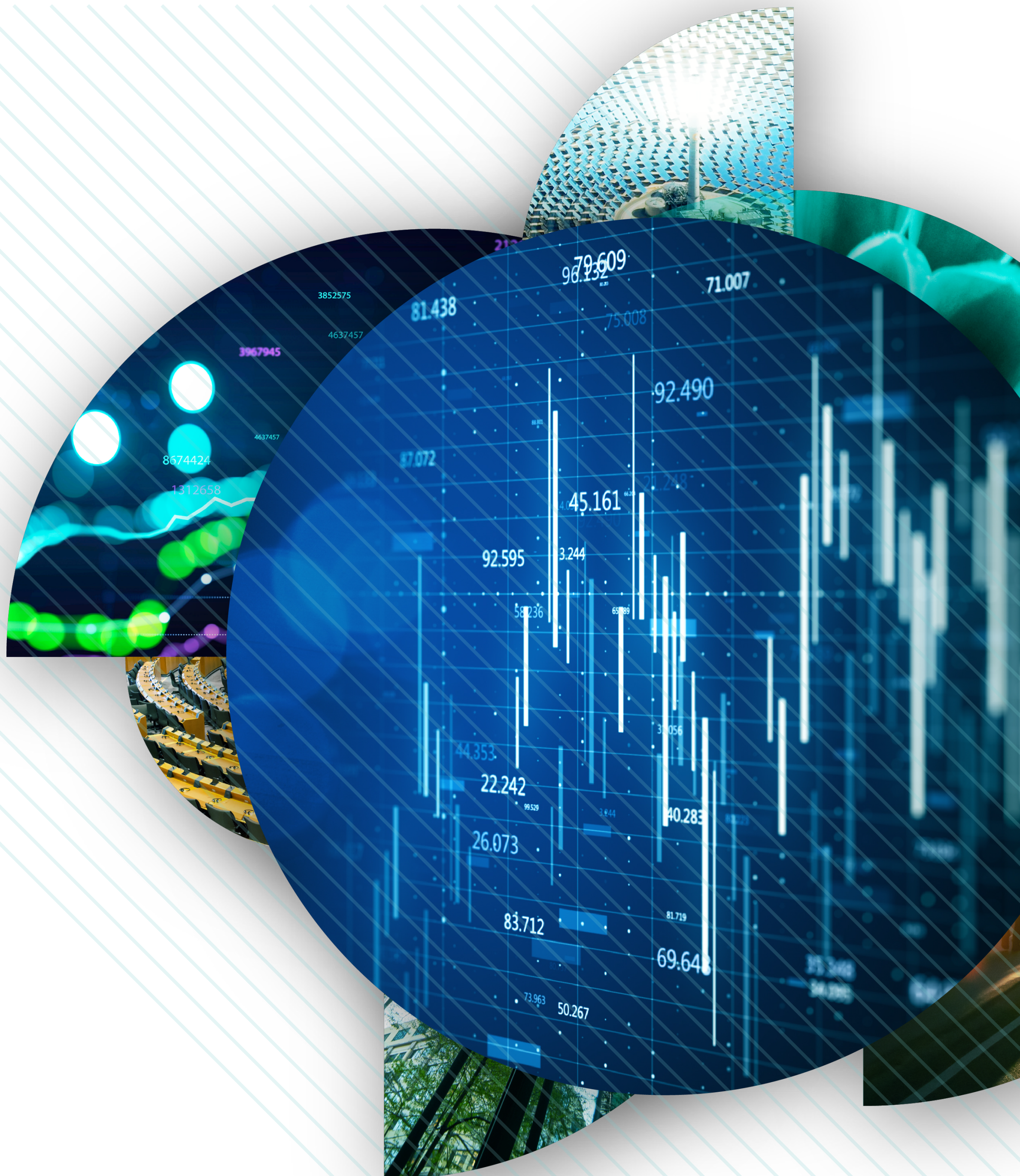
NORTON ROSE FULBRIGHT

ESG | Sustainability

Financial Services regulatory ESG updater

July 2023



Introduction

Environmental, Social and Governance-related (ESG) matters are high on the global agenda with a focus not only on climate change, but also on wider environmental issues, such as, diversity and inclusion.

Greenwashing is the term given to a practice of making misleading statements about the environmental credentials of a business and/or product in order to attract investment or customers more broadly. Mitigating the risks of greenwashing is a particular focus for regulators.

