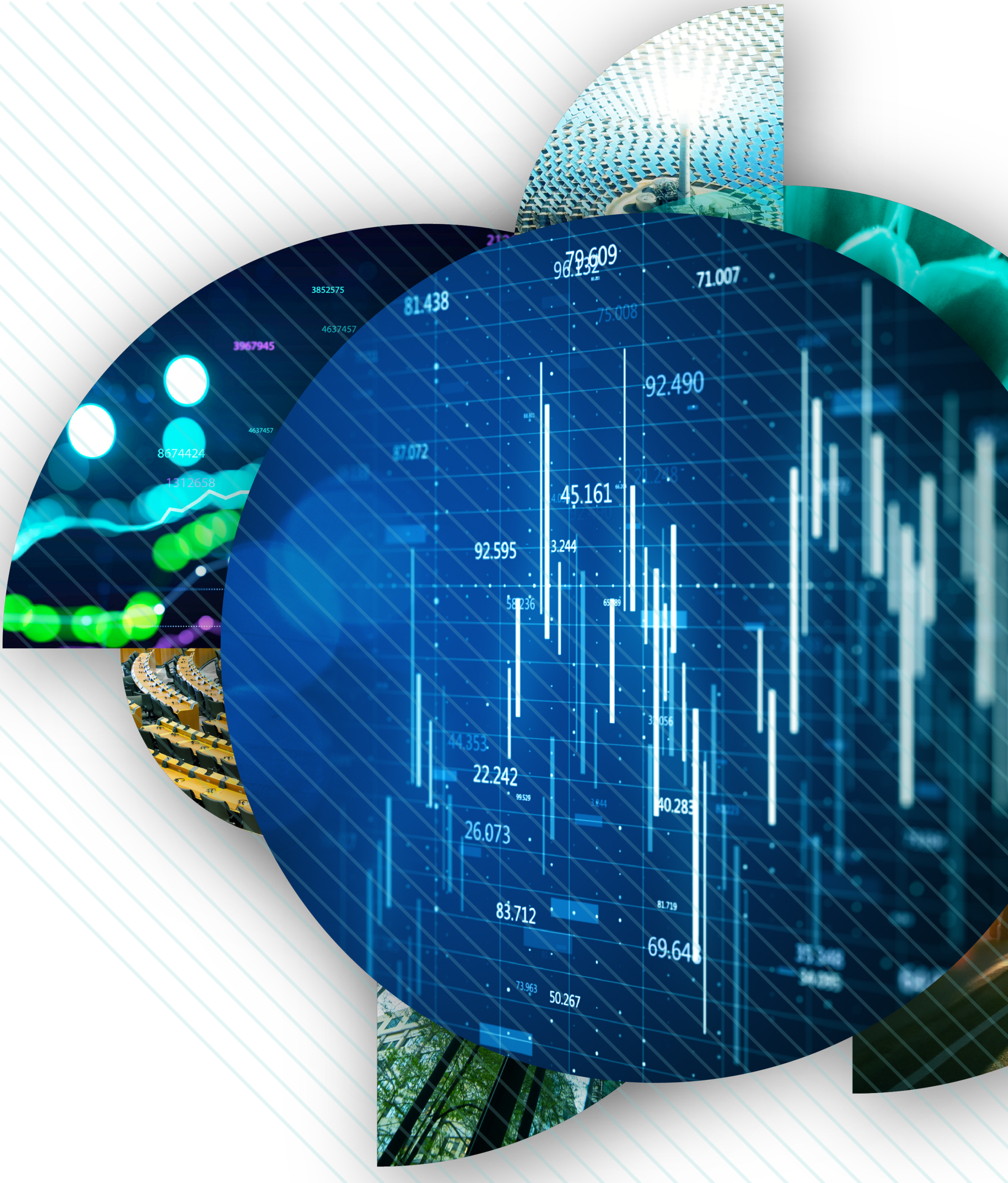
Norton Rose Fulbright

ESG | Sustainability

Financial Services regulatory ESG updater

18 January 2024 to 4 April 2024



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 January 2024 to 4 April 2024, from UK, France, EU, US, Australia, and certain international regulators.

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This month's highlights

6 March 2024 – New NRF briefing note: SEC adopts climate-related disclosure rules

The US Securities and Exchange Commission adopted final rules by a 3-2 vote that would require domestic and foreign registrants to provide climate-related disclosures in their registration statements and annual reports. Read our full update here.

