

# ESG Monthly Newsletter

June 2023

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

- **The Biden Administration continues to move forward with clean energy-related legislation and international initiatives.** In June, the U.S. enacted revised procedures for environmental reviews aimed at streamlining the permitting process for major energy projects, entered into an agreement with the UK to expand trade related to the clean energy transition and released further guidance on clean energy tax credits.
- **EU and UK regulators focus on greenwashing.** In early June, European supervisory authorities published reports advancing a common definition of greenwashing and warning that the practice of greenwashing is on the rise in the financial sector. The UK's advertising regulator has also banned three energy companies' advertisements on the basis that they may mislead consumers as to the overall balance that green activities play in the companies' wider activities.
- **ISSB releases first two sustainability disclosure standards.** The International Sustainability Standards Board has released the final text of IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information* and IFRS S2 *Climate-related Disclosures*. The standards are expected to form a new international baseline for the disclosure of sustainability-related financial information.

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## Legislative and Regulatory Updates

### 1. [Global](#)

**ISSB releases IFRS S1 and IFRS S2.** On June 26, the International Sustainability Standards Board ("ISSB") [released](#) final versions of IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information* and IFRS S2 *Climate-related Disclosures*. The ISSB standards are expected to form a new global baseline for sustainability disclosures. IFRS S1 sets out general disclosure requirements for sustainability-related financial information, and requires entities to provide disclosures about an entity's sustainability-related risks and opportunities in four main areas: (1) governance processes, controls and procedures; (2) strategy for managing sustainability-related risks and opportunities; (3) processes to identify, assess, prioritize and monitor sustainability-related risks and opportunities; and (4) performance in relation to sustainability-related risks and opportunities. IFRS S2 sets out specific disclosure requirements for climate-related risks and opportunities and focuses on the same four areas as IFRS S1. Both fully incorporate the recommendations of the Task Force on

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Tokyo Hong Kong Beijing Melbourne Sydney

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Climate-Related Financial Disclosures (“TCFD”). The ISSB has international support, with its work to develop sustainability disclosure standards backed by the G7, the G20, the International Organization of Securities Commissions (“IOSCO”), the Financial Stability Board, African Finance Ministers and Finance Ministers and Central Bank Governors from more than 40 jurisdictions. Notably, following the ISSB’s release, the UK Financial Conduct Authority (“FCA”) [expressed its support](#) for the standards and its intention to update the climate-related disclosure rules for UK listed companies accordingly in due course.

**Science-based targets for nature launch.** On May 24, the Science Based Targets Network (“SBTN”) [launched](#) the first science-based targets for nature. The targets are meant to help companies “holistically assess and prioritize their environmental impacts” and take integrated action to manage their impacts on nature, with the goals of mitigating risk associated with dependencies on natural resources and supporting biodiversity conservation and restoration. The new science-based targets for nature build on a similar initiative for climate, with over [2,900 companies](#) already setting science-based targets to reduce GHG emissions through the Science Based Targets initiative. Currently, a pilot group of 17 companies are preparing to submit science-based nature targets for validation this year, in advance of a public roll-out of SBTN’s nature-related target setting in early 2024.

## **2. United States**

**NYSE and Nasdaq executive compensation clawback rule delayed.** In early June, each of [NYSE](#) and [Nasdaq](#) filed an amendment to their proposed clawback listing standards with the U.S. Securities and Exchange Commission (“SEC”), delaying implementation of the rules. The listing standards will require companies listed on NYSE or Nasdaq to adopt and comply with a “clawback policy”, which would require companies to recover executive compensation that was erroneously awarded based on misstated financial reporting measures. Following the SEC’s approval of both exchanges’ amended proposals, the new clawback listing standards will now require listed issuers to adopt a clawback policy by no later than December 1, 2023.

**Senator Scott and Representative Comer probe for answers on U.S. coordination with EU on ESG-related regulation.** On June 5, Tim Scott, Ranking Member of the Senate Committee on Banking, Housing, and Urban Affairs, along with James Comer, Chairman of the House Committee on Oversight and Accountability, sent letters to the heads of the [Treasury Department](#) and the [SEC](#) requesting information on the agencies’ role in facilitating the European Union’s efforts to impose its ESG and climate-related measures on U.S. businesses. The letters express concerns regarding the potential effects of tighter EU regulations—in particular, the Corporate Sustainability Reporting Directive (“CSRD”) and draft Corporate Sustainability Due Diligence Directive (“CSDD”)—on a variety of U.S. business sectors and capital markets.

## **3. European Union**

**European Parliament adopts negotiating position on draft Corporate Sustainability Due Diligence Directive.** On June 1, the European Parliament [approved](#) its negotiating position on the draft CSDD. If implemented, the CSDD would require in-scope companies to identify, prevent, end and/or mitigate adverse impacts of their global operations and activities on human rights and the environment. The European Parliament’s position diverges from the European Commission’s initial proposals by expanding the scope of companies subject to the CSDD (notably by broadening the potential applicability of the CSDD to the financial services sector), adding additional substantive requirements for in-scope companies and new enforcement mechanisms, including public censure and the suspension of products from free circulation or export. The revised position would also require a broader range of companies covered by the directive to prepare Paris

Agreement-aligned climate transition plans. The European Parliament, European Council and the Commission will now begin negotiations to reach agreement on the final text to adopt.

