ESG STANDARDS, REGULATIONS, AND IMPLEMENTATION

Reference Guide on Australia, Brazil, Canada, Colombia, the European Union, Peru, the United Kingdom, and the United States

ISLP International Senior Lawyers Project

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FOREWORD

This Guide provides an overview of ESG-related trends and legal developments in Australia, Canada, the European Union, the United Kingdom, the United States, and three key countries of the Amazon basin: Peru, Colombia, and Brazil. ISLP developed this ESG guide with the support of the Gordon & Betty Moore Foundation, through the Foundation's Andes Amazon Initiative – Drivers Strategy. The information presented in this Guide provides readers with an improved understanding of ESG trends, enabling constructive engagement with ESG issues within each of the countries and regions discussed, whether in the context of project development, project financing, or investing in or operating and managing a company.

"ESG" stands for environmental, social, and governance; ESG refers to a group of non-traditional factors that may impact a company's financial performance and operations or may be used by firms to develop financial and other products. Companies are increasingly communicating ESG data to a broad set of stakeholders: shareholders, employees, customers, investors, lenders, regulators and the communities in which such companies operate (collectively, "stakeholders). The Center for Audit Quality[2] defines each of the "E," "S," and "G" factors as follows:

[2] Center for Audit Quality, "The Role of Auditors in Company-Prepared ESG Information: Present and Future" (June 2020), https://www.thecaq.org/rota-esg/ Accessed on September 22, 2022.

> The E, or environmental, component of ESG information encompasses how a company is exposed to, and manages risks and opportunities related to, climate change, natural resource scarcity, pollution, waste, biodiversity loss, and other environmental factors.
>
> The S, or social, component of ESG includes information about a company's values and business relationships. For example, social topics include labor as it relates to human capital management and supply-chain standards, employee health and safety, product quality and safety, privacy and data security, and diversity and inclusion policies and efforts.
>
> The G, or governance, component of ESG incorporates information about a company's corporate governance. This includes information on a company's board and board committee structure; demographic diversity of boards of directors and executive management; executive compensation; critical event responsiveness; corporate resiliency; and policies on lobbying, political contributions, and bribery and corruption.

As ESG issues have evolved in the marketplace, stakeholders can erroneously refer to "investments in ESG" or use the term ESG as a "short-hand" for sustainable or impact investing. It is better to consider ESG as a framework or analytical tool designed to facilitate sustainable investing. Financial products can be designed and marketed with ESG-related goals and considerations in mind; however, ESG is not, in and of itself, the product. Instead, ESG principles are holistic means by which stakeholders can use financial and non-financial factors when making strategic decisions.

References to "ESG" are an outgrowth of corporate social responsibility and gained attention and support following the publication of the UN Global Compact's report "Who Cares Wins"[3] in 2004, which was spearheaded by then UN Secretary-General Kofi Annan through the UN Global Compact (today, considered the world's largest voluntary corporate sustainability initiative) in collaboration with the Swiss Federal Department of Foreign Affairs, and endorsed by 23 financial institutions collectively representing more than US$6 trillion in assets. The report laid the foundation for ESG investing and was a catalyst to the creation of the Principles for Responsible Investment (PRI), which today has over 4,900 signatories with US$121.3 trillion in assets.[4] The PRI's first principle provides that investors "will incorporate ESG issues into investment analysis and decision-making processes."[5] Many companies look for ESG initiatives that align with their environmental and social impact goals in the communities in which they do business.

In 2019, the Business Roundtable, an association of chief executive officers of America's leading companies, released a new "Statement on the Purpose of a Corporation," which committed their companies to serving their corporate purpose as well as delivering on commitments to all of their Stakeholders. The reframing of this statement presented a major shift from the Business Roundtable's prior

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[3] UN Global Compact, "Who Cares Wins" (2004), https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf. Accessed on October 10, 2022.

[4] UNPRI, "Annual Report" (2022), https://www.unpri.org/annual-report-2022/signatories. Accessed on October 10, 2022.

[5] "Principles for Responsible Investment," https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment. Accessed on October 10, 2022.

endorsement of the principle of shareholder primacy (i.e., the historical proposition that a corporation exists principally to serve the interests of their shareholders), in place since 1997. The new statement outlined a "modern standard for corporate responsibility" and a renewed focus on long-term corporate sustainability.[6]

ESG principles have recently been the subject of significant criticism, particularly in the United States. Some critics have voiced concerns regarding how ESG actually facilitates long-term value creation or that adherence to ESG principles delivers results consistent with its promise. In October 2022, an opinion piece in *The Wall Street Journal* referred to a new, US$100 million energy index fund established by Strive Asset Management which will, in part, use "proxy measures to persuade companies to pursue…maximizing return to shareholders" in lieu of what is described as "politicized investment."[7] Likewise, several states in the US including, among others, Florida and Texas, submitted letters to major asset managers and pension administrators questioning whether ESG commitments are coming at the expense of shareholders.[8] Indeed, Florida recently announced that it was divesting approximately US$2 billion from a major asset manager that uses ESG principles as part of its investment strategy. Despite this evolving push-back against ESG, as noted more fully below, demand for ESG-related products and assets continues to

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[6] Business Roundtable, "Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'" (August 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans. Accessed on October 10, 2022.

[7] Wall Street Journal, "The Welcome Pushback Against Politicized Investment Managers" (May 19, 2022), https://www.wsj.com/articles/politicized-passive-investment-index-funds-managers-blackrock-esg-energy-prices-larry-fink-proxy-voting-fracking-investor-democracy-is-expected-index-act-11652992438. Accessed on November 2, 2022.

[8] Ibid.

outstrip supply, and globally speaking, such demand is not expected to abate in the foreseeable future.

There has been significant momentum in developing ESG-related disclosure frameworks for public and private companies, including the Global Reporting Initiative (GRI), the Climate Disclosure Standards Board, the Sustainability Accounting Standards Board Standards (SASB Standards), and the Task Force on Climate-related Financial Disclosures (TCFD). Building on the TCFD, the Task-Force on Nature-related Financial Disclosures, consisting of 34 members with US$19.4 trillion in assets, was announced in July of 2020, and is working with market participants to develop a framework for organizations to report and act on their evolving nature-related risks.

In response to growing calls for consolidation of the multitude of reporting standards and frameworks, at the Twenty-Sixth United Nations Framework Convention on Climate Change Conference of the Parties (COP 26) in 2021, the International Financial Reporting Standards (IFRS) Foundation Trustees announced the establishment of the International Sustainability Standards Board (ISSB) to consolidate content from the various reporting standards and frameworks and to develop a "comprehensive global baseline of sustainability disclosures."[9] The ISSB has to date released two proposed standards for consultation, one with respect to

[9] IFRS, "International Sustainability Standards Board" https://www.ifrs.org/groups/international-sustainability-standards-board/. Accessed on October 10, 2022.

general sustainability-related disclosure requirements, and the other with respect to climate-related disclosure requirements.[10]

This ESG momentum is developing alongside the multitude of challenges facing the international community, ranging from climate change, the continued presence of forced and child labor in global supply chains, an unprecedented loss of biodiversity, and rising inequality. These environmental and social challenges present short-term and long-term risks for companies, and investors and other stakeholders have taken note. As Larry Fink, CEO of BlackRock wrote in his 2022 Letter to CEOs:[11]

> "In today's globally interconnected world, a company must create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders. It is through effective stakeholder capitalism that capital is efficiently allocated, companies achieve durable profitability, and value is created and sustained over the long-term… We focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients. That requires understanding how companies are adjusting their businesses for the massive changes the economy is undergoing."

Reportedly, ESG-related investments represent approximately US$20 trillion in assets under management or approximately 25% of all professionally managed assets around the world. According to BlackRock, sustainable investments alone total

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[10] IFRS, "ISSB delivers proposals that create comprehensive global baseline of sustainability disclosures" (March 31, 2022) https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/. Accessed on October 10, 2022.

[11] Larry Fink's 2022 Letter to CEOs: The Power of Capitalism.

approximately US$4 trillion.[12] At these levels, and as discussed more fully herein, incorporating ESG principles into a company's long-term planning and strategy must be taken seriously.

The focus on ESG largely has been driven by stakeholders who take a long-term view to value-creation and corporate sustainability. Companies increasingly are encouraged to consider (i) how ESG commitments affect their business, both in terms of risks and opportunities, and (ii) their own ESG footprint. The ESG factors relevant or material to a company will depend on the industry, the stage of operations, the geographic location(s) and regulatory frameworks within which it operates, among other factors.

Regulators around the world are also responding. Examples of legislation related to ESG issues that are either in place or in progress in various jurisdictions globally include: modern slavery legislation, anti-corruption and bribery legislation, the regulation of greenhouse gas emissions and carbon pricing, incentive programs through tax legislation and otherwise to encourage the use of renewable energy, the phasing out of single-use plastics packaging and legislation aimed at reducing waste generation and moving towards a circular economy, and ESG- and climate risk-related disclosure requirements for public companies.

Regulatory initiatives have also played a critical role in driving the private sector to focus on ESG. As stakeholders demand ESG-related products and strategies, regulators have focused on ensuring that such products are consistent with the claims made about them (e.g., whether, in fact, a product was developed using

[12] Id.

sustainable processes or is sustainable itself). This has resulted in increasing regulatory scrutiny of such products and claims, and the modification of disclosure frameworks to facilitate the collection and dissemination of consistent, comparable, and reliable ESG metrics. Attention to "greenwashing" claims continues to increase throughout the world, both in national regulatory systems and in the global commons.

More broadly, stakeholders have called on regulators to focus on developing regulatory structures that result in credible, comparable, and transparent disclosure regimes, the idea being that inconsistent regulation across jurisdictions leads to inefficient markets, unnecessary compliance costs, and increased risks in relation to greenwashing claims. Further, as capital continues to flow into ESG-related investment products and assets, it will be critical to ensure that such capital flows are supported by transparent disclosure requirements. Indeed, there is a growing movement to develop international reporting standards in reference to initiatives such as those mentioned above.

On a jurisdiction-by-jurisdiction basis, we can consider the following examples included in this guide:

- In the United States, the regulation of ESG-relevant disclosures is primarily being driven by the US Securities and Exchange Commission (SEC), which has engaged in significant rulemaking initiatives covering climate-related risks, human capital management, cybersecurity, and how investment advisors and managers develop, offer, and manage ESG-related financial products. The SEC's rulemaking is part of a broader "whole of government" approach

adopted by the Biden-Harris administration in relation to addressing climate change risks in particular.

- In Europe, key regulatory drivers include the Sustainable Finance Disclosure Regulation (SFDR) and Taxonomy Regulation. The SFDR represents a disclosure regime around ESG issues for investment managers and other market participants (e.g., pension managers and other types of institutional investors and asset managers). The Taxonomy Regulation chiefly focuses on environmental issues; however, it may provide a potential framework that can be used to address social and governance issues, too.[13] The United Kingdom is pursuing its own regulatory initiatives with respect to ESG, having issued new disclosure requirements that are based on the TCFD framework.
- In Latin America, regulatory authorities are increasingly focused on ESG issues. For instance, Chilean and Mexican authorities have been enforcing regulations regarding ESG-related risk disclosures and reporting requirements for pension funds.
- With regard to Asia-Pacific, Hong Kong and Singapore are leading the way, with regulators pushing market actors to adopt more robust ESG risk and reporting practices, particularly with respect to climate-related issues as these jurisdictions focus on the energy transition, including the development of a "green taxonomy" in certain jurisdictions. Based on media reports, much of the regulatory initiatives in Asia are expected to be based on the TCFD framework.

[13] Comments by Akin Gump Strauss Hauer & Feld LLP partner Ezra Zahabi in "European Union Further Refines Its Sustainable Investment Regulations", January / February 2021.

The Amazon basin, an area often referred to as the 'lungs of the Earth,' is a critical example of the potential risks presented by climate change. At COP 26, the Scientific Panel for the Amazon released the Amazon Assessment Report, which warns that the Amazon is "quickly approaching a potential catastrophic tipping point due to deforestation, degradation, wildfires, and climate change." The solutions proposed by the report (including technological innovation and nature-based solutions) require significant effort by the global community, companies included.[14] Separately, but of relevance to Latin America, is the complexity regarding lithium extraction in the "Lithium Triangle", consisting of Chile, Argentina, and Bolivia. The Lithium Triangle is thought to hold more than 75% of the world's lithium supply, which could be greatly beneficial for powering the anticipated transition to electric vehicles, energy storage systems, and other electronics. However, there are significant environmental and social impacts related to lithium mining. Any mining and related development in the Lithium Triangle, and elsewhere, will need to carefully engage with ESG-related issues.

In this Guide, you will find helpful overviews of the current most prevalent ESG issues, trends in reporting and disclosure requirements, ESG-related penalties and legislation, and legal challenges for each of the following jurisdictions: Australia, Canada, the European Union, the United Kingdom, the United States, and three key countries of the Amazon basin: Peru, Colombia, and Brazil.

[14] Institute for Biodiversity and Ecosystem Dynamics, University of Amsterdam, "Amazon approaches catastrophic potential tipping point" (November 12, 2021) https://ibed.uva.nl/content/news/2021/11/amazon-approaches-catastrophic-potential-tipping-point.html?cb. Accessed on October 10, 2022.

The information presented in this Guide will enable stakeholders to engage constructively with current ESG issues, whether in the context of project development specifically, or business operations more generally.

EXECUTIVE SUMMARY

The following Guide aims to assist all social actors to navigate and improve both government and private sector actions on environmental, social, and governance (ESG). The assessment looks at ESG in several significant countries as part of a larger push by the International Senior Lawyers Project (ISLP) and the Gordon and Betty Moore Foundation's Andes-Amazon Initiative. The sample includes developed countries with significant experience implementing ESG-related practices through investing and global economic activities, specifically: the United States, the United Kingdom, the European Union, Canada, and Australia. The Guide also surveys ESG-related programs in Brazil, Peru, and Colombia, nations with physical control over the Amazon basin, but also with nascent capital markets and opportunities for economic growth. All of these nations are striving to improve ESG practices, whether through government action, unsolicited private action, or public-sentiment-driven private action.

The Guide is organized by country, with subsections covering ESG as well as related topics such as reporting, disclosures, legal challenges, legislation, legal enforcement, and penalties. The developed countries sections tend to be more comprehensive, as their regulatory and legal regimes are more robust.

The Guide highlights the respective nations' progress on ESG issues. As you will see, the EU particularly is far ahead on ESG issues as the European Commission and

private actions have placed emphasis on environmental and social issues for nearly two decades. The Guide extensively highlights France among the EU nations as being a leader in this respect. It also details examples of cooperation among these nations, such as Australia's mining sector using the Canadian Mining Authority's best practices and the British Embassy in Peru working to give guidance to the Lima Stock Exchange on green bonds. The Guide also illustrates how political and social movements within one country can spread to others, such as the Black Lives Matter movement in America, which has inspired regulatory changes throughout the world.

Finally, the Guide highlights how each nation's own challenges, legal systems, and systems of government present certain challenges as well as opportunities with respect to ESG. As a federation, the EU must accept the autonomy of each of its member states. Similarly, the United States and Canada sometimes yield ESG actions to their respective states or territories. For example, California and Illinois have taken proactive approaches to climate change and inequality when their leadership and citizenry demanded action and when they believed that the federal government was not addressing those two issues appropriately.

The Guide also shows that these nations share many views on ESG. Climate change features most prominently in ESG issue policies and programs, followed by human rights abuses. However, certain countries, particularly the UK, note that climate change is not the only environmental challenge they face.

Finally, the Guide includes four annexes that offer additional information on the highlighted standards, organizations, and resources focused on ESG.

AUSTRALIA

ESG developments in Australia have been driven by market expectations and legal challenges that are ESG-based. Although these developments have tended to focus on the climate and environmental areas and have been centered around the mining, energy, and agricultural sectors, Australian regulatory bodies have developed guidelines and policies in relation to ESG and disclosures that, while not mandatory, are applicable across industries. There are currently no ESG-specific regulations in Australia. Corporations are, however, subject to general disclosure obligations, which include material risk assessments, and directors are under obligation to exercise reasonable care and diligence and to act in the best interest of the corporation. Additionally, legislation with respect to modern slavery and employment equity requires certain disclosures. The integration of ESG factors into business operations and disclosures is expected to increase with heightened measures imposed by Australian regulatory bodies.

Current most prevalent ESG issues[15]

Environmental Issues

Australia's economy is heavily dependent on the mining, energy, and agriculture

[15] This chapter was last updated on November 18, 2022

sectors, with a significant majority of Australian exports being from these sectors.[16] Although Australia has significant potential and public support for moving towards renewable energy (in particular solar), the liquefied natural gas (LNG) and coal industries provide a large number of Australian jobs and hold significant political and economic power there. General issues in Australian ESG developments are framed within this context. However, in the face of mounting public and private pressure, mining and energy producers in Australia have begun to make commitments to decarbonize their operations (with varying levels of public approval).

Climate litigation in Australia has generally involved isolated challenges to individual project approvals and has met with limited success.[17] However, within the last three to four years, climate non-governmental organizations (NGOs) have taken a more cohesive and strategic approach to climate litigation, with generally applicable duties (such as a superannuation trustee's obligation to manage funds carefully, or an administrative decision-maker's obligation to consider the physical harms caused by a proposal) within a climate-focused lens. This approach has seen markedly more success. All Australian states and territories have separately committed to net-zero targets by 2050, whilst the national Commonwealth Government in June 2022 committed to a new target of a 43% reduction of

[16]See Australian Bureau of Statistics. "International Trade in Goods and Services, Australia", releaded on November 3, 2022, https://www.abs.gov.au/statistics/economy/international-trade/international-trade-goods-and-services-australia/latest-release#goods-and-services-credits-exports-seasonally-adjusted

[17]Berry, Anna-May (et.al.). "The changing 'climate' of litigation in Australia" https://www.lawyersweekly.com.au/biglaw/34669-the-changing-climate-of-litigation-in-australia.

greenhouse gas emissions by 2030, to below 2005 levels.[18] Australia does not have a carbon tax or mandatory emissions trading scheme, instead relying on a "technology-based approach" by which the government invests in emissions reduction technologies.[19]

Social Issues

The main development in the social component of ESG in Australia has been the introduction of the 2018 Modern Slavery Act (Commonwealth Act or Cth) (MS Act).[20] The MS Act requires that eligible corporations submit Modern Slavery Statements which must set out the reporting entity's actions to assess and address modern slavery risks in their global operations and supply chains. For the first full reporting cycle under the Act, which ended on June 30, 2021, there were close to 2,500 statements submitted to the Register, representing close to 4,500 entities[21].

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[18] The May 2022 Federal elections resulted in a new government, which led to a significant improvement in targets and the passing of the Climate Change Act(Cth) 2022 in September 2022. The Act operates as 'umbrella' legislation to implement Australia's net-zero commitments and codifies Australia's net 2030 and 2050 GHG emissions reductions targets under the Paris Agreement. See https: //www.pm.gov.au/media/australia-legislates-emissions-reduction-targets; and https://www.theguardian.com/australia-news/2022/sep/08/australian-parliament-passes-first-climate-change-legislation-in-a-decade.

[19] In particular, the Commonwealth Government is investing in hydrogen technologies, both "green" and "blue", with the intention that Australia could export hydrogen to the Asia-Pacific. Australia's National Hydrogen Strategy can be accessed at https://www.industry.gov.au/sites/default/files/2019-11/australias-national-hydrogen-strategy.pdf.

