SULLIVAN & CROMWELL LLP

ESG Monthly Newsletter

November 2022

This memorandum highlights key recent developments in environmental, social and governance matters of relevance to public and private 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**.

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Key Developments

- **ISSB confirms requirement to report material Scope 3 emissions and use climate-related scenario analysis.** At meetings in October and November, the ISSB redeliberated certain proposals in its exposure drafts on sustainability- and climate-related disclosures and decided, among other things, to confirm its proposal to require companies to (1) disclose Scope 1, 2, and (where material) 3 greenhouse gas emissions and (2) assess their climate resilience using climate-related scenario analysis. ISSB indicated that it will redeliberate certain other topics at a later date, including the definition of "enterprise value" (in particular, how the term relates to the materiality of sustainability-related financial information), as well as disclosure requirements regarding financed and facilitated emissions and the effects of sustainability-related risks and opportunities on a company's financial position, financial performance and cash flows.
- **COP27 focuses on climate mitigation, adaptation, finance and loss and damage.** The 27th Conference of the Parties to the United Nations Framework Convention on Climate Change took place between November 6 and 20 in Sharm el-Sheikh, Egypt. In a historic development, participants agreed to set up a "loss and damage" fund in order to support vulnerable countries in responding to climate disasters. In addition, COP27 called on governments to revisit and strengthen the 2030 targets in their national climate plans as necessary to align with the Paris Agreement temperature goal, and to accelerate efforts towards the phase-down of unabated coal power and phase-out of inefficient fossil fuel subsidies.
- **U.S. federal agencies continue to focus on climate goals, with the White House announcing steps to implement recent climate-related federal legislation.** The White House reiterated the Biden-Harris administration's climate goals in the days leading up to the U.S. midterm elections, including a 50-52% reduction in emissions by 2030, a carbon pollution-free electricity sector by 2035 and net zero emissions by no later than 2050. A range of federal agencies, including the Treasury, DOL, SEC and EPA, have taken a number of recent steps in order to accomplish these climate goals, but could face stronger headwinds with Democrats losing control of the House of Representatives.

Legislative/ Regulatory Updates

1. *Global*

ISSB continues to redeliberate the proposals in its exposure drafts on sustainability- and climate-related disclosures. The International Sustainability

Standards Board ("ISSB") proposed its General Requirements for Sustainability-related Disclosures ("S1 Standards") and Climate-related Disclosures ("S2 Standards") in March, and has been redeliberating these proposed standards after the original 120-day consultation period ended in July. In October, the ISSB unanimously voted to require company disclosures on Scope 1, 2 and (where material) 3 greenhouse gas ("GHG") emissions using the GHG Protocol Corporate Standard, although it has indicated plans to develop relief provisions with respect to Scope 3 requirements. At a supplementary meeting on November 1, the ISSB unanimously confirmed that companies will be required to use climate-related scenario analysis to inform resilience analysis and to identify climate-related risks and opportunities to support their disclosures. The ISSB is analyzing how to enhance interoperability of the S1 Standards and the S2 Standards with other international and jurisdictional sustainability-related standards, and is working with the European Commission and the European Financial Reporting Advisory Group ("EFRAG"), as well as relevant bodies in other jurisdictions, in preparation for the expected adoption of the standards in 2023. Most recently, in its November 16 meeting, the ISSB discussed timing of reporting and decided that sustainability-related financial information should be provided at the same time as financial statements, subject to a transition period when sustainability reports may be delivered later.

COP27 Concludes in Egypt. The 27th Conference of the Parties to the United Nations Framework Convention on Climate Change ("COP27") took place between November 6 and 20 in Sharm el-Sheikh, Egypt. Among other topics, participants focused on climate mitigation, adaptation, finance and loss and damage. With respect to loss and damage, negotiators from nearly 200 countries agreed to set up a "loss and damage" fund in order to support vulnerable countries in responding to climate disasters. With respect to mitigation, recognizing that accomplishing the Paris Agreement's goal of limiting global warming to 1.5°C "requires rapid, deep and sustained reductions" in global GHG of 43% by 2030 relative to the 2019 level, COP27 called on governments to revisit and strengthen the 2030 targets in their national climate plans as necessary to align with the Paris Agreement temperature goal by the end of 2023, and to accelerate efforts towards the phase-down of unabated coal power and phase-out of inefficient fossil fuel subsidies. Some participants, including the COP26 president, Alok Sharma, expressed disappointment that the final COP27 agreement did not include clear commitments to phase out all fossil fuels.

