

ESG Trends and Hot Topics

November 2021

Key Developments

Hot topics in ESG for directors and executives to consider:

- Institutional investors continue their focus on investees' ESG records as the SEC opens the way for more ESG-related shareholder proposals and the U.S. Department of Labor has proposed rules to facilitate ESG-focused investing and increased proxy voting by U.S. pension plans.
 - Both public and private companies should be prepared for heightened engagement by their investors on ESG matters.
- The IFRS Foundation has launched its global sustainability disclosure standards initiative while regulators in the U.S., UK, EU and elsewhere are rolling out new ESG disclosure requirements for corporates and financial institutions, including private, unlisted companies and subsidiaries of foreign companies.
 - Companies should assess what disclosure standards apply at the parent level and to foreign subsidiaries and should be prepared for heightened regulatory scrutiny of ESG-related disclosures.
- Financial regulators in various jurisdictions are increasingly incorporating climate risks into their regulatory and supervisory practices, including conducting climate stress tests and scenario analyses.
 - Financial institutions should evaluate their existing approach to climate risks and opportunities and prepare to adapt to major climate-related regulatory developments.

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Disclosure Updates

Global

IFRS Launches Highly Anticipated Board to Develop Sustainability Disclosure Standards. On November 3, 2021, the IFRS Foundation formally launched the **International Sustainability Standards Board** (“ISSB”) to develop global sustainability-related disclosure standards that provide investors with “high quality, transparent, reliable and comparable” reporting by companies on climate and other ESG matters. The ISSB intends to build on the work of existing investor-focused reporting initiatives with the aim of becoming a global sustainability disclosure standard-setter for the financial markets. It remains to be seen how existing or proposed disclosure requirements, notably the U.S. Securities and Exchange Commission’s (“SEC”) forthcoming climate disclosure rules (as discussed below), will align with the ISSB’s proposed standards. An IFRS technical readiness working group has published **prototype climate** and **general disclosure** requirements for the ISSB’s consideration, which would require relevant thematic and industry-specific qualitative and quantitative disclosures and build on the existing Task Force on Climate-Related Financial Disclosures (“TCFD”) framework and SASB Standards. The ISSB is expected to commence public consultation in 2022.

New Voluntary Standard Released for Corporate Net Zero Targets. In October 2021, the UN-backed Science Based Targets initiative (“SBTi”) released a **Net-Zero Standard** for companies aimed at establishing a credible and independent assessment of corporate net-zero target setting and enabling companies to align their near- and long-term climate action with limiting global warming to 1.5°C. The SBTi’s new net-zero standard would require companies to deeply cut scope 1, 2 and 3 emissions and mitigate residual emissions with carbon removal, while setting both near- and long-term targets. Consultation on SBTi’s separate **net-zero framework for financial institutions** began in November 2021, with the final version to be published in early 2022.

United States

SEC Plans New Climate Disclosure Rules and Enhances Review of Climate Disclosures Under Existing Guidance. The staff of the SEC’s Division of Corporation Finance (“DCF”) is working on proposed new climate disclosure rules and stepping up review of SEC reporting companies’ compliance with its 2010 guidance on climate change disclosures. The proposed rules, expected in early 2022, will likely require more specific, prescribed quantitative and qualitative information about climate risks and opportunities. The staff has also been issuing comment letters to companies regarding compliance with its existing guidance. In September, the DCF published a sample comment letter highlighting comments that it may issue to companies regarding their climate change disclosures — or the absence of such disclosures in SEC filings. Notably, one of the comments asks the issuer to advise the staff as to what consideration was given to including the same type of climate-related disclosure in the issuer’s SEC filings as is in the issuer’s corporate social responsibility report. S&C’s memo on the sample comment letter is available [here](#), and its memo on the potential content of new rules is available [here](#).

SEC Continues to Signal Interest in Expanded Human Capital Management Disclosures. SEC Chair Gary Gensler in [testimony](#) before the Senate in September

reiterated his focus on enhancing current human capital management disclosures. His testimony echoed one of his [tweets](#) from August in which he had noted that investors want to “better understand” a company’s people, and that new rules could require disclosure of metrics such as workforce turnover, skills and development training, compensation, benefits, workforce demographics including diversity, and health and safety.