[20] Government of Australia. "Modern Slavery Act 2018" https://www.legislation.gov.au/Details/C2018A00153.

[21] Government of Australia, Department of Home Affairs. "Modern Slavery Act", Accessed on November 14, 2022, https://www.homeaffairs.gov.au/criminal-justice/Pages/modern-slavery.aspx.

Governance Issues

Australia's corporate regulators have been more active. The Australian Stock Exchange (ASX),[22] Australian Securities and Investments Commission (ASIC, Australia's corporate regulator),[23] the Australian Prudential Regulation Authority (APRA, Australia's banking regulator), and the Australian Accounting Standards Board (AASB) have each introduced quasi-mandatory ESG disclosure obligations on corporations which reflect market expectations on ESG disclosure. It is anticipated that as the market grows to expect higher levels of ESG disclosure, each of these regulators will impose higher minimum standards of ESG disclosure on listed and unlisted companies.

Is ESG reporting mandatory or otherwise regulated in Australia?

The National Greenhouse and Energy Reporting Act of 2007 (Cth) (NGER Act)[24] requires that corporations which meet a particular emissions or energy-consumption threshold must be registered on the National Greenhouse and Energy Register and provide an annual report to the regulator detailing the greenhouse gas emissions, energy production, and energy consumption of those corporations and members of their corporate group. A corporation meets the threshold for a financial

[22] Australian Council of Super Investors & Financial Services Council. "ESG Reporting Guide from Australian Companies" Accessed on September 18, 2022, https://www.asx.com.au/documents/asx-compliance/esg_reporting_guide_mar14.pdf.

[23] Sadauskas, Andrew. "Nine checkpoints for your ESG claims – because ASIC is now watching…closely" *The Fifth Estate,* June 14, 2022, https://thefifthestate.com.au/business/government/nine-checkpoints-for-your-esg-claims-because-asic-is-now-watchingclosely/.

[24] Government of Australia. "National Greenhouse and Energy Reporting Act 2007" https://www.legislation.gov.au/Details/C2019C00263.

year if it either emits greenhouse gasses equal to 50 kilotonnes or more of CO2, or produces or consumes 200 terajoules or more of energy; or if a facility within its corporate group emits 25 kilotonnes or more of CO2 or produces or consumes 100 terajoules or more of energy. The emissions threshold only deals with scope 1 emissions (e.g. those directly incurred in the process of extracting the minerals) or scope 2 emissions (e.g. those caused by the electricity requirements of scope 1), but not scope 3 emissions (e.g. downstream emissions).

For non-threshold emitters under the NGER Act, there is no express mandatory obligation to report on ESG matters. However, corporations are subject to general disclosure obligations under the Corporations Act 2001 (Cth) (Corporations Act), which requires them to disclose material risks in certain financial documents. These obligations are enforced by ASIC. ASIC has set out its interpretation of these obligations, and how and when ASIC will exercise its powers to enforce those obligations, in its Regulatory Guides. Accordingly, although they are not law per se and a court may disagree with their interpretation, failure to comply with the Regulatory Guides exposes a company to action by ASIC, including court proceedings.[25] Relevantly, the following developments have been undertaken by ASIC:

- ASIC Regulatory Guide 247 outlines what must be included in an operating and financial review (OFR), which forms part of the annual director's report. An OFR must be submitted by all public companies and large private companies.

[25] Australian Securities and Investment Commission (ASIC). "Regulatory guides" https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/.

It was updated in August 2019 to provide that an OFR must include a discussion of ESG risks in context and how those risks will be managed by the entity. It recommends that directors consider compliance with the TCFD recommendations.

- ASIC Regulatory Guide 228 outlines what must be included in a company's prospectuses. A prospectus is required to disclose all risks inherent in the proponent's business model. It identifies "climate change" and "environmental risk" as common risks that will need to be considered.

On November 26, 2021, APRA released a final prudential practice guide on climate change financial risks (Final CPG 229).[26] Like the ASIC regulatory guides, the Draft Guidance provides APRA's view of what constitutes sound practice in line with the binding Prudential Standards. Compliance with the Final CPG 229 is therefore not mandatory, but non-compliance may expose a financial institution to litigation. APRA is also undertaking a Climate Vulnerability Assessment (CVA) with Australia's five largest banks to provide insights into the potential financial exposure of institutions, the financial system, and the economy to the physical and transition risks of climate change.

[26]Available at:
https://www.apra.gov.au/sites/default/files/2021-11/Final%20Prudential%20Practice%20Guide%20CPG%20229%20Climate%20Change%20Financial%20Risks.pdf.

Relevant provisions of the ASIC Guidance on climate disclosure for financial institutions

1. APRA-regulated entities need to work with customers and counterparties to reduce their climate risks, including by providing financial support for those efforts;
2. An APRA-regulated entity's business operations are ultimately the responsibility of the board of directors. A prudent board should (1) ensure that there is appropriate understanding and discussion of climate risk at the board and sub-committee levels; (2) identify, measure, monitor, manage, and report on its exposure to climate risks; (3) set clear roles and responsibilities for senior management in the management of climate risks; and (4) hold management accountable for these responsibilities;
3. APRA-regulated entities would need to have written risk management policies and monitoring practices as well as appropriate plans to mitigate risks; and
4. Compliance with the TCFD recommendations is strongly advised, especially as regards scenario analysis and stress testing.

On a state level, the Climate Change Act 2017 applies in Victoria. A key aspect of it is the commitment to reduce Victoria's greenhouse gas emissions to net zero by 2050. Requiring government agencies to consider climate change in their decision-making and risk management is one of its guiding principles. Additionally, the Renewable

Energy (Jobs and Investment) Act 2017 (Vic) legislated renewable energy targets of 25% of electricity generated in Victoria by 2020, and 40% by 2025.

Under the Modern Slavery Act (MS Act), entities have obligations to make annual reports on forced labor within their supply chains if they are a "reporting entity."[27] Guidance as to the specific application of the MS Act, and the minimum standards expected of reporting entities are set out in guidance published by the Department of Home Affairs.[28] The content of a Modern Slavery Statement is set out in Section 16 of the MS Act. In essence, the Statement must describe:

- the reporting entity's structure, operations, and supply chains;
- the risks of modern slavery practices in its operations and supply chains;
- the actions taken by the reporting entity to assess and address those risks; and
- how the reporting entity assesses the effectiveness of those actions.

[27] An entity is a "reporting entity" if: (a) it has a consolidated revenue of at least AUD$100 million for the financial year (including from any entities the entity controls, using the test set out in the Australian Accounting Standards); and (b) it is an Australian entity, or carries on business in Australia during that financial year. Under Section 21 of the Corporations Act 2001 (Cth), a company relevantly 'does business in Australia' if it has a place of business in Australia, or administers, managers, or otherwise deals with property situated in Australia as an agent, legal personal representative, or trustee, whether by employees, agents, or otherwise. A company should know if it is 'carrying on business' in Australia because it will have had to register with ASIC. Further, a company that does not meet the revenue threshold can volunteer to prepare a Modern Slavery Statement by application to the Australian Border Force. The company can later change its mind, but will need to do so before the reporting period begins. Once the period begins, the company cannot withdraw and must provide a statement. The Commonwealth is also a reporting entity.

[28] Government of Australia. "Commonwealth Modern Slavery Act 2018 – Guideline for Reporting Entities" https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf.

Furthermore, New South Wales (NSW) and Tasmania have additional laws to regulate companies operating within their territories. NSW's Modern Slavery Act commenced on January 1, 2022. While the supply chain transparency regime under the Commonwealth Act still applies, the NSW Act establishes an Anti-Slavery Commissioner as an additional monitor. A similar legislation has been proposed in the Tasmanian legislature.

Under the Workplace Gender Equality Act 2012 (WGE Act),[29] relevant employers must lodge annual reports related to various gender equality indicators. An employer is a "relevant employer" if it is a registered university or employs 100 or more employees in Australia. The annual report must include details of:

- gender composition of the workforce;
- gender composition of the employer's governing bodies;
- equal remuneration between women and men;
- flexible working arrangements to support employees with family or caring responsibilities; and
- consultation with employees on issues concerning gender equality in the workplace.

ESG reporting is advanced in Australia on a regulator-by-regulator basis. ASX, ASIC, APRA, and AASB have all published independent guidance on the minimum expected standard and "best practices" for ESG reporting for organizations. Australian regulators recommend TCFD as the reporting standard, but this is not yet a

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[29] Government of Australia. "Workplace Gender Equality 2012"
https://www.legislation.gov.au/Details/C2016C00895.

mandatory requirement. The TCFD recommendations are generally recognized by Australian regulators including the ASX, ASIC, APRA, the AASB, and the Reserve Bank of Australia. None of these entities mandate compliance with the TCFD recommendations, but each of them encourages compliance.

Industry-specific Reporting

Extractives: The Minerals Council of Australia, the main industry body for Australian mining companies, has stated that it will impose the "Towards Sustainable Mining" (TSM) metric established by the Mining Association of Canada as a future condition of membership. It has indicated that starting in 2025, members will be required to assess and publicly report on their performance against TSM indicators. Independent verification will occur every three years, and a national Community of Interest Advisory Panel will review selected operations on a rotating basis.

Finance: A number of financial institution associations are dedicated to climate change management. However, none of them yet mandate ESG reporting or involve commitments to cease or moderate financing. These include Australian Sustainable Finance Initiative, Investor Group on Climate Change, and Climate League 2030. The Responsible Investment Association of Australia has a certification system that signifies that a financial advisor, or a product or service, has implemented an

investment style and process that systematically takes into account ESG considerations. Also of note is that each of Australia's major banks (Commonwealth Bank of Australia, National Australia Bank, Westpac, and ANZ Banking Group) subscribes to the Equator Principles.

Reporting in Australia is dependent on the nature of the information required. A listed company's market announcements, including its annual reports, are publicly available and can be found on the ASX website. Additionally, documents lodged with ASIC, including annual financial reports, can be purchased from ASIC Connect for a small fee. The public can also access the annual reports of large private companies on ASIC Connect.

Small private companies are generally not required to prepare financial reports unless directed to by ASIC, so their reports are not publicly available. Nevertheless, statements under the Modern Slavery Act[30] and the Workplace Equality Act[31] are all publicly available.

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[30] Australian Border Force. "Online Register for Modern Slavery Statements" https://modernslaveryregister.gov.au/.

[31] Government of Australia. "WGEA Data Explorer" Accessed on September 1, 2022, https://data.wgea.gov.au/organisations.

What are the penalties, if any, for failing to comply with ESG reporting requirements?

Failure to comply with the NGER Act faces the following penalties:

- If a company meets a threshold but fails to apply to be registered, it will incur a civil penalty of AUD$444,000, plus AUD$22,200 per day that the report is outstanding.
- If a registered company fails to provide an annual emissions report, it will incur a civil penalty of AUD$444,000, plus AUD$22,200 per day that the report is outstanding.
- If a person knowingly gives false information to the regulator, they may face imprisonment for up to 12 months.

As detailed above, the ASIC Regulatory Guides are not mandatory; rather, they set out ASIC's interpretation of the law. Failure to comply with these guidelines may expose a corporation to legal action by ASIC. If such legal action is successful, it may expose the company to penalty orders. The maximum penalty for such a breach by a corporation is the greater of AUD$11.1 million or, if the Court can determine the benefit derived from the contravention, three times the value of that benefit.[32] ASIC has not yet launched any formal enforcement action alleging that a corporation has breached its climate disclosure obligations. However, ASIC has advised that it has taken informal action, in that it has conducted a review of listed companies to

[32] This is on the basis that a material non-disclosure would breach s 728(4) of the Corporations Act: https://www.legislation.gov.au/Details/C2021C00380/Html/Volume_3#_Toc83389819. This would attract penalties under s 1317E and 1317G of the Corporations Act: https://www.legislation.gov.au/Details/C2021C00380/Html/Volume_5.

assess their climate disclosure, and written to several “laggards” to remind them of their statutory obligations.[33]

On the other hand, the MS Act and Workplace Gender Equality Act each operate on a “name-and-shame” basis. Failure to comply with either Act will empower the relevant Minister to make a public statement to the effect that the relevant company has failed to comply with the Act.

The ASX Governance Principles regulate disclosures that must be made in public companies’ annual disclosure statements pursuant to the ASX listing rules. The Governance Principles are not mandatory. However, the ASX takes an ‘if not, why not’ approach: boards of public companies must have a coherent explanation for why they have not adopted the recommendations, or else face action from the ASX on the basis that they have not complied with the ASX’s listing rules. Failure to comply with the listing rules may result in the suspension of trading in a company’s securities or, in extreme cases, the termination of its listing. Recommendation 7.4 of the Governance Principles provides that a listed entity should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks.

Since October 2022, the Australian Competition and Consumer Commission (ACCC) has been cracking down on greenwashing, which is the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally

[33]Armour, Cathie. “Managing climate risk for directors”, Australian Securities & Investments Commission. https://asic.gov.au/about-asic/news-centre/articles/managing-climate-risk-for-directors/.

friendly, sustainable, or ethical.[34] ASIC issued its first penalty for greenwashing in October 2022, fining Australian company Tlou Energy AUD$53,280.[35]

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

There is no legislation in Australia that expressly mandates that companies incorporate ESG issues into their corporate governance or decision-making structures. However, under the Corporations Act § 180(1) and § 181(1), directors of Australian companies are under general duties to act with reasonable care and diligence and in the best interests of the company.[36] Courts have held that these duties require a company director to identify reasonably foreseeable risks to the company arising from a course of conduct, and balance that risk against the potential rewards from that course of conduct.[37] Since 2016, Mr Noel Hutley SC (one of Australia's preeminent commercial barristers) has issued a series of non-binding legal opinions (Hutley Opinions) on the relationship between these duties and

[34] ACCC, "ACCC internet sweeps target 'greenwashing', fake online reviews", October 4th, 2022. Accessed on November 18, 2022, 2022.https://www.accc.gov.au/media-release/accc-internet-sweeps-target-greenwashing-fake-online-reviews.

[35] Cox, Lisa. "Australia's Corporate Regulator Issues First Fine For Greenwashing" The Guardian, 14 October 2022, https://www.theguardian.com/environment/2022/oct/27/australias-corporate-regulator-issues-first-fine-for-greenwashing.

[36] Government of Australia. "Corporations Act" https://www.legislation.gov.au/Details/C2021C00380/Html/Volume_3#_Toc83389819.

[37] *ASIC v Rich* (2009) 75 ACSR 1 at 622; *Vrisakis v ASC* (1993) 9 WAR 395 at 450; *ASIC v Cassimatis (No 8)* [2016] FCA 1023 at [467].

climate risks.[38] ASIC, APRA, ASX, AASB, and the Reserve Bank of Australia have all endorsed the Hutley Opinions as reflective of the law in Australia. The Hutley Opinions conclude that climate risks (both physical and transitional risks) are foreseeable and obvious, and accordingly that these duties compel directors to (a) obtain knowledge of the risks posed by climate change to their company, (b) form a rational and informed assessment of the company's best interests in light of those risks, and (c) take the appropriate action to best serve those interests (which may include no action). The Corporations Act does not have extraterritorial application, and therefore does not apply to a company's global operations. Failure to comply with § 180(1) or § 181(1) exposes a director to litigation brought either by ASIC or by the company's own shareholders.

What can be expected on the development of ESG requirements over the short, medium, and long term?

In the short-term, Australia's regulators will be able to impose minimum standards of reporting on corporations. These will reflect the minimum expectations of the market on what constitutes acceptable disclosure. As global trends continue to move towards requiring more climate disclosure, the minimum level of disclosure will continue to rise and this will lead to further regulatory action.

[38] The first and second Hutley opinions (published in 2016 and 2019) can be accessed in "Climate Change and Directors' Duties", Center for Policy Development, https://bit.ly/3DZqX1l. The third Hutley opinion (published in 2021) can be accessed in "Climate Change and Directors' Duties – Further Supplementary Memorandum of Opinion", Center for Policy Development, https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf.

Additionally, ASIC has been taking informal steps to follow up on climate "laggards" with respect to ESG reporting obligations. If these companies fail to improve their reporting, it is expected that ASIC may move from informal to formal action.

Since the AASB requires that climate-related disclosure must be incorporated into a company's financial reports and cannot be isolated into a separate ESG report, a future broader requirement that ESG considerations be integrated into all aspects of a company's reporting in the medium term can be assumed.

Finally, Australian law will likely require that corporate disclosures include a realistic evaluation of the ESG risks faced by a corporation in addition to conforming to the Hutley Opinions (i.e., that directors will be required to inform themselves of climate risks, evaluate the company's best interests in light of those risks, and take appropriate action). Company shareholders will likely have a valid basis for bringing actions against a company's directors if they suffer climate-related loss due to a breach of either of the requirements above.

ESG-based legal challenges in Australia

There have been many ESG-based (primarily climate-based) legal challenges to companies in Australia, primarily within the past five years. The most notable recent and/or ongoing cases are explained below.

- McVeigh v REST:

Mark McVeigh, a pension fund member, sued REST, his superannuation trust, for failing to provide information related to climate change business risks and any plans to address those risks. The case was filed in the Federal Court of Australia in July 2018

and settled in November 2020, with the superannuation trust agreeing to incorporate climate-related financial risks in its investments and implement a net-zero by 2050 carbon footprint goal.[39] In its statement following settlement, REST admitted that climate change "is a material, direct and current financial risk to the superannuation fund across many risk categories" and pledged to ensure its investment managers "take further steps to ensure that investment managers take active steps to consider, measure and manage financial risks posed by climate change and other relevant ESG risks."

REST presented nine key initiatives it intends to implement to continue developing its processes of managing the financial risks of climate change, reporting that McVeigh acknowledged and supported the initiatives.[40] Following these public statements, several of Australia's largest superannuation funds made similar commitments.[41]

- O'Donnell v Commonwealth:

Kathleen O'Donnell, a university student, is suing the Commonwealth of Australia and senior government figures on the basis that exchange-traded Australian Government Bonds (eAGBs) as long-term investments face material risks caused by climate change, and that the Commonwealth and its officers are required to disclose those risks to investors. She alleges that as the Commonwealth failed to do

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[39] Rest, Rest reaches settlement with Mark McVeigh, accessed on 16 November 2022, https://rest.com.au/why-rest/about-rest/news/rest-reaches-settlement-with-mark-mcveigh.

[40] The REST Initiative" Accessed on September 20, 2022, https://therestinitiative.org/.

[41] Fowler, Elouise. "$850b 'climate league' commits to cutting emissions" *Financial Review,* October 14, 2020, https://www.afr.com/companies/financial-services/850b-climate-league-commits-to-cutting-emissions-20201013-p564k9.

so, it therefore has breached a statutory prohibition on misleading or deceptive conduct.[42]

Ms. O'Donnell seeks declarations that the Commonwealth and its agents breached their duties of disclosure as well as injunctions preventing the Commonwealth from promoting eAGBs until it adequately discloses the climate risks associated with them. Although the case is notable for being the first claim brought in relation to sovereign bonds, it also may have broader implications for other long-term investment instruments. This is because it may create a "stepping stone" for other litigants to require similar climate disclosures for other long-term investment instruments.

