C A D W A L A D E R

Oregon County Sues Fossil Fuel Companies and Consulting Firm For Damages Related to 2021 'Heat Dome'

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In a civil suit filed in Oregon state court in June 2023, an Oregon county is suing more than a dozen large oil, gas and coal companies, seeking more than $50 million in damages, in connection with a 2021 "heat dome" and other recent extreme heat events that the county alleges were caused by the defendants' contributions to climate change. Multnomah County is also seeking to recover $1.5 billion to pay for potential damage from future extreme heat events and an additional $50 billion to study, plan and protect people and infrastructure from extreme heat.

The complaint alleges that the defendants, oil majors including Chevron, ConocoPhillips and Shell, fossil fuel trade associations, as well as McKinsey & Company, are responsible for a substantial portion of all greenhouse gas emissions between 1965 and 2023. The county blames the fossil fuel companies for both the direct emissions from their industry activities and emissions from the end use of their products.

The county claims that these emissions were a substantial factor in causing the heat dome that occurred in June 2021 and resulted in the deaths of 69 people, as well as two similar extreme heat events in 2022 and one in May 2023. The heat dome is explained further in the claim: pollution "caused dramatic rises in global temperature, drought, and the drying of regional soil" and that when those conditions met with a dense high-pressure system hovering over the Pacific Northwest, regional temperatures increased as high as 116°F/46.7°C, 40°F higher than the daily average. In previous years, the county reported zero heat-related deaths. In addition, the plaintiff alleges that the burning of fossil fuels substantially contributed to hotter, drier conditions that caused more wildfires, and toxic smoke generated by wildfires has led to increased healthcare visits and hospitalizations. The county supports its allegations with a scientific study concluding, according to the complaint, that fossil fuel emissions caused the heat dome.

The complaint asserts that the companies are liable for negligence, intentional and negligent creation of a public nuisance, and fraud and deceit by misrepresenting to the public for decades that burning fossil fuels would not contribute to climate change and extreme weather events. The county also asserts a claim for trespassing, arguing that it never gave the defendants permission to intrude on its property and cause damage from fire, smoke, water or intense heat.

Counsel for Chevron **stated in an interview** that “[a]ddressing the challenge of global climate change requires a coordinated policy response. These lawsuits are counterproductive distractions from advancing international policy solutions. The federal Constitution bars these novel, baseless claims that target one industry and group of companies engaged in lawful activity that provides tremendous benefits to society.”

Taking the Temperature: As we have covered, climate litigation arising from extreme weather events is an emerging trend identified by the Grantham Institute in its 2023 Trends in Climate Litigation Snapshot. Climate change activists are seeking to hold fossil fuel companies accountable for what they assert is decades of failing to disclose the harm their industry poses to the environment. Major, multinational companies in the energy and fossil fuel sector are often the target of such suits. For example, as we recently reported, Greenpeace, ReCommon and 12 Italian citizens sued ENI, Italy’s largest energy company, for allegedly concealing the detrimental effects of the use of fossil fuels since 1970.

Likewise, a number of suits based on state constitutional rights have been filed around the U.S. Recently, a group of Montana residents, all minors, prevailed at trial on a lawsuit, which we previously discussed, claiming that they “have been and will continue to be harmed by the dangerous impacts of fossil fuels and the climate crisis,” and that the defendants have violated the Montana constitution by fostering and supporting fossil fuel-based energy policies in the state that led to these conditions. Several constitutional provisions allegedly were violated as a result of these actions, according to plaintiffs, including the “inalienable . . . right to a clean and healthful environment,” the obligation of the “[t]he state and each person [to] maintain and improve a clean and healthful environment in Montana for present and future generations,” and Montana’s due process and equal protection provisions. Plaintiffs also challenged a provision in the Montana Environmental Policy Act mandating that any environmental review conducted in connection with action taken in furtherance of the policy “may not include a review of actual or potential impacts beyond Montana’s borders. It may not include actual or potential impacts that are regional, national, or global in nature.” According to the complaint, “[t]his has been interpreted to mean that defendants cannot consider the impacts of climate change in their environmental reviews.” On August 14, 2023, the court determined that the government’s enforcement of this provision has harmed the state’s environment and the plaintiffs by preventing Montana from considering the climate impacts of energy projects, rendering the provision unconstitutional: “By prohibiting consideration of climate change, GHG emissions, and how additional GHG emissions will contribute to climate change to be consistent with the Montana Constitution, the [statute] violates Plaintiffs' right to a clean and healthful environment and is facially unconstitutional.”