SEC Approves Nasdaq’s Board Diversity Proposal. On August 6, the SEC voted to approve [new Nasdaq rules](#) on board diversity. The approved board diversity rules require most companies listed on Nasdaq’s U.S. exchange to publicly disclose certain board-level diversity statistics and have (or explain why they do not have) at least two diverse directors. The rules provide greater flexibility for smaller reporting companies, foreign issuers and companies with five or fewer directors. S&C’s memo on the initial rule proposal and trend towards requiring greater board diversity is available [here](#).

[European Union](#)

EU Continues Taxonomy Implementation. On August 3, 2021, the EU’s Platform on Sustainable Finance published [recommendations](#) for which activities should qualify as sustainable under the remaining four environmental objectives of the EU Taxonomy Regulation which have yet to be defined. The recommendations will inform a delegated act expected to be published in 2022, which will define whether a given economic activity is aligned, and does not conflict, with the Taxonomy’s objectives related to water/marine resources, circular economy, pollution prevention/control and biodiversity. The new delegated act will follow a [first delegated act](#) that defined sustainable activities aligned, and not conflicting, with the Taxonomy’s climate mitigation and adaptation objectives, which was formally adopted earlier this year.

[United Kingdom](#)

UK Progresses Own Versions of EU’s SFDR and Taxonomy. In October 2021, the UK Treasury [published](#) new details regarding the UK government’s plan to require disclosure of businesses’ and investment products’ environmental impact. The plan takes the place of the EU’s SFDR and Taxonomy, which are not applicable in the UK following Brexit. Under the plan, Sustainability Disclosure Requirements (“SDRs”) would cover corporates, asset managers, asset owners and investment products and would require new disclosures, including on investment products’ sustainability impact. Certain companies would also be required to publish net zero transition plans. The UK is also preparing a UK Green Taxonomy to define what economic activities count as environmentally sustainable. Specific reporting requirements, including scope and timing, remain unspecified, and implementation may begin in 2022. The UK government indicated that the ISSB standards referenced above will form a core component of the SDR framework for corporates. In November 2021, the UK Financial Conduct Authority launched [a related public consultation](#) regarding new labelling requirements for sustainable investment products and SDRs for asset managers and FCA-regulated asset owners, with comments requested by January 7, 2022.

UK to Require TCFD Disclosures from Public Companies, Private Companies and Financial Institutions. On October 29, 2021, the UK [announced](#) that Britain’s largest

companies will soon be required to disclose climate-related financial information in line with the four core principles set by the TCFD. The regulations, which the UK government indicated will cover over 1,300 UK-registered companies and financial institutions, will apply to accounting periods starting on or after April 6, 2022, subject to the UK Parliament's approval. Notably, the requirement will apply to private UK companies with more than 500 employees and £500 million in annual net turnover (in each case, on a consolidated basis). The new regulations expand an **existing requirement** that companies with a UK premium listing provide TCFD-aligned disclosure or explain why such disclosure has not been provided.

UK Publishes Green Claims Code for Avoiding “Greenwashing” Marketing Claims.

In September 2021, the UK's Competition and Markets Authority (“CMA”) published **guidance** on how businesses making environmental claims can comply with their obligations under UK consumer protection law and avoid “greenwashing.” The CMA notes that consumer protection law requires that claims be truthful and accurate and not overstate or exaggerate the sustainability or positive environmental impact of a product, service, process, brand or business. In particular, the CMA warned that businesses should be able to back up their claims with robust and credible evidence. The CMA also indicated it would step up related enforcement efforts.

