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European Commission Announces Green Deal Industrial Plan

February 3, 2023

By Duncan Grieve
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On February 1, the European Commission (EC) launched its **Green Deal Industrial Plan** to "enhance the competitiveness of Europe's net-zero industry and support the fast transition to climate neutrality." According to the accompanying **press release**, the EC aims to provide a more supportive environment for scaling up the EU's capacity to manufacture net-zero technologies and products. Additionally, the Plan is intended to build upon previous initiatives and complement ongoing strategies such as the **European Green Deal**.

In summary, the EC's goals in implementing the Plan are:

- Create a more predictable and simplified regulatory environment via a proposed Net-Zero Industry Act, which is intended to provide regulatory standards to support the development of net-zero technologies across the market and support a simplified permitting framework. Additionally, the EC will propose a Critical Raw Materials Act to identify raw materials that are vital to manufacturing net-zero technologies and ensure that they are available.
- Facilitate a path to faster investment in and financing of clean technology production. In order to "speed up and simplify aid granting," the EC intends to propose an amendment to the **General Block Exemption Regulation**, which provides that "[a]s a general rule, except for very small amounts, government aid must be notified to and cleared by the Commission before it is granted." The regulation "exempts EU countries from this notification obligation, as long as [applicable criteria are fulfilled]," and "is designed to reduce administrative burdens on national and local authorities. This regulation is also designed to encourage EU governments to channel aid towards economic growth without giving recipients an unfair competitive advantage." The proposed amendment would increase the threshold at which a member nation, prior to allocating public funds, would have to notify and receive permission from the bloc to do so. This change will, according to the EC's press release, "streamline and simplify the approval" of Important Projects of Common European Interest (IPCEI). IPCEI are large transnational projects of strategic importance to the EU undertaken collaboratively by the private and public sectors.
- Encourage the development of the required skills associated with new technologies by the establishment of Net-Zero Industry Academies to provide up-skilling and re-skilling programs in "strategic industries."
- Enhance global cooperation and improve the resilience of supply chains. The EC intends to engage with the EU's partners, work with the World Trade Organization and further develop the EU's network of Free Trade Agreements.

The EC intends to use existing funds to finance the development of clean technology along with its manufacturing and deployment. In order to assist Member states in accessing REPowerEU funds, the EC has adopted **guidance** that sets out the "process of modifying existing plans and the modalities for preparing REPowerEU chapters." According to the accompanying **factsheet**, the EU has already made available EUR 250 billion for green measures, and can mobilize an additional EUR 372 billion from InvestEU for net-zero investments and a further EUR 40 billion from the Innovation Fund over the next decade. REPowerEU is a **plan** that the EU adopted following Russia's invasion of Ukraine that "sets out a series of measures to rapidly reduce dependence on Russian fossil fuels and fast forward the green transition, while increasing the resilience of the EU-wide energy system."

Ursula von der Leyen, President of the EC, stated that "We have a once in a generation opportunity to show the way with speed, ambition and a sense of purpose to secure the EU's industrial lead in the fast-growing net-zero technology sector. Europe is determined to lead the clean tech revolution. For our companies and people, it means turning skills into quality jobs and innovation into mass production, thanks to a simpler and faster framework. Better access to finance will allow our key clean tech industries to scale up quickly."

Taking the Temperature: In addition to representing a significant investment in accelerating a green transition, the EC's adoption of the Green Deal Industrial Plan is, at least in part, a response to the U.S. Inflation Reduction Act (IRA). The IRA contained approximately $370 billion in climate and energy-related provisions, comprised in large part of $121 billion of investment and production tax credits and the establishment of a $27 billion Greenhouse Gas Reduction Fund to be administered by the Environmental Protection Agency. Overall, it is anticipated that the IRA will lead to 40% emissions reductions by 2030. In announcing the EC's Plan, von der Leyen expressly referenced the U.S. law, remarking that "it is no secret that certain elements of the design of the Inflation Reduction Act raised a number of concerns in terms of some of the targeted incentives for companies. This is why we have been working with the US to find solutions, for example so that EU companies and EU-made electric cars can also benefit from the IRA. Our aim should be to avoid disruptions in transatlantic trade and investment." Ultimately, however, the Plan recognizes the potential for trade-related disputes, and that "Europeans also need to get better at nurturing our own clean-tech industry." We anticipate similar attempts by other countries to balance incentivizing the development of their own renewable energy industries with the goal of maintaining fair trade. However, that will be challenging to achieve based on reactions to the IRA, the Green Deal Industrial Plan, and other climate-related plans that are perceived to benefit "home" industries at the expense of global competitors. When the EU Carbon Border Adjustment Mechanism was announced – which will require foreign exporters to the EU to pay for the cost of their carbon emissions – we anticipated possible push back from competitors as well as possible concerns over compliance with World Trade Organization rules.