The purpose of this updater is to track ESG regulatory developments from the period 14 June – 14 July 2023, from UK, US, EU, French and global regulators.

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This month's highlights

ClientEarth fails in judicial review against FCA

ClientEarth, an environmental charity that seeks to bring legal challenges in respect of entities that it considers have not discharged their environmental responsibilities, has failed in its attempt to judicially review a decision of the Financial Conduct Authority (**FCA**) to approve the prospectus of a UK oil and gas company, Ithaca Energy plc (**Ithaca**). Ithaca's flotation was the UK's largest public listing of 2022.

The registration document in relation to Ithaca's proposed IPO was approved by the FCA and published by Ithaca in October 2022. ClientEarth engaged in correspondence with the FCA following the publication of the registration document as it considered that it contained deficiencies regarding disclosure of Ithaca's climate-related financial risks.

The FCA subsequently approved Ithaca's prospectus and it was published in November 2022. Certain amendments appear to have been made to the climate-related risk factor disclosed in the published prospectus (as compared with the registration document) but ClientEarth considered these were cosmetic in nature.

Ithaca's prospectus contained a number of climate-related disclosures, which included detail relating to risks such as:

- Longer term reduction in the demand for hydrocarbon products due to development of alternative energy technologies and consumer preference.
- Disruption to Ithaca's operations as a result of climate change.
- Litigation and challenge by climate activists.
- Continued political attention to the role of human activity in climate change.
- The impact of international agreements and regulation.

Relevant Requirements

Section 87A(1) of the Financial Services and Markets Act 2000 (FSMA) provides that the FCA may not approve a prospectus unless it is satisfied that it contains the information required by the UK retained version of Regulation (EU) 2017/1129 (the UK Prospectus Regulation).

Article 6(1) of the UK Prospectus Regulation provides that a prospectus must contain the necessary information which is material to an investor for making an informed assessment of (amongst other things) the issuer's assets and liabilities, profits and losses, financial position, and its prospects. It also provides that the information to be included may vary depending on the nature of the issuer, the type of securities and the circumstances of the issuer.

Article 16(1) provides that the risk factors to be included in a prospectus shall be limited to risks which are specific to the issuer and/or to the securities and which are material for taking an informed investment decision.

ClientEarth's Application

ClientEarth filed an application for permission to apply for judicial review of the FCA's decision to approve the prospectus on the basis that it was arguable that:

- The FCA had erred in law by approving Ithaca's prospectus in circumstances where the prospectus failed to disclose or describe adequately Ithaca's assessment of the materiality and specificity of its climate-related financial risks in breach of Article 16(1) of the UK Prospectus Regulation and, in particular, that whilst the risk factor in the prospectus referred broadly to the potential consequences of climate change, there was no assessment of the probability of these risks materialising or the scale of their impact on Ithaca's business in the event that they did materialise.
- The FCA's conclusion that the prospectus contained the necessary information that was material to an investor making an informed assessment of Ithaca's financial position and prospects (as required by Article 6(1) of the UK Prospectus Regulation) was rationally unsustainable, as Ithaca did not include its assessment of the materiality of the climate-related financial risks it faces and it did not include information about the compatibility of Ithaca's business plans with an emissions trajectory aligned with the Paris Agreement and/or the UK Government's net zero commitment, which information was material to an investor's ability to make an informed assessment of its prospects.

The application by ClientEarth was made against the FCA as defendant, but Ithaca also participated in the proceedings as an interested party. The FCA opposed the application on the merits, but also on standing and delay. In respect of the merits of the application, the FCA contended that it is not part of the function of the FCA, when approving a prospectus, to identify or decide for itself the probability or magnitude of risks relating to the issuer or the offered securities, which was the responsibility of the issuer. The FCA was of the view that its role was to ensure that the specificity and materiality of a risk factor is apparent from the disclosure of the risk factor, and that, as it was satisfied that the specificity and materiality of the climate-related risk factors set out in Ithaca's prospectus were adequately described and corroborated, its decision cannot have been irrational.