Shareholder Engagement Updates

SEC Proposes New Proxy Voting Advice Rules. On November 17, 2021, the SEC **proposed amendments** to final rules it had **adopted in 2020** governing proxy voting advice in order to rescind certain requirements that the 2020 rules had placed on proxy advisory firms. The SEC noted that the newly proposed amendments are intended to “avoid burdens on [proxy voting advice businesses] that may impede and impair the timeliness and independence of their proxy voting advice and subject them to undue litigation risks and compliance costs, while simultaneously preserving investors’ confidence in the integrity of such advice.” Under both the 2020 final rules and the proposed amendments, proxy voting advice constitutes a solicitation subject to proxy rules, and proxy firms would need to provide certain disclosures about conflicts of interest to obtain an exemption from the proxy rules’ information and filing requirements. However, the proposed amendments would remove the obligation that proxy advisory firms also adopt and publicly disclose policies and procedures requiring the timely dissemination of proxy voting advice to registrants and notice to clients of registrants’ responses in order to be exempt from the information and filing requirements of the proxy rules. The proposed amendments also clarify the scope of fraud liability for proxy advisors.

SEC Adopts New “Universal Proxy” Rules. On November 17, 2021, the SEC **adopted rules** requiring companies to use a “universal proxy” in all non-exempt solicitations involving director election contests, giving shareholders more flexibility in selecting directors from both the management-backed and dissident slates in contested director elections. The new rules will become effective for any shareholder meeting featuring an election contest held after August 31, 2022. The newly adopted rules change the current requirement that shareholders vote on separate proxy cards for either the management-backed or dissident slates, and therefore effectively are required to choose between them in contested elections. Under the new rules, the universal proxy card will be required to include the names of all duly nominated director candidates presented for election by any party and for whom proxies are solicited. The new rules also establish

certain notice, minimum solicitation, filing and presentation requirements, among other changes consistent with the adoption of a universal proxy requirement. S&C's memo on the new rules can be found [here](#).

Shareholders Face Higher Thresholds for Submitting U.S. Proxy Proposals. From January 1, 2022, shareholders will face narrower eligibility standards for submitting proposals to a shareholder vote for U.S. companies under the SEC's [amendments](#) to Exchange Act Rule 14a-8. The amendments were adopted in September 2020 and increased the shareholding requirements for most shareholders to submit a proposal and raised the thresholds for the level of support previously rejected proposals must receive to be resubmitted. The new rules [apply](#) to proposals submitted for shareholder meetings held on or after January 1, 2022, with certain carveouts for existing shareholders. S&C's memo on the amendments can be found [here](#).

SEC Opens Door to More Proxy Votes on Environmental and Social Issues. On November 3, 2021, the SEC issued a [staff legal bulletin](#), No. 14L, revising its interpretation of rules governing inclusion of shareholder proposals in company proxy statements. Under the new guidance, it will be more difficult for companies to exclude ESG shareholder proposals. The SEC notes in particular that it now may not permit a company to exclude a shareholder proposal "squarely raising human capital management issues with a broad societal impact ... solely because the proponent did not demonstrate that the human capital management issue was significant to the company." The guidance also suggests that previously excluded proposals relating to changes to address climate change or mandate reporting under a climate disclosure framework would no longer be excluded so long as the proposals afford discretion to management as to how to implement the changes. The bulletin has no legal force but indicates how the SEC staff may now address companies' exclusion requests. S&C's memo on the staff guidance is available [here](#).

NAM Sues SEC Over Proxy Firm Oversight. On October 13, 2021, the National Association of Manufacturers ("NAM") filed suit against the SEC for deciding not to enforce rules it adopted in 2020 governing proxy advisory firms without having provided notice and an opportunity for public comment on its decision. Those [2020 rules](#) require proxy firms to disclose conflicts of interest and adopt procedures to give companies a chance to respond to their recommendations. Proxy firms had previously commented that the 2020 rules would delay their advice and limit their independence. In June 2021, SEC Chair Gary Gensler directed the agency to review the rules, and the SEC said it [would not recommend enforcement of the 2020 rules](#) while considering further regulatory action. On November 17, 2021, the SEC proposed amendments to the 2020 final rules, as discussed above.

