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COP15: Agreement Announced on Biodiversity Framework

December 20, 2022

The COP15 biodiversity conference in Montreal concluded yesterday with the announcement of an agreement, apparently reached over the objection of certain African nations, to, among other things, conserve 30% globally of land and sea areas and restore 30% of the planet's degraded terrestrial, inland water, coastal and marine ecosystems by 2030 (known as the '30 by 30' target). Other notable goals of the **agreement** include reducing by half the overall risk posed by pesticides and highly hazardous chemicals; reducing by at least half the introduction and establishment of invasive alien species; and cutting global food waste in half. The signatories to the agreement, which did not include the U.S., agreed to mobilize at least $200 billion per year in biodiversity-related funding from public and private sources. The creation of a new biodiversity fund, however, as requested by Brazil, Indonesia, and the Democratic Republic of the Congo—the three countries home to the world's three largest rainforests—to pay for the 30 by 30 target, was tabled for future talks. In line with the increased push for transparent and detailed disclosure, the COP15 agreement also requires "large and transnational companies and financial institutions to monitor, assess, and transparently disclose their risks, dependencies and impacts on biodiversity." We will provide a more detailed report on the agreement in our next publication.

Regulation: Australian Treasury Launches Consultation on Climate-Related Financial Disclosure

December 20, 2022

Regulation

By Simon Walsh
Special Counsel | Global Litigation

The Australian Treasury **announced** a consultation into proposed rules on climate-related financial disclosure, which will align with the International Sustainability Standards Board ("ISSB") recommendations. The **consultation**, which "seeks initial views on key considerations for the design and implementation of standardised, internationally-aligned requirements for disclosure of climate-related financial risks and opportunities in Australia," will be open for responses until February 17, 2023. The consultation also seeks views on relevant related matters, such as any required changes that need to be made to ensure financial reporting bodies "can keep pace with the expansion of international standard-setting priorities on climate and sustainability reporting."

The consultation sets out six principles to guide the climate-related financial disclosure reforms:

- The reforms should support Australia's climate goals.
- The reforms should improve the quantity, quality, and comparability of disclosures.
- All parties, including businesses, investors, regulators, and the public should have a clear understanding of the obligations imposed by the requirements.
- The new requirements should "as far as possible" be aligned with international reporting standards.
- The requirements should build upon the existing financial reporting system and be scalable and flexible.
- The climate disclosure requirements should be proportional to the risks they seek to address.

Simon O'Connor, CEO of the Responsible Investment Association Australasia, stated that "responsible investors will welcome the government's national sustainable finance agenda, which will finally bring Australia in line with other countries – such as the UK – by supporting the finance sector to contribute to the nation's prosperity."

Taking The Temperature: With this announcement, Australia follows several other jurisdictions, including New Zealand, Japan, the European Union, and the UK, that already have established mandatory climate-related reporting. The U.S., Switzerland and Singapore are also currently developing compulsory climate-related disclosure requirements. While the trend toward mandated disclosure presents the possibility of

convergence toward global unified standards, that harmony is proving elusive. Australia's proposal aligns with the ISSB, as opposed to some other jurisdictions, such as New Zealand and the UK, which align with the Task Force on Climate-related Financial Disclosures ("TCFD") recommendations. While the ISSB and TCFD approaches overlap in significant respects, material differences exist as well. Australia's rationale for opting for the ISSB recommendations is that the TCFD approach "leave[s] significant scope for disclosures to vary in reporting across entities" and instead the ISSB "aims to fill this gap by providing the necessary standardisation and comparability between climate disclosures, as part of a comprehensive global baseline of sustainability-related disclosure standards." As we have discussed, the existence of different standards across jurisdictions will pose a continuing challenge for companies that conduct business in more than one country.

Greenwashing: Research Suggests European Banks "not doing enough to address ... climate change and biodiversity loss"

December 20, 2022

By Duncan Grieve
Special Counsel | White Collar Defense and Investigations

The UK-based responsible investing non-profit ShareAction **announced** the publication of a **report** into the biodiversity and climate strategies of the 25 largest European banks, measured by total assets. The report concludes that even though the surveyed banks are taking steps to expand their green finance offerings, they are "resisting implementing ambitious climate policies" and are generally unprepared for the risks posed by biodiversity loss. The report ranked each bank's performance on metrics measuring the bank's approach to climate and biodiversity governance, strategy, and engagement and collaboration.

All but one of the surveyed banks have implemented green finance strategies, but only 12 of the banks indicated that a portion of their green finance transactions were audited externally through the entire lifecycle of the financing. In an accompanying **press release**, ShareAction stated that current green finance strategies leave too much room for greenwashing and a lack of transparency is leading to "underreporting of banks' support for high-carbon sectors." The report was also critical of the surveyed banks' fossil fuel policies as being "full of loopholes," which allowed continued investment into some fossil fuel-related projects.

Taking The Temperature: As we have frequently discussed, financial institutions addressing climate change and other ESG issues operate in a particularly challenging environment, confronted with a charged political climate on the pro- and anti-ESG sides of the discussion as well as a lack of consensus on many aspects of banks' reporting and governance regarding sustainability issues. The ShareAction report reflects these cross-currents, observing that financial institutions in fact have responded to investor demand in offering sustainable finance products and by implementing policies to govern their own investment decisions and strategies. Given the still-evolving regulatory guidance within and across jurisdictions, it is not surprising that there is meaningful variation in how financial institutions are approaching sustainability issues. The notion of external auditing of green finance transactions to assure compliance with sustainability requirements is particularly controversial, although we expect it to gain greater acceptance going forward with the associated costs imbedded in the deal structure. The SEC's proposed climate disclosure rule, for instance, contemplates requiring companies that are subject to the rules to obtain attestations regarding certain disclosures, such as Scope 1 and Scope 2 greenhouse gas emissions. The continued evolution of global regulatory guidance should reduce the divergence cited by ShareAction and benefit financial institutions by reducing potential challenges over greenwashing and other sustainability-related statements.

