C A D W A L A D E R

U.S. and UK Announce Partnership on Clean Energy Transition

August 15, 2023

By Simon Walsh
Special Counsel | Global Litigation

By Timbre Shriver
Associate | Global Litigation

The United States and the United Kingdom announced a partnership to address a range of global challenges, including the transition to clean energy. As part of the partnership, announced on June 9, 2023, the two countries pledged to boost production of electric vehicles, accelerate the development of clean energy supply chains and facilitate the international deployment of advanced nuclear technologies.

The **Atlantic Declaration** for a Twenty-First Century U.S.-UK Economic Partnership and accompanying Action Plan for a Twenty-First Century U.S.-UK Economic Partnership (ADAPT) outline coordinated actions to deepen the U.S.-UK partnership across five pillars: 1) ensuring U.S.-UK leadership in critical and emerging technologies; 2) advancing closer cooperation on economic security and technology protection toolkits and supply chains; 3) partnering on an inclusive and responsible digital transformation; 4) building a clean energy economy; and 5) strengthening the alliance across defense, health security and space.

The fourth of ADAPT's five pillars focuses on transition the U.S. and UK economies to clean energy, while implementing their respective 2030 contributions under the Paris Agreement and meeting 2050 net zero emission goals. To these ends, the U.S. and UK agreed to take three key actions:

- **Launch negotiations for a Critical Minerals Agreement.** The U.S. and UK plan to develop a critical minerals agreement covering the five relevant critical minerals for electric vehicles—cobalt, graphite, lithium, manganese and nickel—that are extracted or processed in the UK and count toward sourcing requirements for clean vehicles eligible for the clean vehicle tax credit of the U.S. Inflation Reduction Act. The U.S.-UK partnership is intended to support the creation of well-paying jobs in both countries; increase each country's respective and collective clean energy industrial capacity; boost electric vehicle production and deployment; and expand access to sustainable critical mineral and battery supply chains.
- **Partner on a Joint Clean Energy Supply Chain Action Plan.** Under the one-year plan, the U.S. and UK will establish a Joint Action Group on Energy Security and Affordability (JAG) to, by the end of 2023, identify and determine near-term actions to accelerate the buildout of capacity sufficient to meet future clean energy demands in their respective countries and globally. The U.S. and UK will conduct public-private consultations across clean energy supply chains, including with producers of offshore wind power and electric vehicle batteries,

and conduct rapid stress-test exercises, which could form a model for future work on supply chain resilience.

- **Launch a Civil Nuclear Partnership.** Senior officials in both governments will oversee the launch of a civil nuclear partnership to facilitate the safe, secure and sustainable international deployment of advanced nuclear technologies, including small modular reactors, in accordance with the highest non-proliferation standards and consistent with a 1.5 degree Celsius limit on global warming. The JAG will also set near-term priorities to encourage the establishment of new infrastructure and end-to-end fuel cycle capabilities by 2030 on both continents, and substantially minimize reliance on Russian fuel, supplies and services. In addition, a Joint Standing Committee on Nuclear Energy Cooperation will be created to deliver on shared commitments by the end of the year and serve as a bilateral forum to advance shared policy goals, including near-term actions identified by the JAG.

Senior U.S. and UK government officials will convene biannually to assess ADAPT's progress towards its goals.

Taking the Temperature: The U.S. and UK partnership has articulated ambitious, near-term clean energy goals as public investment in the development of clean energy continues to be a hot topic around the world. Of the actions items in the U.S. and UK plan, the launch of a nuclear partnership between the two countries is likely to be controversial. As we noted earlier this year, the UK announced it will classify nuclear power as "environmentally sustainable" in the UK's green taxonomy in order to give it access to the same investment incentives as renewable energy.

