

Sustainability & ESG

Quarterly Roundup

Weil

May 2023

In this newsletter, we highlight key developments relating to environmental, social and governance (“ESG”) topics over the past quarter, with a focus on developments of interest to U.S. public and private companies, companies operating in the United Kingdom and European Union, and global private funds. We also provide links to significant ESG developments that are expected in the near future.

As described below, this Quarterly Roundup addresses significant developments relating to:

- Environmental regulation
- Employment agreements
- Greenwashing
- Corporate compliance and compensation clawbacks
- Anti-ESG at the US federal and state levels
- Sustainable finance
- International ESG disclosure frameworks

United States

Environmental Justice, Vehicle Emissions & Drinking Water

- **Executive Order on Environmental Justice.** On April 21, 2023, President Biden signed an [executive order](#) that, among other things, creates a White House Office of Environmental Justice and requires every federal agency to conduct new assessments of their environmental justice efforts and develop, implement, and periodically update an environmental justice strategic plan.
- **Proposed EPA Standards for Vehicle Emissions.** On April 12, 2023, the U.S. Environmental Protection Agency (“EPA”) announced [proposed federal vehicle emissions standards](#) that would accelerate the ongoing transition to electric vehicles. The new proposed standards would apply to light-, medium- and heavy-duty vehicles for model year 2027 and beyond.
- **Proposed National Drinking Water Regulation.** On March 14, 2023, the EPA announced the first ever [proposed national drinking water regulation](#) for six per- and polyfluoroalkyl substances (“PFAS”). This proposal builds on other key milestones undertaken under [EPA’s PFAS Strategic Roadmap](#), including EPA’s proposal to designate two PFAS as CERCLA hazardous substances; enhancing data on PFAS under EPA’s National PFAS Testing Strategy; and using EPA’s Clean Water Act permitting and regulatory programs to reduce PFAS pollution. The comment period ends May 30, 2023.

Labor & Human Rights

- **FTC Proposed Rules Concerning Non-Compete Clauses.** On January 5, 2023, the U.S. Federal Trade Commission (“FTC”) proposed [Rules Concerning Unfair Methods of Competition](#). If adopted, the proposed rules would prohibit most non-compete clauses in employment agreements and agreements with independent contractors. The comment period expired April 19, 2023. See our [Employer Update](#) for more information.
- **NLRB Developments Relating to Non-Disparagement and Confidentiality Provisions in Severance Agreements.** On February 21, 2023, the National Labor Relations Board (“NLRB”) issued a decision finding that an employer merely offering a non-supervisory employee a severance agreement containing a broad non-disparagement or confidentiality provision constitutes an unfair labor practice (“ULP”) in violation of the National Labor Relations Act (McLaren Macomb and Local 40 RN Staff Council, 372 N.L.R.B. No. 58 (2023)). On March 22, 2023, the General Counsel of the NLRB issued [guidance](#) on that decision that, among other things, informs employers on how to utilize non-disparagement or confidentiality provisions in severance agreements in order to protect themselves from ULP charges. For more information, see our prior alerts, [NLRB Takes Aim at Non-Disparagement and Confidentiality Provisions for Union and Non-Union Employees](#) and [Update: NLRB GC Issues Guidance on Non-Disparagement and Confidentiality Provisions](#).
- **Initiatives Targeting Illegal Child Labor.** On February 27, 2023, the U.S. Department of Labor (“DOL”) and U.S. Department of Health and Human Services [announced](#) new efforts to combat exploitative child labor, including a new DOL-led Interagency Taskforce to Combat Child Labor Exploitation and a call on Congress to increase civil monetary penalties for companies that use child labor. This announcement comes after a [New York Times investigation](#) into migrant child labor published on February 25, 2023. On April 12, 2023, the Secretary of the U.S. Department of Agriculture sent a [letter](#) to members of the meat and poultry industry, requesting that they take steps to eliminate any illegal child labor in their supply chains.

