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ESG | Sustainability

Financial Services regulatory ESG updater

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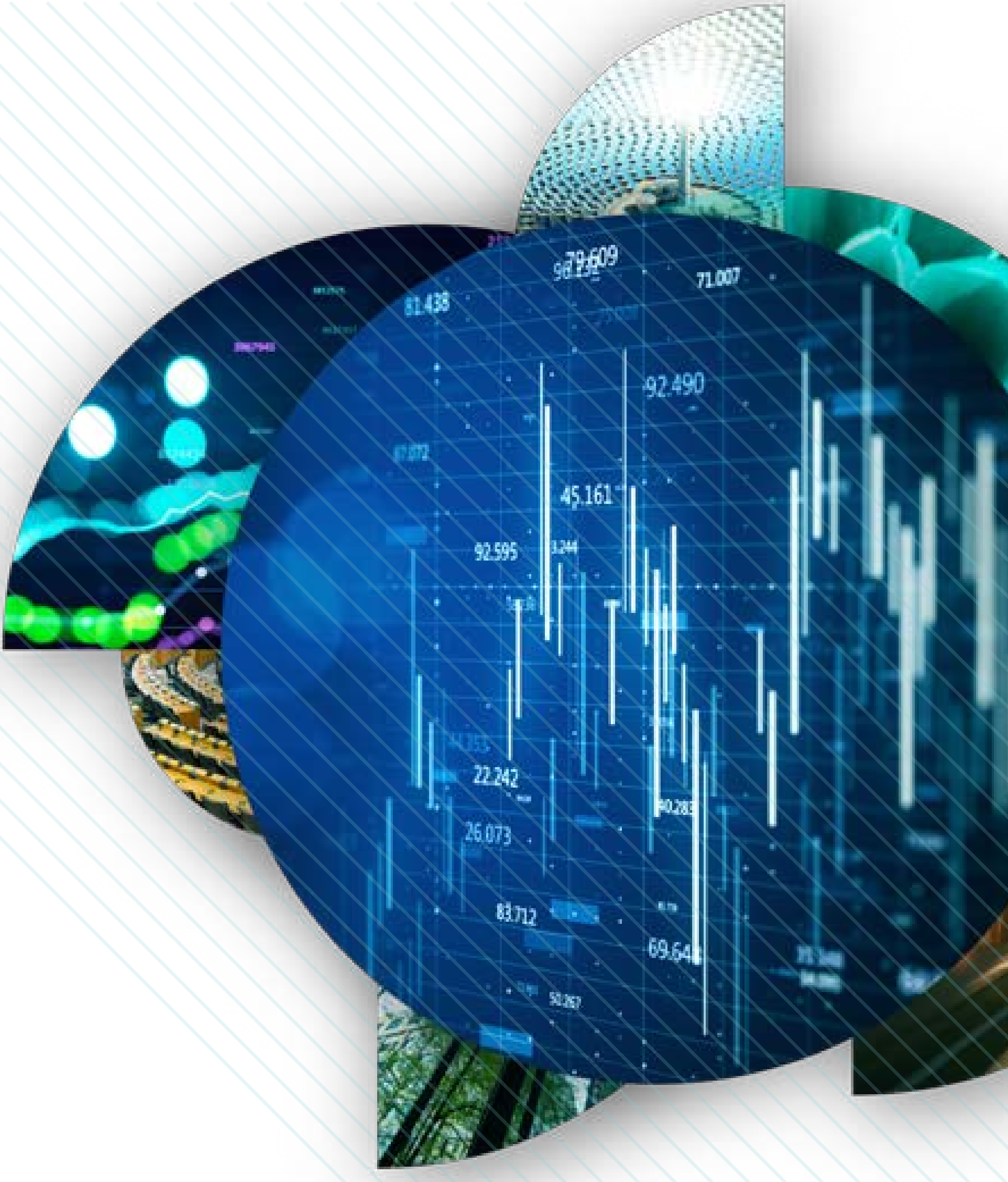

Introduction

Environmental, Social and Governance (**ESG**) is changing the landscape for financial institutions as a wide range of stakeholders including investors increasingly expect them to make their operations more sustainable. Financial services regulators also view ESG as a priority, embedding the principles of climate-related financial risks into their supervisory frameworks and dealing with institutions that may be making exaggerated or unsubstantiated sustainability-related claims that do not stand up to closer scrutiny (so-called 'greenwashing'). However, the key problem for institutions, particularly those operating cross border, is that there is limited uniformity in regulation, financial services regulators are at different stages in developing their ESG regulatory framework particularly in relation to disclosures and taxonomy. It is therefore critical that institutions monitor the latest announcements from the regulators.

