental impacts, is expected to come into force in the coming months, following its adoption by the European Parliament on April 24. In April, the European Parliament also approved several other sustainability-related measures, including a Regulation establishing an EU-wide voluntary carbon removal certification system and a Regulation banning goods made with forced labor. The European Parliament also approved the EU's withdrawal from the Energy Charter Treaty, which provides a framework for companies in the energy sector to challenge government policies that threatened their investments, citing incompatibility between the treaty and the EU's climate goals under the European Green Deal and Paris Agreement.

### U.S. states continue to propose and enact “fair access” statutes.

An increasing number of U.S. states have enacted or are considering enacting legislation requiring financial institutions to provide customers “fair access” to financial services. These fair access requirements, first appearing last year in Florida's House Bill 3 (HB 3), generally prohibit financial institutions from denying or canceling services to a person, or otherwise discriminating against a person in making available services, on the basis of enumerated factors, commonly including political opinions, religious beliefs, “social credit scores” or any factor that is not “quantitative, impartial, and risk-based.” These laws have been adopted in Florida and Tennessee, and at least eight other states are considering similar bills.

### Regulators and standard-setters signal focus on human capital issues.

On April 23, the International Sustainability Standards Board announced that it will commence research to support the development of disclosure standards on human capital (along with biodiversity). On the same day, the U.S. Federal Trade Commission issued its final non-compete rules, banning most employers from entering into noncompete agreements with workers, with limited exceptions for agreements connected to the sale of a business and certain pre-existing agreements with senior executives. The U.S. Securities and Exchange Commission had indicated that it could propose human capital-related disclosure requirements in Q2 2024.

## Legislative and Regulatory Updates

### Global

**ISSB to commence research on disclosure regarding risks and opportunities associated with biodiversity and human capital.** On April 23, the International Sustainability Standards Board (ISSB) [announced](#) that, informed by its recent consultation on future priorities, it will commence research projects on (1) biodiversity, ecosystems and ecosystem services and (2) human capital. The research will focus on the common information needs of investors in assessing whether and how risks and opportunities related to these topics could reasonably be expected to affect a company's prospects. Last year, ISSB adopted IFRS S1, which requires disclosure of material information on all sustainability-related risks and opportunities, as well as IFRS S2, which focuses on climate-related information. Over the next two years, while ISSB will prioritize supporting the implementation of IFRS S1 and S2, it will also pursue the new projects on biodiversity and human capital and embark on its work to establish more specific disclosure standards in these areas. The ISSB has decided not to embark on projects related to risks and opportunities associated with human rights (beyond risks and opportunities relating to a company's own workforce and workers in its value chain) or integration in reporting at this time. However, the ISSB stated that it will closely monitor developments in these areas and may consider including them in a future agenda consultation.

**GRI issues Guidance on Double Materiality, Due Diligence and CSRD.** On March 28, the Global Reporting Initiative (GRI) launched an [initial set of guidance documents](#). This first set of guidance documents cover [double materiality](#), [due diligence](#) and the EU's [Corporate Sustainability Reporting Directive's \(CSRD\) and its implications for companies outside of the EU](#). These documents are intended to "emphasize[] the pertinence of the topic and the significant role played by the globally adopted GRI Standards in helping to address them." Although these documents are drafted as public briefing documents for global policymakers, they set forth insights on how companies that currently produce a GRI report may use the GRI-aligned disclosures to support compliance with sustainability reporting policies set by different jurisdictions.

**The Integrity Council for the Voluntary Carbon Market (ICVCM) names first carbon-crediting programs.** As global scrutiny on voluntary carbon markets continue to intensify, ICVCM has endorsed the first carbon-crediting programs that comply with its Core Carbon Principles (CCPs). See our [previous newsletter](#) for more information on the CCPs. On April 5, ICVCM [announced](#) that the American Carbon Registry (ACR), Climate Action Reserve (CAR) and Gold Standard were approved as CCP-eligible programs, which means that the programs have demonstrated that they meet the rigorous CCP criteria for effective governance, transparency, tracking and robust independent third-party validation and verification. On May 2, ICVCM also [approved](#) the Verified Carbon Standard (VCS, operated by Verra) after VCS made "significant changes to its procedures," as well as Architecture for REDD+ Transactions (ART), as CCP-eligible programs. Under ICVCM's "two-tick" approach, if a program has been assessed to be CCP-eligible, it may use the CCP label on new and existing carbon credits if the credits are

generated using ICVCM-approved methodologies. ICVCM stated that it expects the volume of CCP-labelled carbon credits to grow steadily over 2024.