Also noteworthy in the Oregon action is the fact that the county named as a defendant McKinsey, a global consulting firm and obviously not an energy producer. The complaint alleges that “McKinsey’s work with fossil fuel entities dates back several decades. Though McKinsey promotes itself as being ‘committed to protecting the planet,’

McKinsey counts at least seventeen mining and fossil fuel companies among its biggest clients. McKinsey's claims of commitment to environmental protectionism stand in stark contrast to the millions of dollars it has earned assisting its fossil fuel and mining company clients in promoting themes to deny the existence and/or gravity of ACC." The complaint goes on to plead a claim of fraud and deceit on the basis that "McKinsey has coordinated and participated in a deliberate misinformation campaign to downplay and/or outright deny the causal relationship between the GHG emissions of its members and extreme weather events like those described herein. McKinsey's contribution to, and deception is individually and collectively (with the other Defendants) a cause of enormous harm to the Plaintiff for which this Defendant is individually and jointly and severally liable to Plaintiff." Putting aside for the moment the potential (and likely substantial) legal hurdles confronting a municipality or citizen seeking to prevail on such a claim against an advisor (McKinsey) to an alleged primary actor (an oil and gas company), professional services firms should take note of the allegations. Not only is climate-related litigation on the rise generally, as discussed above, but climate plaintiffs are pursuing increasingly aggressive and novel theories of liability. Depending on the context, the types of allegations pled against McKinsey could underlie claims of greenwashing, aiding and abetting liability, or as here alleged primary liability against an advisor. Professional firms should carefully vet their public statements regarding climate activities, develop robust and documented support for these statements (which necessarily entails having a robust governance/data collection and assessment process), and understand how the firm's client base and related work may be used to call into question even factually accurate climate statements.

France and UK Announce Roadmap to Boost Biodiversity Credit Market

September 5, 2023

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In June 2023, **the UK and France announced** a joint plan to launch a new biodiversity credits scheme. Through the Global Biodiversity Credits Roadmap, the two countries have pledged to support private sector biodiversity efforts and mobilize financing towards preventing biodiversity loss and conserving nature. The U initiative was launched at the Summit for a New Financial Pact held in Paris. The Roadmap supports the **COP15 Global Biodiversity Framework (GBF)**, which, among other things, aims to protect 30% of the world's land and oceans and restore 30% of degraded ecosystems by 2030.

The Roadmap details a plan to scale up global efforts to support companies in buying biodiversity credits—broadly, vehicles for investment in environmental projects that strengthen biodiversity or restore nature in a variety of contexts, including rainforests, oceans and wetlands. It is also designed to centralize expertise on biodiversity credits, establishing working groups and advisory panels to examine best practices on issues ranging from credit funding governance mechanisms to monitoring frameworks. The Roadmap will also consider how to distribute income from biodiversity credits across communities fairly. The Roadmap aims to make progress consistent with international milestone events such as the next United Nations Biodiversity Conference, or COP16, which will be held next year in Turkey. COP15's landmark Kunming-Montreal Global Biodiversity Framework (GBF) is often described as the Paris Agreement of Nature, and the 2024 convention will put individual parties' progress towards their national goals and targets in the spotlight.

In 2020, **the World Economic Forum (WEF) estimated** that more than half of the world's GDP, or $44 trillion, is moderately or highly dependent on nature, yet the funding gap for biodiversity restoration remains significant. In the same year, **the Paulson Institute estimated** that current spending on biodiversity conservation (measured against the total estimated biodiversity protection need) leaves a current biodiversity financing shortfall of between $598 billion and $824 billion per year. The UK and France have reached the conclusion that government initiatives alone cannot cover funding that size biodiversity gap.

Taking the Temperature: Within the EU and elsewhere, biodiversity preservation increasingly has become a priority, as we have discussed. However, securing the necessary investment remains a significant hurdle, and promoting public and private sector funding is a consistent focus of biodiversity efforts, whether in the context of the development of a sustainability taxonomy, the formation of a 35-member bank-led working group to promote nature- and biodiversity-related target setting that is aligned with the GBF, or enhancing biodiversity-related governance and disclosure as part of the Corporate Sustainability Due Diligence Directive.

