CADWALADER

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Regulation: First Greenwashing Fine Issued in Australia

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Regulation

By Duncan Grieve
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On October 27, the Australian Securities and Investments Commission (ASIC) **announced** it had fined Tlou Energy Limited (Tlou) AUD 53,280 (approximately $34,000) "over concerns about alleged false or misleading sustainability-related statements made to the Australian Securities Exchange."

ASIC stated that the company had made four incorrect claims regarding its natural gas-fired power plant in Botswana in a presentation for investors and its market filings. Tlou informed investors twice that the electricity produced by the plant would be carbon neutral due to "carbon sequestration technology;" however, Tlou had failed to check if this was achievable. Furthermore, the company allegedly lied when informing investors that it had received permission to develop a solar farm on the site and that building hydrogen and solar plants at the facility was equally important to the company as the natural gas-fired plant. In its notice of breach, ASIC stated that in reality, Tlou only intended to invest in the sustainable energy projects once the natural gas plant was operational.

ASIC Deputy Chair Sarah Court said that "ASIC is currently investigating a number of listed entities, super funds and managed funds in relation to their green credentials claims. Companies are on notice that ASIC is actively monitoring the market for potential greenwashing and will take enforcement action, including Court action, for serious breaches."

In its **response**, Tlou stated that it did "not accept that it contravened any provision of the [relevant regulation] but agreed to pay the infringement notice to bring this matter to an end and focus the Company's resources on development of its power projects."

Taking the Temperature: As we have highlighted in previous issues of Cadwalader Climate, regulators around the world are increasingly scrutinizing the accuracy of public statements made by companies relating to their green credentials and sustainability initiatives. Despite the small fine in this case, ASIC stated that it is actively investigating a number of funds in relation to potential climate and sustainability-linked misstatements. We expect further regulatory investigations and enforcement on this issue from financial regulators worldwide. While some issuers have resorted to "greenhushing," or practices that include reducing climate-related disclosure in order to avoid regulatory or civil litigation scrutiny, issuers face increasing pressure from investors to respond to climate concerns and continue to make public statements relating to sustainability. Other jurisdictions around the globe have also taken steps to stamp down on greenwashing. See, for example, in the US and UK.

Green Finance: GFANZ Amending Its Membership Rules

November 1, 2022

Green Finance

By Jeffrey Nagle
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The Glasgow Financial Alliance for Net Zero (GFANZ) has amended its membership rules by dropping its connection to the UN-supported Race to Zero campaign. As mentioned in our **article** last week, certain major U.S. banks were considering withdrawing from GFANZ over litigation and enforcement concerns. GFANZ's **progress report** does not mention compliance with Race to Zero guidelines as a condition of membership. Instead it states that the alliances would "take note of the advice and guidance" of Race to Zero. GFANZ has over 450 members worldwide and represents over $130 trillion in assets. Prior to this change, one of the key requirements for institutions signing up to one of the GFANZ alliances, was the commitment to adhere to the Race to Zero minimum standards.

Race to Zero is a "global campaign to rally leadership and support from businesses, cities, regions, investors for a healthy, resilient, zero carbon recovery that prevents future threats, creates decent jobs, and unlocks inclusive, sustainable growth." Earlier this year, Race to Zero amended its criteria with the additional requirement to publish a transition plan within 12 months of membership together with a commitment to achieve net zero across "all emissions scopes."

This requirement caused great concerns to some GFANZ members, especially due to current global energy security issues and the potential conflict between the fossil fuel criteria and their fiduciary duties.

A GFANZ **spokesperson** stated that the change "will help ensure GFANZ's recommendations reflect regional contexts, and the supervisory, regulatory, and legal obligations unique to the financial sector, as we continue to support net-zero implementation. Implementation is a critical step that requires a broad range of guidance and expertise from finance, science, academia, business, the official sector, and civil society."

Taking the Temperature: This move was not entirely unexpected, given the recent pressure GFANZ has found itself under and considering the pushback from some industry participants against Scope 3 (supply chain emissions) requirements. However, considering that GFANZ had previously placed great reliance on the Race to Zero and utilized its criteria as a key source of credibility, it remains to be seen if this change will have an impact on the long-term future and stability of the alliance. This divergence in principles may lead to yet further distinct and potentially confusing and conflicting standards in the sustainability space. It also highlights the challenges confronting the asset management industry in addressing climate-related issues, including how those concerns impact investment decisions and fiduciary duties, their need for issuer

disclosure in order to make informed investment decisions, and their own consideration of not making sustainability disclosure commitments that are incompatible with fiduciary duties or that expose them to legal challenges.