The purpose of this updater is to track ESG regulatory developments from the period 18 December 2023 to 18 January 2024, from UK, France, EU, US, Australia and certain international regulators.

Contacts

Jonathan Herbst
Partner
+44 20 7444 3166
jonathan.herbst@nortonrosefulbright.com

Simon Lovegrove
Global Director of Financial Services Knowledge, Innovation and Product
+44 20 7444 3110
simon.lovegrove@nortonrosefulbright.com

Haney Saadah
Managing Director of Risk Consulting, EMEA
+44 20 7444 2519
haney.saadah@nortonrosefulbright.com

Katie Stephen
Co-Head of the Contentious Financial Services Group
+44 20 7444 2431
katie.stephen@nortonrosefulbright.com

Helen Taylor
Partner
+61 2 9330 8218
helen.taylor@nortonrosefulbright.com

Kate Green
Partner
+61 2 9330 8928
kate.green@nortonrosefulbright

Elisa de Wit
Partner
+61 3 8686 6266
elisa.dewit@nortonrosefulbright.com

William Troutman
Partner
+1 213 892 9208
william.troutman@nortonrosefulbright.com

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An ESG newsletter

This month's highlights

New online briefing note – The anti-greenwashing rule: Proposed FCA guidance
We have published a new online briefing note, The anti-greenwashing rule: Proposed FCA guidance. The FCA is proposing to bring the guidance into force on 31 May 2024, alongside the anti-greenwashing rule itself.

New NRF Webinar: The impact of California's new ESG climate disclosure legislation
On 18 January 2024, members of Norton Rose Fulbright US LLP hosted a webinar to discuss the sweeping impact of California's new ESG climate disclosure legislation.

The session provides an update on some of the key aspects of California's recently enacted legislation that requires certain public and private US companies doing business in California to provide public disclosures regarding their climate emissions, climate risk, carbon neutral claims and use of offsets.

It was a lively discussion about the new requirements in SB 253, SB 261 and AB 1305, the potential effect on companies within and outside California and the team's thoughts on addressing these challenges.

FCA Primary Market Bulletin 46
The FCA has published Primary Market Bulletin 46, which focuses on Article 10 of the EU Market Abuse Regulation and ESG stewardship, as well as sponsor procedures in relation to the TCFD-aligned disclosure requirements.

Australian Treasury releases climate-related financial disclosure: Exposure draft
The Australian Government has released exposure draft legislation which amends the Australian Securities and Investment Commission Act 2001 (Cth) and the Corporations Act 2001 (Cth) to require large businesses and financial institutions to disclose their climate-related risks and opportunities.

United Kingdom

18 December 2023 – Terms of Reference for the Transition Finance Market Review
The Government has published the Terms of Reference for the Transition Finance Market Review.

In 2023 the Government announced in its Green Finance Strategy that it would commission a market-led review into growing transition finance in the UK, to look at how to support companies to continue to access the capital they need to decarbonise and deliver the UK's net zero ambitions. The review has now been commissioned by Treasury Lords Minister Baroness Vere and Department for Energy Security and Net Zero Minister Lord Callanan and is led by Vanessa Havard-Williams. The review lead will be supported by a panel of expert advisors and a secretariat in partnership with the City of London Corporation. It will report back to the Government by July 2024.

19 December 2023 – FCA Primary Market Bulletin 46
The Financial Conduct Authority (**FCA**) has published Primary Market Bulletin 46, which focuses on Article 10 of the EU Market Abuse Regulation (**MAR**) and ESG stewardship, as well as sponsor procedures in relation to the Task Force on Climate-Related Financial Disclosures (**TCFD**)-aligned disclosure requirements.

