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Disclosure: ISSB Makes Recommendations Regarding Scope 1, 2 and 3 Disclosures and Clarifies Materiality Standard

October 25, 2022

Disclosure

By Jason Halper
Partner and Co-Chair | Global Litigation

The International Sustainability Standards Board (ISSB), a standard-setting organization created by the International Financial Reporting Standards (IFRS) Foundation to promote consistent and reliable climate-related disclosures, has unanimously decided on a **recommendation** that companies disclose information on Scopes 1, 2 and 3 greenhouse gas emissions starting in early 2023. "Scope 1 covers direct emissions from a company; scope 2 covers indirect emissions from electricity purchased and used; and scope 3 covers all other indirect emissions from the value chain." The ISSB also intends to develop relief provisions to assist companies applying Scope 3 requirements, which may include additional time to make disclosures and safe-harbor provisions.

As part of its amendments, the ISSB revised the language of various proposals that were confusing. For instance, it clarified that "materiality" has the same definition for climate-related disclosures as it has in the IFRS International Accounting Standards, where materiality is defined as information that "could reasonably be expected to influence the decisions that the primary users of general purpose financial statements make on the basis of those financial statements." The ISSB plans to provide additional guidance to assist issuers in making materiality assessments for climate disclosure purposes.

Taking the Temperature: The ISSB announcement is significant in a number of respects. First, there is a question about issuers' ability to accurately report information on Scope 3 emissions. Because these are value-chain emissions, by definition third parties, not the issuer itself, have the relevant GhG information. It is not clear that issuers will be able to obtain all such information in order to provide complete and accurate reporting, not to mention the potentially significant costs involved in doing so and the potential for double-counting given that one issuer's Scope 3 emissions are another company's direct emissions. The SEC's proposed climate-change disclosure regulation treats Scope 3 emissions differently than Scope 1 and 2 emissions, with disclosure required only if such emissions are material or if the company has made a commitment regarding Scope 3, which also would be subject to safe harbor protections.

Second, the ISSB's materiality clarification also is important. Certain disclosure frameworks, including various EU climate-related standards such as the Corporate Sustainability Reporting Directive (CSRD) and the Sustainable Finance Disclosure Regulation (SFRD), have adopted the concept of "double materiality," whereby information is material not only because of its potential impact on the issuer (the

traditional assessment of materiality), but also because of the issuer's impact on climate. The ISSB's materiality articulation does not adopt the concept of double materiality. Nonetheless, despite the ISSB's clarification, issuers need to be careful to consider whether their climate-related impacts could have a material boomerang effect on their companies. For example, companies engaged in operations that entail significant GhG emissions (*i.e.*, their impact on the environment) could, at some point, anticipate significant legal or regulatory restrictions on those operations (*i.e.*, President Biden's August 5, 2021 Executive Order directing that 50% of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles), which in turn will have a material impact on the nature of the issuer's business or financial performance.

Green Finance: Britain's Largest Domestic Bank to Cease Direct Financing of Oil and Gas Fields

October 25, 2022

Green Finance

By Matthew Smith
Partner | Finance

On Thursday, Britain's biggest domestic bank announced it would stop direct financing to develop new oil and gas fields. Alongside its announcement, Lloyds updated its climate policy, which now prevents project financing or reserve-based lending to greenfield (i.e., new) oil and gas projects. This change in policy will not prohibit general lending to companies in the fossil fuel industry. In this move, the bank joins other lenders and insurers that have scaled back investments in or provided financing to fossil fuel projects (see for example our **recent article** on Munich Re). Last year, Lloyds lent approximately $1.1 billion to oil and gas customers, which accounts for just 0.2% of its overall lending.

Taking the Temperature: There is significant pressure on the financial sector, particularly in light of the upcoming global climate change conference, COP27, which will take place in November, to demonstrate concrete progress toward climate-related targets. On the other hand, energy produced from oil, gas, and coal remains vital to satisfy current global energy needs and, as it relates to sustainability, enables the production of green sources of energy such as wind turbines and solar panels. Lloyds' announcement comes just weeks after the British government announced the end of a moratorium on new oil and gas exploration in the North Sea. Given that there are no readily available solutions, we anticipate continued tension between laudable greenhouse gas reduction goals and the reality that GhG emissions produced from fossil fuel production is needed.