- Sharma v Minister for the Environment:

Although not strictly related to ESG disclosures, the Sharma case is expected to have serious implications for the wider energy and resources sector. The applicants, a group of Australian children, sued the Commonwealth Minister for the Environment. They alleged the Minister, when approving the expansion of a coal mine, failed to consider the mine's potential impacts of climate change, and the harm that climate change would cause to Australian children. At first instance, Bromberg J of the

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[42] Ms O'Donnell also initially claimed that the Commonwealth, as the promoter of a financial instrument, owed a "duty of utmost candour and honesty" to investors, and that the Commonwealth's employees breached obligations to act with due skill and diligence in the management of the funds. These claims were struck out by the Court for lack of standing:
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca1223.
The decision can be accessed here:
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0560.

Federal Court found in favor of the children.[43] This decision was overturned on appeal by the Full Federal Court on several bases, including that the alleged duty would burden "high public policy."[44]

- ACCR v Santos:

The ACCR v Santos' lawsuit has been brought by the Australian Centre for Corporate Responsibility (ACCR), which is an organization of activist shareholders, against Santos, a major Australian LNG producer. In the lawsuit, the ACCR claims that Santos's 2020 Annual Report contains misleading or deceptive statements. Specifically, the ACCR's claim focuses on statements in the 2020 Annual Report that:

- Santos's natural gas is a "clean fuel" that provides "clean energy" and does not materially harm the environment; and
- Santos has a clear and credible pathway to achieve "net zero" Scope 1 and 2 emissions by 2040 through the use of carbon capture and storage projects.

The ACCR alleges that Santos has no basis for stating that the use of carbon capture and storage is a valid method of reducing emissions. Santos is defending the claims on the basis that (i) gas will play an important part in the energy transition and Santos discloses that it does produce carbon emissions; and (ii) Santos's net zero target is credible, and will be further developed alongside the development of low-emissions technology.

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[43] Federal Court of Australia. "Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560",
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0560.

[44] Federal Court of Australia. "Minister for the Environment v. Sharma (No. 2) [2022] FCAFC 65",
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2022/2022fcafc0065.

- Abrahams v Commonwealth Bank:

Guy and Kim Abrahams, who are shareholders in the Commonwealth Bank of Australia (CBA), filed an application[45] in late August 2021 seeking access to internal company documents[46] related to CBA's approval of funding for various gas and other fossil fuel projects. The Abrahams' seek documents evidencing CBA's assessment of the environmental, social and economic impacts of the projects, whether those projects are in line with the goals of the Paris Agreement, and whether CBA's employees discharged their obligations under CBA's internal Environmental & Social Policy. Access was granted by consent pursuant to orders dated November 4, 2021, and the parties are presently in the course of disclosing the documents. Depending on the contents of those documents, this may result in further proceedings against the bank.

Are companies required to disclose information related to ESG issues?

Public companies that are listed on the Australian Securities Exchange (ASX) are subject to the continuous disclosure obligations set out in the ASX Listing Rules. The rules provide that "once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell the ASX that

[45] Federal Court of Australia. "Guy Abrahams and another named in the schedule as trustees of the Guy & Kim Abrahams Family Trust v. Commonwealth Bank of Australia" Accessed on September 4, 2022, https://equitygenerationlawyers.com/wp/wp-content/uploads/2021/08/210826-Originating-Process-stamped.pdf.

[46] Under s 247A of the *Corporations Act*: see https://www.legislation.gov.au/Details/C2021C00380/Html/Volume_1#_Toc83389013.

information."[47] This obligation is reinforced in section 674 of the 2001 Corporations Act 2001.

The ASX Listing rules draw on the definition of "material effect on price or value" in section 677(1) of the Corporations Act: "a reasonable person would be taken to expect information to have a material effect on the price or values of securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities."

The ASX Principles and Recommendations set out recommended (but not mandatory) corporate governance practices for listed entities that the ASX Corporate Governance Council views are likely to achieve good governance outcomes and meet the reasonable expectations of most investors. This Council provides that a listed entity should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks.[48] A 'material exposure' means "a real possibility that the risk in question could materially impact the listed entity's ability to create or preserve value for security holders over short, medium or longer term."[49] The Council also highlights

[47] ASX Listing Rules. "Chapter 3: Continuous disclosure" Accessed on October 20, 2022, https://www.asx.com.au/documents/rules/Chapter03.pdf.

[48] Recommendation 7.4 of the ASX Principles and Recommendations, available at https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf.

[49] Ibid.

that the risks, transition risks, and physical risks associated with climate change do not just affect entities involved in mining or intensive use of fossil fuels.[50]

In addition to the continuous disclosure obligations, all public companies, as well as all large proprietary, managed investment schemes and prescribed disclosing entities, must prepare a financial report and a directors' report for each financial year, in accordance with the 2001 Corporations Act. The directors' report must contain information that members of the listed entity would reasonably require to make an informed assessment of the operations, financial position and business strategies and prospects for future financial years of the entity reported on – this will often be done in the company's OFR.

As noted above, these obligations are enforced by ASIC. ASIC has published Regulatory Guides that set out its interpretation of these obligations and how and when it will exercise its powers to enforce these obligations. Relevantly, ASIC Regulatory Guide 247 provides that an OFR must include a discussion of any environmental, social, and governance risks that, when considered within the context in which the entity operates, could affect the entity's financial performance or capacity to achieve any disclosed outcomes.[51] The risk must be described in context; include any relevant associated analytical comments; and, where the risk relates to

[50] Ibid.

[51] ASIC Regulatory Guide 247 para 247.64, available at https://asic.gov.au/regulatory-resources/find-a-document/find-a-regulatory-document/?docType=Regulatory%20guide.

factors within the control of management, specify how these factors will be controlled or managed.[52]

In addition to the above mandatory disclosure obligation, Regulatory Guide 247 emphasizes that climate change is a systemic risk that could have a "material impact on the future financial position, performance or prospects of entities."[53] As such, it broadly encourages directors to consider voluntarily disclosing in the OFR any additional information that would otherwise be relevant to integrated or sustainability reporting, or in accordance with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).[54]

What are the penalties if a public company fails to disclose all material information?

If the ASX finds that a listed entity has breached its disclosure obligations, the ASX has the power to impose a range of penalties, including:

1. Requiring the entity to take corrective action—for a disclosure breach, the ASX may require the entity to make a corrective announcement to the market;
2. Suspending the entity's securities from trading;
3. Terminating the entity's listing on the ASX; or

[52] ASIC Regulatory Guide 247 para 247.65, available at https://asic.gov.au/regulatory-resources/find-a-document/find-a-regulatory-document/?docType=Regulatory%20guide.

[53] ASIC Regulatory Guide 247 para 247.66, available at https://asic.gov.au/regulatory-resources/find-a-document/find-a-regulatory-document/?docType=Regulatory%20guide.

[54] ASIC Regulatory Guide 247 para 247.66, available at https://asic.gov.au/regulatory-resources/find-a-document/find-a-regulatory-document/?docType=Regulatory%20guide.

4. Taking legal action against the entity to obtain a court order requiring it to comply with its obligations under the Listing Rule.

Further, as outlined above, the ASX Principles and Recommendations set out recommend (but do not mandate) corporate governance practices for listed entities. In applying these principles to an entity's governance practices, the ASX takes an 'if not, why not' approach. As such, if the Board of a public entity chooses not to follow the Council's recommendations (including in relation to disclosure), it must provide a coherent explanation for why (and for what period) certain recommendations were not adopted in order to comply with the ASX's listing rules.[55] Failure to comply with the listing rules may result in the suspension of trading in a company's securities or, in extreme cases, the termination of its listing. The ASX is also required to give ASIC notice and details of any significant contravention of the Listing Rules/Corporations Act so that ASIC can consider whether it wishes to take criminal or other regulatory action in relation to the breach.[56]

While the ASX Listing Rules are not law and the ASX cannot fine or impose any other criminal or civil penalty against listed entities, the failure to comply with the ASX Listing Rules is an offense pursuant to section 674 of the Corporations Act. ASIC may issue an infringement notice to the entity setting out the alleged contravention, the penalty payable to ASIC on behalf of the Commonwealth and that the entity must notify the ASX in accordance with the ASX Listing Rules[57]. ASIC has taken enforcement

[55] ASX Principles and Recommendations, pp. 2-3.

[56] Corporations Act s 792B(2)(c).

[57] Corporations Act s 1317DAE, s 674.

action for breaches of the continuous disclosure obligations in a number of instances including:

- In May 2021, Regional Express Holdings Limited was required to pay a penalty of AUD$66,000 under an infringement notice issued by ASIC for failing to inform the ASX that it was considering the feasibility of commencing domestic operations in addition to its regional operations;[58]
- In June 2021, ASIC commenced civil proceedings against Austal Limited for alleged breaches of the continuous disclosure requirements seeking declarations and pecuniary penalties. On October 10, 2022, the Federal Court of Australia declared that Austal Ltd contravened section 674(2) of the Corporations Act on one occasion from June 16, 2016, and continuing to July 4, 2016, and that the company's former CEO also contravened section 674(2A) of the Corporations Act on one occasion from June 16, 2016, and continuing to July 4, 2016 by reason of being knowingly concerned in Austal's contravention- The Court ordered a series of fines to Austal and the company's former CEO.[59]

On the other hand, under section 1308 of the Corporations Act, it is an offense to make or omit, or authorize the making or omission of, a statement in an OFR, where

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[58] Australian Securities and Investments Commission. "21-105MR REX pays $66,000 penalty for alleged continuous disclosure breach" Accessed on October 20, 2022, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-105mr-rex-pays-66-000-penalty-for-alleged-continuous-disclosure-breach/.

[59] Australian Securities and Investments Commission. "21-128MR ASIC commences civil proceedings against shipbuilder Austal Limited for continuous disclosure breach" Accessed on October 20, 2022, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-128mr-asic-commences-civil-proceedings-against-shipbuilder-austal-limited-for-continuous-disclosure-breach/.

that person:

1. knows that such statement or omission makes the OFR materially false or misleading;
2. did not take all reasonable steps to ensure the OFR is not materially false or misleading because of that statement or omission; or
3. knows, or is reckless as to whether, the OFR is materially false or misleading because of that statement or omission.

As such, in addition to the above penalties that may be imposed on an entity under the ASX Listing Rules, criminal and/or pecuniary penalties may be imposed on any individuals involved in making materially false or misleading statements to the market.

Shareholders and investors can participate in the enforcement process by making a complaint to ASIC, which is empowered to investigate the conduct of the subject of the complaint and to take enforcement actions where appropriate against the company and individuals involved. Alternatively, shareholders can bring litigation against the entity. By way of example, in Abrahams v Commonwealth Bank of Australia (CBA) (2017), shareholders of CBA filed a suit against the company alleging that its annual report failed to disclose business risks related to climate change. The shareholders sought a declaration from the Federal Court of Australia that the bank had violated the Corporations Act, as well as an injunction restraining the bank from

continuing to fail to report on climate change-related risks or its responses, or requiring the bank to report on them.[60]

[60] See for more information: https://www.simmons-simmons.com/en/publications/ckvv7c8ao1hfn0b366u5ed5xr/decision-in-abrahams-v-commonwealth-bank-of-australia.

BRAZIL

Increased attention to ESG and ESG-related matters in Brazil has been generated in recent years through a greater societal concern surrounding corporate sustainability. Although historically the emphasis has been on general environmental and social risks and disclosures, there is increasing activity on the part of both market regulators and legislative bodies in the development of governance and disclosure standards focused on specific ESG-related matters such as climate, management, and workplace diversity and equity. At the same time, activity in the capital and financial markets, in the form of sustainable finance concepts and criteria for the identification of sustainable investment products, bond issuances, and bank lending practices generally, have served to provide incentive for corporations to integrate ESG matters into their businesses. In parallel with ESG regulatory and reporting developments, Brazilian regulators have been working to identify and develop new market instruments and structures, such as a carbon market, that are thought to provide mechanisms to help address ESG-related issues.

Current most prevalent ESG issues[61]

Environmental Issues

According to the CVM, the financial perspective on a company is directly related to its environmental risk as a greater environmental risk can cause reputational damage and thereby diminish the company's credibility. As a result, the financial market sought to strengthen environmental risk assessment mechanisms in companies' activities.[62]

In addition, Brazilian companies that seek to implement sustainability practices in their business models would do so not only to address possible environmental risks, but also to attract the attention of investors seeking to include sustainable investment products in their portfolios.[63] According to the CVM, there is a progressive trend in the financial and capital markets that environment is not just another element to be considered in risk assessment, but also an investment opportunity for investors.[64]

Public authorities' supervision of Brazilian companies' compliance with environmental rules has also increased in the last few years, especially after two

[61] This chapter was last updated on November 8, 2022

[62] Comissão de Valores Mobiliário de Brazil. "A relação entre investimentos e meio ambiente" CVM Sustentável, Volume 2, page 6,
https://www.investidor.gov.br/portaldoinvestidor/export/sites/portaldoinvestidor/publicacao/Serie-CVM-Sustentavel/serie_sustentavel_vol2_vf.pdf.

[63] Iacurci, Greg. "Money invested in ESG funds more than doubles in a year" CNBC, February 11, 2021, https://www.cnbc.com/2021/02/11/sustainable-investment-funds-more-than-doubled-in-2020-.html.

[64] Comissão de Valores Mobiliário de Brazil. "A relação entre investimentos e meio ambiente," page 8.

waste dams collapsed in Brazil.[65] Following these events, stricter rules were passed, especially regarding the safety of water and waste dams. For example, Law 14,066/2020 provided changes in the National Safety Dams Policy (Law 12,334/2010). Another example is Law 14,133, which regulates public procurement and the bidding process (as it will be detailed in item 10 below) and includes environmental criteria in the bidding process. Moreover, the use of "eco-friendly" packages (biodegradable, recyclable, or reusable) has also increased due to the National Policy on Waste Management (Law 12,305/2010), which established obligations regarding reverse logistics measures to companies.

Social Issues

The inclusion of social criteria in the financial and capital markets has grown slowly. According to data from March 2021, the number of investment funds classified as ESG grew from 19 to 35 in one year. Within this new group of investment funds, however, none is exclusively focused on the social dimension of ESG.[66]

Nevertheless, some evolutions can be observed in recent years. For example, Law 14,133, which regulates public procurement and the bidding process, includes social criteria in the bidding process. The contracting government agency could then require, for example, that a minimum percentage of the workforce responsible for a

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[65] The New York Times. "A Tidal Wave of Mud," accessed on November 9, 2022, https://www.nytimes.com/interactive/2019/02/09/world/americas/brazil-dam-collapse.html.

[66] Estadão. "Cadê o S do ESG? Fundos sociais ainda são minoría no mercado," accessed on September 20, 2022, https://www.estadao.com.br/infograficos/economia,entre-os-fundos-esg-os-que-lidam-com-o-aspecto-social-sao-minoria,1158547.

project be made up of women victims of domestic violence and people released from the prison system.[67]

Additionally, financial institutions use boilerplate clauses in financing agreements as a way to address compliance with labor legislation and regulations, especially aspects related to the safety and health of employees. In addition, financing agreements usually contain warranties regarding child labor, slavery-like conditions in the workplace, prostitution, and discrimination based on race or gender.

Governance Issues

The Brazil Corporate Governance Index (BCGI) is the raw average of six indices covering the main aspects of corporate governance: board structure, ownership, board procedures, related party transactions, shareholder rights, and disclosure. Over the last five years, companies that have gone public have chosen to be listed in the "Novo Mercado" or "Nível II" segment of B3 (Brasil, Bolsa, Balcão, the Brazilian stock exchange). This special listing segment has the most requirements regarding companies' governance.

More recently, amidst the COVID-19 pandemic, a company management's ability to react and deploy in a rapid and coordinated manner has been gaining importance. Moreover, effective risk management and the ability to track the acceleration of business digitization are also essential. A recent study conducted by the ACI Institute and KPMG's Board Leadership Center highlights the advancement and development

[67] BMA Advogados. ESG and the new Government Contracting Law In "A post-covid world – The ESG Agenda and Other Trends in 2021", page 7, https://www.bmalaw.com.br/en-US/conteudo/multidisciplinar/introduction-book-a-post-covid-world.

of corporate governance practices in Brazil.[68] Data for this study was collected from the "*formulário de referência*" or Reference Form (similar to the 1-K or 20-F Forms of the Securities and Exchange Commission) of 241 companies.

There are several themes that have repeatedly been targeted for improvement over the years such as diversity in boards of directors, and the creation of independent committees to advise the board (e.g., audit, sustainability, human resources, ethics, etc.). The prevalence and average value of Directors and Officers liability insurance has risen significantly over the last five years. There is a trend of growth in recent years for companies that have adopted risk management policies, mostly due to CVM Instruction 586.

Is ESG reporting mandatory or otherwise regulated in Brazil?

Per CVM Resolution No. 80/2022[69] (which revoked CVM Instruction No. 480/2009), CVM requires companies to disclose, in their *formulário de referência* (similar to the 1-K or 20-F Forms of the Securities and Exchange Commission), risk factors related to social and environmental issues. Additionally, there is a specific item on the *formulário de referência* related to the disclosure of social and environmental information. Companies must disclose the following: (i) if social and environmental information is disclosed; (ii) the methodology followed in preparing this information; (iii) whether this information is audited or reviewed by an independent entity; and

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[68] KPMG. "A governança corporativa e o mercado de capitais." 15ª ed. (2020/2021)", https://assets.kpmg/content/dam/kpmg/br/pdf/2021/03/governanca-corporativa-mercado-capitais.pdf.

[69] Available at https://conteudo.cvm.gov.br/legislacao/resolucoes/resol080.html.

(iv) the page where this information is disclosed. The disclosure of some ESG information is not mandatory for companies registered in category "B."[70]

In Brazil, the general public can access the ESG information of public companies by consulting their *formulário de referência*, which is published annually. At the end of 2020, CVM opened a public hearing notice to discuss expanding ESG disclosure in the "formulário de referência," proposing changes to CVM Instruction 480. According to the regulatory body, the main reason for the changes is the increasing interest in ESG issues by investors and accelerated development of the content and manner in which ESG information is reported by issuers.[71]

As a result of the aforementioned public hearing, in December 2021 CVM published its Resolution No. 59 (republished by CVM Resolution No. 87/2022), which will come into effect in January 2023 and has expanded the basis of ESG disclosure requirements through the *formulário de referência* by publicly traded companies registered with the CVM. The new requirements for the *formulário de referência* include ESG disclosure by publicly traded companies on the following points, among others:

a) whether the company discloses ESG information in an annual report or another specific document for this purpose;

b) the methodology or standard followed by the company in preparing this report;

[70] Id.

[71] Comissão de Valores Mobiliários. "Public Consultation Notice SDM nº 09/20", http://conteudo.cvm.gov.br/export/sites/cvm/audiencias_publicas/ap_sdm/anexos/2020/sdm0920_notice.pdf.

c) whether the report is audited or reviewed by an independent entity;

d) whether the report considers some ESG key-performance indicator, and what are the key material indicators are for the company;

e) whether the report takes into account the Sustainable Development Goals, as well as the recommendations of the Task Force on Climate-Related Financial Disclosures or the recommendations of other entities related to ESG issues; and

f) whether the company carries out inventories of greenhouse gas emissions, indicating, as the case may be, the scope of such emissions.