In Primary Market Bulletin 46, the FCA addresses questions raised by certain stakeholders in relation to Article 10 MAR and market conduct issues more generally in the context of shareholder co-operation regarding ESG stewardship including, for example:

- Whether a major shareholder's voting intentions on significant transactions, influenced perhaps by ESG stewardship concerns, may constitute inside information, thus restricting trading by that shareholder.

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- Whether Article 10 might apply where major shareholders wish to discuss their stewardship plans for particular issuers with other shareholders with similar ESG strategies.
- Whether the shareholder may or should disclose its voting intentions to the market.

The FCA notes that it is not purporting to give guidance on specific hypothetical scenarios, as it is unable to do so. The extent to which any engagement between shareholders, or those between a company and its shareholders might contravene UK MAR or raise other market conduct issues, will depend on the specific circumstances in any given case.

Following the introduction of the TCFD-aligned disclosure requirements for premium listed commercial companies, the FCA has conducted an initial assessment of how sponsors have made changes to their own procedures to assess whether new applicants have procedures in place to enable them to comply with the relevant requirements. In Primary Market Bulletin 46, the FCA outlines its initial observations following submissions from a small group of sponsors, highlighting examples of good practice where relevant.

The FCA concludes that:

- Overall, against a dynamic background of evolving practice in climate-related areas and with issuers and advisers preparing for further developments in international accounting and assurance standards, it was encouraged to see that sponsors are taking steps to ensure their staff and procedures are well positioned to reflect the latest requirements of the Listing Rules.
- Whilst it does not expect sponsors to become climate experts in the context of assessing whether an issuer has established procedures to enable it to comply with its obligations on an ongoing basis, the FCA does encourage sponsors to consider its findings and recommendations, including whether changes to their own procedures and policies may be appropriate.
- The review did not identify any deficiency regarding record keeping and indeed revealed circumstances where fewer records might reasonably have been kept.
- Sponsors may find it useful to monitor and engage, where appropriate, with the FCA's ongoing policy development on sustainability reporting for listed companies.

17 January 2023 – FCA establishes industry-led working group for financial advisers

The FCA has announced that it has established a new working group focused on building capability in sustainable finance across the financial advice sector. The group is being convened to support industry in advising consumers on products making claims about sustainability, following the FCA's publication of a package of sustainable finance measures in November 2023.

The FCA has appointed individuals to act as Chair and Vice-Chair of the group, and the Personal Investment Management & Financial Advice Association will provide the Secretariat. The Chair will appoint the group's membership from across the advice sector and this will include both small and larger industry participants. Stakeholders outside of the group will also be engaged, including consumers, to ensure a balanced representation of views.

Sacha Sadan, the FCA's Director of Environmental, Social & Governance said that this important project would benefit from the group's combined skills and expertise, and emphasised the working group's focus on "practical ideas to support the advice sector in building its capabilities on sustainable finance".

The FCA will sit as an active observer of the group and has asked that it be ready to report on how the advice sector can be supported in delivering good practice in the second half of 2024.

European Union

18 December 2023 – ECB/ESRB joint report-Towards macroprudential frameworks for managing climate risk

The European Central Bank and the European Systemic Risk Board have issued a report, Towards macroprudential frameworks for managing climate risk.

The report sets out three interrelated macroprudential frameworks for climate risks:

The explanatory notes are purely descriptive and cover:

- A surveillance framework that tracks financial stability risks emanating from climate change shocks, along with exposures to these shocks and their interplay with financial risk. Among other things, the report notes that the share of high-emitting economic sectors in bank lending is around 75% higher than its equivalent share in economic activity, while more than 60% of banks' interest income is derived from firms operating in the most carbon-intensive sectors.
- A second framework which leverages evidence on financial stability risks as the basis for a macroprudential strategy for climate change, alongside a preliminary operational design based on existing instruments. All in all, a common EU approach is essential to avoid fragmentation and appropriately tackle a common risk which is global in nature. Prudential policies will need to tackle heterogeneity to improve the overall efficiency of policy response against systemic climate risks. Close coordination of policy responses across countries and sectors, especially within the EU, will be essential if systemic climate risks are to be addressed efficiently, by limiting the risk of spillovers, uncertainty and distortions that might result from a more fragmented approach.
- A framework taking a first look at nature-related risks. There is provided a conceptual overview of nature-related risks by laying out concepts, EU case studies and various initiatives among EU institutions. Much like climate risk, nature risks have both a physical aspect (resulting from the degradation of nature) and a transition aspect (resulting from measures to protect, restore or reduce physical impacts).