The European Union made a similar move in 2022, much to the displeasure of certain environmental advocacy groups. Greenpeace sued the European Commission in May arguing that the inclusion of nuclear power in the EU Taxonomy contravenes the Taxonomy Regulation for economic activities that are considered environmentally sustainable as wells as the European Climate Law and the EU's Paris Agreement obligations. Greenpeace's lawsuit is just one in a number of challenges to the EU Taxonomy, and in particular, its inclusion of fossil gas and nuclear energy, including a suit last filed in April by a number of environmental NGOs.

CFTC Urges Potential Whistleblowers to Report Carbon Credit Misconduct

August 15, 2023

By Jason Halper
Partner and Co-Chair | Global Litigation

By Peter Malyshev
Partner | Financial Services

The Whistleblower Office of the Division of Enforcement of the Commodity Futures Trading Commission (CFTC) **issued an alert** on June 20, 2023 **advising the public on how to identify and report potential violations** connected to fraud or manipulation in the carbon markets, including:

- Manipulative and wash trading in carbon market futures contracts;
- “Ghost” or “illusory” credits listed on carbon market registries;
- Double counting or other fraud related to carbon credits;
- Fraudulent statements relating to material terms of the carbon credits, including quality, quantity, additionality, project type, environmental benefits, permanence or duration, or the buffer pool; and
- Manipulation of tokenized carbon markets.

Voluntary carbon markets can help support the transition to a low-carbon economy through market-based initiatives in which high-quality carbon credits, also called carbon offsets, are purchased and sold bilaterally or on spot exchanges, **the CFTC said in a statement**. Carbon credits are the underlying commodity for futures contracts that are listed on CFTC designated contract markets (DCMs). The commission has enforcement authority and regulatory oversight over DCMs and any trading in those markets.

The alert directs individuals with a potential CEA claim to complete a **Form TCR (Tip, Complaint, Referral)** on the CFTC’s Whistleblower Program website. Whistleblowers may be eligible for confidentiality and anti-retaliation protections, as well as an award of between 10% and 30% of the monetary sanctions collected from a subsequent enforcement action. Whistleblower awards are paid from the CFTC Customer Protection Fund, which is financed through monetary sanctions paid to the commission. Since 2014, the CFTC has granted whistleblower awards totaling approximately $330 million. Awards associated with enforcement actions have resulted in monetary sanctions totaling more than $3 billion.

Taking the Temperature: The CFTC’s whistleblower alert follows a request by a group of Democratic senators in October 2022 that the Commission improve regulation of the

carbon credits market, as we previously reported. The carbon credit market has grown—and is expected to continue to grow— rapidly, as the world aims to reach net zero goals by 2050. Estimates of the value of the market vary widely. According to a report issued by Morgan Stanley in April of this year, the voluntary carbon offsets market is expected to grow from approximately $2 billion in 2022 to $100 billion by 2030, and to $250 billion by 2050.

However, the carbon offset market has come under heavy scrutiny, including by the United Nations and at COP27 in November 2022, with critics (including the Democratic senators in their letter) pointing to the potential for companies to engage in greenwashing and the risk that carbon credits may in fact reduce incentives for corporations to actively work towards carbon reduction. As the Democratic senators' letter points out: "The purchase of offsets allows many of these multinational companies to make bold claims about emission reductions and pledges to reach 'net zero,' when in fact they are taking little action to address the climate impacts of their industry. Several studies have highlighted that carbon offset projects are frequently illegitimate, and those that do contribute to meaningful emissions reductions are often representative of broader 'pay to pollute' schemes that place profit over protecting frontline communities."

The letter exhorted the CTFC to take action across a number of fronts, including "[p]ursu[ing] cases of individual project fraud," and "[d]evelop[ing] a working group to study both the risk to investors associated with carbon offsets and derivatives (legal, reputational, and regulatory) and the systemic climate financial risk created by their availability and usage." The senators closed by reminding the CTFC that it "has a duty to promote the integrity of U.S. markets through sound regulation and to hold companies accountable for fraud or misrepresentation, and we urge you to set meaningful standards to address these issues in the offset market." The decision by the CTFC to bring carbon credits within their whistleblowing awards remit indicates that it may be starting to comply with calls to act to prevent fraud associated with carbon credits. As we have previously discussed, it remains unclear how the CFTC would exercise its regulatory authority in practice and what the implications are for the developments of voluntary carbon markets. The UK Financial Conduct Authority (FCA) is also paying close attention to potential fraud in the carbon credit trading markets, has established an information and reporting portal and has taken enforcement action against individuals using carbon credits to defraud investors.