UK'S CMA Expands Investigation of Greenwashing

February 3, 2023

By Joel Mitnick
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The UK's Competition Markets Authority (CMA) issued a **press release** on January 26, 2023 announcing a potentially wide ranging investigation into the "accuracy of 'green' claims made about household essentials – such as food, drink, and toiletries – to make sure shoppers are not being misled."

The investigation will focus on a range of products known as "fast moving consumer goods (FMCG)" that are used by consumers on a daily basis, such as food, toiletries, cleaning products and others. The CMA characterized the investigations as "an expansion of ongoing work by [CMA] into 'greenwashing,' which seeks to get to the bottom of whether products and services that claim to be green or eco-friendly are being marketed to shoppers accurately."

Sarah Cardell, CMA's Chief Executive, said: "Our work to date has shown there could be greenwashing going on in this sector, and we'll be scrutinising companies big and small to see whether their environmental claims stack up. Now is a good time for businesses to review their practices and make sure they're operating within the law."

Taking the Temperature: Hard on the heels of announcing its support for bona fide competitor collaborations aimed at attaining net zero carbon emissions, the CMA announces it is doubling down on policing greenwashing claims. Taken together, the actions speak loudly that the enforcement agency plans to take action to police marketing practices that promote products as eco-friendly. This development follows the UK's Serious Fraud Office indicating its focus on tackling green investment fraud. In the U.S., the Federal Trade Commission also recently announced an investigation of greenwashing claims, which also follows similar activity in other jurisdictions, including multiple greenwashing-related fines issued by the Australian Securities and Investments Commission and three European regulators launching a joint call for evidence on greenwashing.

SEC Commissioner Uyeda Comments on ESG Investment Strategies

February 3, 2023

By Jason Halper
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Mark T. Uyeda, Commissioner at the U.S. Securities and Exchange Commission (SEC), **spoke** at the California '40 Acts Group on January 27 regarding various investment-related ESG issues.

Commissioner Uyeda offered his view that "ESG investing is complicated by three factors. First, the inability to objectively define 'ESG' or any of its components." As support for this concept, Commissioner Uyeda pointed to the, at-times, low correlation in ESG scores given to the same companies by different ESG ratings providers. The "impracticality of a universal 'ESG' definition," according to Commissioner Uyeda, "creates the potential for abuses that can drive assets to particular companies based on social or political agendas."

The second factor cited by the Commissioner is "the temptation to place the regulators' fingers on the scale in favor of specific ESG goals or objectives." Commissioner Uyeda cited the Department of Labor's (DOL) newly finalized rule on ESG investing as an example. The **rule**, which became effective on January 30, has been **challenged** by twenty-five Republican state attorneys general in Texas federal court. According to Commissioner Uyeda, there is a divergence between the final text of the rule – which he characterizes as providing "that an ERISA fiduciary's investment decision must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis" – and the DOL's accompanying **press release**, which stated that the rule "remove[s] barriers to considering [ESG] factors in plan investments" and eliminates unnecessary restrictions on plan fiduciaries' "ability to weigh [ESG] factors when choosing investments, even when those factors would benefit plan participants financially." The Commissioner questioned the need for any ESG-specific rulemaking by the SEC given "existing requirements under the federal securities laws to disclose accurate information about how client assets are invested" and the ability of the SEC under current rules to pursue greenwashing claims.

Finally, Commissioner Uyeda cited "the desire of certain asset managers to use client assets to pursue ESG-related goals without obtaining a mandate from clients." He cited a report from the minority staff of the U.S. Senate Banking Committee commenting on the investment stewardship activities of the three largest asset managers, and raised a concern about passive investment managers reporting on Schedule 13G notwithstanding that investment stewardship could be **viewed as inconsistent with passive investing**.