As for France in particular, at COP27, President Emmanuel Macron announced an initiative to protect the planet's essential carbon and biodiversity reserves. Central to this initiative are Positive Conservation Partnerships (PCPs), which would function through a biodiversity credit market and ultimately serve as a way to facilitate biodiversity investment. On its end, the Roadmap helps the UK build on its Ten Point Plan for a green industrial revolution and more recent initiatives emphasizing the UK's approach to biodiversity.

As we have previously observed, a related area of focus in terms of spurring climate-related investment concerns carbon credit markets as nations and companies look to offset their emissions and achieve net zero and other climate related goals. At the same time, such schemes are attracting increasing scrutiny and criticism, as we have noted, due to concerns around the transparency and quality of the credits. At least in part due to these concerns, in the fall of 2022, the International Organization of Securities Commissions launched an investigation (see our commentary on that here) into both voluntary and compliance carbon credit markets.

UK Climate Change Committee's 2023 Progress Report Urges Action to Meet Climate Targets

September 5, 2023

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The UK Climate Change Committee (CCC) recently released its **2023 statutory report**, evaluating the UK's progress towards reducing greenhouse gas emissions and meeting carbon reduction targets. This report, mandated by the Climate Change Act, offers a comprehensive analysis of the nation's efforts in tackling climate change. The CCC is a non-departmental public body, sponsored by the **Department for Energy Security and Net Zero**, that advises the government on emissions targets and reports to Parliament on progress made in reducing greenhouse gas emissions.

The CCC's report, published on June 28, 2023, sheds light on critical aspects of the UK's climate journey. The report was prompted by the government's release of the **Carbon Budget Delivery Plan (CBDP)** in March 2023, which detailed policies aimed at achieving carbon budgets and net-zero goals. While the CCC acknowledges the increased transparency as a result of the CBDP, it expresses reservations about the pace of implementation, citing concerns about the nation's ability to meet medium-term targets, especially 2030 goals.

Key Concerns Raised by the CCC

The CCC's report outlines specific areas of concern where immediate action is required to enhance the UK's climate performance. These concerns include:

- *Fossil Fuel Support:* The CCC highlights that despite climate commitments, the government continues to endorse new oil and gas projects and airport expansions. This raises questions, according to the report's authors, about the nation's dedication to transitioning to a low-carbon economy.
- *Decarbonized Steel Production:* A lack of clear policy for decarbonizing steel production is identified as a significant gap in the UK's efforts to reduce emissions in industrial sectors. This omission could hamper progress in achieving comprehensive decarbonization targets.
- *Infrastructure Upgrades:* The CCC emphasizes the necessity of rapid reforms in planning regarding and upgrades to the country's electricity infrastructure. Such actions are crucial to facilitate a transition to cleaner energy sources and sustainable land use practices.

- *Hydrogen Integration:* The report raises concerns about the delayed strategic decision regarding the role of hydrogen in heating systems. The CCC suggests that postponing this decision until 2026 could impede progress towards decarbonizing heating systems efficiently.
- *Priority Recommendations:* The CCC notes that key government departments have not met the priority recommendations outlined in the 2022 report. The report includes 27 priority recommendations for both the government and individual departments, highlighting the need for a more synchronized approach to policy implementation.

Taking the Temperature: The CCC's 2023 progress report highlights the challenges associated with meeting government climate-related commitments. In that sense, the UK's struggles mirror those faced by countries globally, where progress toward net zero goals and increasing transparency may not happen quickly enough to achieve commitments on previously announced timelines, as we have discussed with respect to, among others, Australia, Switzerland, the EU, and countries in the Association of Southeast Asian Nations region. While the UK has a wealth of research and expertise, the 2023 progress report serves as a call for immediate and coordinated action for funding improvements and a swifter transition to low-carbon technologies.

Republicans Unveil Bills Targeting ESG in Securities and Banking

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In late July 2023, House Republicans on the Financial Services Committee introduced four bills targeting various business and market activities that implicate environmental, social, and governance issues. **In a statement** announcing the proposals, the committee stated that "[t]hese measures represent the first step in Republican efforts to combat the ESG movement by restricting politically motivated, non-material disclosure mandates, reforming the proxy voting and shareholder proposal processes, increasing transparency for federal banking regulators, and limiting the Securities and Exchange Commission's (SEC) authority to regulate shareholder proposals."