Green Finance: Letter from NZBA Chair to Its Members

October 25, 2022

Green Finance

By Duncan Grieve
Special Counsel | White Collar Defense and Investigations

Last week, Tracey McDermott, the Steering Group Chair of the Net Zero Banking Alliance (NZBA), a UN-convened banking industry coalition, wrote an **open letter** to NZBA members. The letter reported that since its founding in April 2021, the NZBA's membership had grown from 43 to 119 financial institutions and highlighted the publication of its **Transition Finance Guide**. The non-binding Guide provides suggestions and guidance on actions the banking sector can take in terms of financing efforts to transition to a green economy.

In its preamble, the Guide states that, "Ultimately, banks should send a clear message that their support for real economy firms' net-zero transitions, including transition finance, requires the firms themselves to commit to achieving net-zero targets and to develop credible transition plans. Banks may engage with firms to support and encourage their transition and outline planned support (time and capital) for clients with credible transition plans."

Taking the Temperature: NZBA is part of the UN's Race to Zero Alliance, which also includes the Glasgow Financial Alliance for Net Zero (GFANZ), another investor alliance launched by former Bank of England Governor Mark Carney. GFANZ was in the news recently due to public statements by certain major U.S. banks that the banks were considering withdrawing from the GFANZ due to concerns over their ability to satisfy increasingly stringent decarbonization commitments and the potential to be subject to litigation or enforcement actions as a result. These developments illustrate just a few of the challenges confronting the financial industry with respect to sustainability issues. NZBA and GFANZs' goals are well-intentioned, but financial institutions and other public issuers confront the reality that meeting publicly-articulated goals could be difficult, if possible at all, especially if those goals are attributed to an issuer via membership in industry groups like GFANZ, as opposed to being formulated by the issuer itself.

Disclosure: LMA and ELFA Update Guidance on Leveraged Finance Transaction ESG Disclosure Requirements

October 25, 2022

Disclosure

By Jeffrey Nagle
Partner | Finance

On October 19, the Loan Market Association (LMA) and the European Leveraged Finance Association (ELFA) published the second edition of their **Guide for Company Advisors to ESG Disclosure in Leveraged Finance Transactions**. The Guide is intended to serve as a "practical tool for company advisers to use in support of their incorporation of the information contained in ESG Fact Sheets into company offering materials and ongoing financial reports," and follows a January 2022 workshop where borrowers, banks, law firms, and other industry participants met to discuss challenges and give feedback on the previous iteration of the Guide.

In the **announcement**, ELFA's CEO, Sabrina Fox, stated: "As ESG data availability in the leveraged finance market continues to increase, lenders are keen to ensure that the data is reflected in ESG reporting by borrowers. ESG disclosure is critical to their investment analysis, and market practices continue to develop and evolve. This second edition of the Guide provides an important bridge between lenders and borrowers to support increased ESG disclosure in the leveraged finance market. The Guide, together with the ESG Fact Sheet Series, which now covers 14 sectors and will grow to include more, provide essential insights to collecting and disclosing ESG data, making them powerful tools for borrowers and their advisors."

Taking the Temperature: The current regulatory landscape for ESG-related disclosures is complex and can be opaque for legal practitioners and in-house compliance teams. Until the requirements are clarified, we will likely see further industry-specific guidance published, such as this Guide for leveraged finance transactions. Companies face a difficult balancing act between managing significant pressure from investors and lenders for additional, consistent and relevant ESG-related disclosures and their potential reluctance to provide more disclosures on climate-related efforts and impacts than they are required to do by regulation. This reluctance may stem from typical "greenhushing" concerns, including the potential to be subjected to civil and regulatory enforcement, anti-ESG backlash, and greenwashing accusations.