As we have noted, the regulation of the carbon offset market is a topic of international interest, with the International Organization of Securities Commissions (IOSCO), an international policy forum for securities regulators, announcing the publication of a consultation report and discussion paper on carbon markets in November 2022, and publishing its final report on "Compliance Carbon Markets" just last month, in July 2023.

ESMA Outlines Expected Sustainability Disclosures in Prospectuses

August 15, 2023

By Sukhvir Basran
Partner | Financial Services

By Duncan Grieve
Special Counsel | White Collar Defense and Investigations

On July 11, 2023, the European Securities and Markets Authority (ESMA) issued a **Public Statement** outlining its expectations for sustainability-related disclosures to be incorporated into prospectuses. In its statement, ESMA recognized that sustainability-related matters are of importance to investors but as it currently stands, incoming legislation is either too far from being implemented (i.e., the Listing Act) or "is not expected to give details of the sustainability-related disclosures that should be included in prospectuses drawn up under the Prospectus Regulation." The clarifications seek to promote a more coordinated and informative approach to sustainability reporting under the Prospectus Regulation for both equity and non-equity transactions.

ESMA's primary objective is to promote harmonized and coordinated action by national competent authorities (NCAs) concerning the inclusion of sustainability-related disclosures in prospectuses under the current legislative framework. ESMA recognizes the evolving landscape of sustainability disclosures and aims to bridge the gap between the present disclosure requirements under the Prospectus Regulation and the anticipated future requirements, such as those of the Listing Act and the regulation on European green bonds.

- **Material Disclosure in Prospectuses:** ESMA underscores the importance of including "material sustainability-related disclosures" in both equity and non-equity prospectuses, aligning with **Article 6(1) of the Prospectus Regulation**, which provides that prospectuses shall contain the necessary information which is material to investors. This requirement seeks to ensure that investors have access to pertinent information necessary for making informed investment assessments.
- **Basis for Sustainability Profile Statements:** Issuers are advised to provide a clear basis for any statements regarding their sustainability profile or that of the securities they issue. This could involve referencing market standards, underlying data, assumptions, research, or analysis by third parties, while ensuring a balanced presentation of positive and negative information.
- **Sustainability-Related Disclaimers:** While issuers may acknowledge potential differences in sustainability expectations between themselves and investors, ESMA cautions against using sustainability-related disclaimers to excuse non-performance of factors under issuer control, highlighting the need for accountability and transparency.

- **Comprehensible Disclosure:** ESMA emphasizes the importance of complying with **Article 37(1) of Commission Delegated Regulation 2019/980 (CDR 2019/980)** to ensure the comprehensibility of sustainability disclosures. Issuers should provide clear definitions of technical terminology and transparently describe mathematical formulas and product structures.
- **Incorporation of Non-Financial Reporting:** ESMA encourages issuers to integrate material sustainability-related disclosures from their non-financial reporting, in line with the Non-Financial Reporting Directive and future **Corporate Sustainability Reporting Directive**, into equity prospectuses.
- **Non-Equity Securities with ESG Components:** ESMA outlines expectations for prospectuses related to non-equity securities that consider specific ESG components or objectives, such as "use of proceeds" bonds and "sustainability-linked" bonds. Detailed disclosure requirements are provided for these and ESMA urges issuers and advisers to reach out to them if there are any uncertainties.
- **Consistency Across Advertisements and Prospectuses:** ESMA highlights the importance of consistency between sustainability-related disclosures in advertisements and prospectuses. If sustainability disclosure is material under the Prospectus Regulation, it should be included in the prospectus to ensure alignment and transparency.