This new Resolution incorporates the “comply-or-explain” model for disclosure of ESG information. According to this model, any failure to disclose required ESG information will have to be explained, which serves as an incentive for disclosure.[72]

Reporting has also expanded to the realm of banks and other financial institutions. On September 15, 2021, the Central Bank of Brazil (BCB) released its first Report on Social, Environmental, Climate-related Risks and Opportunities and enhanced regulation on these issues. As of August 18, 2022, BCB has only published the first volume of this report. As a development of the framework established by Resolution CMN 4,327 of 2014, which established requirements to be observed by financial institutions in the establishment of their Social, Environmental and Climate Responsibility Policy (PRSAC in Portuguese), the Central Bank published Resolution BCB 4,945. The new framework mandates disclosure of the PRSAC, the actions taken to ensure PRSAC’s effectiveness, and the criteria for evaluating such actions. The

[72] Available at https://conteudo.cvm.gov.br/legislacao/resolucoes/resol059.html.

disclosure related to evaluations performed on actions taken pursuant to these requirements is optional. The new PRSAC regulation came into force on July 1, 2022 for institutions in segments 1 and 2, and will come into force on December 1, 2022, for institutions in segments 3, 4, and 5 according to Resolution CMN 4,553, which provides for different segments applicable to the financial institutions. Since this new regulation became effective in July 2022, financial institutions in segments 1 and 2 started publishing their Social, Environmental and Climate Responsibility Policies.

In 2012, B3 launched an initiative called “Report or Explain” as a recommendation to listed companies to disclose ESG information. In 2015, more than 71% of companies listed on the stock exchange joined the program, disclosing ESG information or explaining the reasons for their failure to disclose.

Earlier in 2005, B3 created the Corporate Sustainability Index (ISE), which is still used today and classifies as a rating for public companies whose securities are admitted to trading. It acts as an indicator of the average performance of asset prices of companies selected for their recognized commitment to corporate sustainability. It also supports investors in investment decision-making and inducing companies to adopt the best sustainability practices, since ESG practices contribute to business continuity. In addition, B3 has another sustainability index: the ICO2 B3, over-the-counter products (ESG Thematic Bonds, CBIO), and promotes, in partnership with various market players, capacity building and opportunities to share knowledge on

these issues. As an example, B3 provides companies with a guide on how they can introduce ESG aspects into their businesses.[73]

According to B3, the launch of the ISE B3 marks B3's understanding that sustainability can create a competitive advantage for companies and value for their shareholders while promoting a healthy and enduring market. The referred index was designed to measure average stock performance tracking changes in the prices of stocks of companies recognized for their commitment to corporate sustainability.

Given the lack of uniformity in ESG reporting in Brazil, companies usually adhere to or adopt self-regulatory principles for reporting as well as foreign metrics and indexes. Therefore, no metrics have been developed in Brazil to determine the most widely used ESG reporting standard.

Market regulators and the legislative branch are undergoing the development of new rules that will address mandatory reporting of ESG factors, but they are not yet published or in force. In addition, public companies upload information for investors to their websites. These pages provide information on the company's governance, its bylaws, and periodic information disclosed to CVM, including the *formulário de referência*. In addition, many public companies registered in category "A"[74] disclose, on their websites, their socio-environmental risk policies and codes of conduct.

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[73] B3. "ESG Products and Services, Guidances and Publications", https://www.b3.com.br/en_us/b3/sustainability/esg-products-and-services/guidances-and-publications/.

[74] As defined by Chapter 2, article 2 of the CVM Resolution 80 available at https://conteudo.cvm.gov.br/legislacao/resolucoes/resol080.html.

Private companies are not required to disclose periodic information determined in CVM Instruction 480, including the *formulário de referência*. Nonetheless, the Brazilian Institute of Corporate Governance (IBGC) publishes a code with good practices to be followed by private companies. Among these practices, there are guidelines that indicate that the proper disclosure of information results in a climate of confidence, both internally and in the company's relations with third parties.[75]

What are the penalties, if any, for failing to comply with ESG reporting requirements?

Pursuant to Article 65 of CVM Resolution 80, the disclosure of false, incomplete, inaccurate, or misleading information constitutes a serious infringement. As a result, the penalties provided for in Article 11 of Law 6,385 may apply to companies that are required to disclose ESG information in their *formulário de referência* that make a false, incomplete, or inaccurate disclosure, such as the application of a fine or a warning.[76]

The Central Bank's regulation does not impose any penalties for financial institutions that fail to comply with the mandatory disclosure of the PRSAC. Concerning the applicable penalties related to the violation of the duties described in Law 6,404/1976 (discussed in the legislation slides), Article 158 of Brazilian Corporations Law states

[75] Instituto Brasileiro de Governança Corporativa. "Caderno 12 – Boas práticas de governaça corporative para empresas de capital fechado: um guía para sociedades limitadas e sociedades por ações fechadas", accessed on September 20, 2022, https://conhecimento.ibgc.org.br/Paginas/Publicacao.aspx?PubId=21047.

[76] Article 11 of Law No. 6,385 provides for the penalties that CVM may apply in case of infringement of its resolutions or other rules. For more information, see: http://www.planalto.gov.br/ccivil_03/leis/l6385.htm.

that the administrator is civilly liable for the damages caused when violating the law or the company's bylaws. At the administrative level, legal entities that commit harmful acts against the public administration are subject to a fine of up to 20% of their gross revenue, in addition to the publication of the condemnatory decision.

Although there is no environmental legislation related to ESG reporting, Decree 6.514/2008 provides for certain environmental infractions and sanctions, and Law 9,605/1998 provides for environmental crimes. In addition, states and municipalities have their own rules regarding environmental infractions.

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

CVM is discussing more detailed disclosure of ESG information by public companies to promote greater access to information by investors. In addition, recently, CVM proposed the creation of the Socio-Environmental fund FIDC,[77] a type of investment fund that should invest predominantly in credit rights that generate social and environmental benefits.

Brazil has also led an international initiative with the World Bank called the "Partnership for Market Readiness – PMR Brazil." PMR aims to study and support the adoption of market instruments to mitigate the climate change process, in particular carbon-pricing instruments. The initiative has 36 participating jurisdictions, among which 19 are already adopting carbon-pricing instruments, which means assigning a

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[77] FIDC refers to "Fundo de Investimento em Direitos Creditórios"

monetary value to greenhouse gas (GHG) emissions.[78] PMR was approved in 2014 under the coordination of the Ministry of Economy and the World Bank and aimed to provide the government with information about the convenience of the adoption of carbon-pricing instruments as part of the emission mitigation policies in Brazil. More than 80 specialists were involved in the project, and its final report was released in late 2020.[79]

According to the final report, it is feasible and desirable for Brazil to have a regulated carbon-pricing system (carbon market), and it is suggested that the system be anchored in public regulation, although operationalization by the private sector is possible, increasing autonomy and flexibility in the carbon market.[80]

ESG has also been developed through corporate law and financial regulation in Brazil. Law 6,404/1976 or the "Brazilian Corporations Law," despite having been drafted in the '70s, already incorporates ESG criteria to some extent. According to Article 116 of Law 6,404, a controlling shareholder shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role and shall have duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation, and the community in which it operates. In addition, Article 154 of Law 6,404/1976 foresees that the administrator of

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[78] Project PMR Brazil. "Síntese das análises e resultados do Projeto PMR Brasil - Dezembro de 2020" https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/competitividade-industrial/pmr/relatorio-sintese-pmr.pdf.

[79] Ministerio da Economia de Brazil. "Partnership for Market Readiness (PMR)", https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/competitividade-industrial/pmr/partnership-for-market-readines-pmr.

[80] Project PMR Brazil. "Síntese das análises e resultados do Projeto PMR Brasil - Dezembro de 2020," page 9.

a company shall use the powers conferred upon him/her by law and by the bylaws to achieve the corporation's corporate purposes and to support its best interests, including the requirements of the social role of the corporation. Nevertheless, there is no provision as to whether these obligations of the director or the controlling shareholder apply to the company's global operations.

CVM has also provided guidelines on ESG issues through its Instruction No. 617, which states that legal entities that provide services in the securities market must adopt a Policy for the Prevention of Money Laundering and Terrorist Financing. The company's senior management is responsible for approving this policy and for implementing internal controls related to it. The Instruction states that companies that provide services in the securities market must register not only local investors but also foreign investors to identify situations that may constitute money laundering or terrorist financing. The Instruction also provides that the lack of preparation or implementation of the Policy for the Prevention of Money Laundering and Terrorist Financing or the failure to adopt internal rules and controls to monitor situations that may represent money laundering or terrorist financing constitute serious infringement and are, therefore, subject to the penalties stated in Article 11 of Law 6,385.

Additionally, in August 2022, the B3 opened a public hearing to discuss a proposal for an Annex to its *Regulation for the Listing of Issuers and for the Admission of Securities for Trading* ("*Regulamento para Listagem de Emissores e Admissão à Negociação de Valores Mobiliários,"* in Portuguese), aimed at promoting diversity and inclusion in the companies listed in the stock exchange. B3 is proposing that rules be adopted, in a "comply-or-explain" format, by companies listed on the stock exchange, except

those expressly exempted. Among others, these are the measures proposed by B3: (i) the election of at least one woman and one member pertaining to a minority community as effective members of the board of directors and the executive board; and (ii) the inclusion, in the company's corporate documents, of a diversity policy for members of management, as well as the ESG guidelines used by the company. The focus of B3 through this proposal is to stimulate greater diversity and inclusion inside leadership positions of listed companies.

In relation to the "comply-or-explain" model, similar to the format recently adopted through CVM Resolution 59, B3 indicated that this model demands that the company present evidence of implementation of the rule. In case of failure to implement the rule, companies must provide a valid justification. This evidence, if the rule is adopted, would be disclosed in the company's Reference Form.

B3 has pointed out that its proposal for new rules regarding diversity and inclusion does not exist in a vacuum, but rather in a context of new rules by other regulators in Brazil (such as the recent rules enacted by CVM and BCB) as well as initiatives of stock exchanges and regulators from other jurisdictions.

Public Procurement and Bidding regulations in Brazil also provide for development issues. Under the regulation on public procurement and bidding, Law 8,666/1993 provided that the bidding process should seek to ensure the promotion of

sustainable development.[81] Law No. 14,133/2021, published on April 1, 2021, will revoke Law 8,666/1993 in 2023 and does more than just maintain ESG-related concerns.[82]

According to the new law, environmental impacts and mitigating measures must be considered for a Preliminary Technical Assessment and recycled and biodegradable goods will be preferred against other goods. Also, the adoption of mitigation practices (e.g., reduction of GHG) is one of the criteria for breaking ties between bidders on government contracts, and variable compensation tied to the achievement of environmental sustainability could be applied.[83]

Besides setting sustainability criteria, the new legislation also includes social criteria in the bidding process. For example, the contracting government agency can require that a minimum percentage of the workforce responsible for the project be made up of women victims of domestic violence and people released from the prison system. There are also criteria related to corporate governance. Bidders on contracts worth more than BRL 200 million shall have implemented compliance programs in their organizations within six months of signing the contract. Furthermore, the adoption of such a program shall be a tiebreaker between two proposals.

The provisions of the bidding law apply to all institutions that are participating in the process, and a foreign company may be contracted. There is no provision for specific penalties regarding the above points. However, article 155 of Law No.

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[81] Article 3 of Law No. 8,666 of June 21, 1993. Available at: http://www.planalto.gov.br/ccivil_03/leis/l8666cons.htm.

[82] BMA Advogados. ESG and the new Government Contracting Law In “A post-covid world – The ESG Agenda and Other Trends in 2021”, page 7, accessed on November 9, 2022, https://www.bmalaw.com.br/en-US/conteudo/multidisciplinar/introduction-book-a-post-covid-world.

[83] Ibid.

14,133/2021 provides that some penalties can be applied to the bidder if, for example, false statements are made or there is fraud in the bidding process.[84]

Within the scope of the national financial system in Brazil, it is mandatory for all financial institutions licensed by the BCB to have environmental and social risk management systems in place. The BCB published Resolution 4,945, which provides for the Social, Environmental and Climate Responsibility Policy and will revoke Resolution 4,327. The requirements of both Resolutions apply to all institutions regulated under BCB's rules in connection to its activities—it does not specify territorial extent regarding the company's operations. The regulation does not impose any penalties for failing to comply with the mandatory disclosure of information related to the institutions' Social, Environmental, and Climate Responsibility Policy.

Additionally, BCB published some additional regulations related to ESG recently: (i) Resolutions CMN No. 4,943 and No. 4,944, which improve the rules for managing social, environmental, and climate risks for entities operating within the National Financial System (SFN); (ii) Resolution CMN No. 4,945, which establishes new rules on the Social, Environmental, and Climate Responsibility Policy (PRSAC); (iii) Resolution BCB No. 139, which establishes requirements for the disclosure of Social, Environmental and Climate Risks and Opportunities Report (GRSAC); (iv) Normative Instruction No. 153, which establishes the standardized tables for the GRSAC Reports publication; and (v) Resolution BCB No. 140, which provides the creation of Section 9 – Social, Environmental, and Climatic Impediments, in Chapter 2, in the Rural Credit

[84] Project PMR Brazil. "Síntese das análises e resultados do Projeto PMR Brasil - Dezembro de 2020," page 9.

Manual (MCR). Through these resolutions, which were published in September 2021, the BCB revised and proposed guidelines on social, environmental and climate-related disclosure and risk management to be observed by financial institutions in the conduct of their business, activities, and processes, as well as their relationship with stakeholders. According to BCB, the new rules are part of its efforts to acknowledge the relevance of social, environmental and climate-related issues for Brazil's economy and financial stability.[85] In addition, the BCB published a report providing guidance on its new regulation on social, environmental, and climate-related risk disclosures,[86] published its first Report on Social, Environmental, and Climate-related Risks and Opportunities and established mandatory disclosure of the Social, Environmental, and Climate Responsibility Policy of regulated institutions.[87]

In September 2021, the Brazilian Financial and Capital Markets Association (ANBIMA) published its rules and procedures for identifying sustainable investment funds. Criteria were defined to identify funds that aim at sustainable investment—they will be called "IS," that is, those that consider environmental, social, and/or governance factors in their investment analyses. The criteria must be observed by both the asset manager and the fund so that investment funds can be labeled as IS. The rules apply to all fund managers with the objective of sustainable development, including managers currently identified in some way as sustainable investment, such as equity

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[85] Available at: https://www.bcb.gov.br/content/about/legislation_norms_docs/BCB_Disclosure-GRSAC-Report.pdf.

[86] Available at: https://www.bcb.gov.br/content/about/legislation_norms_docs/BCB_Disclosure-GRSAC-Report.pdf-'86=-'.

[87] Central Bank of Brazil. "The BCB publishes the Report on Social, Environmental and Climate-related Risks and Opportunities and enhances regulation on these issues." Accessed on November 9, 2022, https://www.bcb.gov.br/en/pressdetail/2411/nota.

funds classified in the subcategory “sustainability/governance,” and funds that carry words associated with sustainability (e.g., “sustainable,” “green,” “ESG,” among others) in their names, as well as managers who have plans to launch funds identified as sustainable. The new rules and procedures came into force on January 3, 2022.

In December 2020, SUSEP, the Brazilian state body responsible for organizing, regulating, supervising and promoting insurance operations, pension plans, savings bonds, reinsurance, and insurance brokerage in the country, proposed (i) to carry out studies and proposals aimed at improving ESG risk management; (ii) to increase transparency in relation to exposure to climate risks; and (iii) to establish minimum criteria for the classification of sustainable products, aimed at stimulating investments and operations in the insurance sector. Additionally, in December 2020, the Brazilian Federation of Banks issued the updated self-regulation rules on social and environmental practices. One of the requirements is the management and reporting of climate change risks and opportunities in the financial institutions’ businesses, in accordance with the recommendations of the Financial Stability Board’s Task Force on Climate-related Financial Disclosures, or TCFD. The rules aim to:

(a) ensure greater transparency in relation to the governance structure of the PRSAC;

(b) include topics to be considered in managing the impacts of the activities of its members, such as diversity, inclusion, health and safety at work, use of renewable energy sources, and adoption of construction techniques and sustainable reforms; and

(c) include social and environmental aspects for the analysis of collateral.

More recently, in August 2021, the Federation issued the Brazilian Federation of Banks' (FEBRABAN) sustainability policy, but it does not apply penalties to the members that fail to comply with the requirements.

FEBRABAN Sustainability Policy:

Requirement	Applicable to the Portfolio Managers	Applicable to the Fund
Commitment	Adopt ESG integration policy	Summary of the ESG objective in the bylaws; portfolio aligned/ committed to the ESG objective; investments that do not harm the ESG objective.
Ongoing actions	Maintain governance structure dedicated to ESG related issues	Investment strategy, including: methodology, data (source and processing); tools (engagement policies); methodology's limitations; data and tools. Due diligence and monitoring with regard to the measurement of ESG objectives.
Transparency	Disclosure od updated information to the public	Disclosure of updated information to the public – policies and actions – Considerations of ESG factors in the disclosure.
Indexes		Use index as a reference to achieve ESG goals - index is equally aligned with the fund's objective. Comply with other requirements; monitor and be diligent with the index.

The Brazilian Association of Private Pension Entities (ABRAPP) has a sustainability committee that, in 2020, developed a Sustainability Best Practices Guide, as well as a questionnaire applicable to the associated pension funds. It acts as a guideline and does not institute mandatory actions. Recently, in 2021, ABRAPP published a handbook to provide guidelines and tools to support their associates in the evolution of their investment practices, specifically, in evaluating the capacity to integrate ESG aspects in investment management: The Brazilian green bonds market, while incipient compared to the global green bonds market, has been developing. These bonds have been tradable on B3 since 2018.[88] The first sustainable bond issued by a Brazilian company was issued by BRF S/Ain 2015 and raised €500 million. In 2020, thematic bond issues linked to sustainability totaled US$5.3 billion in 37 transactions, more than double of the value of 2019, US$2.2 billion. In January 2021 alone, six Brazilian companies raised more than US$2.2 billion in sustainable bond transactions.[89]

In 2021, the Business Council for Sustainable Development (CEBDS) launched a new corporate agenda with recommendations on the main topics related to ESG for companies in Brazil. The objective of the study, called Vision 2050, is to present the

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[88] B3. "ESG Products and Services" http://www.b3.com.br/en_us/b3/sustainability/esg-products-and-services/green-bonds/.

[89] Valor Econômico. "Emissões de títulos 'verdes' já superam os US$5.3 billion.", https://valor.globo.com/publicacoes/suplementos/noticia/2021/02/02/emissoes-de-titulos-verdes-ja-superam-os-us-53-bi.ghtml.

vision of a sustainable future and the actions companies should take by the end of the decade to achieve development based on ESG criteria by 2050.[90]

Furthermore, it is worth noting that banks and other institutions of the financial sector are actively participating in the sustainable bonds segment. In June 2016, important institutions of this sector—including banks, fund managers, insurance companies, and pension funds with BRL 1.8 trillion in assets under management—signed the "Brazil Green Bonds Statement," which highlights the signatories' desire to see the growth of a Brazilian green bonds market and sets out specific actions conducive to achieving this goal. In the statement, the institutions stated that they recognize the growth of the international green bonds market as one of the mechanisms to finance solutions to climate change and that they believe this growth meets their interests as investors in the Brazilian capital market.[91]

Since December 2020, some of the largest Brazilian banks—Banco Bradesco, Banco Itaú and Banco BTG Pactual—have issued green bonds.[92] Banco BTG Pactual was the first bank in the region to issue a sustainable bond in Brazil in early 2020.[93] The bank sold US$500 million bonds at a 2.875% yield and the proceeds were used to finance the reduction of GHG emissions and access to basic services, such as the expansion

[90] CEBDS. "Visão 2050." Accessed on November 9, 2022, https://cebds.org/publicacoes/visao-2050/#.Yv5kEXbMLIU and "CEBDS lança nova agenda corporativa para empresas que miram ESG" https://invest.exame.com/esg/cebds-lanca-nova-agenda-corporativa-para-empresas-que-miram-esg.