The Court's Decision

The High Court refused ClientEarth's application for permission to apply for judicial review of the FCA's decision on the basis that:

- The prospectus did address risks arising out of climate-related factors and it was not arguable that the FCA had misdirected itself in law as to the meaning of Article 16(1) (the FCA's position being that, whilst there is a requirement in Article 16(1) for the specificity and materiality of a risk factor to be adequately described on the face of the prospectus, it was for Ithaca to determine the materiality and specificity of the risks to be included and not the FCA).
- Against the background of the duty to be concise, the FCA's conclusion that the various risk factors were adequately and specifically described, having regard to the face of the prospectus itself, was not arguably in error in public law terms.
- Under s. 87A of FSMA, the FCA has to be satisfied that a prospectus complies with Article 16(1), including that a risk is adequately described and that the risk factors are corroborated, and therefore the FCA has a considerable margin of discretion. Coupled with the FCA's expertise in the area, this makes the irrationality standard particularly difficult to surmount. The fact that the Paris Agreement was a risk for Ithaca's business had been disclosed and it was open to the FCA to conclude that, in the context of the whole of the prospectus, Ithaca had provided investors with sufficient information to make an informed assessment of risk in accordance with Article 6(1) of the UK Prospectus Regulation. Such a conclusion was not arguably in error in public law terms.

It has been reported that ClientEarth has since indicated that it will apply for the decision to be reconsidered.

Comment

The FCA's case that Ithaca's disclosures were compliant with the relevant requirements of the UK Prospectus Regulation may offer some assistance to other corporates in terms of the approach to disclosures and level of detail they are required to provide in relation to climate-related risks given the FCA's view that it is for the company to assess the specificity and materiality of relevant risks and for the FCA to ensure that the specificity and materiality of a risk factor is apparent from the disclosure. The description of risk factors must be adequate and no particular form is required.

However, third party challenges such as this judicial review application by ClientEarth and general increased prominence being given to climate-related risk factors may increase the level of scrutiny by the regulator. Corporates are also likely to face further challenges from organisations such as ClientEarth and other parties unhappy with their climate-related disclosures, including investors and customers who do not face the same procedural and evidential difficulties as an applicant seeking to judicially review the regulator. In the meantime, listed corporates should ensure they have in place robust and well-documented procedures and governance arrangements around the identification, assessment and disclosure of climate-related risks.

United Kingdom

26 June 2023

The FCA has published a statement welcoming the International Sustainability Standards Board's (**ISSB**) first sustainability-related reporting standards – the General Requirements for Disclosure of Sustainability-related Financial Information (**IFRS S1**) and the Requirements for Climate-related Disclosures (**IFRS S2**).

The FCA notes that it has been a strong advocate of the development of international corporate reporting standards on sustainability, and says the ISSB standards answer the clear market demand for complete, consistent, comparable and reliable corporate sustainability disclosures.

The UK government also recently signalled support for the ISSB and announced that it would be establishing a mechanism for formal UK endorsement and adoption of the standards. Furthermore, once available for use in the UK, the FCA's intention is to update its climate-related disclosure rules to reference the ISSB standards.

Sacha Sadan, Director of Environmental, Social and Governance, at the FCA said:

'We have been working closely with the ISSB since the start and are hugely supportive of its mission to create a common, global language for companies around the world to communicate their sustainability stories, in a consistent, comparable way. That is why we are delighted to see the final standards launched today.'

29 June 2023

The FCA has published a letter addressed to the Heads of ESG and Sustainable Finance for firms in the Sustainability-Linked Loans (**SLL**) market. The letter contains a review of the SLL market.

Earlier this year, the FCA engaged with a number of stakeholders to: better understand the functioning of the SLL market; gather additional market intelligence on the SLL market from key stakeholders; determine what measures might improve the market integrity of the SLL product; and understand where the FCA may be able to encourage further development of the SLL market as an important transition financing tool.

The letter summarises the FCA's findings, which are:

- Not realising potential – while a number of banks are keen to promote SLLs, the market is currently not achieving its potential. Increased trust and transparency could deliver wider uptake.
- Borrower concerns – borrowers are concerned about unwelcome scrutiny if they miss performance targets. They may also consider the time and costs of doing an SLL against a more conventional loan.
- Market participants that the FCA spoke with believe that a more prescriptive framework would improve market integrity and reduce the threat of greenwashing accusations. This could include more meaningful, science-based targets.
- There is the potential for conflicts of interest if banks accept weak targets and count the loan as part of their sustainable finance quota.
- Several banks are advocating for uniform disclosure and independent monitoring and verification of targets. This could include well-disclosed targets aligned to borrowers' published transition plans.

The letter goes on to note that some of these issues have been addressed by the recently published revision of the Loan Market Association's Sustainability-Linked Loan Principles (SLLP). There has been a positive reaction to these from the market and the FCA believes a broader adoption of the existing SLLPs would drive further growth.

