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December 9, 2022

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Latin Lawyer ESG Webinar: Regulating the Green Investment Boom – Promise & Pitfalls

Join Cadwalader Partner **Jason Halper** and Special Counsel **Duncan Grieve**, along with Santamarina y Steta partner Juan Carlos Machorro G., for a webinar discussing one of the hottest of hot topic areas in the Latin American region on December 15 from 4-5 PM UTC. Find more details and register **here**.

COP15 Biodiversity Conference Begins in Montreal

December 9, 2022

By Jason Halper
Partner and Co-Chair | Global Litigation

The United Nations' Environment Programme's Biodiversity Conference, COP15, kicked off this week in Montreal after a two-year delay. The overarching aim is for governments to agree on a new set of goals for nature over the next decade through the UN Convention on Biological Diversity post-2020 framework process. The **first draft** of the framework was released in July 2021. According to the UN, the framework "sets out an ambitious plan to implement broad-based action to bring about a transformation in society's relationship with biodiversity and to ensure that, by 2050, the shared vision of living in harmony with nature is fulfilled." The framework provides a global framework for the development of national targets regarding biodiversity goals. It assumes that a "whole-of-government and society approach is necessary to make the changes needed over the next 10 years as a stepping stone towards the achievement of 2050 Vision." The framework provides 2030 and 2050 milestones, including for 2030, conservation of at least 30% globally of land and sea areas (known as 30 by 30), restoration of at least 20% of degraded water systems and reduction of invasive species by at least 50%. The first draft of the framework also addresses financial support and pollution reduction goals.

The World Economic Forum **highlighted** the importance of the framework in "setting policies and regulations that will require businesses and financial institutions to protect, restore and sustainably manage nature." Global Director for Environmental Standards at CDP Sue Armstrong Brown **described** COP15 as a "once in a generation" opportunity and urged governments to "seize this chance and create the enabling environment companies need to drive forward their commitments."

Taking the Temperature: COP27 in Egypt, like much of the sustainability discussion, focused on climate change mitigation and adaptation efforts. Biodiversity-related impacts of climate change typically have received less attention, although that is changing. Regulators and industry now frequently are openly recognizing the relationship between biodiversity impact and financial and operation risk and opportunity. For instance, Sylvie Goulard, Deputy Governor of the Banque de France, the French central bank, stated in an October 24 speech that central banks need to take more aggressive action regarding nature-related risk because of their complexity and also because "shocks" in one sector can have significant impacts on other sectors. And the Taskforce on Nature-Related Financial Disclosures recently published the third iteration of its disclosure framework for nature-related risk management and disclosures, which could help spur a drive toward global consensus on such disclosure and focus attention on the issue. We will continue to monitor COP15 for developments over the next two weeks.

Investing: Financial Institutions Continue to Navigate State ESG Views

December 9, 2022

Investing

By Sara Bussiere
Associate | Global Litigation

Banks continue to navigate rough waters in dealing with certain state finance officials over positions on climate. As we have **reported**, in August approximately nine financial institutions were included on a list, mandated under state law to be complied with by the Texas comptroller, of "Financial Companies that boycott energy companies." Last week, at least some of these firms petitioned to be removed from the list, and thereby relieved of the prohibitions on transacting business with the state that result from being included. The financial firms contend, among other things, that they should never have been on the list in the first place because they never stopped doing, and continue to do, business with energy companies. Just days later, Florida's Chief Financial Officer Jimmy Patronis **announced** that the state was withdrawing approximately $2 billion from funds managed by BlackRock, $1.43 billion in long-term securities and $600 million in overnight investments, by 2023. Patronis cited concerns over BlackRock's "ESG standards" and wanting "to get the best returns possible for taxpayers" as reasons for the withdrawal. A BlackRock spokesperson said that the asset manager was "surprised" by the announcement because Patronis and his staff had not previously raised any performance concerns with BlackRock. This week, BlackRock was also subpoenaed by the Texas Senate Committee on State Affairs seeking documents regarding its ESG practices and requesting testimony at a December 15 hearing (following August letters from the Committee to BlackRock and three other asset managers requesting documents and testimony relating to their investment practices). BlackRock has recently appointed Mark McCombe as Vice Chairman to focus on "BlackRock's story to more stakeholders across the US, specifically at the state level."

Taking the Temperature: There is no shortage of discussion regarding how climate change and other ESG considerations increasingly have become politicized. On the other side of the ledger, Attorneys General from sixteen states and the District of Columbia recently wrote to the chairs and ranking members of certain Senate and House Committees expressing concern over "efforts to interfere with financial institutions' ability to make sound investment decisions on behalf of hardworking Americans," and observing that investment managers' fiduciary duties required appropriate consideration of ESG factors. On November 22, the Department of Labor finalized a rule clarifying that retirement plan fiduciaries may consider ESG factors when selecting investments and exercising shareholder rights. As this debate continues, asset managers are left to tread between these two camps and at the same time discharge their fiduciary duties to clients both in terms of investment selection and monitoring and disclosure.