Energy Charter Treaty exodus and reform. In recent months, there has been a growing exodus from the Energy Charter Treaty ("ECT"). To date, seven of 54 contracting states (Poland, Spain, the Netherlands, France, Slovenia, Germany and Luxembourg) have indicated a plan to withdraw from the treaty. The ECT affords investment protections to investors in energy projects, including access to international arbitration. Since 2017, the contracting parties of the ECT have been discussing "modernisation" of the treaty via amendments that would create "flexibility" mechanisms that would allow the parties to phase out existing fossil fuel investment protections after 10 years. By contrast, withdrawing states are currently subject to a 20-year sunset clause, meaning any investments made prior to the point of withdrawal continue to benefit from the ECT's investment protections for a period of 20 years. After a failure to secure majority support on the proposed amendments, a vote on the modernisation amendments were removed from the agenda of the November 22, 2022 ECT conference and postponed until April 2023, further delaying resolution of this issue. On November 24, 2022, the European Parliament called for the EU to exit the treaty.

UN Business and Human Rights Treaty. In 2014, the United Nations Human Rights Council established an open-ended intergovernmental working group to consider an internationally legally binding instrument requiring states to regulate transnational corporations and other business enterprises with respect to human rights. In late October 2022, the 8th Session of the working group took place, and proposed amendments to the Third Revised Draft of the Business and Human Rights Treaty were submitted and discussed. Some of the provisions debated included the extent to which states would be required to introduce laws mandating human rights due diligence and imposing liability for business-related human rights abuses. A further updated draft treaty is expected to be published by July 2023.

2. *United States*

U.S. Department of Labor finalizes ESG Investing Rule. On November 22, the U.S. Department of Labor's ("DOL") Employee Benefits Security Administration finalized a rule permitting retirement plan fiduciaries to consider climate change and other ESG factors when selecting investments and exercising shareholder rights. The final rule rolls back Trump-era rules that prohibited retirement plan fiduciaries from selecting investments and investment courses of action based on "non-pecuniary" factors. The final rule will delete the "pecuniary/non-pecuniary" terminology from the current regulation and adds language recognizing that a fiduciary's duty of prudence may often require evaluation of the economic effects of climate change or other ESG factors on a particular investment or investment course of action. The rule will go into effect 60 days after its publication in the Federal Register. *See* S&C's memo for additional information on the rule.

Biden-Harris Administration proposes requirement for major federal contractors to publicly disclose Scope 3 GHG emissions and set science-based emissions reduction targets. On November 10, the White House announced the Biden-Harris Administration's proposed Federal Supplier Climate Risks and Resilience Rule, which would require federal contractors receiving more than $50 million in annual contracts to publicly disclose Scope 1 and 2 GHG emissions, as well as relevant categories of Scope 3 GHG emissions, to disclose climate-related financial risks and to set science-based emissions reduction targets. Federal contractors with more than $7.5 million but less than $50 million in annual contracts would be required to report Scope 1 and 2 GHG emissions. The rule was jointly proposed by the Defense Department, General Services Administration and NASA and is subject to public comment.

Financial Stability Oversight Council discusses climate-related impacts on the insurance industry. On November 4, Secretary of the U.S. Department of Treasury (the "U.S. Treasury") Janet Yellen presided over a meeting of the Financial Stability Oversight Council ("FSOC") at which the effects of climate change on the domestic insurance industry were discussed. Elizabeth K. Dwyer, the Superintendent of Financial Services at the Rhode Island Department of Business Regulation, described the increasing financial risk that the insurance sector bears as climate change-related events increase in both frequency and severity, citing as an example the destruction caused by Hurricane Ian. FSOC also heard from Steven Seitz, the Director of the Federal Insurance Office (the "FIO"), regarding the FIO's proposal to collect zip code-level data from insurers in order to assess current and future insurance availability and affordability for consumers, particularly in regions of the country that are subject to an elevated risk of climate change-related events. *See* S&C's memo for more information on the FIO data collection program.