GUARDRAIL Act (H.R. 4790): The proposed Guiding Uniform and Responsible Disclosure Requirements and Information Limits Act of 2023 appears to target, at least in part, the SEC's **proposed climate-related disclosure rule**.

- It would amend the Securities Exchange Act of 1934 (Exchange Act) by providing that "whenever pursuant to this title the Commission is engaged in rulemaking regarding disclosure obligations of issuers, the Commission shall expressly provide that an issuer is only required to disclose information in response to such disclosure obligations to the extent the issuer has determined that such information is material with respect to a voting or investment decision regarding the securities of such issuer."
- The Act, if passed, also would require the Commission to "maintain a list" on its website "that contains (A) each mandate under the Federal securities laws and regulations that requires the disclosure of non-material information; and (B) for each such disclosure mandate, an explanation of why the mandate is required."
- The bill would expressly eliminate issuer private liability for omissions involving non-material information.
- It also mandates the formation of a Public Company Advisory Committee, which would "provide the Commission with advice on its rules, regulations, and policies with regard to its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation," although the Commission would not be bound to "agree or act upon" the Committee's findings or recommendations.

- Finally, the Act would require the SEC to assess and issue a report on the "detrimental impact" of the European Union's **Corporate Sustainability Reporting Directive (CSRD)** and **Corporate Sustainability Due Diligence Directive (CSDDD)** on U.S. companies, consumers, investors and economy.

Congressman Bill Huizenga, a sponsor of the GUARDRAIL Act, said that the GUARDRAIL Act "takes positive and deliberate steps to refocus the SEC on its core mission instead of pushing a political and social agenda."

Protecting Americans' Retirement Savings from Politics Act (H.R. 4767): This bill addresses certain aspects of shareholder proposals, proxy voting, and the registration of proxy advisory firms.

- With respect to shareholder proposals, the proposed Act provides that an issuer may exclude from company proxy materials a shareholder proposal whose subject matter "is environmental, social, or political (or a similar subject matter)" and, in contrast to current SEC guidance, "without regard to whether such shareholder proposal relates to a significant social policy issue."
- The bill also would require the SEC, every five years, to "conduct a comprehensive study and issue a report on shareholder proposals, proxy advisory firms, and the proxy process" in which it would address a laundry list of eleven topics. It would also require proxy advisory firms to be registered with the Commission.
- Significantly, the bill would preclude managers of passively managed investment funds from voting securities, other than on "routine matters," except in accordance with the voting instructions of the beneficial owner or the issuer. Otherwise, managers must abstain from voting.
- Next, taking a page from certain state laws, the bill would amend the Investment Advisors Act of 1940 by mandating that, in acting in the "best interest" of the customer, "the best interest of a customer shall be determined using pecuniary factors, which may not be subordinated to or limited by non-pecuniary factors, unless the customer provides informed consent, in writing, that such non-pecuniary factors be considered," but in that event that investment advisor must "disclose the expected pecuniary effects to the customer over a time period selected by the customer and not to exceed three years." Pecuniary factor is defined as "a factor that a fiduciary prudently determines is expected to have a material effect on the risk or return of an investment based on appropriate investment horizons."
- Finally, under the bill, the SEC would have to undertake a study "to determine the extent to which issuers of municipal securities . . . make disclosures to investors regarding climate change and other environmental matters; and solicit public comment with respect to such study."

American FIRST Act (H.R. 4823): The American Financial Institution Regulator Sovereignty and Transparency Act would amend various federal banking laws to limit U.S. regulators' interactions with international organizations.

- The bill would provide that the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Board of Directors of the FDIC, the Board of the National Credit Union

Administration, and the Director of the Federal Housing Finance Administration, "may not implement a non-binding recommendation made by the Chairperson of the Financial Stability Oversight Council or contained in an Executive Order unless" the applicable regulator "provides the Committee on Financial Services of the House of Representatives (House Committee) and the Committee on Banking, Housing, and Urban Affairs of the Senate (Senate Committee) with— (A) notice that the [regulator] intends to implement such recommendation; (B) a report containing the proposed implementation by the [regulator] and a justification for such implementation; and (C) upon request, not later than the end of the 120-day period beginning on the date of the notice under subparagraph (A), testimony on such proposed implementation."