18 December 2023 – EBA guidelines on benchmarking of diversity practices, including diversity policies and gender pay gap

The European Banking Authority (**EBA**) has published a final report on the guidelines on benchmarking of diversity practices, including diversity policies and gender pay gap, under the Capital Requirements Directive IV and the Investment Firms Directive. The guidelines harmonise the collection of data for diversity benchmarking and the benchmarking of the gender pay gap at the level of the management body. The data collection exercise will be implemented in the EBA's tool for data collection. The first data collection under the guidelines will be conducted in 2025 with a reference date of 31 December 2024.

20 December 2023 – Commission Delegated Regulation (EU) 2023/2830 supplementing Directive 2003/87/EC

There was published in the Official Journal of the EU (**OJ**), Commission Delegated Regulation (EU) 2023/2830 of 17 October 2023 supplementing Directive 2003/87/EC of the European Parliament and of the Council by laying down rules on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances. The Delegated Regulation enters into force on the day following its publication in the OJ.

21 December 2023 – Commission provides additional guidance to help financial undertakings report about environmental performance of their activities under

The Commission has adopted a guidance document which addresses frequently asked questions on the interpretation and implementation of Commission Delegated Regulation 2021/2178 of 6 July 2021.
The delegated act specifies the content and presentation of information to be disclosed by undertakings subject to Article 19a or 29a of Directive 2013/34/EU (**EU Accounting Directive**) concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation.

The guidance document considers the:

- Scope of entities subject to the reporting obligations.
- Reporting obligations of large financial undertakings and financial undertakings admitted to trading on EU markets relating to how they finance, invest in or insure taxonomy-aligned activities.
- Taxonomy assessment of specific exposures such as to retail clients, local authorities and exposures to individual undertakings and groups.
- Taxonomy assessment of specific exposures such as to retail clients, local authorities and exposures to individual undertakings and groups.

It also contains targeted questions specifically related to credit institutions, insurance undertakings, and asset managers.

22 December 2023 – Commission Delegated Regulation (EU) 2023/2772 supplementing the EU Accounting Directive as regards sustainability reporting standards
There has been published in the OJ, Commission Delegated Regulation (EU) 2023/2772 supplementing the EU Accounting Directive (as amended by the CSRD) as regards sustainability reporting standards. The Delegated Regulation sets out the first set of EU sustainability reporting standards under the CSRD. It came into force on the third day following publication and applies from 1 January 2024 for financial years beginning on or after 1 January 2024.

12 January 2024 – Consolidated Q&As on SFDR
The European Supervisory Authorities have issued consolidated Q&As on the Sustainable Finance Disclosure Regulation.

France

19 December 2023 – Closing speech by Marie-Anne Barbat-Layani, AMF Chair-20 years of the Autorité des Marchés Financiers
The Autorité des Marchés Financiers (**AMF**) has published the closing speech, delivered by AMF Chair, Marie-Anne Barbat-Layani, at the 20 years of the AMF event.

In her speech, Ms Barbat-layani highlights that one of the AMF's priorities is to promote more sustainable finance and makes the following key observations:

- The AMF is preparing for the implementation of the Corporate Sustainability Reporting Directive (**CSRD**), which is one of the cornerstones of the European Commission's (**Commission**) European Green Deal. This regulation will introduce much more stringent transparency requirements, including on climate transition plans, and mandatory third-party verification of information.
- As a regulator, the AMF is implementing its objective of ensuring that sustainable finance regulations are implemented on a daily basis, through its supervisory activities. The aim is to ensure that the information is accurate, genuine and not misleading. The AMF does not rule out the option of sanctions in the event of a proven breach of regulations.
- The AMF is working hard with financial players to educate, clarify and inform them about the applicable rules.
- The AMF has just published its second study on Taxonomy reporting for listed non-financial companies. The AMF hopes these findings will encourage companies to improve their efforts to communicate the sustainability of their activities.
- The AMF conducts thematic controls for educational purposes, often as part of common supervisory actions coordinated by the European Securities and Markets Authority.