ESG-Related Enforcement & Greenwashing

- **Selected SEC Enforcement Actions Focused on ESG Issues.** On February 3, 2023, the U.S. Securities and Exchange Commission (“SEC”) [settled charges](#) with Activision Blizzard regarding claims the company had failed to maintain disclosure controls and procedures to collect and review employee complaints about workplace misconduct. As a result, the company’s management lacked sufficient information to understand the volume and substance of employee complaints about workplace misconduct and did not assess whether any material issues existed that would have required public disclosure. On March 28, 2023, the SEC [settled charges](#) with Brazilian mining company Vale S.A. relating to false and misleading claims in its sustainability reports about the safety of its dams prior to the 2019 collapse of its Brumadinho dam that killed 270 people. This was the first action brought by the SEC’s recently established Climate and ESG Task Force within the Division of Enforcement.
- **SEC Division of Examination Priorities Continue to Include ESG Investing.** On February 7, 2023, the SEC Division of Examinations released its [2023 Examination Priorities](#), which continue to include a focus on ESG-related advisory services and fund offerings. The Division will assess whether funds are operating in the manner set forth in their disclosures and whether ESG products are appropriately labeled (i.e., “greenwashing”), and whether recommendations of such products for retail investors are made in investors’ best interest. Recent enforcement actions targeting greenwashing and other ESG topics are available [here](#).

Fiduciary Duty of Oversight, Corporate Compliance & Compensation Clawbacks

- **Fiduciary Duty of Oversight Developments.** On January 26, 2023, the Delaware Court of Chancery held in [In Re McDonald's Corporation Stockholder Derivative Litigation](#) that the fiduciary duty of oversight applies to officers as well as directors. The court held that the officer in question (the head of human resources) had an obligation to make a good faith effort to put in place reasonable information systems so that he obtained the information necessary to do his job and report to the CEO and the board, and he could not consciously ignore red flags indicating that the corporation was going to suffer harm. In a related [decision](#) on March 1, 2023, the Delaware Court of Chancery dismissed claims against director defendants alleging that they ignored red flags about a corporate culture that condoned sexual harassment and misconduct. See our prior alert, [New McDonald's Opinion Provides Directors a Playbook for Responding to "Red Flags" of Alleged Workplace Misconduct](#).
- **Updated DOJ Guidance on Corporate Compliance Programs and Compensation-Incentives and Clawback Pilot Program.** On March 3, 2023, the Criminal Division of the U.S. Department of Justice ("DOJ") issued updated guidance on its [Evaluation of Corporate Compliance Programs](#) and information about a new three-year [Compensation Incentives and Clawback Pilot Program](#). The updates emphasize the importance of compensation structures in fostering a compliance culture, including through appropriate incentives and deterrents such as clawbacks in the event of misconduct, and expectations as to consequence management of compliance violations and disciplinary measures. The updates also discuss expectations concerning policies and procedures governing the use of personal devices, communications platforms and messaging applications. During the Pilot Program, companies entering into criminal resolutions will be required to implement compliance-related criteria into the compensation and bonus system, and prosecutors may consider fine reductions where companies have sought to recoup compensation from certain employees.
- **Proposed NYSE and Nasdaq Listing Standards Relating to Compensation Clawback Policies.** On February 22, 2023, the [New York Stock Exchange](#) and [Nasdaq Stock Market](#) filed with the SEC proposed listing standards that would require listed companies to develop and implement a policy requiring recovery of incentive-based compensation in the event of a restatement. Issuers subject to the listing standards are required to adopt a clawback policy not later than 60 days following the date on which the applicable listing standard becomes effective. See our prior alert, [NYSE and Nasdaq Propose Compensation Clawback Listing Standards](#). On April 24, 2023, the SEC extended the time period for it to take action on the proposed rule change; June 11, 2023 is the date by which the SEC will either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed [NYSE](#) and [Nasdaq](#) rules.