The FCA will continue to monitor this market, as part of its wider work on transition finance, with a view to considering the need for further measures to support the development of a robust transition finance ecosystem.

Currently, the FCA has no plans to introduce regulatory standards or a code of conduct for this market, but it will reconsider if required by the market.

5 July 2023

The International Regulatory Strategic Group (IRSG) published a consultation paper on a draft voluntary code of conduct for ESG ratings and data product providers.

This draft code of conduct aims to foster a trusted, efficient and transparent market, by introducing clear standards for ESG ratings and data products providers and also clarifies how such providers can interact with wider market participants. Based on the International Organisation of Securities Commissions' (**IOSCO**) recommendations, the draft code sets out six principles with the aim of:

- Improving the availability and quality of information provided to investors at product and entity levels.
- Enhancing market integrity through increased transparency, good governance and sound systems and controls.
- Improving competition through better comparability of products and providers.
- By basing the draft code heavily on the IOSCO recommendations, it is intended to be internationally interoperable and it is hoped that it can represent an important step towards a globally consistent regulatory framework.

In line with IOSCO's recommendations, the draft code is structured around four key outcomes:

- Good governance: ESG ratings and data providers are expected to ensure appropriate governance arrangements are in place that enable them to promote and uphold the principles and overall objectives of the code.
- Systems and controls: ESG ratings and data products providers are expected to adopt and implement written policies and procedures designed to help ensure the issuance of high quality ESG ratings and data products.
- Managing conflicts of interest: ESG ratings and data products providers are expected to identify, avoid or appropriately manage, mitigate and disclose actual or potential conflicts of interest that may compromise the independence and objectivity of ESG ratings and data products providers' operations.
- Transparency: ESG ratings and data products providers are expected to make adequate levels of public disclosure and transparency a priority for their ESG ratings and data products. This includes their methodologies and processes to enable users to understand the product and any associated potential conflicts of interest, while managing a balance with respect to proprietary or confidential information, data and methodologies.

France

20 June 2023

The Autorité des Marchés Financiers (**AMF**) has proposed several points that listed companies should consider in order to prepare for the implementation of the new European Directive on Corporate Sustainability Reporting (**CSRD**) and its mandatory European Sustainability Reporting Standards (**ESRS**).

In order to prepare for the CSRD, the AMF recommends the following:

- Firms should analyse the legislation and develop their expertise. A thorough reading of the text is an essential first step in order to ensure a good understanding of the numerous disclosure requirements. Moreover, it is also necessary to grasp the 'underlying aspects' of sustainability, i.e. the ramifications of each ESG topic covered by the standards.
- Firms should work in 'project' mode, through the involvement of all company functions. A cross-cutting organisation, including all the internal stakeholders and involving the company management, is a key factor of success in the implementation of this new regulatory framework.
- Firms should adapt tools for data collection and construction. Depending on the way in which companies are organised, their ESG issues and the materiality of those issues, certain disclosure requirements will be completely new and require the production of new data, while others will already exist, but partially and therefore will have to be supplemented. In addition, some disclosures required by the standards will concern the company's value chain. It is therefore important to anticipate and address data compilation, collection and the improvement of data reliability.
- Firms should establish robust internal control sustainability reporting. Close dialogue with the auditor(s) or independent third-party organisation from the start and throughout the process of reporting production and monitoring could also be beneficial for businesses.

- With the principle of "double materiality", the cornerstone of the CSRD, companies must report the information necessary to understand not only the effects of sustainability issues on their financial position and performance, but also their impact on the environment and society. The double materiality analysis carried out by companies should make it possible to identify sustainability topics reflecting the main ESG risks, opportunities and impacts of the company due to its activities and its value chain.
- Since the materiality analysis is the starting point for sustainability reporting, companies will benefit from updating and/or swiftly implementing their materiality assessment process.
- With regard to transparency, a clear description by companies of their materiality analysis approach - critical in sustainability reporting - and their assumptions and trade-offs, will be important especially for the first reporting years.
- Together with the double materiality analysis, the prioritisation operation can be usefully supplemented by a gap analysis of the future transparency requirements of the ESRS and the sustainability information already published by companies.

EU

16 June 2023

The European Securities and Markets Authority (**ESMA**) has launched a Call for Evidence (**CfE**) on the integration of sustainability preferences in the suitability assessment and product governance arrangements.