[91] Climate Bonds Initiative (CBI). "Investor Statement", https://www.climatebonds.net/market/country/brazil/investor-statement.

[92] Valor Econômico. "Emissões de títulos 'verdes' já superam os US $5.3B."

[93] Euromoney. "Green bonds come of age in Latin America", https://www.euromoney.com/article/281a64sqxxcitue6mmebk/esg/green-bonds-come-of-age-in-latin-america.

of power transmission to renewable energy projects and the financing and refinancing of renewable energy projects.[94] Also in December 2020, Banco Bradesco issued BRL 1.2 billion, the largest issuance of a sustainability-labeled bond made by a Brazilian private bank. The proceeds will fund new and existing projects and assets in areas that contribute to the transition to a low-carbon economy, such as energy and operational efficiency, renewable energy, clean transport, and green buildings.[95.]

Regarding public procurement and bidding related to infrastructure sectors, such as transport, mining, and hydroelectric projects, the applicable legislation—Federal Laws No. 8,987/1995 and No. 11,079/2004—provides that infrastructure projects must consider environmental preservation, as well as the financial sustainability and socio-economic advantages of the project. In addition, as a result of Section 16 of Federal Decree 7,746/2012, federal agencies such as ANTT, ANM, and ANEEL have developed a sustainable logistics plan to address ESG issues. Although the federal laws mentioned above and the sustainable logistics plan do not contain specific obligations directly applicable to infrastructure companies, it is essential to note that these rules may support the inclusion of ESG-related obligations in public procurement and administrative contracts.

Brazil also has an Anti-Bribery Law (Law No. 12,846) which provides for the administrative and civil liability of legal entities for the practice of acts against both national and foreign public administration, and their executives may also be held

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[94] Banco BTG Pactual. "Green, Social and Sustainable Financing Framework – October 2020", https://www.btgpactual.com/assets/documents/citizenship/environment/sustainable-impact-investing/btg-framework.pdf.

[95] Banco Bradesco. "Bradesco issues record green financial bill among Brazilian private banks", https://banco.bradesco/html/classic/sobre/sustentabilidade/en/internas/news/new1.shtm.

liable. In addition to administrative liability, companies may be held liable in the civil sphere, with the possibility of suspension or interdiction of their activities or the compulsory dissolution of the legal entity, among other penalties. Considering the penalties applied under the Anti-Bribery Law, companies began to adopt internal policies and controls, such as audit committees, codes of ethics, in addition to establishing specific clauses on compliance with anti-bribery regulations in contracts entered into with other legal entities.

Socio-environmental Legislation in Brazil has also been developed by the National Environmental Policy (Política Nacional do Meio Ambiente - PNMA), implemented by Law No. 6.938/1981. This law defines the mechanisms and instruments for the protection of the environment in Brazil and one of its main objectives is to make economic and social development compatible with the preservation of the environment.[96] Article 6 of the law states that the bodies and entities of the federal government, state government, and local government are responsible for the protection of the environment. In addition, public and private business activities shall be carried out in accordance with the guidelines of the PNMA.

Another important topic of PNMA is the broad definition of a polluter — any party that is, directly or indirectly, responsible for an activity that causes environmental degradation. This definition is an incentive for environmental risk to be taken into account in the context of public and private activities, whereas Article 4, item VII, of

[96] Presidência da República do Brasil. Lei No. 6.938 de 31 de agosto de 1981 "Dispõe sobre a Política Nacional do Meio Ambiente, seus fins e mecanismos de formulação e aplicação, e dá outras providências.", http://www.planalto.gov.br/ccivil_03/leis/l6938.htm.

PNMA states that the polluter has the obligation to recover and/or to indemnify the damage caused.

Environmental mechanisms under the PNMA

(i) Environmental Study Impact (EIA) and Environmental Impact Report (RIMA), which seek to carry out a complete assessment of environmental impacts of economic activities and propose the corresponding mitigation measures;
(ii) Environmental licensing, which is intended to monitor potential polluting activities, in order to minimize interferences caused by companies in the environment;
(iii) Environmental auditing, which means a verification process in organizations to analyze if the environmental conduct of a company meets a set of specific criteria. PNMA's provisions encourage companies to take social and environmental risks into consideration in their activities.

What can be expected on the development of ESG requirements over the short-, medium-, and long-term?

In the short-term, given the new CVM rules regarding the disclosure of information by companies and the regulation of the Central Bank of Brazil, Brazilian companies can be expected to start making ESG-related disclosures with more consistency and

uniformity. In addition, it can be expected that a greater variety of products related to sustainable finance, such as green bonds, will be offered.

Furthermore, in the medium-term, it can be expected that a carbon market will be implemented in Brazil. The World Bank and the Ministry of Economy concluded that the implementation of a carbon market in Brazil was desirable and feasible when compared to other carbon pricing mechanisms.

Finally, long-term expectations indicate that regulatory bodies, especially in the capital and financial markets, have increasingly included ESG issues in their agendas. Should this trend continue, it can be expected that future laws and regulations will incorporate even more ESG criteria and requirements. The Regulation Director of the Central Bank of Brazil expressed that the adoption of ESG criteria by companies is a path with no return. If companies haven't adapted yet, they will have to do so in the future. In 2016, Brazil launched a National Policy for Biofuels, known as Renovabio (Law 13,576), in order to expand biofuel production in Brazil, contributing to the security of the national fuel supply, to environmental preservation, and to the promotion of development and economic/social inclusion. Renovabio aims to increase the gradual replacement of fossil fuels in the Brazilian Energy Matrix by using biofuel, thus contributing to the reduction of greenhouse gas emissions.

ESG-related legal challenges in Brazil

In December 2021, CVM published new rules regarding public companies' new *formulário de referência* (CVM Resolution 59), which entails greater detail for disclosure of ESG information. Considering that the regulation is recent, cases related to companies' failure to disclose ESG information or ESG risks have not yet been

adjudicated. In addition to the regulation regarding the disclosure of ESG information, Brazilian socio-environmental legislation and the work of the Brazilian Institute of Corporate Governance (IBGC) have contributed to challenging companies to adopt good ESG practices.

Are companies required to disclose information regarding ESG issues?

In Brazil, the general information of public companies is disclosed through the Reference Form - "*Formulário de Referência*" (similar to the 1-K or 20-F Forms of the Securities and Exchange Commission), which is published annually by public companies. The disclosure of information and preparation of the Reference Form is regulated by CVM Resolution No. 80. It is worth noting that CVM Resolution No. 59 (republished by CVM Resolution No. 87) changed dispositions of CVM Resolution No. 80 and, among other points, expanded the basis of ESG information to be disclosed by public companies and will come into effect in January 2023.

The new requirements contained in the Reference Form include ESG information to be disclosed on the following points:

i. whether the company discloses ESG information in an annual report or another specific document for this purpose;
ii. the methodology or standard followed by the company in preparing th report;
iii. whether the report is audited or reviewed by an independent entity;

iv. whether the report considers the disclosure of a materiality matrix regarding ESG matters, as well as some ESG key-performance indicators, and what are the key material indicators for the company;

v. whether the report considers the Sustainable Development Goals, as well as the recommendations of the Task Force on Climate-related Financial Disclosures or the recommendations of other entities related to ESG issues; and

vi. whether the company carries out inventories of greenhouse gas emissions, indicating, as the case may be, the scope of such emissions.

The new model of the Reference Form should provide investors with more detailed information regarding ESG matters, thus facilitating informed investment and proxy voting decisions.

Among other items to be disclosed in accordance with the new model of the Reference Form, the companies must indicate if their ESG reports consider the disclosure of a "materiality matrix" regarding ESG matters, as well as some ESG key-performance indicators, and what are the key-material indicators for the company. Nonetheless, the Reference Form does not indicate what is the CVM perception regarding the concept of a "materiality matrix." In addition, this Resolution does not address the concept of double materiality. According to the "comply-or-explain" model adopted by CVM Resolution No. 59, any failure to disclose required ESG information will have to be explained. This model works as an incentive for companies to disclose ESG information to investors and, consequently, has the potential to facilitate informed investment decisions by investors.

In September 2022, B3 published its third guide regarding sustainability and ESG management by companies (*Guia de Sustentabilidade e Gestão ASG nas Empresas,*" in Portuguese). This guide highlights the advances and challenges of international organizations to create a global standard of disclosure of ESG information, as well as initiatives related to the taxonomy, which are important to combat greenwashing. In addition, the guide presents 14 steps towards sustainability, underlining the best practices of management of ESG by companies, taking into account stakeholders integral the value chain of the companies.[97]

One of the topics mentioned by B3 that is pivotal for the management of ESG matters is materiality. According to B3, it is important that companies define priorities in accordance with the perceptions of the stakeholders and the business itself in order to identify what really matters for the business and focus their efforts on material themes. Among other recommendations, B3 states in its report that the dialogue with stakeholders shall be continuous and the material issues revised in a predetermined periodicity, considering that materiality is dynamic (some themes can become material, while others may cease to be according to the context and reality of each company). The guide also underlines the concept of double materiality as the following: (i) impacts that activities of the company generate on people, economy, society, and environment (materiality of impact) and (ii) impacts related to risks and opportunities that these agents can generate on the company, affecting its ability to generate value (financial materiality).

[97] Available at: : https://www.b3.com.br/data/files/C9/27/46/11/220838101E311E28AC094EA8/Guia_B3_Sustentabilidade_ASG_v2209_VF.pdf.

Despite not being mandatory, this guide of B3 is of great importance for the development and improvement of corporate governance practices by companies, especially in a context where few companies include ESG aspects in their decision-making processes. According to recent research, despite 75% of the companies interviewed considering that ESG matters are a priority, only 14% include ESG issues in the decision-making process and less than half disclose their sustainability report.[98] The guide has the purpose of sharing and disseminating knowledge and best practices regarding ESG themes. According to B3, it is important that companies find their own solutions regarding ESG matters, taking into consideration the materiality of their businesses, sector, and a positive agenda for the society.

For cases when an interested party (other than a shareholder or bondholder) reports material events that have not been disclosed/fully disclosed to a regulator, CVM Resolution 80, which regulates the registration of companies and the disclosure of periodic information by issuers to the market, provides that the issuer of securities must send to CVM the periodic information required by the Resolution, in accordance with the content, term, and form established by the Resolution. The disclosure of information must be made by the Investor Relations Director, which is responsible for the disclosure of information required by the legislation and the regulation of the Brazilian capital market, according to Article 49 of CVM Resolution 80. Among the information to be disclosed, the issuers must disclose ESG information in their Reference Forms. In addition to CVM Resolution 80, CVM Resolution 44 specifically

[98] Grant Thornton. "O que as empresas de capital aberto estão reportando?" ESG on Board, May 2022, accessed on November 11, 2022, https://www.grantthornton.com.br/globalassets/1.-member-firms/brazil/6.insights/pdf/divulgacoes-esg_o-que-as-empresas-de-capital-aberto-estao-reportando.pdf.

applies to the case of disclosure of material facts. This Resolution states that it is considered "relevant" any decision or any act or fact of a political-administrative, technical, business, or economic nature that could significantly influence (i) the quotation of securities issued by public companies; (ii) the decision of investors to buy, sell or hold securities; or (iii) the decision of investors to exercise any right inherent to the condition of the holder of securities issued by or related to the company. If information of an ESG nature is considered a Material Fact, it must be disclosed to the public in accordance with the terms of CVM Resolution 44.

The Investor Relations Director is responsible for the disclosure of information to be disclosed under the terms of CVM Resolution 44. Article 3, first paragraph, of CVM Resolution 44 provides that controlling shareholders, directors, members of the board of directors, the audit board, and any sector of the company with technical or advisory functions must communicate any Material Fact or act of which they are aware to the Investor Relations Director. If these persons have knowledge of a material fact or act and verify the failure of the Investor Relations Director to disclose this information, they are only exempted from liability if they immediately communicate the material fact or act to CVM. In addition to the points above, it is worth mentioning that the enforcement action of CVM occurs through the supervision of the issuers of securities and the receipt of reports from third parties, even if the third party does not have a relation with the company; even anonymous reports are accepted. After being received by CVM, the report is sent to the company, which has the right to reply, and, if applicable, the report is sent to a technical area of CVM, which will be in charge of the analysis of the case.

What are the penalties if a public company fails to disclose all material information?

As mentioned above, CVM is adopting the "comply-or-explain" model in relation to the disclosure of ESG information by companies in their Reference Forms. According to this model, if the company does not disclose the ESG information that is required to disclose, it will have to explain the reason for the non-disclosure. This model can be seen as an "enforcement" by CVM of its rules, as companies will have to carry the burden of explaining to the market the non-disclosure of ESG information. It is important to note that CVM Resolution 80, which regulates the disclosure of the Reference Form by public companies, states that the failure to comply with the deadlines for the disclosure of periodic information (what includes the Reference Form) and the disclosure of false, incomplete, and misleading information are serious infringements of the Resolution. Consequently, CVM can impose penalties on the violator, which are prescribed in Article 11 of Law 6,385/76 (Law of the Brazilian Capital Market), and which may include a fine.

In the case of CVM Resolution 44, which regulates the disclosure of Material Facts by public companies, the infringement of any of its dispositions is considered a serious infringement, and the offender is subject to the penalties prescribed in Article 11 of Law 6,385/76, including a fine. On the other hand, according to CVM Resolution 45, the pecuniary base penalty applicable (i) to the case of non-disclosure of periodic and eventual information (including those of ESG nature) is BRL 300,000; and (ii) to the case of non-disclosure of material facts or disclosure in disconformity with CVM Resolution 44 is BRL 600,000. These provisions of penalties work as an incentive to the

companies in relation to the correct and timely disclosure of information (including those related to ESG matters).

Finally, according to Law 9,605/1998 (Environmental Crimes Act), individuals and legal entities may be exposed to criminal penalties for disclosing false or misleading information within the scope of licensing, forestry concessions, or any other administrative procedure. The penalty is also applicable to cases of omission. The penalty is increased if there is significant damage to the environment as a result of the use of false, incomplete, or misleading information.

CANADA

ESG and ESG-related issues have gained greater relevance in Canada over the course of the last several years through increased stakeholder engagement with corporations, increased regulatory activity, particularly in the environmental/climate area, and an ongoing emphasis on diversity and inclusion, including specific attention to Indigenous rights and diversity in board and management structures. Legislative action, court proceedings, and market and investor pressures (including divestments from major Canadian resource projects) have all contributed to the prominence of ESG matters and the impact of ESG on business operations. There is significant work ongoing to make available enhanced disclosure of ESG information by public companies and to adopt a single framework to provide concise, standardized metrics on material ESG issues. Thus, although there are currently no specific ESG disclosure requirements under Canadian laws, the work of the Canadian Securities Administrator (CSA) and of local regulators has increasingly recognized that ESG information is critical to stakeholder engagement with business operations.

Current most prevalent ESG issues[99]

Environmental Issues

Climate change has become a mandatory consideration during the assessment of projects undertaken by the federal government (pursuant to the Impact Assessment Act) or undertaken by the Province of British Columbia (pursuant to the Environmental Assessment Act).[100] Climate change, and greenhouse gas (GHG) emissions considerations, in particular, have also become increasingly prominent in Canada with the implementation of carbon pricing regimes by both the federal and provincial governments.

In 2018, the Government of Canada introduced a federal carbon pricing scheme through the Greenhouse Gas Pollution Pricing Act which set a minimum standard for carbon pricing across Canada.[101] This move supports the federal government's commitment to reducing GHG emissions by 40-45% below 2005 levels by 2030 and to achieving net-zero emissions by 2050.[102]

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[99] This chapter was last updated on August 17, 2022.

[100] See Canadian Legal Information Institute. "Impact Assessment Act, SC 2019, c 28, s 1 at section 22(i)" https://canlii.ca/t/9hfl#sec22.

[101] Canadian Legal Information Institute. "*Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.", https://canlii.ca/t/54w34.

[102] Government of Canada, "Government of Canada confirms ambitious new greenhouse gas emissions reduction target",

https://www.canada.ca/en/environment-climate-change/news/2021/07/government-of-canada-confirms-ambitious-new-greenhouse-gas-emissions-reduction-target.html.

Carbon pricing has changed the economics of operating a business in Canada and therefore has also shaped investor concerns.[103] In 2021, the Canadian Net-Zero Emissions Accountability Act became law. The Act legislates Canada's commitment to net-zero GHG emissions by 2050 and requires current and future governments to establish emission reduction plans and report on measures to meet this target.[104]

Further, the Canadian Infrastructure Bank, a federal government-owned financial institution, is developing a sustainability policy which will guide its investment decisions.[105] It also prioritizes the financing of projects that suit its climate priorities, which include public transit, clean power, and green infrastructure.[106]

Climate change issues have also become more prominent in Canada in the last five years due to high profile divestments from Canada's oil sands operations.[107] Notable insurers, such as Liberty Mutual[108] and Zurich Insurance Group,[109] and asset managers

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[103] Pembina Institute. "Staying the course on carbon pricing sends strong investment signal", https://www.pembina.org/media-release/staying-course-carbon-pricing-sends-strong-investment-signal.

[104] Canadian Legal Information Institute. "Canadian Net-Zero Emissions Accountability Act, SC 2021, c 22." https://www.canlii.org/en/ca/laws/astat/sc-2021-c-22/latest/sc-2021-c-22.html?autocompleteStr=canadian%20net-ze&autocompletePos=2#Targets_and_Plans__11221.

[105] Canadian Infrastructure Bank. "Investment Policy (March 2021)", https://cib-bic.ca/wp-content/uploads/2021/03/CIB-Investment-Policy.pdf.

[106] Canadian Infrastructure Bank, "FAQ", https://cib-bic.ca/en/about-us/frequently-asked-questions/.

[107] Flavelle, Christopher. "Global Financial Giants Swear Off Funding an Especially Dirty Fuel", *New York Times*, February 2, 2020, https://www.nytimes.com/2020/02/12/climate/blackrock-oil-sands-alberta-financing.html.

[108] Smith, Ryan. "Liberty Mutual slammed for tar sands links", *Insurance Business Canada,* October 5, 2020, https://www.insurancebusinessmag.com/ca/news/environmental/liberty-mutual-slammed-for-tar-sands-links-235232.aspx.

[109] Meyer, Carl. "Swiss insurance giant divests from the oilsands", *National Observer,* June 27 2019, https://www.nationalobserver.com/2019/06/27/news/swiss-insurance-giant-divests-oilsands.

such as Blackrock,[110] have been pressured by investors to avoid investing in or underwriting companies operating in this region. This enhanced scrutiny may influence domestic operations and the depth of ESG disclosure moving forward.

Additionally, over the past year, there has been an increase in the issuance of green bonds and other financial instruments focused on sustainability. Green bonds are debt instruments which finance environmentally or socially beneficial projects, including green infrastructure or other projects to support climate change adaptation and mitigation. For example, earlier this year BCI announced plans to invest CAD$5 billion into sustainability bonds, increasing from their current investments of CAD$881 million.[111] As part of the 2021 budget, the Canadian federal government has announced that they will also issue CAD$5 billion in green bonds.[112]

Sustainability-linked bonds are also becoming more commonly used in Canada. These are negotiable debt instruments where the terms are directly related to a company's actual performance against ESG outcomes. These investments encourage companies to work towards achieving material, quantitative, pre-determined, regularly monitored, and externally verified ESG objectives. In order to encourage transparency, credibility, and uniformity of information, several markets have adopted voluntary guidelines and guidance, developed by the International

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[110] Flavelle, Christopher. "Global Financial Giants Swear Off Funding an Especially Dirty Fuel."