Artificial Intelligence

- **New NIST Artificial Risk Management Framework.** On January 26, 2023, the National Institute of Standards and Technology of the U.S. Department of Commerce published the first version of its [Artificial Intelligence Risk Management Framework](#). The Framework is designed to equip organizations and individuals with approaches that increase the trustworthiness of AI systems, and to help foster the responsible design, development, deployment and use of AI systems over time.

Other ESG / Sustainability

- **New COSO Guidance on Internal Control over Sustainability Reporting.** On March 30, 2023, the Committee of Sponsoring Organizations of the Treadway Commission ("COSO") released [Achieving Effective Internal Control over Sustainability Reporting \(ICSR\): Building Trust and Confidence through the COSO Internal Control-Integrated Framework](#). This guidance is designed to help organizations achieve effective internal control over sustainability reporting, using the globally recognized COSO Internal Control—Integrated Framework.

- **New BlackRock and State Street Guidance.** In March 2023, BlackRock issued its [annual Chairman/CEO letter](#) to investors, its [investment stewardship priorities for 2023](#) and [guidance](#) on a range of ESG topics including board diversity, human capital management, climate-related risk, corporate political participation and human rights. See our prior alert, [BlackRock's Engagement Priorities and Chairman's Letter Provide Key Messages to Stakeholders](#). Also in March 2023, State Street Global Advisors issued its [U.S. proxy voting policy for 2023](#), [CEO letter](#) and [guidance](#) on a range of ESG topics.

Anti-ESG – Federal Developments

- **Presidential Veto on Anti-ESG Measure Impacting Retirement Accounts.** On March 20, 2023, President Biden [vetoed](#) legislation that sought to void the DOL final rule titled [Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights](#) that became effective on January 30, 2023. The rule allows retirement plan fiduciaries to consider any factor that maximizes financial returns for retirees, which may include climate change and other ESG factors. An attempt on March 23, 2023 to [override the veto](#) did not reach the required two-thirds majority in the House. On January 26, 2023, 25 Republican state attorneys general (led by Utah) [sued](#) the DOL in the U.S. District Court for the Northern District of Texas seeking to enjoin the rule.

Anti-ESG – Selected State Developments

- **21 States.** On March 30, 2023, the Republican attorneys general of 21 states (led by Montana) wrote a [letter](#) to 53 asset managers with \$40 billion or more in assets, citing concerns that asset managers are committing to pursue ESG goals (including goals stemming from membership of Climate Action 100+ and the Net Zero Asset Managers Initiative), rather than acting in the best fiduciary interests of clients.
- **19 States.** On March 16, 2023, Governors of 19 states (led by Florida) issued a [joint policy statement](#) to lead state-level efforts to “protect individuals from the ESG movement,” including blocking the use of ESG in investment decisions and banning the financial sector from considering “social credit scores” in banking and lending practices.
- **Arkansas.** On March 30, 2023, [HB 1307](#) was signed into law, requiring the state to divest from financial services companies that discriminate against fossil fuel, firearms or ammunition industries or that refuse to deal based on ESG factors. On April 10, 2023, [HB 1253](#) was signed into law, requiring, among other things, fiduciaries of state pension benefit plans to discharge their duties solely in the pecuniary interests of participants and beneficiaries.
- **Florida.** On May 2, 2023, the Governor signed into law [HB 3](#), requiring, among other things, state retirement systems and public boards of trustees to make investment decisions and exercise shareholder rights based solely on pecuniary factors, prohibiting state bond issuers from issuing ESG bonds on or after July 1, 2023, and prohibiting consideration of ESG factors in government contracting.
- **Idaho.** On March 23, 2023, the Governor signed into law [H.B. 191](#), requiring that public procurement decisions shall not be based on ESG standards. On March 31, 2023, the Governor signed into law [H.B. 190](#), prohibiting credit unions and banks holding state funds from boycotting certain energy and firearms sectors.
- **Kansas.** On April 25, 2023, [HB 2100](#) became law, requiring fiduciaries of the Kansas public employees retirement system to act solely in the financial interest of participants and beneficiaries, and providing that the state shall not give preferential treatment to or discriminate against contractors based on ESG criteria.
- **Kentucky.** On January 3, 2023, the Kentucky State Treasurer [released](#) a [list](#) of financial institutions that are engaged in energy company boycotts, which are subject to divestment by state governmental entities pursuant to Kentucky Revised Statute Section 41.474. On March 24, 2023, the Governor signed into law [HB 236](#) that, among other things, requires retirement system investment managers to consider only pecuniary factors in investment decisions.