Regulation: EU Adopts Legislation to Tackle Deforestation

December 20, 2022

Regulation

By Sara Bussiere
Associate | Global Litigation

Earlier this month, the European Commission **announced** a provisional agreement between the European Parliament and the Council of the European Union on regulation pertaining to deforestation-free supply chains. In a questions and answers **document** published last year alongside a draft regulation, the EU stated that "by promoting the consumption of 'deforestation-free' products and reducing the EU's impact on global deforestation and forest degradation, the new rules are expected to bring down greenhouse gas emissions and biodiversity loss." If the regulation is implemented, all companies subject to the rules would be required to carry out "strict due diligence" if they sell on or export from the EU market any of the following products: palm oil, cattle, soy, coffee, cocoa, timber, and rubber. Derived products, such as beef, furniture, or chocolate, will also be subject to such strict due diligence. The EU describes its selection of these products as having been chosen "on the basis of a thorough impact assessment identifying [the listed products] as the main driver of deforestation due to agricultural expansion." The list will be subject to regular review and could be expanded in the future.

Companies selling in, or exporting out, of the EU market will be required to prove that their products are both deforestation-free (*i.e.*, produced on land that was not subject to deforestation after December 31, 2020) and compliant with all relevant and applicable laws in the country of production. Companies also will be required to collect geographical information on the land where the commodities were produced so that checks can be made to ensure compliance. According to the press release, the European Commission will establish a "benchmarking system that will assess countries or parts thereof and their level of risk of deforestation and forest degradation." Before the regulation can enter into force, the European Parliament and Council of the European Union have to formally adopt the proposed regulation. Market participants will then have 18 months to implement the rules, with micro and small enterprises having additional time to make the required changes.

Taking The Temperature: Although the regulation is expected to have an 18-month implementation period, companies should not be complacent. Affected companies should start taking steps to fully consider the implications of the rule changes and take sufficient time to thoroughly review and investigate their supply chains. Companies should ensure that their policies, procedures, and procurement practices provide sufficient transparency and comply with the requirements of the regulation. Some other jurisdictions have begun to implement similar requirements on companies operating within their borders. In the UK, the Environment Act 2021 will impose a duty on companies to implement a due diligence procedure and also to report, on an annual

basis, on “forest risk commodities.” The interplay between this regulation and the goals outlined at COP15, briefly summarized above, remains to be seen.

Regulation: Republican House Judiciary Committee ‘launch investigation’ into Climate Action 100+

December 20, 2022

Regulation

By Jason Halper
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Republican members on the House Committee on the Judiciary have written a letter to the steering committee members of Climate Action 100+, Ceres and CalPERS, requesting documents and seeking information regarding antitrust compliance. The letter claims that Climate Action 100+, the investor-led initiative created to “ensure the world’s largest corporate greenhouse gas emitters take necessary action on climate change,” “seems to work like a cartel.” The press release accompanying the letter states that the House Republicans have “launched an investigation ... probing whether major climate groups that spearhead the [ESG] movement are violating antitrust laws.” Climate Action 100+ was first launched in 2017 and includes 700 investors managing over $68 trillion USD in assets.

The press release states that “woke corporations are collectively adopting and imposing progressive policy goals that American consumers do not want or do not need. An individual company’s use of corporate resources for progressive aims might violate fiduciary duties or other laws, harming its viability and alienating consumers.”

In November, CalPERS CEO Marcie Frost stated that ESG risk analysis is not an endorsement of one political ideology, that “those who say otherwise are actually advocating for investors like CalPERS to put on blinders, to ignore information and data that might otherwise help build on the retirement security of our two million members,” and that “what these critics want is for CalPERS to stop considering ESG risks, even though doing so would be contrary to our fiduciary duty and might put the performance of our investments in jeopardy.”

Taking The Temperature: This letter is yet another development in the politicized ESG debate occurring in the United States. We have reported on similar requests for documents from various state and federal officials multiple times in recent months, as well as actions, such as those by finance officials in Texas and Florida, to reduce business with financial institutions deemed insufficiently supportive of the oil and gas industry. Investor climate coalitions in particular are being subject to significant scrutiny. Recently, Vanguard announced that it was withdrawing from the Net Zero Asset Managers Initiative following a report by the Minority Staff of the U.S. Senate Committee on Banking, Housing and Urban Affairs regarding the supposed influence of the “liberal views” toward ESG of the “Big Three” asset managers, Blackrock, State Street and Vanguard. Similarly, the Glasgow Financial Alliance for Net Zero last month dropped its connection to the UN-supported Race to Zero campaign after several large U.S. banks threatened to withdraw over concerns about ESG backlash and potential antitrust

implications associated with such commitments. It remains to be seen, however, the extent to which such actions chill long-term progress on the part of financial institutions related to sustainability issues. Climate change will have an impact on most companies, and as Ms. Frost of CalPERS observes, it could be a breach of fiduciary duty to investors for financial institutions to ignore those real-world impacts due to political pressure.