U.S. Treasury begins rulemaking process to implement the Inflation Reduction Act. On October 5, the Internal Revenue Services ("IRS") kicked off the formal process of the U.S. Treasury's implementation of the IRA by issuing six notices requesting public comment on different aspects of extensions and enhancements of the IRA, asking for feedback by November 4. The U.S. Treasury also released a fact sheet with additional information on the notices as well as background on its implementation process. The IRS has begun the process of defining "transferability" of low-carbon energy tax credits as part of implementing the IRA, and based on the quick turnaround for comments it's possible new tax provisions could be in place within the next 18 months. On November 3, the IRS issued three additional notices seeking public input on upcoming energy guidance, noting that changes under the IRA "won't happen immediately" but that the IRS is working as quickly as possible. *See* S&C's memo for additional information on recent developments in U.S. hydrogen investments, incentives and policies.

SEC adopts final mandatory clawback rules. On October 26, the U.S. Securities and Exchange Commission ("SEC") voted 3 to 2 to adopt a new rule and amendments to implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The final rule directs national securities exchanges and associations to require policies mandating the recovery (or "clawback") of excess incentive-based compensation earned by a current or former executive officer during the three fiscal years preceding a required accounting restatement, including to correct an error that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period. The final rule requires exchanges to propose conforming listing standards by February 27, 2023, which must become effective by November 28, 2023. Each listed issuer would then be required to adopt a clawback policy within 60 days after its exchange's listing standard has become effective. *See* S&C's memo for more information on the rule and amendments.

3. *United Kingdom*

FCA convenes panel to develop Code of Conduct for ESG data and ratings. On November 22, the Financial Conduct Authority ("FCA") announced that it had convened a group of panelists to develop a voluntary Code of Conduct for ESG data and ESG ratings providers. Members of the Panel, led by the International Capital Market Association (ICMA) as secretariat, include the London Stock Exchange Group and the ratings agency Moody's. The purpose of the ESG Data and Ratings Code of Conduct is to address trust and reliability concerns across capital markets by providing a "proportionate and effective" regulatory regime and formalizing best practice. The main areas that the code will cover include transparency, governance, conflicts of interest, and systems and controls. The first meeting of the panel is scheduled to take place next year.

FCA opens consultation on proposals to tackle "greenwashing." On October 25, the FCA opened a consultation on proposals to tackle "greenwashing", which include proposed restrictions on how investment products can use certain terms such as "ESG", "green" or "sustainable" in product names and marketing. The proposals also include possible introduction of additional consumer-facing disclosures, such as additional disclosures of the types of investments that may be held within a particular product. The FCA has also proposed introducing a general "anti-greenwashing" rule that would apply to all regulated firms in order to reaffirm that existing requirements around clear, fair and not misleading communications apply in the context of sustainability-related claims. The

consultation period ends on January 25, 2023, and the FCA aims to publish their final set of rules in mid-2023.

4. *European Union*

EU Council adopts directive on gender balance on listed company boards. On November 22, the European Parliament adopted a new EU "Women on Boards" Directive that aims to ensure large listed EU companies have at least 40% of their non-executive director positions held by members of the underrepresented sex by June 2026. The Directive will do this by requiring companies to favor the underrepresented sex when choosing between two equally qualified candidates. Members States are able to elect to lower the target to 33% if they apply the threshold across both executive and non-executive positions. The Directive also introduces an obligation on companies to adjust their process for selecting candidates if they fail to meet the targets, including by giving priority to candidates of the underrepresented sex. Member States will have two years to implement the Directive in their national legislation.