[111] Jones, Jeffrey. "B.C's investment fund commits $5-billion to green bonds and plans to reduce its carbon exposure", *Globe and Mail*, February 19, 2021, https://www.theglobeandmail.com/business/article-bcs-investment-fund-commits-5-billion-to-green-bonds-and-plans-to/.

[112] Government of Canada. "2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy", https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/erp/Canada-2030-Emissions-Reduction-Plan-eng.pdf.

Capital Market Association, to ensure sustainability linked-bonds are used to achieve ESG objectives.[113]

Finally, there has been a rise in green and sustainability-linked loans.[114] Typically, green loans provide funds to companies to finance projects that demonstrate clear environmental benefits, while sustainability-linked loans tend to align loan terms with a borrower's commitment to meet predetermined ESG standards.[115] As of May 2022, Canadian companies had issued nearly CAD$31 billion in sustainability-linked loans.[116]

Social Issues

One of the most prevalent issues under the social aspect of ESG are Indigenous rights. Indigenous rights are constitutionally recognized and protected in Canada, with a corresponding duty on the Crown (i.e., federal and provincial governments) to consult with and, where required, accommodate Indigenous groups when making decisions impacting Indigenous rights. Indigenous relations and the movement

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[113] Lanteri-Massa, Fabien (et.al) "New Voluntary Guidance: Sustainability-Linked Bond Principles" *Blakes Bulletin*, July 20, 2020, https://www.blakes.com/insights/bulletins/2020/new-voluntary-guidance-sustainability-linked-bond.

[114] Lanteri-Massa, Fabien (et.al.) "New Guidance Documents on Green Loans and Sustainability Linked Loans" *Blakes Bulletin*, May 8, 2020, https://www.blakes.com/insights/bulletins/2020/new-guidance-documents-on-green-loans-and-sustaina.

[115] Loan Syndications and Trading Association, the Loan Market Association and the Asia Pacific Loan Market Association, "Green Loan Principles", https://www.lsta.org/content/sustainability-linked-loan-principles-sllp/ and "Sustainability Linked Loan Principles (SLLP)", https://www.lsta.org/content/sustainability-linked-loan-principles-sllp /.

[116] Saminather, Nichola. "Canada banks face 'greenwashing' claims as oil & gas firms obtain sustainable financing" *Reuters News*, May 12, 2022, https://www.reuters.com/business/sustainable-business/canada-banks-face-greenwashing-claims-oil-gas-firms-obtain-sustainable-financing-2022-05-12/.

towards reconciliation with Indigenous peoples has become increasingly prevalent in recent years. The Truth and Reconciliation Commission of Canada operated from 2008 to 2015 to document the history and lasting impacts of colonization on Indigenous peoples.[117] It published a comprehensive report of its findings which includes 94 Calls to Action regarding reconciliation between Canadians and Indigenous peoples.[118] Call to Action #92 called upon Canada's corporate sector to adopt and apply the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a reconciliation framework. Canadian provincial governments have begun to take steps to incorporate UNDRIP into Canadian law. In 2019, the Government of British Columbia was the first Canadian government to commit to implementing UNDRIP when it enacted the Declaration on the Rights of Indigenous Peoples Act.[119] On June 21, 2021, the Government of Canada enacted the United Nations Declaration on the Rights of Indigenous Peoples Act, which committed Canada to ensuring its federal laws are consistent with UNDRIP.[120]

For companies operating in Canada, Indigenous issues can significantly impact projects and operations. In practice, companies consult with and accommodate (when required) Indigenous groups when developing projects. Impact benefit

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[117] Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" Accessed on September 2, 2022, https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf.

[118] Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" 015), https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf.

[119] Government of British Columbia. "Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44.", https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044.

[120] United Nations. "United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14", https://laws-lois.justice.gc.ca/eng/acts/U-2.2/.

agreements are often entered into between proponents and Indigenous groups for projects that affect Indigenous rights.

Human rights and Indigenous rights' records of Canadian companies operating abroad

In Nevsun Resources Ltd. v Araya[121] plaintiffs from Eritrea alleged that a Canadian mining company violated customary international law by allowing human rights abuses to occur in an Eritrean mine. Typically, international claimants would be limited to legal recourse in the jurisdiction where the alleged human rights abuses occurred; however, the Supreme Court of Canada determined the claim can be brought under Canadian law.

Similarly, in Choc v Hudbay Minerals Inc.,[122] the Ontario Superior Court of Justice allowed a lawsuit brought by the Indigenous Mayan Q'eqchi' of Guatemala to proceed against Hudbay Minerals, a Canadian mining company. The plaintiffs alleged that private security personnel under the control and supervision of Hudbay committed human rights abuses against them. These cases have yet to be heard on the merits.

[121] Canadian Legal Information Institute. "Nevsun Resources Ltd. v Araya, 2020 SCC 5", https://canlii.ca/t/j5k5j.

[122] Canadian Legal Information Institute. "Choc v Hudbay Minerals Inc., 2013 ONSC 1414", https://canlii.ca/t/glr0n.

In 2020, the federal Senate introduced legislation to require increased reporting on international labor practices from companies that do business in Canada and/or import goods into or within Canada.[123] As of August 2022, the Modern Slavery Act has not been passed into law. If it is passed into law, the Modern Slavery Act would apply to all companies listed on a Canadian stock exchange, as well as companies that operate or have assets in Canada and that meet specified criteria. The Modern Slavery Act would require all regulated companies to provide an annual report on their efforts to prevent and reduce the risk of forced labor.

On March 15, 2021, the Office of the Canadian Ombudsperson for Responsible Enterprise (CORE) formally began operations. CORE's mandate is to provide an independent and impartial venue for investigating human rights complaints related to the international operations of Canadian companies.[124] CORE adheres to the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. The scope of CORE's mandate is currently limited to companies in the oil and gas, garment, and mining sectors. Complaints to CORE can be submitted via its website and can be submitted by anyone.[125]

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[123] Parliament of Canada. Bill S-216 "An Act to enact the Modern Slavery Act and to amend the Customs Tariff" Accessed on September 10, 2022,
https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10922230.

[124] Government of Canada. "Mandate of the Canadian Ombudsperson for Responsible Enterprise" Accessed on September 10, 2022, https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/mandate-mandat.aspx?lang=eng.

[125] Government of Canada. "CORE Online Complaint Firm"
https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/complaint-plainte.aspx?lang=eng.

Governance Issues

Currently in Canada, the participation of women on boards of directors is a prominent corporate governance issue. Since 2015, most provincial securities regulators in Canada have required public companies to disclose information regarding the representation of women on their boards, including: (1) the number and proportion of directors and executive officers who are women, (2) whether the company has adopted targets for women on the board and in executive positions, and (3) how the level of representation of women in these positions is considered when making appointments.[126] Other diversity disclosure requirements were introduced in Canada in 2020, mirroring broader societal concerns around systemic racism. As of January 2020, publicly listed, federally incorporated companies governed by the Canada Business Corporations Act must report annually on the corporation's policies and practices related to diversity and inclusion, including the number and percentages of board members and senior management who are Indigenous, persons with disabilities, and members of visible minorities.[127]

Canada is the first jurisdiction in the world to require reporting on dimensions of diversity other than gender.[128] Further, in June 2020, the Canadian Council of Business

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[126] British Columbia Securities Commission. "Form 58-101F1 Corporate Governance Disclosure", https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy5/58101F1-F-December-31-2016pdf.pdf.

[127] Canadian Centre for Diversity and Inclusion. "Diversity disclosure requirements changing for federally incorporated public companies effective January 1, 2020", https://ccdi.ca/blog/diversity-disclosure-requirements-changing-for-federally-incorporated-public-companies-effective-january-1-2020/.

[128] Canadian Centre for Diversity and Inclusion, "Diversity disclosure requirements changing for federally incorporated public companies effective January 1, 2020", https://ccdi.ca/blog/diversity-disclosure-requirements-changing-for-federally-incorporated-public-companies-effective-january-1-2020/

Leaders Against Anti-Black Systemic Racism launched the BlackNorth Initiative, a challenge to businesses to sign a pledge committing to specific actions and targets that will build diverse and inclusive workplaces and end anti-Black racism.[129]

Is ESG reporting mandatory or otherwise regulated in Canada?

Except for the diversity disclosure discussed in the last section, there are no specific ESG reporting requirements regarding ESG issues. However, ESG issues may be required to be reported under the general requirement to report "material information" (i.e., information that, if omitted or misstated, would likely influence a reasonable investor's decision to buy, sell, or hold a security, also referred to as "materiality) under Canadian corporate and securities legislation. Companies must disclose this information in disclosure documents.[130]

In Canada, each province and territory has its own securities laws, regulations, and rules. With that said, provincial regulators are members of the Canadian Securities Administrators (CSA) and endeavor to achieve consistency in rules across jurisdictions through "National Instruments."[131] If instruments are not universally adopted by provincial and territorial securities regulators, they are "Multilateral Instruments" rather than National Instruments. When considering environmental issues, CSA policy developments tend to be driven by the Ontario Securities

[129] "BlackNorth Initiative", https://blacknorth.ca/

[130] CPA Canada & TMX Group. "A Primer for Environmental & Social Disclosure", https://www.tsx.com/resource/en/2388

[131] "Canadian Securities Administrators", https://www.securities-administrators.ca/

Commission (OSC), which is the country's largest securities regulator, as well as the British Columbia Securities Commission (BCSC).

In recent years the CSA has also provided guidance, in the form of Staff Notices, with respect to what environmental and diversity information may be material and needs to be disclosed. For example, Staff Notice 51-333 provides guidance for disclosure of environmental information.[132] It notes that investors are increasingly interested in how environmental matters affect issuers and that environmental matters may affect issuers in different ways. It also provides several considerations for issuers to look at when determining if they need to disclose environmental information. They note that it can be difficult to determine what information needs to be provided, but that issuers should err on the side of disclosing.[133]

Staff Notice 51-358 builds upon and reinforces Staff Notice 51-333 by providing further guidance to assist issuers in identifying material climate change-related risks and improving their disclosure of those risks. This Staff Notice emphasizes that climate change and the associated financial impacts are mainstream business issues and that investors are taking an increased interest in voluntary disclosure frameworks.[134]

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[132] Canadian Securities Administrators. "Staff Notice 51-333", https://www.osc.ca/sites/default/files/pdfs/irps/csa_20101027_51-333_environmental-reporting.pdf.

[133] Canadian Securities Administrators. "Staff Notice 51-358" https://www.osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf, pages 7-8.

[134] Ibid.

Which regulatory documents require disclosure of material ESG information in Canada?

- Management's Discussion and Analysis (MD&A): this requires the issuer to disclose material information that may not be fully reflected in financial statements, as well as trends and risks that are reasonably likely to affect the issuer's future performance. Trends related to consumer preference, supply chain management, availability, and price of carbon credits or offsets are examples of environmental and social information that may require disclosure in a MD&A.
- Annual Information Form: among other matters, the issuer must describe risk factors related to the company and its business most likely to influence an investor's decision to purchase securities of the company and, if they have been implemented, any environmental and social policies that are fundamental to its operations. Environmental risk factors may include climate-change risks such as potential exposure to effects of extreme weather patterns, emissions-limiting regulations, or the transition to a low-carbon economy.
- Disclosure of Corporate Governance Practices: the issuer is required to disclose prescribed information related to board and committee duties and responsibilities as well as board independence and composition.

In May 2020, the Government of Canada announced the Large Employer Emergency Financing Facility as part of its COVID-19 economic response. To access this, employers must commit to publishing annual climate-related financial disclosure reports consistent with the framework established in the Task Force on Climate-related Financial Disclosures (TCFD) 2017 Final Report.[135] The TCFD has developed policies regarding disclosure of material information that are in addition to obligations under securities laws. These policies are detailed in the Primer for Environmental & Social Disclosure, updated in August 2020. It also references other information for listed companies looking to enhance their ESG disclosure.

In summary, although there are no specific ESG disclosure requirements under Canadian laws (except for those outlined previously), ESG disclosure is required where it discloses a material risk. Regulators are increasingly recognizing that ESG information is critical to business operations and investment decisions, which informs the scope of what is "material."

There are also industry-specific reporting standards including for the mining industry. Members of the Canadian Mining Association (CMA) are obliged to participate in the Towards Sustainable Mining (TSM) initiative.[136] TSM is only mandatory within Canada, but many of the CMA's members voluntarily implement the standard in overseas operations. TSM works, in part, by requiring CMA members to commit to a set of Guiding Principles and then to report their performance against

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[135] Task Force on Climate-Related Financial Disclosures (TCFD). "Final Report 2017", https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf.

[136] Certified Management Accountants of Canada (CMA). "Towards Sustainable Mining", https://mining.ca/towards-sustainable-mining/.

the program's 30 indicators in annual TSM progress reports.[137] Each facility's results are publicly available and are externally verified every three years. While this mandatory reporting is not expressly referred to as ESG, the required performance indicators overlap with common ESG factors. These factors include: Indigenous and community outreach; safety and health; preventing child and forced labor; crisis management and communications planning; tailings management; biodiversity conservation management; water stewardship; and climate change, including energy use and GHG emissions management. It is unclear what penalties would apply for failing to report but given that participation is a membership requirement, failure to report may have membership implications.

On the other hand, the Transport Association of Canada or Waterpower Canada (the national hydropower trade association, formerly called The Canadian Hydropower Association) does not appear to have mandatory sustainability or ESG reporting related to hydropower and transportation. However, the Canadian Electricity Association (CEA) has developed the Sustainable Electricity Program, a mandatory program for Corporate Utility Members of the CEA, which promotes the integration of sustainability into business decision-making and continuous performance improvement.[138] As a part of the program, the CEA reports the performance of its members on a range of metrics organized under five reporting pillars (low-carbon future, infrastructure renewal and modernization, building relationships, risk

[137] Certified Management Accountants of Canada (CMA). "TSM Guiding Principles," https://mining.ca/towards-sustainable-mining/tsm-guiding-principles/

[138] Canadian Electricity Association. "Sustainable Electricity Program," https://electricity.ca/deliver/sustainability/sustainable-electricity-program/

management systems, and business innovation). All Corporate Utility Members must undergo verification of their performance once every four years.

Access to reports varies depending on the nature of the information. Public companies are required to file various documents on a quarterly basis on the System for Electronic Document Analysis and Retrieval (SEDAR). SEDAR keeps records of all documents filed by any public company in Canada.[139] These can be accessed through each company's "Issuer Profile," which are stored in alphabetical order on SEDAR's website. The Issuer Profile provides information on the size of the public company, who their main provincial securities regulator is, what stock exchanges they are listed on, their financial year end, and access to all their filed documents. There is no fee for searching SEDAR's website.

Private companies choose to publicly disclose a broad range of ESG information in a variety of forms on their website or through annual sustainability reports. If ESG information is not proactively disclosed by a private company it can be very difficult to find. The Canadian federal government and each province maintain a database of basic information on companies incorporated in their jurisdiction that can be searched. A private company is likely incorporated either where their main office is located or under the federal Business Corporations Act. Most provinces charge fees for each search, which generally cost between CAD$10 and CAD$25.[140]

[139] SEDAR. "Issuers Profiles", https://www.sedar.com/issuers/issuers_en.htm

[140] For example, see the fee prices for a corporate search in British Columbia: https://www2.gov.bc.ca/gov/content/employment-business/business/managing-a-business/permits-licences/businesses-incorporated-companies/forms-corporate-registry#fees.

Canadian securities legislation has also recognized any information that would reasonably be expected to have a significant effect on the market price or value of a security as material. If the omission or misstatement of information would affect a reasonable investor's decisions whether to buy, sell, or hold securities in an issuer, that information is also considered material. However, there is no bright-line test for materiality. According to the CSA, materiality varies based on the nature of the information itself, the size of the company, the nature of its operations, the volatility of the company's securities, the prevailing market conditions, and many other factors. Information that may be significant for a small company may not be material for a larger one.

ESG information is not specifically included in the standards, though the CSA has issued Staff Notices to provide guidance on when environmental disclosure is required. Companies are not generally required to interpret or disclose the impact of external political, economic, and social developments on their affairs, unless those developments will have a direct and uncharacteristic effect on the company's operations. These effects do not need to happen in the near term. If a climate-related matter would likely change a reasonable investor's decision if it were to happen, then that should be disclosed, even if the effects would only crystallize over the medium or long-term.

Canadian securities legislation does not currently recognize the concept of double materiality or otherwise require a public company to disclose their impact on the climate. Most securities regulators accept complaints. For example, the OSC has a

Whistleblower Program to report potential violations of Ontario securities law.[141] This program accepts complaints from any individual or group of individuals who are aware of or suspect that a public company has violated Ontario securities law and submitted original information to the OSC.[142] The ASC has a similar program and accepts complaints regarding activities that have occurred in the previous six years.[143] British Columbia,[144] Saskatchewan,[145] Manitoba,[146] Quebec,[147] Newfoundland and Labrador,[148] Prince Edward Island,[149] New Brunswick,[150] and Nova Scotia[151] also have mechanisms to report complaints. In general, reports should be made to the

[141] Ontario Securities Commission (OSC). "Whistleblower Program", https://www.osc.ca/en/enforcement/osc-whistleblower-program.

[142] Ontario Securities Commission (OSC). "Submission Guide", Accessed on September 20, 2022, https://www.osc.ca/en/enforcement/osc-whistleblower-program/submit-whistleblower-report/submission-guide.

[143] Alberta Securities Commission (ASC). "Enforcement Complaints System", https://albertasecurities.com/complain-or-report.

[144] British Columbia Securities Commission (BCSC). "File a Complaint" Accessed on September 21, 2022, https://www.investright.org/resources/report-to-us/file-a-complaint/#complaints-about-companies.

[145] Financial and Consumer Affairs Authority. "Form for complaints under The Securities Act, 1988" Accessed on September 20, 2022, https://fcaa.gov.sk.ca/public/CKeditorUpload/Securities/Investor_Complaint_Form_August_2019_update.pdf

[146] Manitoba Securities Commission. "Enforcement Process", https://mbsecurities.ca/complaints-guidance/file-a-complaint/enforcement-process.html.

[147] Autorité des Marchés Financiers. "Make a Complaint", https://services-en-ligne.public.lautorite.qc.ca/1A/scp/DemandeAssistance?langue=en.

[148] Government of Newfoundland and Labrador. "Securities Regulation", https://www.gov.nl.ca/dgsnl/securities

[149] Prince Edward Island. "Filing a Complaint with Securities", https://www.princeedwardisland.ca/en/information/justice-and-public-safety/filing-complaint-securities.

[150] Financial and Consumer Services Commission. "Filing A Securities-Related Complaint", https://www2.gnb.ca/content/gnb/en/services/services_renderer.200985.Filing_A_Securities-Related_Complaint_.html.

[151] Nova Scotia Securities Commission. "File a Complaint or Report a Scam", https://nssc.novascotia.ca/file-complaint-or-report-scam.

public company's Principal Regulator, which can be found listed on their Issuer Profile on SEDAR.