SEC Proposes Enhanced Proxy Voting Disclosure. On September 29, 2021, the SEC issued a proposed rulemaking to enhance the information mutual funds, ETFs and other registered management investment companies report annually about their proxy votes. The proposal aims to enhance current Form N-PX disclosures so investors can more easily understand and analyze proxy voting information. The proposed rules would require funds and managers to categorize their voting by type (such as environment or climate; human rights; corporate governance; diversity, equity and inclusion; political activity; and others) using the same language as the issuer's form of proxy. S&C's memo

on the proposed rulemaking is available [here](#).

Institutional Investor Updates

BlackRock Gives Major Clients More Control Over Proxy Votes. In October 2021, BlackRock [announced](#) that certain institutional clients will be able to vote their shares directly instead of relying on BlackRock to vote based on its internal voting policies. The changed policy, beginning January 1, 2022, will expand major investors' say in proxy voting decisions at a time when issuers face increasing proxy challenges on ESG-related matters including climate change, gender equality and executive pay. The new policy affects around 40% of the \$4.8 trillion of index equity assets Blackrock manages. Clients covered by the new policy will be able to vote proxies according to their own policies, choose from a menu of third-party proxy voting policies or continue relying on BlackRock to vote their shares. Certain investors will also be able to direct votes on individual resolutions or companies. BlackRock has said it is exploring expanding voting choice to investors in ETFs, index mutual funds and other products.

ISS Publishes Survey of Investors' Policy Priorities. On October 1, 2021, ISS released its 2021 [Global Benchmark Policy Survey](#) and, for the first time, a [separate survey on climate-related matters](#). ISS uses responses to formulate its revised proxy voting policies, which are expected to be released in mid-November for the 2022 proxy season. Some highlights from this year's survey include overwhelming support from investor-respondents (94%) for ISS revisiting its existing policy of not recommending votes against directors of companies with "poor governance provisions" (e.g., dual-class stock without a reasonable sunset provision or a classified board) that went public prior to 2015, when ISS had tightened its governance voting policies. A supermajority of investor-respondents (86%) also believed incorporating ESG-related metrics into executive compensation programs is an appropriate way to incentivize executives.

Financial Institution Developments

White House Outlines "Whole-of-Government" Climate Strategy. On October 14, 2021, the White House released its [Roadmap to Address Climate-Related Financial Risk](#), which highlights the key role of financial regulators and the federal government in implementing the Biden administration's climate-risk strategy. The roadmap outlines the Biden administration's "whole-of-government" approach to climate-related financial risk and its efforts to spark public and private investment in a net zero, clean energy future. S&C's memo on the White House roadmap is available [here](#).

U.S. FSOC Identifies Climate Change as Emerging Threat to Financial Stability and Recommends Accelerated and Coordinated Actions by U.S. Financial Regulators. On October 21, 2021, the U.S. Financial Stability Oversight Council ("FSOC") released its [Report on Climate Related Financial Risk](#), which identifies climate change as an "emerging threat to the financial stability of the United States," reviews FSOC members' incorporation of climate-related financial risks into their regulatory and supervisory activities, analyzes the impediments to addressing climate-related financial risks, and discusses the use of scenario analysis for financial stability assessments. FSOC members include the heads of the Department of the Treasury, the SEC, the CFTC and federal banking regulators, among other U.S. financial regulators. The report lists over 30 recommendations in four areas: expanding capacity across FSOC and its members to address climate-related financial risk; improving climate-related data and methodologies; enhancing public climate-related disclosures; and assessing and mitigating climate-related risks to financial stability. S&C's memo on the FSOC report is

available [here](#).