- The bill also would preclude these regulators from implementing a "major covered rule" without first providing the House and Senate Committees with "testimony, and a detailed economic analysis with respect to the proposed or final rule, including projections of economic costs, sectoral effects, and effects on the availability of credit, the gross domestic product, and employment." Major covered rule is defined as a rule having an "effect, in the aggregate, on the economy of the United States of $10,000,000,000 or more during the 10-year period beginning on the date the rule takes effect; and that is intended to align or conform with a recommendation from a nongovernmental international organization (including the Financial Stability Board, the Bank for International Settlements, the Network of Central Banks and Supervisors for Greening the Financial System, and the Basel Committee on Banking Supervision)."
- Additionally, the bill would prohibit these regulators from meeting with or otherwise engaging "with a covered international organization on the topic of climate-related financial risk during a calendar year unless the Federal banking regulator has issued a report" to the House and Senate Committees containing, for the previous calendar year, a "complete description of the activities of the covered international organization in which the Federal banking regulator participates (including any task force, committee, or other organizational unit thereof); and a detailed accounting of the governmental and non-governmental funding sources of the covered international organization." "Covered international organization" is defined as the Financial Stability Board, the Network of Central Banks and Supervisors for Greening the Financial System, and the Basel Committee on Banking Supervision.
- Federal banking regulators also would be required to keep a "complete record" of all interactions with "non-governmental international organizations" and issue a related report annually to the House and Senate Committees.

Businesses Over Activists Act (H.R. 4655): This bill would preclude the SEC from compelling an issuer to include in company proxy materials "any shareholder proposal" or related discussion of such a proposal.

While on its face the bill is not ESG focused, its sponsor, Congressman Ralph Norman, made that focus clear: "ESG is an evil pollutant that must be eradicated from corporations and businesses. Ultimately, the Businesses Over Activists Act would preserve the first amendment rights of corporations and impede economic damages stemming from the misuse of resources delegated to the management of these politicized proposals. The SEC should not and does not have the authority to compel companies to include ESG proposals."

Taking the Temperature: We have frequently discussed Republican-led anti-ESG initiatives at the state level in the U.S. Numerous Republican-controlled state legislatures have enacted laws mandating divestment of state funds from asset managers deemed to "boycott the energy industry" or restricting investment managers from casting proxy votes for the purpose of furthering "non-pecuniary interests." Republican governors of 19 states launched an alliance, led by Florida Governor Ron DeSantis, to "push back against President Biden's environmental, social, corporate governance (ESG) agenda that is destabilizing the American economy and the global financial system. In March 2023, 21 Republican Attorney Generals wrote a letter addressed to over 50 large U.S. asset managers citing "concerns about the ongoing agreements between asset managers to use Americans' savings to push political goals during the upcoming proxy season." Focused on industry climate collaborations such as the Net-Zero Asset Managers Initiative, the AGs stated their intent to "enforce [their] states' civil laws against unfair and deceptive acts and practices and state and federal civil laws prohibiting agreements to restrain competition."

The four bills discussed above reflect federal legislators' apparent interest in increasing anti-ESG pressure. Even prior to the introduction of these bills, in June, two Republican members of Congress reintroduced the Ensuring Sound Guidance (ESG) Act, which would amend the Investment Advisers Act of 1940 and the Employee Retirement Income Security Act of 1974 (ERISA) by requiring managers to only consider "pecuniary factors" in acting in the best interests of clients unless the client specifically requests that non-pecuniary factors be considered. The bill challenges a Biden Administration Department of Labor rule that overturned previous restrictions on the ability of retirement plan fiduciaries to consider ESG-related factors in their investment decisions.

It is unclear whether any of the four House bills introduced in July will ever become law, or if they do, in a form remotely resembling the current text of the bills. The two paragraph Business Over Activists Act does not appear to represent a meaningful attempt at legislation in its outright ban on inclusion of shareholders proposals in company proxy materials. The Securities Exchange Act Rule 14a-8, which governs this issue, was first adopted over 80 years ago, in 1942, and is an established part of the corporate governance framework in the U.S.