Enforcement for failure to report all material information is based on the nature of the act and the entity. If a public company fails to disclose material information, or misrepresent information, they can face significant monetary or penal sanctions. For illustration, in Ontario, fines can be a maximum of CAD$1 million, and the OSC can require the public company to disgorge any profits they made due to not disclosing all material information.[152] Compliance orders can be made obligating the public company to disclose the material information.[153] The securities commission can also issue a cease trade order, banning trade in the public company's stock or ban individuals from trading or acting as a director or officer of a public company.[154]

A public company also faces civil liability for failing to provide required continuous disclosure.[155] Shareholders who have purchased their shares on the secondary market have a limited right to sue the company that did not disclose all material information. They may also sue the responsible issuer's directors and officers, insiders of the issuer, and experts (if the expert's statement contained the misrepresentation). These individuals are liable even if the shareholder did not rely

[152] Ontario Securities Commission (OSC). "OSC Sanctions", https://www.osc.ca/en/enforcement/osc-sanctions

[153] See for example the British Columbia Securities Act, at s.156, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96418_01#section157

[154] See for example the Alberta Securities Act, RSA 2000, C-S-4 at s.199, online: https://www.qp.alberta.ca/documents/Acts/s04.pdf

[155] See for example the Ontario Securities Act, at part XXIII, online: https://www.ontario.ca/laws/statute/90s05#BK196 or the British Columbia *Securities Act* at Part 16.1, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96418_01#part16.1

on the misstatement. Damages for a civil lawsuit are generally limited to 5% of the company's market capitalization or CAD$1,000,000, whichever is larger.[156]

There may also be criminal charges if the public company engages in intentional fraud. These cover cases where the public company's actions could result in negative market reaction, the collapse of companies/financial institutions, financial burden on victims, or high costs involved in conducting an investigation. An interested party may report these crimes to the Royal Canadian Mounted Police, Canada's national police service, though they are unlikely to prosecute unless the company's actions are particularly serious.[157]

In general, interested parties do not participate in the process beyond reporting the failure to the relevant investigatory authorities, who will then investigate and impose penalties as required. If the authorities require more information, they may contact the interested party to discuss.

Most corporate legislation in Canada permits eligible shareholders to introduce proposals to a public company's proxy circular. To be eligible, a shareholder must generally hold either 1% of the issued voting shares or shares with a fair market value of CAD$2,000, though the exact requirements may vary depending on the particular jurisdiction and can change in the future.[158]

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[156] See the Ontario Securities Act at ss. 138.1 "liability limit, 138.7(1) or the British Columbia *Securities Act* at ss.140.1 "liability limit" and 140.7.

[157] Royal Canadian Mountain Police (RCMP). "Capital market fraud", https://www.rcmp-grc.gc.ca/en/economic-financial-crime/types-financial-crime#market

[158] See for example, see "Canada Business Corporations Act R.S.C., 1985, c. C-44 at s.147(5)", online: https://laws-lois.justice.gc.ca/eng/acts/C-44/FullText.html.

Public companies are not required to submit all proposals they receive from an eligible shareholder. If a proposal attempts to redress a personal grievance or does not relate in a significant way to the business of the public company, the public company does not need to submit the proposal.[159]

Some Canadian legislation provides more exceptions, which may be applicable depending on where the public company was incorporated. For example, the federal Canada Business Corporations Act allows public companies to discard proposals that are being abused to secure publicity.[160] Similarly, Alberta,[161] Saskatchewan,[162] Manitoba,[163] Nova Scotia,[164] and Newfoundland and Labrador[165] prohibit submitting proposals primarily for the purposes of promoting general economic, political, racial, religious, social, or similar causes.

These mechanisms have been used successfully. The Atkinson Foundation, a Canadian charity, introduced a motion to be voted on at the annual meeting for the TMX Group, the financial services company that runs Canada's major stock

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[159] See for example, the "Business Corporations Act S.B.C 2002 at s.189(5)(d)", online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/02057_00_multi#section189.

[160] Government of Canada, "Canada Business Corporations Act R.S.C., 1985, c. C-44", https://laws-lois.justice.gc.ca/eng/acts/C-44/FullText.html.

[161] Government of Alberta, "*Business Corporations Act*, RSA 2000, c B-9 at s.136(5)"https://www.qp.alberta.ca/documents/Acts/B09.pdf.

[162] Canadian Legal Information Institute, "*The Business Corporations Act*, RSS 1978, c B-10 at s.131(5)" https://www.canlii.org/en/sk/laws/stat/rss-1978-c-b-10/latest/rss-1978-c-b-10.html.

[163] Government of Manitoba, "*The Corporations Act*, CCSM c C225 at s.131(5)", https://web2.gov.mb.ca/laws/statutes/ccsm/c225e.php#131(5).

[164] Province of Nova Scotia, "*Companies Act*, RSNS 1989, c 8, at Third Schedule (9)(5)" https://nslegislature.ca/sites/default/files/legc/statutes/companies.pdf.

[165] Government of Newfoundland and Labrador, "*Corporations Act*, RSNL 1990, c C-36 at s.227", https://www.assembly.nl.ca/legislation/sr/statutes/c36.htm#227_.

exchanges, including the Toronto Stock Exchange (TSX) and TSX Venture Exchange.[166] The motion would have required TMX Group to report on its policies and practices regarding Indigenous community relations and Indigenous reconciliation. TMX Group initially opposed the motion, but after discussion an amended proposal requiring TMX Group to develop internal policies on equity, diversity and inclusion was passed.[167]

What are the penalties, if any, for failing to comply with ESG reporting requirements?

As there are no specific ESG reporting requirements, there are no specific penalties for failing to report. However, if ESG issues are material, and there is a failure to report those issues, there may be penalties. While, the TSX is currently unable to issue monetary penalties as a result of a company being suspended or delisted, a failure to disclose material information would also be a violation of the relevant securities law and the company could be fined by the relevant securities regulators under those provisions. There is no indication that any such actions are currently being taken against a company for failing to disclose ESG information. Failing to disclose material information may result in a halt in trading of the particular security. Non-compliance with exchange rules may even result in suspension or termination of participant status.

[166] TMX Group, “TMX Group Announces Support of Amended Shareholder Proposal”, https://www.tsx.com/news?id=827.

[167] SHARE, “Press Release: TMX Group Limited shareholders vote in favour of company-supported shareholder proposal on Indigenous inclusion”, https://share.ca/press-release-tmx-vote-reconcilation/.

Penalties/sanctions for a failure to disclose material information may include being placed on a list of defaulting companies maintained by most securities regulatory authorities, the issuance of a temporary or permanent cease-trade order by the securities regulatory authorities, delisting from the applicable stock exchange, fines, or administrative penalties.[168] Depending on the nature of the misrepresentation, fines can be as much as CAD$5 million or five years in prison.[169] Regulators are also permitted to make creative orders to rectify the issue, which may include ordering companies to amend their public disclosure or to make new disclosure.[170] In addition, companies may be liable under securities legislation and at common law to investors for damages for misrepresentations in a publicly disclosed communication or for failure to make timely disclosure.[171]

In 2017, Greenpeace Canada, an environmental NGO, requested the Alberta Securities Commission (ASC) halt the initial public offering of Kinder Morgan Canada, an energy infrastructure company, for incomplete disclosure of climate-related risks in its IPO prospectus. This was an informal complaint in the form of a letter. Greenpeace alleged that this represented a failure to provide "full, true and plain

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[168] Canadian Securities Administrators, "Enforcement Overview", https://www.securities-administrators.ca/enforcement.aspx?id=73.

[169] See for example the Ontario *Securities Act,* R.S.O. 1990, c. S.5 at part XXIII, online: https://www.ontario.ca/laws/statute/90s05 or the British Columbia *Securities Act* R.S.B.C. 1996, c. 418 at Part 18, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96418_01#part18.

[170] See for example the Ontario *Securities Act,* at s.127, online: https://www.ontario.ca/laws/statute/90s05#BK189 or the British Columbia *Securities Act* at s.157, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96418_01#section157.

[171] See for example the Ontario *Securities Act,* at part XXIII, online: https://www.ontario.ca/laws/statute/90s05#BK196 or the British Columbia *Securities Act* at Part 16.1, online: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96418_01#part16.1.

disclosure of all material facts related to the securities issued or proposed to be distributed," as required by securities laws. After the ASC announced it would investigate the complaint, Kinder Morgan amended its prospectus.[172]

There have been penalties for disclosing environmental information without complying with Canadian law. In 2019, O.T. Mining corporation was fined CAD$159,000 and barred from trading in Canadian securities for, among other things, making statements about its mine in the United States of America which had not been approved by a "qualified person;"[173] the fine directly attributed to the unapproved statements was CAD$10,000. In 2004, Canadian Metals Exploration Ltd. agreed to pay a CAD$20,000 fine for failing to provide a technical report to support their disclosure about a potential nickel mine in British Columbia and failing to adequately disclose the steps needed to successfully develop the mine.[174]

ESG reporting has advanced in Canada because of the work of the CSA and provincial regulators. For example, the Ontario provincial government created a Capital Markets Modernization Taskforce to review and modernize Ontario's capital markets regime. Their final report recommended that the OSC require enhanced

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[172] Erlichman, Stephen & Langlois, Sophie. "ESG Disclosure in Canada – Legal Requirements, Voluntary Disclosure and Potential Liability", https://www.fasken.com/en/knowledge/2021/02/esg-disclosure-in-canada-legal-requirements-voluntary-disclosure-and-potential-liability.

[173] Canadian Legal Information Institute. "Financial Markets Authority c. OT Mining Corporation inc., 2019 QCTMF 48", https://canlii.ca/t/j2fpg.

[174] British Columbia Securities Commission (BCSC). "Canadian metals Exploration Ltd. [Settlement Agreement] 2004 BCSECCOM 636", https://www.bcsc.bc.ca/enforcement/administrative-enforcement/settlements/2004/canadian-metals-exploration-ltd-settlement-agrmnt.

disclosure of ESG information by public companies and adopt a single framework to provide concise, standardized metrics on material issues.[175]

Most institutional investors in Canada consider climate change one of their three main priorities when deciding whether to invest in a company. Late last year, eight of the largest institutional investors in Canada issued a letter calling for public companies to provide consistent and complete ESG information based on TCFD and the Sustainability Accounting Standards Board (SASB) frameworks.[176]

The most widely used standards in Canada, as in other countries, are the TCFD and the SASB frameworks.[177] Companies are not currently required by law to use either framework, though the OSC is exploring making one of the standards mandatory. In June of last year, the federal government issued a communiqué along with other G7 members calling for mandatory climate-related financial disclosures based on the TCFD framework.[178] Institutional investors also play a key role in moving ESG forward

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[175] Capital Markets Modernization Taskforce "Consultation Report", https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-report-en-2020-07-09.pdf, page 27.

[176] Institutional Investors, "Companies and investors must put sustainability and inclusive growth at the centre of economic recovery", https://assets.ctfassets.net/iifcbkds7nke/7KzpOa8QD5lrwf8Nlmxknu/b0d5bd23bee9f63a839b539ef2eeb45e/Nov_23_Maple_8_CEO_statement_Updated_for_CEO_signatures_EN.pdf.

[177] See Capital Markets Modernization Taskforce "Consultation Report" at page 27, https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-report-en-2020-07-09.pdf; Millani, "ESG Sentiment Study of Canadian Institutional Investors" at page 5, https://www.tsx.com/resource/en/2555; Institutional Investors, "Companies and investors must put sustainability and inclusive growth at the centre of economic recovery", https://assets.ctfassets.net/iifcbkds7nke/7KzpOa8QD5lrwf8Nlmxknu/b0d5bd23bee9f63a839b539ef2eeb45e/Nov_23_Maple_8_CEO_statement_Updated_for_CEO_signatures_EN.pdf, which all highlight TCFD and SASB as standard frameworks to use.

[178] Government of Canada. "G7 Finance Ministers & Central Bank Governors Communiqué," https://www.canada.ca/en/department-finance/programs/international-trade-finance-policy/g7-finance-ministers-central-bank-governors-communique.html.

in Canada, as noted above. According to a recent study, a majority of institutional investors favor companies using either the TCFD or SASB.[179] Institutional Shareholder Services (ISS), a corporate governance consultancy firm, has recently published guidelines encouraging investors in TSX-listed companies to vote against the election of directors or boards that demonstrate poor risk oversight of environmental and social issues.[180]

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

There is no specific legislation mandating the incorporation of ESG issues into corporate governance, but securities legislation does require public companies to disclose all material risks, which can include ESG-related risks. Failure to disclose required information can lead to public companies facing penalties and sanctions.

In 2020, British Columbia became the first jurisdiction in Canada to statutorily permit and regulate benefit companies by amending its Business Corporations Act to allow companies to register as a benefit company. To do so, companies must note in their notice of articles that they are "committed to conducting its business in a responsible and sustainable manner and promoting one or more public benefits."[181]

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[179] Millani, "ESG Sentiment Study of Canadian Institutional Investors", https://www.tsx.com/resource/en/2555.

[180] Institutional Shareholder Services (ISS). "Proxy Voting Guidelines for TSX-Listed Companies Benchmark Policy Recommendations," https://www.issgovernance.com/file/policy/active/americas/Canada-TSX-Voting-Guidelines.pdf.

[181] Business Corporations Act (British Columbia) at paragraph 51.992(1), https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/02057_03b# section 51.992.

The benefit company must specify the public benefit in their articles.[182] Benefit companies must publish an annual report and evaluate their performance in carrying out their commitments against a third-party standard. Directors and officers are required to conduct the business in a responsible and sustainable manner. Shareholders holding either 2% or at least CAD$2 million worth of issued shares in a benefit company may start legal proceedings if directors fail to act in accordance with the new purposes of the benefit company.[183]

As discussed above, the Modern Slavery Act, if passed, would require many companies to disclose the steps they have taken during each year to prevent and reduce the risk that forced or child labor is used at any step of the production process. Violations of the Act would carry a maximum penalty of CAD$250,000 for each violation. The CORE is now accepting human rights complaints in relation to the international operations of any Canadian companies in the oil and gas, garment, or mining industries. Each Canadian province has introduced legislation mandating minimum standards for treatment of domestic employees. This legislation does not apply to a company's global operations.

What can be expected on the development of ESG requirements over the short-, medium-, and long-term?

In the short-term, Canada will likely see the introduction of mandatory ESG reporting. Mandatory ESG disclosures may be accompanied by increased complaints against

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[182] Business Corporations Act (British Columbia) at paragraph 51.992(2).

[183] Business Corporations Act (British Columbia) at paragraph 51.993.

companies for failing to provide full disclosure of all ESG issues, or for making a material misstatement in their prospectus. As other jurisdictions continue to increase the use of ESG reporting, Canadian companies will likely have to increase their ESG disclosure to maintain their access to aspects of those markets. Since 2020, Canada has seen a dramatic increase in investor interest in ESG-related funds which will likely also add to increased adoption of ESG reporting.[184] The adoption of ESG reporting practices will also likely be influenced by increased climate change litigation which seeks to hold industry responsible for their GHG emissions and contributions to climate change.[185] More public companies, particularly those involved in finance, transportation, and infrastructure, will likely also consider providing ESG reporting as shareholders and activists continue to put pressure on companies to disclose ESG issues, particularly those related to climate change.[186]

The federal government may rely on OSFI to impose additional requirements on banks to take ESG issues into account when making decisions regarding lending. In the medium term, there is likely to be increased scrutiny of disclosure (or a lack of disclosure) and complaints against public companies for failing to adequately disclose ESG issues in reporting of material issues regardless of the introduction of mandatory ESG reporting. Some of these complaints will likely lead to judicial

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[184] Gagnon, Jean-Francois. "Insights from Canadian asset managers into the environmental, social and governance (ESG) strategies in the investment management industry", https://www.ey.com/en_ca/financial-services/the-rise-of-esg-investing.

[185] Gage, Andrew. "Senior lawyer to evaluate legal options for local governments to sue fossil fuel companies", https://www.wcel.org/media-release/senior-lawyer-evaluate-legal-options-local-governments-sue-fossil-fuel-companies.

[186] Millani. "Millani's TCFD Disclosure Study: A Canadian Perspective", https://www.tsx.com/resource/en/2672/millani-s-tcfd-disclosure-study-a-canadian-perspective-2021-06-23-en.pdf.

decisions that provide additional definitions on which ESG disclosure issues are material for the purpose of reporting. In the realm of social issues, companies will likely face increased expectations (and possibly requirements) with respect to reporting the social impacts of their operations, including environmental justice and environmental racism.[187] This incoming trend will also likely affect the requirements for some environmental and project authorizations in Canada. It is likely that Canadian companies will be required to report on Indigenous issues as they relate to their operations.[188]

With respect to governance issues, it is possible in the medium term that provincial governments will require companies to provide a certain percentage of board positions based on equity, diversity, and inclusion requirements (as is already happening in some jurisdictions).[189] At a minimum, it is likely that provinces will require increased reporting on the demographics of board members. More companies will likely require supply chain providers to have their own ESG disclosure policies and actions (as some are already doing).

Finally, for the long-term, ESG disclosure will likely be common for public and private companies, and disclosure standards will continue to evolve over this time. With respect to environmental issues, new issues may be introduced and/or the consideration of ESG issues may be re-prioritized. For example, it is likely that

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[187] MacDonald, Elaine. "Environmental racism in Canada: What it is, what are the impacts, and what can we do about it?", https://ecojustice.ca/environmental-racism-in-canada/.

[188] Canadian Council for Aboriginal Business, "Business Reconciliation in Canada", https://www.ccab.com/wp-content/uploads/2019/09/Business-reconciliation-in-canada_WEB-final_AA.pdf.

[189] Capital Markets Modernization Taskforce "Consultation Report", https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-report-en-2020-07-09.pdf, page 23.

companies will be required to provide reporting on not only their GHG reduction efforts, but also on efforts to contribute to climate change adaptation and mitigation in the communities in which they operate. With respect to social issues, if environmental justice, environmental racism, and Indigenous issues have not already been incorporated into ESG reporting, they almost certainly will be incorporated in the long-term. In the realm of governance issues, diversity and inclusion reporting are also likely to become more prevalent and are also likely to expand beyond consideration of the Board of Directors to include consideration of senior and executive management. The progression of climate change issues, and the increased adoption of adaptation and mitigation measures, will likely drive disclosure developments.

As ESG reporting is still new in Canada, many companies are still in the process of determining how best to provide and disclose ESG information. It is anticipated that investors will expect ESG disclosure that addresses both current performance as well as plans and measurable targets to improve that performance.[190]

ESG-related legal challenges in Canada

Claims related specifically to environmental disclosures are occurring in Canada. In 2019, investors launched a class action lawsuit against Barrick Gold, a gold mining company headquartered in Canada, for allegedly making secondary market misrepresentations in relation to its Pascua-Lama gold mining project in Chile and

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[190] Millani. "Semi-Annual Sentiment Study of Canadian Institutional Investors: Climate Change & TCFD-Aligned Reporting", https://www.tcfdhub.org/wp-content/uploads/2021/07/Millani-TCFD-sentiment-study-EN.pdf.

Argentina.[191] The alleged misrepresentations include Barrick Gold stating that they were in compliance with all regulatory standards and had "a strong focus on CSR and safety and environmental performance." Most of the claims were dismissed by the trial court, although one alleged misrepresentation about Barrick Gold's water management system was allowed to proceed.[192] The investors appealed, and in 2021 the Ontario Court of Appeal ordered the trial judge to reconsider his decisions in relation to non-environmental misrepresentations.[193] On July 29, 2021, the Supreme Court of Canada refused to hear an appeal of this determination.[194]

There have been lawsuits against the Canadian federal government for failing to introduce a plan to fulfill its Paris Agreement commitment to keep global warming to between 1.5˚C and 2˚C. Thus far, Canadian courts have generally dismissed these lawsuits as not being justiciable, disclosing no reasonable cause of action and seeking remedies that are not legally obtainable.[195] The only current exception is Mathur v Ontario, 2020 ONSC 6918, where seven youth are seeking a declaration that the Ontario provincial government is violating their rights under the Canadian Charter of Rights and Freedoms for failing to address climate change and seeking

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[191] Canadian Legal Information Institute. "DALI Local 675 Pension Fund (Trustees) v. Barrick Gold, 2019 ONSC 4160 (DALI)", https://www.canlii.org/en/on/onsc/doc/2019/2019onsc4160/2019onsc4160.html.