Taking the Temperature: Commissioner Uyeda's speech touched on many topics that frequently come up when there is a discussion about an asset managers' consideration of climate and other ESG issues in investment decision-making and proxy voting activity. In our view, from the perspective of financial institutions, these issues are best addressed through good governance and thorough disclosure consistent with applicable regulatory guidance. For instance, we have commented on difficulties involved in making sense of the ESG ratings landscape, including in part because of the type of concerns identified by the Commissioner. But to us the answer lies in greater granularity and disclosure because the divergence of approaches is reflective of: (1) the wide range of information to consider regarding a company's ESG profile; (2) the lack of consensus on how to assess that information; and (3) divergent views on what constitutes "good" and "beneficial" in the broader ESG market. By offering greater transparency regarding the inputs to their rankings and how those inputs are assessed and weighed, ESG ratings providers can offer consumers of that information a basis to make informed decisions as to how to effectively utilize the ratings. Nonetheless, we anticipate continued regulatory initiatives and, in the U.S., politically-driven activity until a consensus emerges on an approach to ESG ratings. Commissioner Uyeda also commented on whether passive investment management is inconsistent with exercising stewardship principles in proxy voting. That issue was highlighted in connection with Vanguard's withdrawal from the Net Zero Asset Managers Initiative, where it cited as a reason its goal of providing clarity "about the role of index funds and about how we think about material risks, including climate-related risks," as we previously reported. Because passive investment strategies represent a large percentage of global assets under management, there would be significant implications for overall shareholder-company engagement if such managers were not able to engage with companies on climate and other potentially material issues.

Launch of Congressional Sustainable Investment Caucus

February 3, 2023

By Timbre Shriver
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On January 25, Representatives **Sean Casten** and **Juan Vargas** announced the launch of the Congressional Sustainable Investment Caucus (CSIC). According to the press releases, the "CSIC will bring together Members of Congress with experts to better understand sustainable investing and inform policy making that provides investor protections and transparency of information to market participants." The caucus will be co-chaired by Representatives Casten and Vargas with the other founding members being Representatives Bill Foster, Seth Magaziner, Raúl Grijalva, Brad Sherman and Emanuel Cleaver.

Representative Casten stated that "given the significant growth of assets under management in funds that prioritize ESG factors, Congress has a duty to craft policies that provide investor protections and transparency of information to market participants."

Representative Vargas commented that "sustainable investment has increased tremendously as investors in my district and across the country consider environmental, social, and governance (ESG) factors in their investment decisions. ESG impacts the health and vibrancy of our communities, workplaces, and ecosystem. As our economy continues to grow, we must work together with the SEC to ensure that investors, asset managers, and market advocates receive the disclosures needed to make profitable and ethical decisions in our capital markets."

Taking the Temperature: In the U.S., the drumbeat of ESG politicization continues. We have written about actions by various state finance officials to limit business dealings with financial institutions deemed insufficiently supportive of the fossil fuel industry or that consider ESG factors in investment decisions. Within the last week twenty-five Republican state attorneys general along with two energy companies have commenced an action against the U.S. Department of Labor seeking to "hold unlawful and set aside" rules governing how retirement plan managers can consider climate change and other ESG factors. Additionally, Republican members of the House Judiciary committee commenced an inquiry into Climate Action 100+, a continuation of assertions that industry climate collaborations raise antitrust concerns. On the other hand, "pro-ESG" forces have mobilized, including via the launch of the Congressional Sustainable Investment Caucus. Another example is the November 2022 letter from 17 state attorneys general to the chairs and ranking members of the Senate Banking, Housing and Urban Affairs Committee and the House Financial Services Committee. The letter states that investment managers have a fiduciary duty to include ESG considerations as part of their investment decision-making process and that consideration of "ESG factors is consistent with legal responsibilities to evaluate potential risk and reward in assessing the merits of an investment. Consideration of those factors does not categorically block investment in any given industry or sector, but merely allows for an

evaluation of the expected impact of environmental, social, and governance events on returns."