As for the other bills, we offer the following observations:

- The Guardrail Act's mandate that only material information needs to be disclosed appears to reflect a view that elements of the SEC's climate disclosure rule (and perhaps other regulations previously issued by the Commission) would require disclosure of non-material information. This provision thereby offers an issuer the ability to argue that at least in certain instances non-compliance would not be a violation of the regulation (which in any event still has not been finalized). Similarly, the requirement that the SEC maintain a list of required non-material disclosures presumes that certain mandated disclosure is immaterial and appears at least in part to be an effort to initiate a public debate and open for legal challenge the SEC's justification for its assessment of whether required disclosure is material or, if not, why disclosure if warranted.

- **The Guardrail Act's requirement that the SEC issue a report on the "detrimental impact" of the EU's CSRD and CSDDD seems to put the rabbit in the hat by demanding a certain conclusion. The CSRD 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 CSDDD requires in-scope companies to assess and take action with respect to environmental harm and human rights concerns throughout their value chains. However, we often have discussed the desirability of attempting to achieve something resembling global consensus regarding sustainability-related disclosure, particularly for multi-national companies, rather than requiring companies operating in multiple jurisdictions to satisfy disparate disclosure regimes. To the extent sustainability issues raise material risks or opportunities for companies, disclosure likely is required irrespective of a regulatory mandate, underscoring the potential value of initiatives like the CSRD. Similarly, the CSDDD can be viewed, in part, as establishing a governance framework for assessing sustainability-related risks and opportunities, and therefore, supports the processes and practices underlying the disclosure required by the CSRD.**
- **The Protecting Americans' Retirement Savings from Politics Act would overturn certain current SEC guidance on when issuers must include shareholder proposals in company proxy materials. The bill would permit exclusion of all ESG-related proposals, and would not require proposals addressing a "significant social policy" issue to be included. Currently, pursuant to Staff Legal Bulletin 14L issued in 2021 from the Division of Corporation Finance, companies may not exclude shareholder proposals under the "ordinary business operations" exemption if they implicate a "significant social policy," irrespective of the significance of that policy to the company and even if the impact falls below the economic thresholds of Rule 14a-8(i)(5) (a separate basis for exclusion).**
- **The proposed Act's prohibition on proxy voting by investment managers is potentially significant, and echoes criticism from other quarters about the influence of passive managers on corporate voting. In a March 30, 2023 letter to over 50 large asset managers on behalf of 21 Republican state attorneys general, the AGs stated that "your non-ESG funds do not disclose to investors that their investments will be used to further ESG goals, including pressuring companies to reduce emissions in economically destructive ways." Relatedly, the letter adds that, "[i]nvestors looking for low cost, passive indexing investments may be unwittingly funding . . . ESG activism." We also discussed that, at the end of last year, Vanguard withdrew 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 influence of the "liberal views" toward ESG of the "Big Three" asset managers, Blackrock, State Street and Vanguard. The report asserted that, contrary to what it deemed appropriate for passive investment strategies such as index funds, asset managers that are NZAM members commit to engage with portfolio companies toward a goal of achieving net zero emissions by 2050. The report recommended, among other things, increased disclosure in the form of more limited availability of Schedule 13G passive ownership reporting, and consideration of whether any of these managers could be deemed a bank holding company, and therefore subject to Federal Reserve regulation along with capital and liquidity requirements, to the extent that they "influenced at least one**

of the banking organizations in its respective investment funds to conform its lending activities to ESG principles or otherwise change corporate policies."