Taking the Temperature: Regulatory authorities are increasingly acknowledging the importance of alignment and harmonization of non-financial reporting and disclosure across the EU. The timing of this move to publish guidelines as to what ESMA expects to find in prospectuses reinforces this since it is a measure aimed to plug the gap while issuers and investors await incoming regulations. This coordinated effort is aiming to minimize inconsistent standards across EU Member States and, ideally, create a more a level playing field for issuers across the EU and enhance transparency for investors.

ESMA is engaged in further studies on a number of other key topic areas. ESMA published Progress Reports in June 2023, with other EU supervisory authorities, to the European Commission on greenwashing in the financial sector. The Progress Reports define greenwashing and outline mitigation efforts companies can take to avoid greenwashing claims. Final greenwashing reports are due in May 2024. Separately, ESMA is working with the European Commission to address shortcomings related to "how ESG factors are incorporated into methodologies and disclosures of how ESG factors impact credit ratings."

Accounting Firms Challenged on Reporting of Climate Risks in Company Financial Statements

August 15, 2023

By Jason Halper
Partner and Co-Chair | Global Litigation

By Sara Bussiere
Special Counsel | Global Litigation

Environmental law NGO **ClientEarth has written** to the Global Public Policy Committee (GPPC), which brings together representatives of the six large international accounting organizations, to request greater transparency and higher standards in how climate change is addressed in financial statements. ClientEarth expressed concern that most companies in the **Climate Action 100+ focus list** "and their auditors do not fully consider climate-related matters when preparing their financial statements or the audits thereof, or at the very least do not explain if and how they have done so."

In 2020, **the GPPC wrote to the IASB**, confirming that "[a]ll GPPC networks will provide technical communications to audit partners and professionals on the recent IASB and IAASB developments and engage with companies and other stakeholders to encourage greater transparency on the impact of climate-related matters on companies' financial statements." According to ClientEarth, the GPPC has yet to fulfill this commitment.

Taking The Temperature: ClientEarth's letter is just the latest salvo by environmental or investor groups expressing concern about the state of climate-related financial statement reporting. We have reported, for instance, on an October 2022 Carbon Tracker Report, which claimed that "despite a growth of net zero pledges along with other climate commitments in the last year, most of the companies surveyed, with a collective market capitalization of over $10 trillion, do not appear to be addressing the financial impact of these commitments, or of climate change risks more generally, in their financial statements." Earlier this year, Climate Action 100+ released its 2022 progress report, which indicates the initiative has made headway in some areas but notes the need for progress in others. In the foreword to the progress report, Andrew Gray, current chair of the global Steering Committee for Climate Action 100+, conceded that "the lack of credible short- and medium-term decarbonization strategies across the majority of focus companies needs to be tackled. So, too, does the clear lack of capital allocation commitments towards climate-change mitigation."

In 2022, over 30 members of the Institutional Investors Group on Climate Change (IIGCC) wrote to the UK's four largest accounting firms outlining investor expectations on increased and more transparent disclosure regarding how climate-related risks were

being taken into consideration in the audit process. Separately, 34 members of the IIGCC wrote to the Audit Committee Chairs of 17 of Europe's largest companies requesting insight into why standards for financial reporting and climate-related accounting disclosures had yet to be met.

Likewise, organizations such as the International Sustainability Standards Board (ISSB) and the International Accounting Standards Board (IASB) have disseminated reporting guidelines designed to promote increased transparency in climate change reporting in financial statements.

We have written extensively on the lack of, and need for, consensus on appropriate climate-related disclosure schemes for financial reporting. In the UK, for example, a recent survey showed a developing consensus among UK companies that ESG considerations should be integrated into reporting frameworks, and yet, sustainability reporting is not yet "on par with the level of detail and scrutiny given to financial reporting [alone]." The formation of the Forum ISSB Preparers Group (a partnership between the World Economic Forum (WEF) and the International Sustainability Standards Board (ISSB)), which aims to share insights for those adopting the ISSB sustainability reporting standards, is an example of the necessary action being taken to address the lack of consensus on appropriate climate-related disclosure.