4 April 2024 – SEC stays requirements of final climate-related disclosure rules pending legal challenges

Shortly after finalizing its final rules for climate-related disclosure, the SEC faced legal challenges on several fronts, including lawsuits from states, non-governmental organisations, and industry. The legal theories underpinning these challenges include that the final rules exceed the SEC's authority; violate the major questions doctrine and should be left to Congress; compel speech in violation of the First Amendment; and are arbitrary and capricious. These cases have been consolidated before the Eighth Circuit Court of Appeals and pending. In light of these challenges, the SEC has voluntarily stayed implementation of the final rules pending resolution of judicial review. The SEC has stated that it plans to vigorously defend the rules but views a stay as facilitating judicial resolution given the complexities involved in the legal challenges.

United Kingdom

24 January 2024 - Transition Plan Taskforce's mandate extended to align with the TFMR

The Transition Plan Taskforce (**TPT**) announced that HM Treasury had extended its mandate until at least 31 July 2024, with a possible further three months extension to the end of October 2024.

The TPT's mandate has been extended so that it can support the Transition Finance Market Review (**TFMR**). As of January 2024, the TPT has nearly completed the delivery of the tasks listed in its Terms of Reference. This includes the delivery of the TPT Disclosure Framework and other outputs which are included in the IFRS Knowledge Hub.

The TPT will release its final outputs this year, including:

- Final Deep Dive Sector Guidance for Asset Owners, Asset Managers, Banks, Electric Utilities & Power Generators, Food & Beverage, Metals & Mining and Oil & Gas.
- Notes on adaptation, nature, just transition, Emerging Markets & Developing Economies (**EMDEs**) and Small to Medium-Sized Enterprises (**SMEs**).
- A Forward Pathway on transition plans, with considerations for the maintenance of a strong ecosystem around transition plans.

Furthermore, the TFMR, launched on 22 January 2024, aims to assess what the UK financial and professional services ecosystems need to achieve in order to become a leading hub for and provider of transition financial services.

It will explore how to create the conditions for:

- Scaling transition focussed capital raising with integrity.
- Maximising the opportunity for UK based financial services.
- Positioning the UK's professional services ecosystem as a global hub.

Extending the TPT's mandate ensures alignment with the TFMR and synergy between the two initiatives. By creating a period of overlap, the UK will be able to fully support these developments at home and abroad. The extension to the TPT's mandate will allow the TPT to fully contribute to the work of the TFMR, drawing on the knowledge and networks that the TPT has established on transition finance and transition plans. It will also ensure globally consistent approaches and support market actors with the guidance and tools they need to deliver high quality transition plans.

2 February 2024 - New FCA webpage – Sustainability disclosure and labelling regime

The FCA published a new web page regarding its sustainability disclosure and labelling regime and what this means for firms.

In particular, the FCA has set out how firms should consider the regime and, where relevant, the steps to take before the new rules come into effect. However, this is not an exhaustive list.

The web page also touches on:

- Implementation timeframes.
- Investment labels.
- General – including fund of funds.
- Naming and marketing.

8 March 2024 - House of Commons' Treasury Committee Report: Sexism in the City

The House of Commons Treasury Committee (**the Committee**) published a report as part of its current inquiry into Sexism in the City, in order to evaluate the progress made in relation to gender based inequality within the financial services sector, since its predecessor Committee highlighted the problem in 2018. The issues raised by the 2018 Committee included the underrepresentation of women in senior positions, as well as a large difference in average pay between men and women.

The report however, outlines that there has been a significant lack of progress since 2018.

Key findings

Key findings of the report can be summarised as follows:

- Many of the barriers to women identified in 2018 remain stubbornly in place and firms still treat diversity and inclusion as a 'tick box' exercise rather than a core business priority, despite clear evidence that diverse firms achieve better results.
- There have been only incremental improvements in the proportion of women holding senior roles in financial services firms.
- Sexual harassment and bullying remain prevalent in financial services and firms are dealing with allegations of such behaviours poorly.
- There is a widespread misuse of non-disclosure agreements in the sector, which have the effect of silencing the victim of harassment and forcing them out of an organisation, while protecting perpetrators.
- The average gender pay gap in financial services remains the largest gender pay gap of any sector in the UK economy.