## United States

**Florida and Tennessee have enacted “fair access” statutes; eight other states are considering similar laws.** An increasing number of states have enacted or are considering enacting legislation requiring financial institutions to provide customers “fair access” to financial services. These fair access requirements, first appearing last year in Florida’s House Bill 3 (HB 3), generally prohibit financial institutions from denying or canceling services to a person, or otherwise discriminating against a person in making available services, on the basis of enumerated factors, commonly including political opinions, religious beliefs, “social credit scores,” or any factor that is not “quantitative, impartial, and risk-based.” On May 2, the Florida Governor signed into law House Bill 989, which will (1) provide for a customer complaint and investigation process for alleged violations of Florida’s fair access requirements introduced by Florida’s HB 3, and (2) appear to expand the financial institutions subject to the fair access and related compliance attestation requirements under the Florida Financial Institutions Codes to include non-Florida chartered banks. On April 22, 2024, the Tennessee Governor signed into law House Bill 2100, a fair access law that will apply to, among others, national banks and state banks with more than \$100 billion in assets, as well as insurers. At least eight other states—Arizona, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana and South Dakota—are also considering fair access bills, some of which would apply to payment processors, payment networks, and credit card companies and networks in addition to banks and insurers.

Compliance with fair access laws, including any related compliance attestation and customer complaint response requirements, may present challenges due to uncertainty regarding the scope of their application and inconsistent requirements across states, as well as interpretive questions regarding certain key terms, such as “social credit scores” and “quantitative, impartial and risk-based.” See our [memo](#) for more information.

**FTC issues final rule banning most non-compete agreements with workers.** On April 23, the Federal Trade Commission (FTC) issued the final text of its “Non-Compete Clause Rule.” The final rule bans most employers from entering into new—or enforcing existing—noncompete agreements with workers, with limited exceptions for agreements connected to the sale of a business and certain pre-existing agreements with senior executives, including agreements executed before the effective date. The final rule is scheduled to become effective on September 4. Court challenges to the final rule have already been filed. See our [memo](#) and [webinar](#) for more information.

**Members of U.S. Congress introduce resolutions to overturn SEC’s Final Climate-Related disclosure rules.** On April 9 and April 17, respectively, Representative Bill Huizenga introduced a Congressional Review Act (CRA) [resolution](#) in the U.S. House of Representatives and Senator Tim Scott [introduced](#) a parallel [resolution](#) in the U.S. Senate, in each case seeking to overturn the SEC’s final climate-related disclosure rules for public companies. See our memos for a

summary of the SEC's [final rules](#) as well as the SEC's [stay of these rules](#) pending completion of judicial review. The CRA provides Congress with a mechanism to review and potentially reverse major rules issued by federal agencies. The two chambers of Congress would need to pass a joint resolution of disapproval in order to overturn the rules. If President Biden vetoes the resolution, a two-thirds majority in both chambers would be necessary to override the veto.

## European Union

**Council finalizes delay of sustainability reporting standards for non-EU companies and specific sectors.** On April 30, the Council of the European Union [adopted](#) a directive that will postpone the adoption of certain sustainability reporting standards under the Corporate Sustainability Reporting Directive (CSRD). Specifically, the directive (initially [proposed](#) by the European Commission in October 2023) will postpone the adoption deadline until June 30, 2026 for (a) sector-specific sustainability reporting standards for EU companies and (b) general sustainability reporting standards that specify reporting obligations for non-EU companies in scope of CSRD.

**European Parliament adopts CSDDD.** On April 24, the European Parliament adopted the revised text of the EU Corporate Sustainability Due Diligence Directive (CSDDD). On March 15, the Committee of the Permanent Representatives of the Governments of the EU Member States (COREPER) reached agreement on the revised text of the CSDDD, which would significantly reduce the scope of the directive but would still require covered EU and non-EU companies to, among other meaningful obligations, (1) establish and implement measures with respect to the identification, prevention, bringing to an end, minimization and remediation of adverse human rights and environmental impacts and (2) adopt and put into effect, through best efforts, a transition plan for climate-change mitigation aligned with a 1.5°C global warming pathway. A formal adoption by the Council of the European Union, which is expected in May, is required for the CSDDD to enter into force. EU Member States will then be required to implement the CSDDD into their national legislation within two years and first-time application will be staggered between three and five years from the CSDDD's entry into force.

**European Parliament adopts Regulation to establish carbon removal certification system.** On April 10, the European Parliament [adopted](#) a Regulation establishing an EU-wide voluntary certification framework for carbon removals. The goal of the new EU Carbon Removals Certification System (CRCF) is to incentivize carbon removal activities in the EU and contribute to the EU's strategy to achieve climate neutrality by 2050, while also countering greenwashing. The finalized rules differentiate between categories of carbon removal and emission reduction activities to ensure the quality and comparability of permanent and temporary carbon removal technologies, such as direct air capture, carbon farming and soil emission reductions. The CRCF requires the creation of a registry to increase transparency and minimize double-counting of carbon removals. The CRCF must be formally approved by the Council of the European Union before it enters into force.