ESMA targets "greenwashing" in investment fund names. On November 18, the European Union's securities watchdog, the European Securities and Markets Authority ("ESMA"), launched a consultation on draft guidelines for the use of ESG or sustainability-related terms in fund names. The proposed measures included quantitative thresholds for the minimum proportion of investments sufficient to support the use of an ESG or sustainability-related term in the name of a fund. The purpose of the guidelines is to protect investors from misleading, unsubstantiated or exaggerated claims about the sustainability benefits of investment funds. The consultation will run until February 20, 2023.

EFRAG finalizes draft European Sustainability Reporting Standards. On November 15, the European Financial Reporting Advisory Group ("EFRAG") approved the final drafts of the European Sustainability Reporting Standards ("ESRS") to be submitted for approval and adoption by the European Commission. The ESRS set out the specific disclosure requirements that will apply to both EU and non-EU companies required to report on sustainability-related impacts, opportunities and risks under the EU's Corporate Sustainability Reporting Directive ("CSRD"). Additional information on the CSRD is available in S&C's memo. Following feedback on initial drafts, EFRAG streamlined the standards, including by reducing the number of disclosure requirements and phasing in certain of the requirements. EFRAG indicated that it will conduct further research and public consultation on how to implement requirements that banks, insurers and asset managers provide disclosures related to entities in their value chain.

5. *Hong Kong*

Stock Exchange of Hong Kong proposes new listing regime for specialist technology companies. On October 19, the Stock Exchange of Hong Kong Limited ("Exchange") published a consultation paper inviting market feedback on its proposal to allow Specialist Technology Companies to list on the Main Board of the Exchange ("STC Regime"). The STC Regime targets certain "specialist technology companies" primarily engaged in the research and development ("R&D") and commercialization or sales of products and services that apply science and technology to certain industries, including new energy and environmental protection. The new energy and environmental protection industry would include new energy generation, new energy storage and transmission technology, and new green technology. Written comments to the consultation paper are due on December 18, 2022. *See* S&C's memo for more information on the proposal.

Litigation/ Enforcement Developments

1. ***United States***

SEC announces enforcement results for FY2022. On November 15, the SEC announced that it filed 760 total enforcement actions in fiscal year 2022, which is a 9% increase over 2021. Of the 760 enforcement actions, 462 were new or "stand alone" enforcement actions (a 6.5% increase over 2021), 129 were actions against issuers who were allegedly delinquent in making required SEC filings, and 169 were "follow-on" administrative proceedings seeking to bar or suspend individuals from certain securities markets functions based on criminal convictions, civil injunctions or other orders. In its press release discussing FY2022 enforcement actions, the SEC noted that as ESG concerns have grown increasingly important to investors, the SEC has focused its attention on ESG issues with respect to public companies and investment products and strategies. *See* S&C's memo for additional information on the SEC's securities enforcement and litigation activities over the past year.

FTC Chair and DOJ AAG comment on the role of ESG in antitrust enforcement. On September 20, U.S. Federal Trade Commission ("FTC") Chair Lina Khan and the Department of Justice Antitrust Division Assistant Attorney General ("AAG") Jonathan Kanter testified before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. Chair Khan stated that merger approvals are not conditioned on the adoption of a particular set of ESG policies, and that illegal mergers cannot be remedied by corporate promises to make ESG commitments. When asked about whether ESG coordination among financial institutions (e.g., participation in Climate Action 100+) runs afoul of antitrust laws, Chair Khan stated that she would want to look at the issue more closely before opining on its legality. In response to the same question, AAG Kanter noted that, generally speaking, collusion is anticompetitive and "when firms have substantial power and they use that power to achieve anticompetitive ends, that should be actionable under the antitrust laws."

2. ***Australia***

ASIC takes first "greenwashing" enforcement action. On October 27, the Australian Securities & Investments Commission ("ASIC") announced that it had taken its first action for 'greenwashing' and issued penalties against listed company Tlou Energy Limited ("Tlou") over concerns about alleged false or misleading sustainability-related statements made to the Australian Securities Exchange in October of 2021. Tlou paid A$53,280 as a result of four infringement notices issued by ASIC. In issuing the action, ASIC pointed to its previously published Information Sheet 271 on how to avoid greenwashing and confirmed that ASIC is currently investigating a number of listed entities, super funds and managed funds "in relation to their green credentials claims." The penalty is consistent with ASIC's 2022-2026 Corporate Plan, which signaled that ASIC plans to take enforcement action to prevent harms arising from greenwashing and to support effective climate and sustainability governance and disclosure.