U.S. Bank Regulators Indicate Supervisory Guidance for Large Banks on Climate Risk Management Is Forthcoming. In a [speech](#) delivered on October 7, 2021, Federal Reserve Governor Lael Brainard noted that the Federal Reserve is developing scenario analysis to model climate-related financial risks and anticipated that it would be helpful to provide supervisory guidance for large banks in their efforts to address climate-related risks. Subsequently, in November, the Acting Comptroller of the Currency Michael Hsu delivered a speech outlining [five climate change-related questions](#) that large bank boards of directors should ask senior management to improve climate risk management practices. The questions cover a bank's overall exposure to climate change; identification of specific counterparties, sectors and locales that warrant a bank's heightened attention when assessing the potential impacts of climate change; a bank's exposure to a carbon tax; vulnerability of a bank's data centers and other critical services to extreme weather; and how a bank can seize opportunities related to climate change. The Acting Comptroller also indicated that the OCC is developing high-level supervisory expectations for large banks related to climate risk management, with framework guidance expected to be issued by the end of 2021, to be followed next year with detailed guidance for each risk area.

UK Banking Regulator Examines Climate Change and Capital Requirements. On October 28, 2021, the Bank of England's Prudential Regulatory Authority ("PRA"), which oversees UK banks, insurers and major investment firms, [published a report](#) highlighting how it will embed climate change into its supervisory approach from the end of 2021, requiring that regulated entities demonstrate their ability to understand and manage climate-related financial risks on an ongoing basis. The report found that capital is not the right tool to address the causes of climate change (greenhouse gas emissions), but that it should be used to provide resilience against the consequences (financial risks), and that current capital regimes likely do not yet capture the full extent of climate-related financial risks. The PRA also indicated that it would conduct further research on the link between climate change and regulatory capital requirements.

ECB Publishes Results of Climate Stress Test. In September 2021, the European Central Bank ("ECB") released a paper entitled the [ECB Economy-wide Climate Stress Test](#), describing the methodology and results from its economy-wide climate-related stress test. The stress test analyzed the resilience of non-financial companies and euro area banks to climate risks under various assumptions about future climate policies and comprised three main pillars: climate-specific scenarios with projections of climate-related macroeconomic conditions over the next 30 years, a comprehensive dataset, and climate-specific models capturing the direct and indirect transmission channels of climate risk drivers. The ECB paper reported that climate change represents a major source of systemic risk, particularly for banks with portfolios concentrated in certain economic sectors and geographic areas. Subsequently, on October 18, 2021, the ECB published a [letter to banks](#) announcing a 2022 stress test on climate-related risks, the outcome of which will be integrated into the supervisory review and evaluation process but will not lead to any direct impact on bank capital requirements. A [summary](#) of how central banks around the world are using climate scenario stress tests was also recently published by the Network for Greening the Financial System, an intergovernmental

network of central banks and supervisors.

Sustainable Finance Developments

Bank of England to Use Bond Buying to Encourage Cuts in Corporate Carbon Emissions. In November 2021, the Bank of England [released its plan](#) to “tilt” its bond buying towards greener issuers in order to achieve a target of a 25% reduction in the weighted average carbon intensity of its Corporate Bond Purchase Scheme portfolio by 2025, and full alignment with the UK’s target of net zero greenhouse gas emissions by 2050. The extent to which purchases are tilted either towards or away from a given issuer will depend on four metrics: the emission intensity of its activities; its progress to date in reducing emissions; having published a climate disclosure; and having an emissions reduction target (with more credit if this is third party verified). The ECB and the Bank of Japan have [indicated previously](#) that they are considering similar measures.

Investment Fund and Asset Management Developments

U.S. Retirement Fund Fiduciaries to be Able to Consider Climate and Other ESG Factors in Investing. On October 13, 2021, the U.S. Department of Labor (“DOL”) announced a proposed rulemaking to amend the Investment Duties regulation under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”) that would clarify the application of ERISA’s plan fiduciary duties of prudence and loyalty to selecting investments and investment courses of action and exercising shareholder rights. The proposal is intended to remove barriers implemented by the prior administration that the DOL believes limit fiduciaries’ ability to consider climate change and other ESG matters as factors when selecting investments and exercising shareholder rights. Comments on the proposed rule are due by December 13, 2021. S&C’s memo on the proposed rulemaking is available [here](#).