Regulation: European Council Declines to Mandate that Director Care Obligations Require Consideration of Sustainability Matters

December 9, 2022

Regulation

By Duncan Grieve
Special Counsel | White Collar Defense and Investigations

In February 2022, the European Commission adopted a proposal for a Corporate Sustainability Due Diligence Directive to "foster sustainable and responsible corporate behavior throughout global value chains." On December 1, the European Council adopted a General Approach regarding the Directive that modified the prior draft in certain respects. In their current form, the rules would require in "scope" companies to undertake due diligence across aspects of their "chain of activities" in order to identify adverse climate and social impacts and implement mitigation efforts. The EC chose "chain of activities" over the original "value chain" language in order to "reflect divergent views of Member States on the issue of whether to cover the whole 'value chain' or limit the scope to the 'supply chain.'"

If adopted, the rules would apply first to EU companies with more than one thousand employees and EUR 300 million net worldwide turnover, or, for non-EU companies, EUR 300 million net turnover generated in the EU three years from enactment of the final Directive. The EC left to the EU Member States, which must individually adopt the Directive, to decide whether "to apply the Directive to the provision of [] financial services." In another significant change from the Commission proposal, the Council deleted a provision that would have required directors of EU companies to take into account sustainability matters in their decision-making due to concerns from Member States that doing so could "potentially undermin[e] directors' duty to act in the best interest of the company" and would interfere "with national provisions regarding directors' duty of care." The Directive was "aligned as much as possible with the soon-to-be-adopted Corporate Sustainability Reporting Directive (CSRD)."

Taking the Temperature: Notwithstanding the EC decision, the European Parliament has yet to weigh in with its position, and ultimately, Member States will have to decide whether to adopt the Directive in whole or as modified. While significant press attention has been paid to the EC decision to let Member States potentially exempt large aspects of the financial services industry from the regulation, it also is worth considering the implications, if any, of the EC decision not to mandate sustainability as part of the directors' duty of care. On the one hand, from an "outside-in" materiality perspective, sustainability considerations likely already factor into board decision-making to the extent the issue is material to the organization. And directors of EU companies are subject to various laws and regulations that impact climate-related disclosure and governance, including the CSRD. On the other hand, at least in the abstract, it is possible to imagine situations where director duties to act in the best interest of the company arguably are at odds with considering the company's external impacts. As a

result, the choice to defer to Member States' governance codes, or directors themselves, on that issue, appears reasonable and prudent, particularly given the extensive climate regulatory regime already in place.

Investing: Singapore Exchange Creates Sustainable Debt Label

December 9, 2022

Investing

By Drew Newman
Associate | Global Litigation

The Singapore exchange, SGX Group, **announced** the launch of the SGX Sustainable Fixed Income initiative, which "allows investors to more easily identify investments that meet certain criteria at issuance" for fixed income securities. These criteria are: (1) alignment with **recognized** green, social and sustainability standards; (2) confirmation from a "reputable external reviewer" that the securities align with these recognized standards; and (3) regular public reports setting out the securities' alignment with these recognized standards and any material developments that may affect alignment with these standards. Issuers can use the SGX Sustainable Fixed Income Mark to identify any security that meets these requirements.

Singapore Exchange Regulation (SGX RegCo) has estimated that approximately 200 of the fixed income securities currently listed on the exchange already meet the criteria and these will be "onboarded over the next few months." Issuers applying to list and quote fixed income securities on the exchange can also simultaneously apply for recognition under the Initiative and the two applications will be considered concurrently.

According to Lee Beng Hong, Head of Fixed Income, Commodities & Currencies, SGX Group, the initiative allows issuers "to demonstrate their commitment to these well-understood standards and raise their visibility and profile to investors who are interested in sustainable fixed income securities." Tan Boon Gin, CEO of SGX RegCo, also stated that "[s]ustainable investing is gaining momentum and SGX Group anticipates that such an assurance may therefore be helpful for other asset classes."

Taking the Temperature: With this initiative, Singapore now joins other exchanges across the region, including the Hong Kong and Shanghai stock exchanges, which already offer green listings. Demand for ESG-related investment products continues to increase and this announcement likely comes in response to growing concern over the lack of consistent standards and regulations in the markets for identifying sustainable investments. The Singapore exchange has included widely adopted and supported international standards as part of its initiative, which should promote green listings on the exchange.