Financial Institutions Developments

1. ***Global***

GFANZ releases final report on net zero transition plans for financial institutions. On November 1, the Glasgow Financial Alliance for Net Zero ("GFANZ") issued its final report on the Fundamentals, Recommendations, and Guidance for Financial Institutions Net Zero Transition Plans for delivery to COP27. GFANZ, established in April 2021, is the world's largest coalition of financial institutions, comprised of over 550 member firms across the finance industry, committed to accelerating the decarbonization of the

economy. The report provides a voluntary "pan-sector framework" for financial institutions focused on four aspects of transition finance: (1) technologies and products that will enable the economy to decarbonize (or "climate solutions"); (2) business models already aligned with a science-based pathway to achieve net zero; (3) companies with credible transition plans in the process of aligning with a science-based decarbonization pathway; and (4) managed phase-out of high-emitting assets that will be stranded in the transition to net zero.

2. *United Kingdom*

Bank of England's Prudential Regulation Authority offers critical feedback on managing climate risk. On October 21, the Deputy Governor of the Prudential Regulation Authority ("PRA") published a "Dear CEO" letter warning regulated financial institutions that too little progress had been made on implementing frameworks for climate-related risk management since the publication of the PRA's supervisory statement in 2019. The letter reiterated the broad key areas in which the PRA expected firms to make progress: governance, risk management, scenario analysis, disclosure and data; and gave examples of effective and less effective practices in each area. Of these, the PRA were most critical of firms' scenario analysis capabilities, stating that they were "not sufficiently well developed to support effective decision-making." If deemed appropriate, the PRA may exercise their supervisory powers to ensure that climate factors are embedded into firms' strategic activities.

3. *European Union*

EU financial regulators issue "greenwashing" call for evidence. On November 16, the European Supervisory Authorities ("ESA"), which is comprised of the European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and ESMA, published a call for evidence seeking views on the motivations and risks associated with misleading or exaggerated claims about the sustainability credentials of investment products. Parties from which the ESA stated it was seeking input in particular include retail investors, financial institutions and academics. The deadline for submitting responses is January 10, 2023, after which a progress report is expected to be published by May 2023 and a final report to be published by May 2024.

ECB sets deadline for banks to tackle climate risks. On November 2, the European Central Bank ("ECB") published the results of a thematic review showing that the majority of banks in the EU lacked the methodologies and information required to identify and manage climate-related risks. The review identified 96% of financial institutions in the EU which had "blind spots" in considering risk drivers, time horizons and business lines in their climate risk assessments, and only 14% of institutions had processes in place to take corrective action when key performance targets were missed. In response, the ECB set a series of deadlines by which EU banks are expected to have taken adequate action. Banks are expected to have adequately categorized climate risks and conducted full assessments of their impacts by March 2023, included climate and environmental risks in their governance strategy and risk management by the end of 2023, and met all remaining supervisory expectations by the end of 2024. The ECB has stated that it will consider taking enforcement action where deadlines have been missed.

EBA publishes report on incorporating ESG risks in the supervision of investment firms. On October 24, the EBA released a report on how competent authorities in EU member states should incorporate ESG risks into their supervision of investment firms and credit institutions. Mandated under the Investment Firms Directive, the report provides

criteria, parameters and metrics by which competent authorities should assess ESG risks as part of their supervisory review and evaluation process ("SREP"). The report noted that the types of ESG risks would depend on each firm's activities and services, but noted that potential ESG-related risks could include losses due to mismanagement of client assets due to breach of contractual terms for complex ESG products, adverse movements in ESG-sensitive financial instruments, and ESG-related litigation. Investment firms and credit institutions will need to be mindful of the impact that the incorporation of these risks could have on the outcome of their SREP results, which in turn inform which supervisory measures may be taken by competent authorities.