EU Progresses Disclosure Requirements for Sustainable Investment Products. On October 22, 2021, the EU’s financial supervisory authorities published a [joint final report](#) on the content and presentation of disclosures related to sustainable investment products that will be required under the EU’s Sustainable Finance Disclosure Regulation (“SFDR”) and EU Taxonomy Regulation. The report on the SFDR’s Regulatory Technical Standards proposes requiring identification of the environmental objectives to which the economic activities funded by the product contribute and substantial disclosures on how and to what extent the economic activities in which the product invests qualify as environmentally sustainable as defined in the EU Taxonomy, including an indication of whether the environmentally sustainable economic activities’ compliance with the EU Taxonomy has been assessed by an auditor or a third party. The final report will be the basis for a delegated act to be adopted by the European Commission and is expected to enter into force beginning July 2022.

IOSCO Adopts Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management. In November 2021, the International Organization of Securities Commissions (“IOSCO”), an intergovernmental group of global securities regulators, released [recommendations](#) for regulators to consider with respect to sustainability and asset management. The five recommendations address asset managers’ practices, policies, procedures and disclosure; product-level disclosure; regulatory supervision and enforcement; ESG terminology; and financial and investor education.

CFA Institute Publishes Voluntary Global ESG Disclosure Standards for Investment Products. In October 2021, the CFA Institute, a trade society of investment

management professionals, released [Global ESG Disclosure Standards for Investment Products](#). The principles-based standards are intended to cover all types of investment vehicles, asset classes and ESG approaches and aim to ensure investors are provided with complete, reliable, consistent, clear and accessible ESG-related disclosures.

Insurance Sector Developments

NYDFS Issues Guidance for New York Insurers on Managing Climate-Related Financial Risks. In November 2021, the New York Department of Financial Services, the state's banking and insurance regulator, released [final guidance](#) for how New York domestic insurers should take a strategic approach to managing climate risks that considers both current and forward-looking risks and identifies actions required to manage those risks in a manner proportionate to the nature, scale and complexity of insurers' businesses. The guidance outlines NYDFS' specific expectations for insurers' governance, business models and strategies, risk management, scenario analysis and public disclosure. Insurers are expected to implement the expectations related to board governance and have plans in place to implement expectations relating to organizational structure by August 15, 2022, with more complex expectations, such as those relating to risk appetite, scenario analysis and public disclosure, taking longer to implement.

Federal Insurance Office Requests Public Comment on Climate Risk. In August 2021, the U.S. Treasury's Federal Insurance Office ("FIO") issued a [request for information](#) on its future work relating to the insurance sector and climate-related financial risks. The FIO noted that its initial work will focus on (1) assessing climate-related issues or gaps in the supervision and regulation of insurers; (2) assessing the potential for major disruptions of private insurance coverage in U.S. markets particularly vulnerable to climate change, and facilitating mitigation and resilience for disasters; and (3) increasing engagement on climate-related issues and leveraging the insurance sector to achieve climate-related goals. The FIO indicated that the responses to the request for information will help it make recommendations on actions that can be taken by various insurance sector stakeholders, including state insurance regulators, insurers and policyholders, to address climate-related financial risks. The comment period closed November 15, 2021.

Competition Law Developments

Europe Addresses Corporate Sustainability Goals and Competition Laws. Competition authorities across Europe are [starting to consider](#) how companies can engage in cross-industry cooperation to achieve environmental and climate-related goals without raising antitrust concerns. National authorities in the [Netherlands](#), [Germany](#), the [UK](#) and [Greece](#), among others, have recently published guidance or discussion papers for companies seeking to cooperate with competitors to further sustainability goals. Similarly, and in an unprecedented fashion, EU Competition Commissioner Margrethe Vestager has been [encouraging](#) companies to proactively engage in a dialogue with the European Commission to obtain individual, informal guidance in respect of collaborations related to sustainability. Such policy initiatives, however, remain preliminary, even as the number of industry collaborations related to climate and other sustainability goals continues to grow. Further developments in this area of policymaking are expected this year and throughout 2022, including additional guidance from the European Commission and revised EU guidelines on horizontal agreements.

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