Responsibility for tackling these issues and driving much-needed cultural change must sit with the senior leadership and boards of firms. Investors also have a key role to play in holding firms to account, as do the Government and financial regulators in driving change, combatting sexual harassment, and bullying.

The report further states that neither of the Government's flagship policies on gender equality (the gender pay gap reporting regulations introduced in 2017 and HM Treasury's Women in Finance Charter introduced in 2016), have brought about the extent of change that was hoped for.

The report welcomes the proposals by the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority to strengthen their non-financial misconduct rules and enhance their ability to act against individuals in sexual harassment cases. However, it expresses concern around the regulators' proposals to require firms to implement strategies, collect and report data and set targets, as it states well-run firms should be doing this anyway. These costly initiatives with unclear benefits would likely be treated by many firms as another 'tick-box' compliance exercise, rather than necessarily driving much-needed cultural change. The requirements would also not apply to smaller firms with fewer than 251 employees. This is concerning as the Committee's anecdotal evidence suggests issues are more prevalent within such firms.

FCA statement

The FCA has released a statement regarding the report.

The statement highlights that the FCA shares the Committee's view that there is an important role for regulators to play in tackling gender inequality, given the link to the FCA's statutory objectives and the relevance for financial services' competitiveness. It also states that the FCA agrees with the Committee on the importance of calling on boards and senior leadership of firms to take greater responsibility for delivering change.

The statement references the FCA's consultation on proposals to boost diversity and inclusion within the financial services sector and welcomes the Committee's feedback on it. The FCA will reflect on the range of views received, particularly those of the Committee, on its proposals that firms should set their own diversity and inclusion strategy and collect, report, and disclose data against certain characteristics. The FCA will also consider how it can tighten expectations on firms to tackle misconduct such as bullying and sexual harassment, through considering the Committee's recommendations.

European Union

18 January 2024 - EBA consults on guidelines on the management of ESG risks

The European Banking Authority (**EBA**) issued a consultation on draft guidelines on the management of ESG risks.

The EBA has developed these draft guidelines in line with its roadmap on sustainable finance and they address the mandate specified in letters a, b, and c of Article 87(a)5 of the Capital Requirements Directive (letter d of that mandate referring to the criteria for setting specific climate-related scenarios will be addressed through subsequent EBA work).

The draft guidelines seek to enhance the identification, measurement, management and monitoring of ESG risks by institutions and support their safety and soundness as they are confronted with the short, medium and long-term impact of ESG factors. The draft guidelines also contain requirements as to the internal processes and ESG risk management arrangements that institutions should have in place, including specific plans to address the risks arising from the transition and process of adjustment to relevant sustainability legal and regulatory objectives. The draft guidelines also include minimum reference methodologies to be developed and used by institutions to measure ESG risks. The focus is on the main features of key types of methodologies with some flexibility given to institutions as regards specific details.

The deadline for comments on the consultation is 18 April 2024. The EBA expects to finalise the draft guidelines by the end of this year.

23 January 2024 - ECB report on risks of misalignment of banks' financing with the EU climate objectives and assessment of the alignment of the EU banking sector

The European Central Bank (**ECB**) published a report focusing on the transition risks stemming from banks' credit portfolios.

Key takeaways from the report include:

- Risks in relation to the transition towards a decarbonised economy can have a significant effect on the credit portfolio of a financial institution. These transition risks are drivers of credit, market, operational and liquidity risk. It is thus vital for financial institutions to assess the risks arising from the transition towards a decarbonised economy.
- If the transition towards a decarbonised economy becomes disorderly, there will be a growing need to quantify the transition risks in banks' credit portfolios. Accordingly, alignment assessment is widely recognised as a useful method for quantifying transition risks in a credit portfolio. Although other methods give an indication of the carbon intensity of a credit portfolio at a certain point in time, alignment assessment provides insight into whether the corporations in a credit portfolio are moving towards low-carbon production.
- Based on forward looking production data for assets within the sectors most impacted by the shift towards a low-carbon economy, the report assesses the risk stemming from the (mis)alignment of banks' financing with EU policy objectives. An alignment assessment is conducted using the open-source Paris Agreement Capital Transition Assessment (**PACTA**) methodology to determine bank-wide alignment rates. To assess and benchmark alignment at bank level, the technology-level (mis)alignments from PACTA are aggregated to present a net alignment rate for a given bank. In the future however, the PACTA approach to alignment assessment could be further developed to cover a broader array of sectors, such as shipping and aviation, as well as other types of risk, for example market risk.
- The euro area banking sector shows substantial misalignment and may therefore be subject to increased transition risks. Furthermore, around 70% of banks are also subject to elevated reputational and litigation risk.
- Banks can apply the approach used in the report to further develop their alignment assessment capabilities to help determine the transition risks they face as well as meet the impending disclosure requirements under the European Banking Authority's Implementing Technical Standards on Pillar 3.