Shareholder Engagement and Proxy Advisory Updates

Glass Lewis releases 2023 Proxy Voting Policy Guidelines. On November 17, Glass Lewis released its 2023 Proxy Voting Policy Guidelines. Among other changes, Glass Lewis will generally recommend against officer exculpation charter provisions, which some companies have adopted (or are proposing to adopt) in light of the recent changes to Section 102(b)(7) of the Delaware General Corporation Law, unless the board has a "compelling rationale" and the provision is "reasonable." In addition, Glass Lewis, which previously recommended voting against nominating or governance committee chairs at Russell 1000 companies that fail to provide sufficient disclosure regarding the board's role in overseeing environmental and social ("E&S") issues, will expand this policy to cover all Russell 3000 companies. Glass Lewis's policy updates are effective for shareholder meetings taking place beginning on or after January 1, 2023.

ISS proposes 2023 voting policy changes. On November 4, Institutional Shareholder Services Inc. ("ISS") announced 17 proposed changes to its benchmark voting policies. Unlike Glass Lewis, ISS is proposing to generally recommend in favor of officer exculpation charter provisions. In addition, ISS proposes to introduce more specific policies on shareholder proposals on the congruency between a company's political contributions and lobbying, on the one hand, and its public commitments and policies, on the other hand. ISS also proposes to extend its global policy on climate board accountability for companies identified in the Climate Action 100+ Focus Group. Under the proposed updates, ISS would generally recommend voting against what it considers to be the "appropriate" director(s) or other items at high-emitting companies that ISS does not consider to be adequately disclosing climate risk information. The comment period on ISS's proposed policies ended on November 16 (ISS typically releases its final policies in December).

SEC adopts enhanced proxy voting disclosure by investment funds and requires disclosure of "say-on-pay" votes for institutional investment managers. On November 2, the SEC voted 3 to 2 to adopt amendments Form N-PX to enhance the information mutual funds, exchange-traded funds and certain other registered funds ("funds") report about their proxy votes (together, the "final rules"). In addition, the final rules will require disclosure on Form N-PX of how institutional investment managers ("managers") voted on "say-on-pay" matters. The final rules will be effective on July 1, 2024, covering votes occurring on or after July 1, 2023. The final rules will require standardized disclosure, in a structured data format, of various categories of proxy voting, allowing the SEC, investors and others to more easily analyze funds' and managers' proxy voting records. Together with the SEC's recently proposed ESG-related fund rules and other ESG-related initiatives, these requirements will likely lead to increased scrutiny on funds that incorporate ESG considerations into their investment strategies. *See* S&C's memo for more information.

Institutional investors announce plans to expand client voting power. BlackRock and Vanguard both recently announced plans to expand the proxy voting power held by retail investors in their respective funds. On November 2, Vanguard announced that it will be conducting a trial in early 2023 to grant investors in several of its equity index funds more options regarding how their shares are voted at corporate meetings. On November 3, BlackRock announced that it will be expanding its Voting Choice program to allow retail investors in select mutual funds in the UK to cast votes in the upcoming 2023 proxy season. In addition, Charles Schwab's asset-management arm announced in October that it would start polling shareholders of certain funds regarding key proxy issues so as to inform the company's voting approach and policies.

ISS ESG releases extensive methodology updates for Governance QualityScore. On October 31, 2022, ISS ESG, the responsible investment arm of ISS, announced that it was introducing 23 new factors (in addition to 52 existing factors) to its Governance QualityScore ("GQS") methodology. The 23 new factors span seven topical areas, including (1) information security (to assess companies' third-party information security risks and breaches, support levels for information security-related shareholder proposals, and the disclosure level of information security-related performance measures in executive compensation plans); (2) director skills (to assess companies' level of director skills as it pertains to climate, diversity, equity and inclusion ("DEI") and other selected skills); (3) emerging risk oversight (by evaluating the independence of committees responsible for climate, human capital management, health and safety and succession); and (4) DEI (to expand existing assessments of DEI profiles by evaluating whether LGBTQ+ directors and ethnically diverse leaders are on company boards). Additional information about the GQS is available on the ISS website.

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