- **Montana.** On April 19, 2023, the Governor signed into law [HB 228](#) that requires the state board of investments to only take into account pecuniary factors. On April 20, 2023, the Governor signed into law [HB 356](#) that prohibits governmental entities from contracting with a company that has a policy that discriminates against firearm entities or firearm trade associations, and requires written verification in state contracts that a company does not so discriminate.
- **Texas.** On March 20, 2023, the Texas Comptroller [updated](#) its [list](#) of financial companies that are considered energy firm “boycotters” which are subject to divestment by state governmental entities pursuant to Texas Government Code Chapter 809. The Comptroller also issued related [FAQs](#).
- **Utah.** On March 14, 2023, the Governor signed into law:
 - [SCR 009](#) that, among other things, directs investment funds to be managed by investment managers with a commitment to focus solely on financial interests;
 - [SB 96](#) that requires certain public entities to make investment decisions with the sole purpose of maximizing the risk-adjusted return on investment; and
 - [SB 97](#) prohibiting public entities from contracting with a company unless the contract includes a written certification that the company does not and will not engage in, among other things, an economic boycott against (a) companies in the fossil fuel, energy, timber, mining agriculture and firearms industries, (b) companies that do not meet or commit to meet environmental standards, and (c) companies that do not facilitate access to abortion or sex characteristic surgical procedures.
- On March 15, 2023, the Governor signed [HB 449](#) that prohibits a company from coordinating with another to intentionally destroy certain companies (including firearms companies and companies that do not meet or commit to meet certain ESG criteria) by eliminating the viable options for the companies to obtain a product or service.
- **West Virginia.** On March 28, 2023, the Governor signed into law [HB 2862](#) that prohibits the state’s investment management board and its fund managers from casting any shareholder vote for the purpose of furthering non-pecuniary interests such as environmental, social, corporate governance or other similarly oriented considerations unless such consideration directly and materially effects the financial risk or financial return to beneficiaries based on appropriate investment horizons consistent with an investment pool’s objectives and funding policy.

UK / EU

- **Updated UK Green Finance Strategy.** On March 30, 2023, the UK Government published its updated [Green Finance Strategy](#), which aims to reinforce and expand the UK’s leadership position on green finance and investment, including how to mobilize the investment needed to meet its climate and nature objectives.
- **Updated FRC Statement of Intent on ESG.** On January 30, 2023, the UK Financial Reporting Council (“FRC”) published an update to its 2021 [Statement of Intent](#) on ESG challenges, identifying areas where there remain ongoing challenges in ESG reporting, suggesting actions for preparers to produce decision relevant information, and the FRC’s plans to engage with the market to ensure that stakeholder needs are being met as demand for ESG information continues to evolve.
- **New UK Department for Energy Security and Net Zero.** On February 7, 2023, the UK government [announced](#) the creation of a new Department for Energy Security and Net Zero, which is focused on the energy portfolio from the former Department for Business, Energy and Industrial Strategy. Among other things, the new Department has been tasked with securing the UK’s long-term energy supply, reducing energy bills and halving inflation. Its [priorities](#) for 2023 include ensuring the UK is on track to meet its net zero commitments and support its carbon capture and hydrogen sectors.