EU Commission Adopts Final Sustainability Reporting Rules

August 15, 2023

By Sukhvir Basran
Partner | Financial Services

On July 31, 2023, the European Commission announced its adoption of the **European Sustainability Reporting Standards (ESRS)** for companies subject to the **Corporate Sustainability Reporting Directive (CSRD)**. The **long-awaited** ESRS represent a significant milestone in the implementation of the CSRD, which aims to update the existing EU sustainability reporting framework and expand the number of companies required to report on sustainability-related impacts, opportunities and risks.

The European Financial Reporting Advisory Group (EFRAG) was tasked with preparing the ESRS, and in November 2022, it submitted its **final draft** to the Commission in the form of technical advice. The Commission made certain modifications to the framework, including the materiality approach, the phasing-in of certain requirements, the conversion of certain requirements into voluntary disclosure, the introduction of greater flexibility in a number of disclosure requirements, and the introduction of technical modifications. The Commission's adoption of the ESRS is effected by way of the **Delegated Regulation on the European Sustainability Reporting Standards**. The CSRD, scheduled to apply from the beginning of 2024, replaces the 2014 **Non-Financial Reporting Directive (the NFRD)** and introduces more comprehensive reporting requirements on environmental, social and governance issues. Compliance with the CSRD will be mandatory for all large European companies, and companies listed on EU-regulated markets including EU subsidiaries of non-EU parent companies.

Key Provisions of the ESRS

Materiality-based Reporting: The ESRS retain the mandatory nature of some sustainability disclosures but introduce a materiality-based reporting approach. While general disclosures under ESRS 2 are compulsory for all reporting entities, specific disclosure requirements will apply only if deemed material to a company's business model and activity. The materiality assessment process must undergo external assurance.

Phase-in for Selected Disclosures: The Commission has introduced additional phase-ins for certain reporting requirements, particularly for companies with fewer than 750 employees. This approach aims to ease compliance for smaller companies. The phase-ins mainly apply to reporting on biodiversity and social issues.

Voluntary Disclosures: Some data points have been designated as voluntary, including reporting a biodiversity transition plan and specific indicators related to the workforce.

Interoperability: The ESRS were developed with a high degree of alignment with the **International Sustainability Standards Board (ISSB)** and the **Global Reporting Initiative**

(GRI) standards. The Commission emphasized that companies required to report under ESRS on climate change will report similar information to those using the ISSB climate standard, but ESRS go further by providing additional information on impacts relevant for stakeholders beyond investors.

Next Steps and Scrutiny

The adopted ESRS delegated act will undergo a two-month scrutiny period in the EU Parliament and Council. These bodies have the authority to reject the ESRS cannot make amendments. Once the scrutiny period concludes, companies subject to the NFRD and large non-EU listed companies with over 500 employees will be required to start reporting under ESRS for the financial year 2024, with the first reports due in 2025. Other large companies will follow a year later, and listed SMEs will start issuing their first ESRS sustainability statements in 2027, with the option to opt out for up to two years.

Taking the Temperature: Although not entirely without criticism, the adoption of the ESRS represents a significant development in the EU's sustainable finance agenda. We have frequently discussed the importance of reporting and disclosure frameworks, without which investors are unable to compare sustainability credentials from company to company. Even following adoption of the ESRS, however, there remains a continuing need to "align" with international standards, including the ISSB, and promote consistency with other EU directives. While a jurisdictional and, to some extent, global alignment process will continue, it remains to be seen how long it takes and the extent to which consensus ultimately is achieved. On a positive note, the ISSB has agreed to reference the ESRS within the S1 appendix "as a source of guidance companies may consider, in the absence of a specific ISSB standard, to identify metrics and disclosures if they meet the information needs of investors."