- **The House bill, consistent with the Republican AGs' letter and the Senate Banking Minority Staff report, questions whether the definition of passive investing is limited in scope to an actual investing strategy, but instead also requires that passive managers not engage with portfolio companies on climate or other stewardship issues. Were such a view to become the consensus, it would have enormous implications for the ability of the passive asset management industry to engage with portfolio companies. PricewaterhouseCoopers, for instance, estimates that passive investment strategies will represent 25% of global assets under management by 2025, for a total of $36.6 trillion AuM. The inability of passive asset managers to engage with companies in which their clients have invested such large amounts inevitably would radically change the landscape of investor-company engagement and have particularly substantial ramifications in the climate change area, where asset managers have been vocal advocates for greater climate-related disclosure and consideration by company boards of climate risks and opportunities.**
- **Finally, the American FIRST Act targets, among other things, U.S. banking regulator interaction with international banking and financial organizations, often directly taking aim at those involved in addressing issues arising from climate change. The bill would preclude (absent notice and the required report to Congress) these regulators from "meeting with or otherwise engaging with," or implementing rules that are "intended to align or conform with a recommendation from a nongovernmental international organization (including the Financial Stability Board, the Bank for International Settlements, the Network of Central Banks and Supervisors for Greening the Financial System, and the Basel Committee on Banking Supervision)."**
- **The Financial Stability Board, an international body convened by the G20 nations to monitor and make recommendations about the global financial system, formed the Task Force on Climate-Related Financial Disclosures to give guidance on climate-related financial disclosure. The TCFD disclosure framework is one of the most influential reporting standards (if not the most) as numerous regulators and large institutional asset managers have coalesced around its recommendations as the appropriate basis for issuer disclosure. However, following the publication of the inaugural International Sustainability Standard Board (ISSB) Standards—IFRS S1 and IFRS S2, which "fully incorporate the recommendations of the TCFD"—the Financial Stability Board asked the IFRS Foundation to take over the monitoring of the progress on companies' climate-related disclosures from the TCFD. Presumably the bill would apply to regulator interactions with the ISSB.**
- **Likewise, the Basel Committee has been significantly involved in climate-related financial system matters, as we have discussed, for example, here and here.**
- **Similarly, the purpose of the Network of Central Banks and Supervisors for Greening the Financial System is to "help strengthening the global response required to meet the goals of the Paris agreement and to enhance the role of the financial system to manage risks and to mobilize capital for green and low-carbon investments in the broader context of environmentally sustainable development. To this end, the**

Network defines and promotes best practices to be implemented within and outside of the Membership of the NGFS and conducts or commissions analytical work on green finance.”

ESMA and NCAs to Assess Disclosures and Sustainability Risks in the Investment Fund Sector

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On July 6, 2023, the European Securities and Markets Authority (ESMA), in collaboration with National Competent Authorities (NCAs), **launched the Common Supervisory Action (CSA)** aimed at assessing the compliance of supervised asset managers with various regulations and implementing measures related to sustainable finance.

The primary objective of the CSA is to ensure that asset managers operating within the European Union adhere to the relevant provisions outlined in the Sustainable Finance Disclosure Regulation (SFDR), the Taxonomy Regulation, and applicable "Level 2 measures," including those within the Undertakings for Collective Investment in Transferable Securities (UCITS) and Alternative Investment Fund Managers Directive (AIFMD) implementing acts concerning the integration of sustainability risks.

The CSA aims to achieve several objectives:

- Assessing Adherence to Rules and Standards: The CSA will evaluate whether market participants, particularly asset managers, are complying in practice with applicable rules and standards. This assessment seeks to ensure the transparency and credibility of sustainability-related disclosures.
- Greenwashing Risk Identification: The CSA aims to gather additional information on greenwashing risks in the investment management sector.
- Supervisory and Regulatory Intervention: Based on the findings of the CSA, additional relevant supervisory and regulatory interventions may be identified and implemented to mitigate the risks associated with incorrect or misleading disclosures and promote the integration of sustainability factors in investment practices.

The CSA is currently underway, having been launched on July 6, 2023, and will continue until September 2024.

Taking the Temperature: Asset managers operating within the EU should be prepared for increased scrutiny of their sustainability-related disclosures and risk integration practices. In line with the new package of measures to build on and strengthen the foundations of the EU sustainable finance framework published in June 2023, the CSA's

focus on compliance with the SFDR, Taxonomy Regulation, and related measures underscores the importance of accurately and transparently communicating environmental, social, and governance factors to investors. Asset managers should also be mindful of the risk of greenwashing and take proactive measures to ensure the accuracy and authenticity of their sustainability claims, and as we previously reported, European financial regulators are paying increasing attention to greenwashing. In recent progress reports, regulators have articulated a common, high-level definition of greenwashing and outlined greenwashing risks, impacts, proposed mitigation efforts and challenges for their respective industries. At the same time, however, the European Commission has rejected suggestions that it introduce minimum environmental standards for Article 8 or Article 9 funds under the SFDR on the grounds that it is a disclosure regime, and therefore, it will not set minimum requirements for the key parameters of sustainable investment, such as "do no significant harm" and governance indicators. We also have previously reported on the decision late last year by a large number of asset managers to downgrade ESG funds due to a lack of guidance on how to apply the existing regulatory announcements in distinguishing Article 8 from Article 9 funds. All of which is to say that guidance and market practice in this area remains fluid and likely will continue to be unsettled for the foreseeable future.