Frank Elderson (Member of the Executive Bord of the ECB and Vice Chair of the Supervisory Board of the ECB) has also written a blog on the ECB's Supervision Blog titled "Failing to Plan is Planning to Fail". He argues that misalignment with the EU climate transition pathway can lead to material financial, legal and reputational risks for banks. It is therefore crucial for banks to identify, measure and most importantly, manage transition risks, just as they do for any other material risk.

14 February 2024 - Council of the EU – final compromise text – proposed Regulation on the transparency and integrity of ESG rating activities

The Council of the European Union published the final compromise text of the proposed Regulation on the transparency and integrity of ESG rating activities, and amending Regulation (EU) 2019/2088. An 'I' item note has also been published.

15 March 2024 - Compromise package – Proposed Directive on Corporate Sustainability Due Diligence

The Council of the EU published a letter it had sent to the Chair of the European Parliament's Committee on Legal Affairs concerning the proposed Directive on Corporate Sustainability Due Diligence and amending the Whistleblower Directive. The letter states that following informal trilogue between the three institutions on 13 December 2023 a draft compromise package (set out in an annex to the letter) has now been agreed by the Permanent Representatives Committee. The letter further provides that should the European Parliament adopt its position at first reading in the form set out in the compromise package the Council of the EU would approve the European Parliament's position.

26 March 2024 - ESMA consults on draft technical standards under the EU Green Bond Regulation

On 26 March 2024, the European Securities and Markets Authority (**ESMA**) issued a consultation paper containing draft technical standards supplementing the EU Green Bond Regulation. The consultation paper is the first of two consultations planned by ESMA with the other set for Q1 2025.

The EU Green Bond Regulation lays down uniform requirements for issuers of bonds that wish to use the designation 'European green bond' or 'EuGB' for their environmentally sustainable bonds. The Regulation establishes a registration system and supervisory framework for external reviewers of European green bonds and to prevent greenwashing in the green bonds market in general, the Regulation also provides for some voluntary disclosure requirements for other environmentally sustainable bonds and sustainability-linked bonds issued in the EU.

In this consultation paper ESMA sets out four draft regulatory technical standards and one draft implementing technical standard relating to the registration and supervision of entities interested in becoming external reviewers of EU green bonds. They also seek to clarify the criteria used for assessing an application for registration by an external reviewer. The draft technical standards cover the:

- Criteria to be assessed at the time of registration relating to senior management, board members and analytical resources per Article 23(2)(a) and(b) EU Green Bond Regulation.
- Criteria to assess sound and prudent management and management of conflicts of interest per Article 27(1) and (2) EU Green Bond Regulation.
- Criteria for assessing knowledge and experience of analysts per Article 28(1) and (3) EU Green Bond Regulation.
- Criteria applicable to outsourcing of assessment activities per Article 33(7) EU Green Bond Regulation.
- Standard forms, templates and procedures for the provision of registration information per Article 23(7) EU Green Bond Regulation.

Next steps

The deadline for comments on the consultation paper is 14 June 2024.

ESMA will consider the feedback received to the consultation and submit the draft technical standards to the European Commission by 21 December 2024.

France

7 February 2024 – The Authorité des Marchés Financiers publishes briefing note on preparing for the CSRD

The Authorité des Marchés Financiers (**AMF**) has published a briefing to help prepare firms for the Corporate Sustainability Reporting Directive (**CSRD**) and its mandatory European Sustainability Reporting Standards (**ESRS**) which gradually applied as of January 2024.