Disclosure: Companies Requesting Action on Mandatory Assessments and Disclosure to Address Biodiversity Loss

November 1, 2022

Disclosure

By Sara Bussiere
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A group of over 300 companies, in advance of the December COP15 in Montreal, have signed a **statement** asking governments to mandate that "large and transnational businesses and financial institutions assess and disclose their impacts and dependencies on biodiversity, by 2030." The group includes many large institutions, including Axa Group, Aviva Investors, BNP Paribas, UBS, Roche, Unilever, Vale and Tata Steel. The goal of COP15 is to agree on a global framework for the protection and restoration of global biodiversity (and is different than COP 27, taking place in Egypt starting November 6, which focuses on limiting global warming).

The signatories claim that voluntary disclosure is not sufficient in light of current risks and that the changes are required to "create fair competition for business, increase accountability, engage investors, empower consumers, involve SMEs through supply chains, help ensure the rights of indigenous peoples and local communities and ultimately accelerate the transformation of our economies."

The **report**, which accompanies the statement, states that companies provide far less nature-related disclosure (*i.e.*, regarding deforestation or water security) than other climate-related disclosures. For example, 18,600 companies disclosed climate data through CDP in 2022, yet of these, only 1,000 disclosed data on forests and nearly 4,000 offered information on water security.

Taking the Temperature: This development highlights the complex and nuanced nature of climate-related reporting. Much of the public discussion and activity regarding sustainability tends to involve efforts to limit global warming, but the current and future impacts on nature of global warming to date are inextricably tied to that goal and also represent a risk (or opportunity in some cases) for issuers. In some jurisdictions, this type of disclosure already is mandated. For instance, EU climate-related regulation embodies 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. Presumably the inside-out materiality perspective requires nature-related disclosure, and some companies' impacts on society or nature may result in a material "boomerang" impact on the company. For example, 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 is likely to have a material impact on the operations of automobile companies. But even

where not necessarily mandated, we expect to see increased pressure from investors for companies and financial institutions to expand the scope of their disclosure.

Regulation: Central Banks Should Consider Climate and Biodiversity Shocks When Stress Testing Financial Institutions

November 1, 2022

Regulation

By Jason Halper
Partner and Co-Chair | Global Litigation

Deputy Governor of the Banque de France, the French central bank, Sylvie Goulard, stated in a **speech** on October 24 that central banks need to take more aggressive action regarding nature-related risk. She posited that "monetary assessments of ecosystem services have many limitations," in part because of their complexity and also because "shocks" in one sector can have significant impacts on other sectors. As a result, she proposed that "the best risk mitigation strategy is to do everything in our power, early enough, to ensure that we remain within planetary boundaries." She proposed that central banks incorporate climate and biodiversity impacts into their decision-making as an aspect of their "non-monetary portfolios;" integrating nature-related concerns into central banks' monetary operations, as the European Central Bank has begun to do for climate change, and implement nature-related stress testing exercises that address both climate and biodiversity shocks for banks and financial institutions to improve global financial stability.

Goulard concluded her speech by stating: "The task ahead looks like an uphill battle: academic economic departments, policy makers, central bankers and supervisors remain far behind the curve when it comes to acknowledging that our socioeconomic systems need to operate a radical transformation. We know that those who dare to question the status quo face strong pushback or even reputational risks for their careers. They may be considered 'activists' or 'dreamers.' However, we have no choice but to restore nature as much as possible, as quickly as possible and finance can play a role in this task. The magnitude of the change required makes it difficult but also promising. No generation on earth for the past 12,000 years had such a responsibility to keep the world alive."

Taking the Temperature: Just as Blackrock's CEO has stated that "climate risk is investment risk," Goulard appears to be saying that nature risk is financial stability risk. What is more, she opines that governments and companies will be hard-pressed to understand the full range of impacts resulting from climate-related biodiversity change. That, in turn, threatens the stability of global financial systems and the companies that operate within those systems. Financial regulators around the world, including in the U.S., have weighed in on climate-related issues confronting financial institutions, but less so specifically regarding biodiversity. For instance, the Federal Reserve Board recently announced that six of the largest U.S. banks "will participate in a pilot climate scenario analysis exercise designed to enhance the ability of supervisors and firms to measure and manage climate-related financial risks" (and that there would be no "capital or supervisory implications from the pilot"). We expect regulators increasingly

to focus on nature-related climate change impacts as another aspect of risk to financial stability resulting from global warming.