- **New UK Advertising Guidance on Environmental Claims and Social Responsibility.** On February 10, 2023, the UK Advertising Standards Authority published new [guidance](#) for advertisers relating to misleading environmental claims and social responsibility, including the need to substantiate “carbon neutral,” “net zero” or similar claims.
- **EU Corporate Sustainability Reporting Directive Now in Force.** On January 5, 2023, the [Corporate Sustainability Reporting Directive](#) (“CSRD”) entered into force. The CSDR strengthens the rules concerning social and environmental disclosures, including requiring audit of certain disclosures, and will be applicable to approximately 50,000 companies. The first companies will have to apply the new rules for the first time in the 2024 financial year, for reports published in 2025.
- **Proposed EU Green Claims Directive.** On March 22, 2023, the European Commission published its proposal for a [Directive on the substantiation and communication of explicit environmental claims \(Green Claims Directive\)](#). The proposed Directive aims to, among other things, protect consumers and companies from greenwashing and enable consumers to contribute to accelerating the green transition by making informed purchasing decisions based on credible environmental claims and labels substantiated by scientific evidence. Under the proposed Directive, companies found to have made unsubstantiated environmental claims about their products could face penalties amounting to at least 4% of their annual revenue. The proposed Directive also complements [proposed changes to the Unfair Commercial Practices Directive](#) published in March 2022.
- **Political Agreement Reached on EU Green Bond Standard.** On February 28, 2023, the European Parliament and the European Council reached a [political agreement on the Commission’s proposal for a European Green Bond Standard](#). This Regulation will establish an EU voluntary high-quality standard for green bonds. Issuers would need to ensure that at least 85% of the funds raised by the bond are allocated to economic activities that align with the EU Taxonomy Regulation. This will allow investors to more easily assess, compare and trust that their investments are sustainable, thereby reducing greenwashing risks.
- **SFDR Developments.** On February 17, 2023, the Official Journal of the European Union published the [Commission Delegated Regulation \(EU\) 2023/363](#) relating to pre-contractual documents and periodic reports under the Sustainable Finance Disclosure Regulation (“SFDR”). On April 5, 2023, the European Commission approved the issuance of [answers](#) to questions submitted in September 2022 by the European Supervisory Authorities on the interpretation of SFDR. Among other things, the answers clarify what is meant by “sustainable investment” and “consideration” of principal adverse impacts. On April 12, 2023, the Joint Committee of European Supervisory Authorities published a [joint consultation paper](#) on the review of SFDR Delegated Regulation regarding content, methodologies and presentation of sustainability disclosures.
- **Political Agreement Reached on Sustainable Fuels for EU Aviation.** On April 25, 2023, the European Parliament and the European Council reached a [political agreement on the ReFuelEU Aviation proposal](#), which would require aviation fuel suppliers to supply a minimum share of sustainable aviation fuels (“SAF”) at EU airports, starting at 2% of overall fuel supplied by 2025. Mandated SAF content will rise to 6% by 2030 before climbing to 70% by 2050. The proposal would also require aircraft departing from EU airports to refuel only with the amount of fuel necessary for the flight to avoid excess emissions related to the extra weight.

International

- **Effective Dates for ISSB Disclosure.** At its [meeting on February 16, 2023](#), the International Sustainability Standards Board (“ISSB”) agreed that its initial IFRS Sustainability Disclosure Standards (“Standards”), IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related Disclosures, will become effective for annual reporting periods beginning on or after January 1, 2024 (assuming adoption by regulators in markets that require IFRS reporting). The final Standards are expected to be issued by the end of Q2 2023. The ISSB also “tentatively” decided to not require Scope 3 GHG emissions until after the first reporting year. On April 4, 2023, the ISSB “tentatively” [decided](#) to introduce a transition relief in IFRS S1 that would allow an entity to report on only climate-related risks and opportunities (as set out in IFRS S2) in the first year it applies IFRS S1 and IFRS S2. The entity would be required to provide information about its other sustainability-related risks and opportunities in the second year it applies the two Standards.
- **New Draft Framework for Nature-related Financial Disclosures.** On March 28, 2023, the Taskforce on Nature-related Financial Disclosures (“TNFD”) released the fourth and final beta version of the [TNFD Nature-Related Risk & Opportunity Management and Disclosure Framework](#). This framework aims to enable organizations to report and act on evolving nature-related risks and opportunities. Public feedback is due June 1, 2023. The TNFD framework, including Task Force on Climate-related Financial Disclosures (“TCFD”)-aligned recommended disclosures, is scheduled for publication in September 2023, ready for market adoption.
- **Updated UN PRI Reporting Framework.** On January 26, 2023, the UN Principles for Responsible Investment [published](#) its 2023 Reporting Framework. Climate change and human rights are now included as priority issues, with indicators focused solely on human rights included for the first time. Other key changes include increased alignment with other leading global reporting frameworks including the TCFD, the TNFD, the UN-convened Net Zero Asset Owner Alliance and the Net Zero Asset Managers initiative, as well as updated question and response options, improved clarity, reduced granularity of data requests and decreased overall number of indicators.
- **Updated Sustainable Lending Principles.** On February 22, 2023, the Loan Syndication and Trading Association (“LSTA”), Loan Market Association and Asia Pacific Loan Market Association issued updated Green Loan Principles, Social Loan Principles, and Sustainability-Linked Loan Principles, which are accessible through the LSTA’s [Sustainable Lending Library](#). The core components of these globally applicable principles are the use of loan proceeds, the process for project evaluation and selection, management of loan proceeds and reporting. The revised principles apply to green loans, social loans and sustainability-linked loans originated, extended or refinanced after March 9, 2023.