Per Article 25(2) of MiFID II and Articles 54 and 55 of Commission Delegated Regulation 2017/565 (**MiFID II Delegated Regulation**), investment firms providing investment advice or portfolio management have to provide suitable personal recommendations to their clients or have to make suitable investment decisions on behalf of their clients. The MiFID II Delegated Regulation was subsequently updated as part of a broader European Commission initiative on sustainable development.

The amendments to the MiFID II Delegated Regulation also prompted a review and update of the 2018 ESMA guidelines on suitability. In ESMA's final report published in September 2022 an updated version of the guidelines was published and these apply from 3 October 2023. It was also mentioned in the final report that the Securities and Markets Stakeholder Group suggested that ESMA organise a CfE on how suitability preferences are assessed and on possible alternative approaches following the publication of the updated guidelines.

ESMA agrees that it is important to continuously engage industry on this topic and has therefore decided to launch this CfE to gather evidence on the evolution of the market and on how firms are applying the legal requirements.

In particular, the CfE is intended to help ESMA:

- Develop a better understanding of how MiFID II requirements are being implemented and applied by firms across the European Union and the challenges firms face in their application.
- Gain a better understanding of investor experience and reactions to the inclusion of sustainability factors in investment advice and portfolio management services.
- Collect information, views and data on main trends on aspects related the provision of sustainable investment products and services to retail clients.

The deadline for responding to the CfE is 15 September 2023.

ESMA, together with Member State competent authorities, will assess the replies to the CfE and will continue monitoring the application by firms of the MiFID II requirements on the topics of suitability and product governance and the related ESMA guidelines to ensure supervisory convergence on this important topic.

6 July 2023

ESMA announced the launch of a common supervisory action (**CSA**) with Member State competent authorities (**NCAs**) on sustainability-related disclosures and the integration of sustainability risks.

The aim of the CSA is to assess supervised asset managers' compliance with the relevant provisions in the Sustainable Finance Disclosure Regulation (**SFDR**), the Taxonomy Regulation and relevant implementing measures,

including those relevant provisions in the UCITS Directive and Alternative Investment Fund Managers Directive implementing acts on integration of sustainability risks.

Using a common methodology, developed by ESMA, the NCAs will share knowledge and experiences on how to foster convergence in how they supervise sustainability related disclosure. Among the main objectives is to:

- Assess whether market participants adhere to applicable rules and standards in practice.
- Gather further information on greenwashing risks in the investment management sector.
- Identify further relevant supervisory and regulatory intervention to address the issue.

In 2023, continuing until Q3 2024, NCAs will undertake their supervisory activities and share knowledge and experiences through ESMA to foster convergence in how they supervise sustainability-related disclosures and sustainability risk integration in asset managers.

7 July 2023

There was published in the Official Journal of the European Union (**OJ**) Commission Recommendation (EU) 2023/1425 of 27 June 2023 on facilitating finance for the transition to a sustainable economy.

The Recommendation is addressed to:

- Undertakings that want to contribute to the transition to climate neutrality and environmental sustainability, while enhancing their competitiveness and are seeking finance for investments for this purpose.
- Financial intermediaries and investors that are willing to provide transition finance to undertakings.
- Member States and financial supervisory authorities.

Among other things the Recommendation notes that financing the transition to a climate-neutral and sustainable economy is at the core of the European Commission's Communication of 2021 on a Strategy for Financing the Transition to a Sustainable Economy, which outlines the need for an inclusive approach to sustainable finance regardless of sectors, geographies, actors and the different starting points in the transition.

The Recommendation aims to support market participants that wish to obtain or provide transition finance by offering practical suggestions on how to approach transition finance. In particular, the Recommendation clarifies the concept of transition finance, acknowledging the significant role that market participants can play by voluntarily using tools from the Union sustainable finance framework, as needed for transition finance.

United States

20 June 2023

The Commodities Futures Trading Commission's (**CFTC**) Whistleblower office issued an alert, notifying the public on how to identify and report potential Commodity Exchange Act violations connected to fraud or manipulation in the carbon markets.

The alert describes how the CFTC's Whistleblower Office will work with market participants that report information related to potential fraud in the carbon markets, including, but not limited to, manipulative and wash trading, 'ghost' credits, double counting, fraudulent statements relating to material terms of the carbon credits, and potential manipulation of tokenised carbon markets.

Individuals who submit such information through the CFTC's Whistleblower Programme may be eligible for certain confidentiality and anti-retaliation protections, as well as monetary awards if that information leads to a successful CFTC enforcement action.