**European Commission publishes ESRS drafts.** On June 9, the European Commission published a [formal consultation](#) on the European Sustainability Reporting Standards (“ESRS”), which form part of the reporting standards that will apply to EU companies and companies with certain EU-listed securities that fall within the scope of the CSRD. The new drafts reflect revisions from standards proposed by the European Financial Reporting Advisory Group last year. Notable changes include imposing a materiality threshold on most of the climate-related disclosures required under the ESRS. The draft act is open for consultation until July 7, 2023. Sector-specific standards and standards applicable to non-EU companies in scope for the CSRD remain pending.

**EU reaches provisional agreement to simplify access to corporate sustainability and other disclosures.** On May 23, the European Council and European Parliament [announced](#) that they have reached a provisional agreement on creating a centralized digital platform for financial and sustainability-related information about EU companies and investment products. The European Single Access Point (“ESAP”) aims to enable users to access, via a single platform, publicly available information already required to be disclosed under existing EU legislation. Under the provisional agreement, the ESAP is set to be introduced in three phases over four years from summer 2027.

## Financial Institutions Updates

### 1. [United States](#)

#### **FIO issues report on supervision of climate-related risks in the insurance industry.**

On June 27, the Treasury Department’s Federal Insurance Office (“FIO”) [issued](#) a report on Insurance Supervision and Regulation of Climate-Related Risks, which concluded that there are “nascent and important efforts” to incorporate climate-related risks into state insurance regulation and supervision, and urged state insurance regulators to adapt their regulatory and supervisory tools to incorporate climate-related risks. The report, issued as a response to an [executive order](#) issued by President Biden in May 2021, signals the Biden administration’s continued focus on climate-related financial risk. In the report, the FIO observes increased incidences of climate-related disasters over the past few years, noting the need to monitor and address potential disruptions in private insurance coverage, particularly in regions most vulnerable to climate change impacts. The FIO makes 20 policy recommendations for the National Association of Insurance Commissioners and state insurance regulators, including prioritizing work on scenario analysis and improving climate-related disclosures by the insurance industry.

### 2. [European Union](#)

#### **EU financial regulators publish interim reports on greenwashing.**

On June 1, three European supervisory authorities published progress reports on greenwashing in the financial sector. In their reports, the [European Banking Authority](#) (“EBA”), [European Insurance and Occupational Pensions Authority](#), and [European Securities and Markets Authority](#) (“ESMA”) adopted a common understanding of greenwashing, which acknowledges that greenwashing can occur regardless of any intention to mislead consumers and even if no immediate damage to individual consumers or investors arises as a result. According to the reports, greenwashing is on the rise, with the EBA reporting a four-fold increase since 2018. ESMA flagged multiple types of sustainability-related claims particularly susceptible to greenwashing, including claims on ESG impact, stakeholder engagement and corporate resources and expertise. The reports noted that, whilst the EU’s existing regulatory framework (including the EU Taxonomy, SFDR and the CSRD) should enhance the ability to identify and monitor greenwashing, more experience is needed to comprehensively assess its effectiveness and shortcomings. The authorities

will publish their final greenwashing reports in May 2024, which will consider final policy recommendations, including possible changes to the EU regulatory framework.

## Litigation and Enforcement Developments

### 1. [United States](#)

**National Association of Manufacturers to join SEC 14a-8 lawsuit.** On May 25, the National Association of Manufacturers (the “NAM”) [intervened](#) in *National Center for Public Policy Research v. SEC*. Initially, the National Center for Public Policy Research (“NCPPR”), a communications and research foundation, [challenged](#) an SEC no-action letter advising The Kroger Co. that it could exclude an NCPPR shareholder proposal from its proxy materials, arguing that the SEC engaged in unconstitutional “viewpoint discrimination” because the SEC had previously not permitted the exclusion of similar proposals. In its motion to intervene, the NAM looks beyond NCPPR’s argument and broadly challenges the SEC’s authority to require companies to include shareholder proposals in their proxy filings. Specifically, the NAM argues in its motion that Rule 14a-8 exceeds the SEC’s statutory mandate because requiring companies to include certain shareholder proposals in their proxy statements constitutes “compelled” corporate speech, in violation of the First Amendment. The NAM also criticized what it views as the SEC’s “inconsistent and politically motivated manner” of applying its proxy rules.