In its briefing, the AMF proposes the following points that listed companies may consider for the preparation and correct implementation of this new regulatory framework:

- **Analysing the legislation and developing expertise.** Given the novelty, complexity and density of the new requirements introduced by the CSRD and the ESRS, a thorough reading and analysis of the texts are the first essential step in their implementation, to ensure a good understanding of the numerous disclosure requirements (nature of expected qualitative and quantitative information, links between the various requirements and datapoints, etc.).
- **Working in 'project' mode through involving all of the 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 the new regulatory framework.

- **Adapting tools for data collection and construction.** It is important to anticipate and address data compilation, collection, and the improvement of data reliability, these matters possibly implying a more or less substantial adaptation of reporting tools and channels, or an organisational change.
- **Establishing robust internal control of sustainability reporting.** Robust internal control and substantial involvement of the governing bodies will undoubtedly be very beneficial in the process of implementing the CSRD and ESRS within companies. 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.

20 February 2023 – AMF publishes position paper outlining key principles for SFDR review

The AMF has published a position paper outlining the key principles it believes should guide the Sustainable Finance Disclosure Regulation (**SFDR**) review.

In the position paper the AMF highlights, among others, the following:

- The new framework should provide clarity in terms of product categorisation and thus include product categories based on objective minimum criteria.
- Conversely, the review should preserve a wide range for disclosures, seeking simplification wherever possible to focus on relevant disclosures for investors and taking into account other developments in the sustainable finance agenda.
- The AMF advocates for an EU categorisation system to enable, above all, end investors to identify and compare financial products that make contributions to sustainability factors. These new product categories should rely on minimum criteria to ensure that products belonging to them attain a minimum level of contribution.
- The categorisation system should rely on objective minimum criteria that leave no room for interpretation.
- Compliance with the new categorisation system should be subject to Member State competent authority supervision.
- The existing Article 6 of the SFDR could be redrafted to become more specific, primarily by spelling out the types of risks to be considered and the expected disclosures relating to the methodology used to quantify their impact on product return.

United States – SEC and CFTC

6 March 2024 – New NRF briefing note: SEC adopts climate-related disclosure rules

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Australia

1 February 2024 – Keynote address on ASIC's 2024 enforcement priorities

The Australian Securities and Investments Commission (**ASIC**) Deputy Chair, Sarah Court, delivered a keynote address regarding ASIC's 2024 enforcement priorities in the superannuation sector. ASIC reiterated that greenwashing and misleading or deceptive conduct with respect to environmental and sustainability claims in the superannuation sector would be a key enforcement priority for Australia's primary financial services regulator.

ASIC indicated that in 2024, its focus would be on:

- Net zero statements and targets made without merit.
- The use of terms like 'carbon neutral', 'clean' or 'green' not founded on reasonable grounds.
- Use of inaccurate labelling or vague terms in sustainability-related funds.

ASIC stated that it expects boards to engage directly on sustainability claims, including aspirational statements, targets, active stewardship commitments and investment descriptions. ASIC has previously indicated that it plans to widen its focus in 2024 to director and officer duties in the context of greenwashing.

7 February 2024 – Report on the proposed Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 [No.2] (Cth)

The Australian Environment and Communications Legislation Committee (the **Committee**) has tabled its report and findings on the proposed *Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 [No.2]* (Cth). The Bill was intended to require Ministerial Review of projects having regard to carbon budget and emissions targets. The Committee has recommended that the Bill not be passed.

19 March 2024 – ASIC guidance to small businesses on greenwashing

ASIC has issued guidance to small businesses on current developments and ways to avoid greenwashing.

ASIC have indicated that the majority of small and medium sized businesses will not be required to disclose climate-related information under the the proposed Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill (discussed above) if it is ultimately passed. However, ASIC have noted that because many small to medium sized businesses form part of the supply chain for larger businesses, this may require them to engage with climate reporting considerations over time, even though they do not have direct climate reporting obligations. This may arise where a large business is required to disclose their scope 3 emissions (currently envisaged under the Bill), which may include emissions that occur within the supply chain.

ASIC have indicated that when the mandatory climate-related financial disclosure laws come into effect, ASIC will work with small business representatives to develop practical guidance for small businesses in relation to the requirements of the new laws and how the new laws may impact them.

27 March 2024 – Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (Cth)

On 27 March 2024, the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (Cth) was introduced to the Australian Federal Parliament. The Bill is part of the Australian Government's commitment to implement mandatory climate-related financial reporting for large entities.