United States – SEC and CFTC

4 December 2023 – CFTC issues proposed guidance regarding the listing of voluntary carbon credit derivative contracts
The Commodity Futures Trading Commission (**CFTC**) has approved proposed guidance and request for public comment regarding the listing for trading of voluntary carbon credit derivative contracts.

The proposed guidance outlines certain factors a CFTC-regulated exchange, or designated contract market, should consider when addressing requirements of the Commodity Exchange Act and CFTC regulations that are relevant to the contract design and listing process.

The deadline for feedback to the proposed guidance will be 16 February 2024.

California Climate Emissions and Carbon Offset Disclosure Laws
The recent California legislative session saw the enactment of three pieces of climate legislation that are expected to have a significant impact on companies doing business in California, whether public or private.

Senate Bill 253: The Climate Corporate Data Accountability Act
SB 253 represents the first concrete climate emissions disclosure requirement in the US. The law applies to companies "doing business in California" with $1 billion or more in annual revenue worldwide. This includes public and private companies. "Doing business in California" is a phrase defined in the California Revenue and Taxation Code; there are several tests that may need specific evaluation depending upon a company's operations.

Covered entities will need to report annually their climate emissions in accordance with the Greenhouse Gas Protocols. Scope 1 and Scope 2 emissions reports will first be due starting in 2026, using 2025 as the reference year. Scope 3 emissions will need to be added to the reports starting in 2027.

SB 253 directs the California Air Resources Board to issue implementing regulations by January 1, 2025, as well as authorizing CARB to enforce the law. Failure to comply subjects an entity to administrative penalties of up to $500,000 per reporting year.

Senate Bill 261: Climate-related risk disclosures
SB 261 requires public and private companies doing business in California with $500 million in annual revenue or more worldwide to issue biennial climate risk disclosure reports adhering to the most current Task Force on Climate-Related Financial Disclosures (TCFD) framework. The first disclosure report must be issued by January 1, 2026. Failure to comply subjects an entity to administrative penalties of up to $50,000 per reporting year.

Assembly Bill 1305: Disclosures regarding voluntary carbon offsets, net zero, and carbon neutrality claims
AB 1305 establishes public disclosure criteria for the following entities operating in, or making claims in, California:

- entities making net zero, carbon neutral, or emission reduction claims in connection with the entity or its products;
- entities that purchase voluntary carbon offsets and make claims that the entity is net zero, carbon neutral, or something substantially similar.

AB 1305 also establishes public disclosure criteria for entities marketing or selling voluntary carbon offsets within California.

While the specific disclosures differ based on the category, in general, they require the entity to provide the basis for the claim or offset and whether it has been verified independently. Entities must publish the disclosures on the entity's public website. Failure to comply subjects an entity to civil penalties of up to $2,500 per day capped at $500,000.

Australia

19 December 2023 – Development of Australia's first Carbon Exchange
The Australian Clean Energy Regulator (**CER**) has partnered with the Australian Securities Exchange (**ASX**) to undertake "exploratory work" on the development of an Australian Carbon Exchange. The exchange aims to make participating in Australia's carbon markets cheaper and easier.

The ASX and the CER will work together in 2024 with carbon market participants and other relevant stakeholders to develop an exchange model that can be supported under the existing regulatory framework for carbon credit units. The exchange is intended to operate similar to a securities exchange where carbon credits can be traded, cleared and settled.

The exchange is anticipated to be launched between late-2024 to early 2025 pending consultation with the market.