ESG Developments On the Radar

Listed below are significant forthcoming ESG-related rulemaking and other developments that are expected in the near future. We have provided links to current materials to facilitate real-time tracking. Dates (where provided) reflect current guidance and are subject to change.

United States

- **SEC rulemaking:**
 - Approval of [NYSE and Nasdaq clawback rules](#) (by June 11, 2023)
 - Final rules on [cybersecurity risk governance and disclosure](#) (2023)
 - Final rules on [climate change disclosure](#) (2023)
 - Final rules on [investment company names](#) (2023)
 - Final rules on [enhanced disclosures by certain investment advisers and investment companies about ESG investment practices](#) (2023)
 - Proposed rules on [board diversity disclosure](#) (2023)
 - Proposed rules on [human capital disclosure](#) (2023)
- **Other federal agency rulemaking:**
 - Final [Federal Supplier Climate Risk and Resilience Rule](#)
 - Final EPA standards on [car and truck emissions](#)
 - Final EPA [drinking water](#) regulation
 - Proposed EPA standards limiting [power plant GHG emissions](#)
 - Final FTC rules on [non-compete clauses](#)
 - Revised FTC [Guides for the Use of Environmental Marketing Claims](#) (“Green Guides”)
 - Final Federal Reserve [Principles for Climate-Related Financial Risk Management for Large Financial Institutions](#)
- [U.S. Court of Appeals for the Fifth Circuit](#) decision on challenge to Nasdaq board diversity rules filed by Alliance for Fair Board Recruitment and the National Center for Public Policy Research v. SEC (Case 21-60626)

UK/EU

- Final UK Competition and Markets Authority [Guidance on Environmental Sustainability Agreements](#)
- Final UK Financial Conduct Authority policy statement on [sustainability disclosure requirements and investment labels](#) (Q3 2023)
- Final EU [Corporate Sustainability Due Diligence Directive](#) (2023)
- Final [European Sustainability Reporting Standards](#) (June 2023)
- Final EU [Green Bond Standard](#) (2023)
- Final EU [Green Claims Directive](#)

- Final European Securities and Markets Authority [guidelines on funds' names using ESG or sustainability-related terms](#)
- Draft report to implement EU regulation [prohibiting products made using forced labor](#), including products made in the EU for domestic consumption and export, and imported products

International

- Final ISSB IFRS S1 [General Requirements for Disclosure of Sustainability-related Financial Information](#) and IFRS S2 [Climate-related Disclosures](#) (Q2 2023)
- Final [TNFD framework](#) (September 2023)
- Draft [UN Business and Human Rights Treaty](#) (July 2023)
- Draft International Auditing and Assurance Standards Board and International Ethics Standards Board for Accountants [standards for sustainability ethics and assurance](#) (2024)

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