The Bill includes updated legislation setting out the government's proposed climate-related financial disclosures regime.

While it was originally expected that the requirements for mandatory reporting would be gradually phased-in from 1 July 2024, the commencement date has been delayed under the Bill with reporting to now commence from 1 January 2025.

28 March 2024 – ASIC first greenwashing penalty proceeding

ASIC has succeeded in its first greenwashing civil penalty proceeding against an Australian investment management firm (the **Firm**).

ASIC alleged that the Firm made false and misleading statements in representing that certain ESG exclusionary screens applied to investments in its 'Ethically Conscious Global Aggregate Bond Index Fund (Hedged)' (**Fund**).

In a liability hearing in early March, the Firm made admissions to the effect that:

a. it failed to screen all issuers of securities, only screening companies, and generally only publicly listed companies;
b. it failed to research each entity within a company with multiple issuing entities; and
c. its fossil fuel screening failed to exclude companies involved in thermal coal exploration, exploitation and transportation.

The Firm disputed the scope of the contraventions by contending that their product disclosure statements (**PDSs**) did not represent that *all* securities, including bonds issued by governments or government owned entities, would be screened against ESG criteria. Instead, the Firm submitted that the PDSs represented that only securities issued *by companies* were screened against the criteria.

In a judgment handed down on 28 March 2024, Justice O'Bryan accepted the Firm's submission that its misleading representations were only in respect of securities issued by companies. Ultimately, and consistent with the Firm's admissions, Justice O'Bryan held that the Firm engaged in misleading or deceptive conduct and made false or misleading representations in contravention of the ASIC Act when it made representations that securities issued by companies had been researched and screened against the ESG criteria. His Honour found that unscreened securities made up 74% of the value of the Fund, with 167 securities in total violating the ESG criteria. A penalty hearing in the matter has been listed on 1 August 2024.

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

23 January 2024 - NGFS technical document providing guidance on the purpose and use of the NGFS scenarios

The Network for Greening the Financial System (**NGFS**) has published a technical document, NGFS scenarios: Purpose, use cases and guidance on where institutional adaptations are required.

The NGFS scenarios were introduced in 2020 and have been refined and updated over four iterations. They have assisted central banks, supervisors, and other financial actors in exploring various potential future outcomes of climate change and the transition. However, the NGFS scenarios are not an end-state toolkit and users need to review assumptions and validate scenarios.

The technical document sets out the purposes and practical applications of the NGFS scenarios, as well as acknowledges the need for scenario users to clarify what they intend to achieve and to consider how the scenarios they use allow them to meet their objectives and/or specific requirements. The technical document also contains frequently asked questions about the scenarios.

The frequently asked questions include how the NGFS would suggest that institutions adapt the scenarios if they so choose. The NGFS suggests that how to adapt the scenarios depends on the country context, purpose of the exercise, and the chosen methodology. A non-exhaustive list of options is provided but institutions can consider other approaches to use and adapt the scenarios. The non-exhaustive list of options includes that users could consider adding hazards that are relevant to their scope, such as wildfires, for dense forestry areas, or coastal flooding, for coastal areas. In addition, they could consider increasing the severity of physical damages to explore tail risk events. Changing the timeframe of the exercise could have a similar impact, as physical risk impacts in the distant future are likely to be more severe than those with a short-term horizon, which are typically used in risk assessments. From the perspective of a longer timeframe, the NGFS suggests that institutions might also opt to include a tipping point in their analysis and explore the potential impacts of such risks materialising. Moreover, users could combine, align, or change existing scenarios to develop a custom scenario that suits their needs best.

20 February 2024 – FSB Chair publishes letter to G20 Finance Ministers and Central Bank Governors on promoting global financial stability

The FSB published a letter from its Chair, addressed to G20 Finance Ministers and Central Bank Governors on global financial stability.

In the letter, the Chair of the FSB makes the following remarks regarding ESG:

- The FSB will continue to coordinate international work through the FSB roadmap to address financial risks from climate change.
- This year, the FSB will focus on deepening its analysis of climate-related financial risks to financial stability and examining the relevance of transition plans for financial stability.
- The FSB will also report in November on further progress on implementation of disclosures and reporting in line with international standards, in coordination with the ISSB, IOSCO and others.

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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