**European Parliament approves Regulation banning goods made with forced labor.** On April 23, the European Parliament [approved](#) landmark EU forced labor

rules, which will prohibit the sale, import and export of goods produced with forced labor. The Regulation grants the European Commission and the authorities of member states the power to investigate goods, supply chains and manufacturers suspected of using forced labor. Manufacturers of goods found to be produced with forced labor will be compelled to withdraw these items from the EU single market, though they can reintroduce goods into the market if they can demonstrate the elimination of forced labor from their supply chains. Companies that fail to comply may be penalized with fines. The Regulation was adopted by a wide margin and formal approval from the Council of the European Union is anticipated after the June EU elections. The Regulation will come into effect three years from its official publication, in 2027.

**European Parliament consents to exit the Energy Charter Treaty.** On April 24, the European Parliament [voted](#) to consent to withdraw from the Energy Charter Treaty, which was established in 1994 to provide a framework for companies in the energy sector to challenge government policies that threatened their investments. The European Commission proposed withdrawing from the treaty, noting that it no longer considers the treaty to be compatible with the EU's climate goals under the European Green Deal and Paris Agreement. European Parliament's consent was a prerequisite for the Council of the European Union's vote on the final decision to withdraw, which is expected in May of this year.

## Asia Pacific

**Hong Kong Stock Exchange adopts ISSB-aligned climate reporting standards.** On April 19, The Stock Exchange of Hong Kong Limited [announced](#) that it would adopt climate-related disclosure requirements for listed companies based on the ISSB's IFRS S2 standard. The new reporting requirements have phased compliance dates, which require all issuers to begin making mandatory disclosures on Scope 1 and 2 greenhouse gas emissions for financial years commencing on or after January 1, 2025.

## Global

**Basel Committee issues discussion paper on climate scenario analysis.** On April 16, the Basel Committee on Banking Supervision [issued](#) a Discussion Paper aimed at strengthening the management and supervision of climate-related financial risks through climate scenario analysis (CSA). In 2022, the Basel Committee [released](#) Principles for managing climate-related financial risk, which encouraged banks to use CSA to assess the resilience of their business models. The Discussion Paper expands on the 2022 Principles, noting that the variation of uses, data and methodologies across jurisdiction have limited its ability to set consistent supervisory expectations. The Discussion Paper identifies seven key features of CSAs and seven usage-specific considerations for CSA exercises conducted by banks and supervisors to foster a robust dialogue on the design, implementation and use of CSAs, and calls for feedback to refine and standardize regulatory practices with the aim of strengthening CSA's role in the management of climate-related financial risks.

## Litigation and Enforcement Developments

### United States

**U.S. Supreme Court rules on liability for Item 303 omissions in shareholder suits.** On April 12, the U.S. Supreme Court [ruled](#) in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, that a violation of Securities and Exchange Commission Item 303—which requires public companies to disclose “known trends or uncertainties” that could impact their income—cannot, in the absence of an otherwise misleading statement, support a private lawsuit brought under SEC Rule 10b-5(b) under the Securities Exchange Act of 1934. In a unanimous opinion by Justice Sotomayor, the Court ruled in favor of Macquarie, reversing the Second Circuit’s decision allowing such claims to survive a motion to dismiss. The Court’s decision in *Macquarie* eliminates a circuit split and provides a heightened standard for plaintiffs seeking liability under Rule 10b-5 based on information omitted from issuers’ public filings. Shareholders will not be able to survive dismissal or summary judgment without pointing to a “statement” rendered misleading by the alleged omission. As the Court noted, however, the SEC can still bring enforcement actions against individuals and companies for Item 303 violations. And the Court’s decision explicitly leaves unresolved several arguments the plaintiffs and SEC had raised in the case, including the question of what constitutes a “statement made” under 10b-5(b). In light of this legal uncertainty and the SEC’s authority, careful attention to Item 303’s requirements remains imperative in order to limit public companies’ exposure to costly litigation and enforcement actions. See our [memo](#) for more information.

## Energy Transition Updates

### United States

**White House announces awards under Inflation Reduction Act to finance clean energy projects in low-income communities.** On April 4, the White House [announced](#) selections for \$20 billion of awards to fund climate and clean energy projects. The awards, made available through the \$27 billion Greenhouse Gas Reduction Fund created by the Inflation Reduction Act, will be invested in a wide range of projects including distributed clean power generation and storage, net-zero retrofitting programs for homes and small business, and zero-emission transportation. At least 70% of the awards announced on April 4 will be invested in low-income and disadvantaged communities.

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