12 January 2024 – Australian Treasury releases climate-related financial disclosure: Exposure draft legislation
Following the completion of two consultation stages in 2023, the Australian Government has released exposure draft legislation which amends the Australian Securities and Investment Commission Act 2001 (Cth) and the Corporations Act 2001 (Cth) to require large businesses and financial institutions to disclose their climate-related risks and opportunities.

Under the draft legislation, the Australian Government proposes to require all entities that meet prescribed size thresholds to report information relating to governance, strategy, risk management and emissions targets. The requirements will be gradually phased-in commencing from 1 July 2024, with all applicable companies being required to report by 1 July 2027.

This forms part of the Australian Government's commitment to improving the quality of climate-related financial disclosures and achieving net zero emissions by 2050. The framework is intended to bring Australia in line with other jurisdictions such as the EU, UK, New Zealand and Japan with respect to climate-related financial disclosures.

The Treasury is calling for views on the draft legislation and explanatory materials to be submitted by 9 February 2024.

18 January 2024 – Australian Association of National Advertisers releases Environmental Claims Code: Exposure draft

The Australian Association of National Advertisers (**AANA**) which is a not-for-profit and self-regulated industry organisation, has released a draft Environmental Claims Code (the **Code**) which aims to ensure that advertisers and marketers develop and maintain rigorous standards when making environmental claims. Once the new Code takes effect, the AANA's sister body Ad Standards will handle complaints under the Code.

While the proposed Code is not binding on members or the industry, the AANA is Australia's main body for advertisers and represents the common interests and obligations of companies across all business sectors involved in the advertising, marketing and media industry. The Code highlights growing interest and concern by industry members as to the potential risks of greenwashing in advertising.

Interested parties have until 22 March 2024 to submit their comments.

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

Nothing to report.

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.

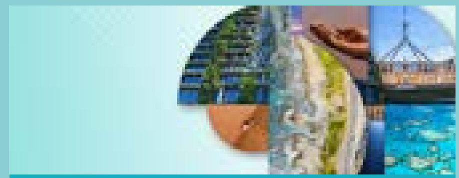
We have produced a number of resources, including articles, podcasts and newsletters, to help clients navigate this evolving, complex landscape:

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.

Contacts

Global

Jonathan Herbst
Global Head of Financial Services, London
+44 20 7444 3166
jonathan.herbst@nortonrosefulbright.com

Haney Saadah
Managing Director of Risk Consulting, EMEA, London
+44 20 7444 2519
haney.saadah@nortonrosefulbright.com

Simon Lovegrove
Global Director of Financial Services Knowledge, Innovation and Product, London
+44 20 7444 3110
simon.lovegrove@nortonrosefulbright.com

Europe

Claire Guilbert
Partner, Luxembourg
+352 28 57 39 298
claire.guilbert@nortonrosefulbright.com

Sébastien Praicheux
Partner, Paris
+33 1 56 59 54 25
sebastien.praicheux@nortonrosefulbright.com

Roberto Cristofolini
Partner, Paris
+33 1 56 59 52 45
roberto.cristofolini@nortonrosefulbright.com

Salvatore Iannitti
Partner, Milan
+39 02 86359 429
salvatore.iannitti@nortonrosefulbright.com

Floortje Nagelkerke
Partner, Amsterdam
+31 20 462 9426
floortje.nagelkerke@nortonrosefulbright.com

Anna Carrier
Senior Governance and Regulatory Affairs Advisor, Brussels
+32 2 237 61 46
anna.carrier@nortonrosefulbright.com

Michael Born
Counsel, Frankfurt
+49 69 505096 421
michael.born@nortonrosefulbright.com

United States

Andrew Lom
Global Head of Private Wealth and Head of Financial Services, New York
+1 212 318 3119
andrew.lom@nortonrosefulbright.com

William Troutman
Partner, Los Angeles
+1 213 892 9208
william.troutman@nortonrosefulbright.com

Australia

Helen Taylor
Partner, Sydney
+61 2 9330 8218
helen.taylor@nortonrosefulbright.com

Kate Green
Partner, Sydney
+61 2 9330 8928
kate.green@nortonrosefulbright

Elisa de Wit
Partner, Melbourne
+61 3 8686 6266
elisa.dewit@nortonrosefulbright.com

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