International regulators – FSB, ISOCO, Basel Committee, NGFS, SASB, IFRS, ISSB

22 June 2023

The Network for Greening the Financial System (**NGFS**) has published a conceptual note highlighting the three key areas to be covered in the NGFS Blended Finance Handbook, due to be released at COP 28.

The three key areas to be covered in the NGFS Handbook are:

- Draw lessons from representative case studies on blended finance projects for climate action.
- Identify key success factors for blended finance transactions and a blended finance ecosystem.
- Highlight a set of principles and best practices to scale up blended finance for climate adaptation and mitigation.

The NGFS Handbook will complement ongoing international work to promote and scale transition financing, particularly in emerging economies and most vulnerable countries.

26 June 2023

The International Sustainability Standards Board (**ISSB**) has published its inaugural standards. The standards are designed to ensure that companies provide sustainability-related information alongside financial statements – in the same reporting package.

The standards, which fully incorporate the recommendations of the Task Force on Climate-related Financial Disclosures (**TCFD**), are:

- IFRS S1 which provides a set of disclosure requirements designed to enable companies to communicate to investors about the sustainability-related risks and opportunities they face over the short, medium and long term. IFRS S1 is effective for annual reporting periods beginning on or after 1 January 2024 with earlier application permitted as long as IFRS S2 is also applied. The objective of IFRS S1 is to require an entity to disclose information about its sustainability-related risks and opportunities that is useful to users of general purpose financial reports in making decisions relating to providing resources to the entity.
- IFRS S2 which sets out specific climate-related disclosures and is designated to be used with IFRS S1. IFRS S2 is effective for annual reporting periods beginning on or after 1 January 2024 with earlier application permitted as long as IFRS S1 is also applied. The objective of IFRS S2 is to require an entity to disclose information about its climate-related risks and opportunities that is useful to users of general purpose financial reports in making decisions relating to providing resources to the entity.

The ISSB will work with jurisdictions and companies to support adoption.

The first steps will be creating a Transition Implementation Group to support companies that apply the standards and launching capacity-building initiatives to support effective implementation.

30 June 2023

The Suitability Accounting Standards Board (**SASB**) has announced how the newly issued ISSB standards will affect the SASB standards.

The ISSB standards require industry-specific disclosures and the SASB standards have a prominent role in helping companies to apply IFRS S1 and IFRS S2:

- IFRS S1 requires companies to consider the SASB standards in order to identify sustainability-related risks and opportunities and disclose related information.
- IFRS S2 provides accompanying guidance derived from the climate-related topics and metrics in the SASB standards.

As such, the ISSB has committed to maintain, enhance and evolve the SASB standards, and encourages preparers and investors to continue to use them.

An initial phase of SASB standards enhancements is underway to improve the international applicability of the non-climate related disclosures.

The ISSB has also released updated SASB standards to align the climate-related topics and metrics with the industry based guidance in IFRS S2. This targeted update:

- Added new topics and metrics covering financed emissions in three industries: asset management and custody activities; commercial banks; and insurance.
- Revised 12 metrics to enhance international applicability.
- Removed six metrics that were not intentionally applicable.

Resources

ESG is high on the regulatory agenda. Businesses, governments, regulators, financial services firms and individuals all have a part to play in tackling climate change and this view is increasingly shared across society. In terms of financial markets, investors are increasingly seeking sustainable financial products and ESG investing, traditional investing combined with sustainable or otherwise philanthropic aims, has seen huge growth in recent years. Regulated firms are also seeking to improve their own ESG performance more generally to build stronger relationships with their stakeholders, including those who use their services. Whilst the growing emphasis on ESG presents opportunities for financial services providers, it also brings with it a number of risks, which need to be properly managed with a view to avoiding future regulatory investigations and enforcement.

We have produced a number of resources, including articles, podcasts and newsletters, to help clients navigate this evolving, complex landscape:

Financial services: Regulation tomorrow

Our blog, Financial services: Regulation tomorrow offers a convenient resource for those keeping track of the evolving and increasingly complex global financial services regulatory environment.

Financial Services Regulatory Developments in ESG

Developed by our global financial services regulatory lawyers and integrated risk advisory group, our Financial Services Regulatory Developments in ESG Hub provides resources and insights to help clients stay informed of key regulatory developments in the sector.

ESG and Sustainability Insights newsletter

Our ESG and Sustainability Insights newsletter brings together recent insights and resources on key topics affecting your business, including climate change and regulation, business and human rights, sustainable finance, energy transition and more.

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