### 2. [United Kingdom](#)

**ASA bans energy company advertisements for making misleading climate-related claims.** On June 7, the UK’s advertising regulator, the Advertising Standards Authority (“ASA”), banned advertisements from three energy companies (namely, [Petronas](#), [Repsol](#) and [Shell](#)). The ASA ruled that the advertisements breached the UK Code of Broadcast Advertising (“BCAP Code”) and/or the UK Code of non-Broadcast Advertising and Direct & Promotional Marketing (“CAP Code”), including provisions requiring that the basis of environmental claims must be clear and that unqualified claims could mislead if they omit significant information. A common theme in the ASA’s rulings was that, in the absence of appropriate qualifying information, a company’s environmental claims may mislead consumers as to the overall balance that green activities play in the company’s wider activities. The ASA’s action follows its release in February of guidance to help marketers and advertising agencies interpret the rules of the BCAP Code and CAP Code that concern environment-related advertising issues. See S&C’s February [ESG newsletter](#) for more information.

## Energy Transition Updates

### 1. [Global](#)

**U.S. and UK announce joint declaration to reduce trade barriers and promote a clean economy.** On June 8, the U.S. and UK [announced](#) the Atlantic Declaration for a Twenty-First Century U.S.-UK Economic Partnership (the “Atlantic Declaration”). The Atlantic Declaration includes measures aimed at building a clean economy and expanding trans-Atlantic trade, including an intention for the United States and the United Kingdom to enter into a critical minerals agreement covering five minerals important for electric vehicles (cobalt, graphite, lithium, manganese and nickel) that are extracted or processed in the UK, permitting them to count towards sourcing requirements for clean vehicles eligible for the Section 30D clean vehicle tax credit in the U.S. Inflation Reduction Act. The White House has also said that President Biden will request the U.S. Congress to designate the UK as a “domestic source” under the U.S. Defense Production Act of 1950 in order to facilitate cross-border investment and industrial collaboration.

### 2. [United States](#)

**The IRS and Treasury Department issues proposed regulations for direct pay and transferability.** On June 14, the U.S. Internal Revenue Service and Treasury released a series of proposed regulations addressing the requirements and process for making a “direct pay” election and a “transfer” election under the U.S. Inflation Reduction Act of

2022. Both elections allow taxpayers to monetize U.S. clean energy tax credits. More specifically, the “direct pay” election allows tax-exempt and government entities (and for certain credits, taxable entities as well) to receive tax credits as a fully refundable direct payment, and the “transfer” election allows non-tax-exempt taxpayers to sell all or a portion of tax credits to unrelated parties for cash. See our recent [S&C Energy Transition Insights](#) for more details.

**Updates to the National Environmental Policy Act permitting process enacted.** On June 3, President Biden signed into law the [Fiscal Responsibility Act](#) (“FRA”), which extends the federal debt limit until January 1, 2025. In addition, to increase the efficiency of major energy and infrastructure project permitting process, the FRA imposes page and time limits for environmental review documents issued by the federal agencies, such as generally limiting an environmental impact statement (“EIS”) to 150 pages (excluding citations and appendices) and setting a two-year deadline for federal agencies to provide an EIS. Prior to the FRA, the average completion time for an EIS was [4.5 years](#).

### **3. European Union**

**EU adopts delegated acts on green hydrogen.** On June 20, the European Union formally adopted two delegated acts outlining detailed rules on the EU definition of renewable hydrogen. The First Delegated Act outlines the conditions under which hydrogen, hydrogen-based fuels or other energy carriers (including ammonia) can be considered renewable fuels of non-biological origin (“RFNBOs”). The Second Delegated Act and its associated Annex set out the methodology for determining the lifecycle GHG emissions savings for RFNBOs, which must represent greater than 70% relative to a fossil fuel comparator in order to qualify towards the renewable energy targets. Please see our recent [S&C Energy Transition Insights](#) for more details.

**Carbon Border Adjustment Mechanisms enter into force.** On May 17, 2023, the EU Carbon Border Adjustment Mechanism (“CBAM”) entered into force. The CBAM will require importers of certain goods into the EU to pay a carbon price on GHG emissions embedded into the production of those goods equivalent to the cost of covering those emissions within the EU’s own carbon pricing system. The CBAM is a core element of the EU’s “Fit for 55” package of climate proposals to reduce its GHG emissions by 55% by 2030, and is the EU’s flagship instrument for tackling “carbon leakage”. Please see our recent [S&C Energy Transition Insights](#) for more details.

### **4. Australia**

**Australia publishes Critical Minerals Strategy.** On June 20, the Australian federal government published its [Critical Minerals Strategy 2023-2030](#) (the “Strategy”). The Strategy has four main objectives: (i) creating diverse, resilient and sustainable supply chains through strong and secure international partnerships, (ii) building sovereign capability in critical minerals processing, (iii) using critical minerals to help Australia become a renewable energy superpower and (iv) extracting more value from Australia’s resources in order to create jobs and economic opportunities. The Strategy also indicates the government’s plans to update Australia’s existing list of critical minerals, which is less extensive than the lists incorporated into U.S. and EU law. While the Strategy highlights some targeted support intended to accelerate development of critical minerals projects, such as Export Finance Australia’s A\$2 billion Critical Minerals Facility (A\$1.5 billion of which has already been committed), it does not include any announcements of significant new government investment. The Strategy also does not include proposals for tax, regulatory or other financial incentives to develop critical minerals projects.



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