[192] DALI at para 141.

[193] Canadian Legal Information Institute. "Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation, 2021 ONCA 104,"

https://www.canlii.org/en/on/onca/doc/2021/2021onca104/2021onca104.html.

[194] Canadian Legal Information Institute. "Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation, 2021 ONCA 104," https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/18969/index.do.

[195] Climate Case Chart. "Lho'imggin et al. v. Her Majesty the Queen 2020 FC 1059," http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201116_NA_decision-1.pdf.

an order that Ontario set a science-based greenhouse gas emission reduction target.[196] The Ontario Court of Justice refused to dismiss the claim as it found that it was not plain and obvious the case is not justiciable.[197] This is a preliminary decision, and the case has yet to proceed to trial.

Greenpeace Canada requested the ASC halt the initial public offering of Kinder Morgan Canada for incomplete disclosure of climate-related risks. The outcome of this investigation was not publicly disclosed.

Are companies required to disclose information related to ESG issues?

Canadian securities legislation does not currently recognize the concept of double materiality or otherwise require a public company to disclose their impact on the climate. However, Canadian securities legislation does recognize any information that would reasonably be expected to have a significant effect on the market price or value of a security as material. If the omission or misstatement of information would affect a reasonable investor's decisions whether to buy, sell, or hold securities in an issuer, that information is also considered material.

However, there is no bright-line test for materiality. According to the CSA, materiality varies based on the nature of the information itself, the size of the company, the nature of their operations, the volatility of the company's securities, the prevailing

[196] Climate Case Chart. "Mathur, et.al. v. Her Majesty the Queen in Right of Ontario," http://climatecasechart.com/non-us-case/mathur-et-al-v-her-majesty-the-queen-in-right-of-ontario/.

[197] Ibid.

market conditions and many other factors. Information that may be significant for a small company may not be material for a larger one.[198]

ESG information is not specifically included in the standards, though the CSA has issued Staff Notices to provide guidance on when environmental disclosure is required.[199] Companies are not generally required to interpret or disclose the impact of external political, economic, and social developments on their affairs, unless those developments will have a direct and uncharacteristic effect on the company's operations. These effects do not need to happen in the near term. If a climate-related matter would likely change a reasonable investor's decision if it were to happen, then that should be disclosed, even if the effects would only crystallize over the medium or long-term.

What are the penalties if a public company fails to disclose all material information?

If a public company fails to disclose material information, or misrepresent information, they can face significant monetary or penal sanctions. For illustration, in Ontario, fines can be a maximum of CAD$1 million, and the OSC can require the public company to disgorge any profits they made due to not disclosing all material information.[200]

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[198] Ontario Securities Commission. "National Policy 51-201 Disclosure Standards" Accessed on October 20, 2022, https://www.osc.ca/sites/default/files/pdfs/irps/pol_20020712_51-201.pdf.

[199] Available at https://www.securities-administrators.ca/resources/regulatory-sandbox/csa-publications/.

[200] OSC, "OSC Sanctions." Accessed on October 20, 2022, https://www.osc.ca/en/enforcement/osc-sanctions.

Compliance orders can be made obligating the public company to disclose the material information.[201] The securities commission can also issue a cease trade order, banning trade in the public company's stock or ban individuals from trading or acting as a director or officer of a public company.[202]

A public company also faces civil liability for failing to provide required continuous disclosure.[203] Shareholders who have purchased their shares on the secondary market have a limited right to sue the company that did not disclose all material information. They may also sue the responsible issuer's directors and officers, insiders of the issuer, and experts, if the expert's statement contained the misrepresentation. These individuals are liable even if the shareholder did not rely on the misstatement. Damages for a civil lawsuit are generally limited to 5% of the company's market capitalization or CAD$1,000,000, whichever is larger.[204]

There may also be criminal charges if the public company engages in intentional fraud. These cover cases where the public company's actions could result in negative market reaction, the collapse of companies/financial institutions, financial burden on victims, or high costs involved in conducting an investigation. An interested party may report these crimes to the Royal Canadian Mounted Police,

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[201] See for example the British Columbia *Securities Act*, at s.156, accessed on October 20, 2022, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96418_01#section157.

[202] See for example the Alberta *Securities Act*, RSA 2000, C-S-4 at s.199, accessed on October 20, 2022, https://www.qp.alberta.ca/documents/Acts/s04.pdf.

[203] See for example the Ontario *Securities Act,* at part XXIII, accessed on October 20, 2022, https://www.ontario.ca/laws/statute/90s05#BK196 or the British Columbia *Securities Act* at Part 16.1, accessed on October 20, 2022, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96418_01#part16.1.

[204] See the Ontario *Securities Act* at ss. 138.1 "liability limit, 138.7(1) or the British Columbia *Securities Act* at ss.140.1 "liability limit" and 140.7.

Canada's national police service, though they are unlikely to prosecute unless the company's actions are particularly serious.[205]

[205] Royal Canadian Mountain Police, "Capital market fraud", accessed on October 20, 2022, https://www.rcmp-grc.gc.ca/en/economic-financial-crime/types-financial-crime#market.

COLOMBIA

Even though ESG reporting is not mandatory in Colombia, a majority of national agencies and regulators have included ESG standards into private and public business practices and provisions. Incentives for companies of collective benefit and interest (BICs) and the indication of the enforcement of Decree 151 of 2021 in 2023, requiring all issuers to adopt clear ESG principles and disclose information about the compliance, decisions, and application of these principles, are clear indications of a big push towards a robust ESG legal framework in Colombia.

Current most prevalent ESG issues[206]

Environmental Issues

The Colombian Government, through the Ministry of Environment and Sustainable Development, promotes tax incentives for companies and organizations that seek to protect or are interested in protecting the environment. In this sense, some of the benefits for these companies and organizations are (i) income tax discounts for investments in control, conservation, and improvement of the environment; (ii) sales tax exclusions for goods sold in the Colombian territory associated with the development of activities that generate positive environmental impacts; (iii) incentives for energy efficient management projects; and (iv) an income tax

[206] This chapter was last updated on November 18, 2022.

discount of 50% of the investment made in energy efficient management projects for a period of up to 15 years.

Most recently, Colombia adopted a "Green Taxonomy" system for economic activities and assets that contribute to the achievement of the country's environmental objectives and commitments. Circular 005 of 2022 issued by the Financial Superintendence of Colombia (Superintendencia Financiera de Colombia, or SFC), a national agency that oversees the Colombian financial system, indicated the parameters for adopting the Green Taxonomy. The Taxonomy incorporates a set of definitions aimed at supporting different actors in the public and private sector, such as bond issuers, investors, financial institutions, and public entities, among others, in the identification and evaluation of investments that can meet environmental objectives and that can be considered green or environmentally sustainable in Colombia.[207]

Social Issues

With Circular 008 of 2022 of the SFC, Colombia has included sustainability-linked bonds as those debt instruments whose characteristics may vary depending on the issuer´s prior compliance with sustainable performance objectives. In this sense, information regarding the selection of key indicators, the calibration of sustainable

[207] Instituto Colombiano de Estudios Fiscales. "Circular 005, Instrucciones sobre adopción de la taxonomía verde en Colombia", accessed on October 31, 2022, https://www.icef.com.co/component/k2/item/6148-circular-005-instrucciones-sobre-adopcion-de-la-taxonomia-verde-en-colombia.

performance objectives, the characteristics of the bonds and the external verification and reporting of the issuer must be incorporated as a minimum.[208]

Circular 020 of 2022[209] defined earmarked bonds as those bonds whose proceeds are used exclusively to finance or refinance, either in part or in full, new or existing eligible projects. Eligible projects are defined as assets, investments, related or support expenses, and research and development activities that contribute to the achievement of environmental, social, sustainable, or orange economy objectives. In this sense, the categories of bonds were defined as follows:

- Green bonds: securities in which the resources are exclusively destined to finance or refinance, in part or totally, assets or projects that contribute to the achievement of environmental objectives, including climate objectives and those of biodiversity conservation and ecosystem services.
- Social bonds: securities in which the resources are used exclusively to finance or refinance, in part or in full, assets or projects that contribute to the achievement of social objectives, including gender equality.
- Sustainable bonds: securities in which the resources are destined exclusively to finance or refinance, in part or in full, assets or projects that simultaneously contribute to the achievement of social and environmental objectives.
- Orange bonds: securities in which the resources are exclusively destined to finance or refinance, either partially or totally, assets or projects to promote

[208] Available at https://www.cerlatam.com/normatividad/superfinanciera-circular-externa-008-de-2022/.

[209] Available at https://www.cerlatam.com/normatividad/superfinanciera-circular-externa-020-de-2022/.

the integral development of the creative and cultural industries comprised by those sectors that include the creation, production, and commercialization of goods and services based on intangible contents of a cultural nature or that generate protection within the framework of copyrights.

Governance Issues

According to ManPowerGroup, a global staffing firm, Colombia has made significant progress in advancing pay equity. On average, the gap between men's and women's pay is 12.9%, while in the rest of the countries in the region it is 17%. This indicates that for every 100 Colombian pesos that a man in Colombia receives in total labor income, a woman earns 87.1 pesos. In this sense, employed men received, for the year 2020, a monthly labor income of 1.23 million pesos, while women received 1.07 million.

Notwithstanding the above, Law 1496 of 2011 was issued with the purpose of guaranteeing equal salaries and labor remuneration between men and women, in addition to establishing mechanisms to eradicate any form of discrimination between men and women.[210]

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[210] Congreso de la República de Colombia. Ley 1496 de 2011 “Por medio de la cual se garantiza la igualdad salarial y de retribución laboral entre mujeres y hombres, se establecen mecanismos para erradicar cualquier forma de discriminación y se dictan otras disposiciones”, https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=45267.

Is ESG reporting mandatory or otherwise regulated in Colombia?

ESG reporting and policy development in Colombia is government-driven. The Financial Superintendence of Colombia (Superintendencia Financiera de Colombia - SFC), a national agency that oversees the Colombian financial system, is one of many Colombian agencies that promotes ESG reporting. Others include the Ministry of Industry, Tourism, and Trade, the Ministry of the Treasury and Public Expenditure, the Council of Competitiveness and Innovation, the Land Renovation Agency (Agencia de Renovación del Territorio), the Presidential Counselor for Regions (Alta Consejería para las Regiones), and the Colombian Stock Market, among others. Other entities such as the National Planning Department (Departamento Nacional de Planeación) have issued guidelines that seek to encourage impact investments in the private sector.

Impact Investing in Colombia

The 2018-2022 National Development Plan (Plan Nacional de Desarrollo 2018-2022) created by the Departamento Nacional de Planeación produced policies and plans to increase sustainability in Colombia, including the 2050 National Energy Plan to promote and increase the use of renewable energy sources such as solar and wind energy,[211] and the

[211] Unidad de Planeación Minero Energetica. "Plan Energético Nacional 2020-2050," https://www1.upme.gov.co/DemandaEnergetica/PEN_documento_para_consulta.pdf.

> Green Growth Policy seeking to promote productivity and competitiveness, assuring social inclusion and the sustainable use of natural capital.[212]

The SFC established a Best Corporate Practices Code or “Country Code” (Código de Mejores Prácticas Corporativas / Código País) in 2007 and updated it in 2014 to implement a reporting scheme composed of corporate governance recommendations and best practices, based on the “comply or explain” principle, for issuers in the real and financial sector. The Country Code applies to all Colombian issuers of Colombian securities, but is relevant to other types of non-issuing companies given that the SFC has issued recommendations for other private and public entities to follow the Country Code’s best practices of reporting. The recommendations are voluntary; however, securities issuers are obligated to submit an annual report to the SFC and publish a report online on the implementation of corporate governance standards. In these reports companies have to describe how they comply with each of the recommendations.

Additionally, the Colombia Stock Exchange established the obligation to publish an annual sustainability report, in which issuers must include the following information: (i) corporate structure; (ii) code of ethics; (iii) management report; and (iv) frequent

[212] Departamento Nacional de Planeación. “Política de Crecimiento Verde,” https://www.dnp.gov.co/Crecimiento-Verde/Paginas/Politica-crecimiento-verde.aspx.

questions. Additionally, the Colombia Stock Exchange published a guide for the drafting of ESG reports for Issuers in Colombia.[213]

The General Regulations of the Colombia Stock Exchange have certain requirements related to the registration of ESG bonds, such as that the projects in which the resources are going to be invested must comply with some special characteristics that are summarized in the preservation, maintenance, or improvement of the environment.

The Colombian government has issued the following rules on certain ESG-related disclosure requirements:

- Circular 031 of 2021, issued by the SFC, provides instructions on the disclosure of information on social and environmental issues, adopting the international standard of the Task Force for Climate Related Financial Disclosure (TCFD). Issuers must submit to the SFC no later than February 10, 2023, the implementation plan of the instructions contained in the Circular, which must be complied with by 2024.
- Circular 007 of 2021, issued by the SFC added to the pension funds investment framework a chapter on alternative investments and on ESG as part of their investment policy.
- Decree 151 of 2021, which provides that as of February 10, 2023, issuers of securities must include a specific chapter on ESG practices, processes, and

[213] Global Reporting Initiative & Bolsa de Valores de Colombia. "Guía para la Elaboración de Informes ASG para Emisores en Colombia.", https://www.globalreporting.org/media/ymfbqoxy/guia-informes-asg-para-emisores-colombia.pdf.

indicators in their annual periodic report. Furthermore, quarterly reports must include a chapter dedicated to material changes to the company's ESG practices, processes, and indicators. In other words, ESG reporting will be mandatory for issuers of securities as of February 10, 2023.

- Decree 3341 of 2009, which requires disclosure of social investments by the entities that are part of the financial system and the insurance and securities markets.
- Decree 2046 of 2019, requiring that commercial companies of collective BIC, a type of entity in Colombia with the combined purpose of obtaining profits distributable among its shareholders and for the benefit of a social or environmental interest, must submit an annual report to the Superintendence of Corporations on its social and environmental activities during the period.

A study conducted by the SFC and the Grupo Banco Mundial, within the project Greening the Colombian Financial System that analyzed the ESG reporting of 30 Colombian issuers of securities, concluded that the standard most widely used is the GRI – Global Reporting Initiative.

Access to reports in Colombia is prescribed depending on the nature of such information:

- Public: (I) Article 5.2.4.2.3 of Decree 2555 of 2010, as amended by Decree 151 of 2021, establishes that securities issuers must disclose through the National Registry of Securities and Issuers (RNVE) a quarterly report which shall contain specific information about practices related to ESG. Such information can be accessed through the SFC's webpage. Issuers will only be required to disclose and report on ESG matters starting on February 10, 2023.

- Private: Only companies registered as issuers before the RNVE and the SFC are obligated to disclose information to the public and the general market. Consequently, private companies that are not registered issuers do not take part in the RNVE and are not required to make public disclosures, including related to their ESG practices.

What are the penalties, if any, for failing to comply with ESG reporting requirements?

In relation to companies of collective BICs, the Superintendence of Companies may require the application of corrective measures by a company for failing to comply with its reporting requirements. Non-compliance with such requirements may give rise to the imposition of fines or sanctions of up to 200 legal monthly minimum wages.

Failure to comply with the requirements related to the registration of ESG bonds at the Colombia Stock Exchange could give rise to suspension of the security registration. In Colombia, no sanctions have been imposed or actions enforced by regulators for failing to comply with ESG reporting requirements.

What is a company of collective benefit and interest (BIC)?

BICs are companies that work towards a social, environmental, positive, and verifiable impact. To become or to be acknowledged as a BIC, a company must include this condition within its bylaws. In Colombia, BIC

companies were created and regulated under Law 1901 of June 18, 2018.[214] Following this law, the Ministry of Industry, Tourism, and Trade has set a series of benefits for companies that comply with BIC standards such as preferential rates in industrial property services, tax benefits for the distribution of shares among employees, and preferential conditions in lines of credit.[215]

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

Circular Letter 029 of 2014 issued by the SFC requires mandatory pension funds to create and disclose their organizational structure for investment and risk management, including the roles and/or responsibilities for the management of ESG and climate risks, and sets forth the professional and technical requirements for the internal and external members of the board to be part of the ESG and climate aspects board.

[214] Congreso de la República de Colombia. Ley 1901 de 2018 "Por medio de la cual se crean y desarrollan las sociedades comerciales de beneficio e interés colectivo (BIC)," https://dapre.presidencia.gov.co/normativa/normativa/LEY%201901%20DEL%2018%20DE%20JUNIO%20DE%202018.pdf.

[215] Ministerio de Comercio, Industria y Turismo de Colombia. "Cuales son los beneficios de ser una Sociedad BIC," https://www.mincit.gov.co/prensa/noticias/industria/cuales-son-los-beneficios-de-ser-una-sociedad-bic.

The SFC in conjunction with the Finance and Public Credit Ministry, among other entities, have been promoting new regulations and initiatives aimed at implementing ESG criteria in Colombian legislation.

What can be expected on the development of ESG requirements over the short-, medium-, and long-term?

In the short-term, Colombia might not have any normative changes related to ESG. However, it is expected that more entities and companies will continue adopting ESG aspects in their policies under the actual regulation and driven by stakeholders' and the market's demands. Decree 151 of 2021 will enter into force in 2023, requiring issuers to adopt ESG principles and disclose information about the compliance, decisions, and application of these principles, to have a positive impact on ESG indicators, encourage entities to implement meaningful ESG measures, and have a positive impact on investing conditions in general by standardizing ESG reporting and attracting investors.

Finally, in the long run, a more robust and uniform ESG legal framework can be expected. The Colombian government might take action to promote ESG measures in private and public companies, registered or not as issuers. Additionally, investment policies and guidance around ESG aimed at attracting investors interested in social impact can also be developed in this time.

On November 15, 2022, the Government published the bases of the National Development Plan 2022-2026, revealing that the Plan will contain a series of commitments and regulations relating to impact investment in Colombia.

ESG-related legal challenges in Colombia

At the time of drafting this guide, there have been no legal challenges to companies in Colombia regarding ESG.

Are companies required to disclose information related to ESG issues?

Colombian legislation expressly recognizes the materiality threshold, defined as information that would be taken into account by a prudent and diligent investor at the time of buying, selling, or holding the securities or at the time of exercising rights inherent to such securities.[216]

On the other hand, ESG information disclosure is still not mandatory. However, Decree 151 of 2021, which introduced the disclosure of ESG matters into the disclosure regime of issuers, did not modify the materiality threshold. The person or entity responsible for disclosing the information is the legal representative or representatives of the company. The disclosure must first be done by the means established by the SFC (e.g., publication on the SFC website) before publishing the information by other physical or digital means. Interested parties can report material events, but the official publication in the SFC can only be done when the legal representative of the issuer communicates the information to the SFC.

[216] See Congreso de la República de Colombia. Decreto 2555 de 2010 "Por el cual se recogen y reexpediden las normas en materia del sector financiero, asegurador y del mercado de valores y se dictan otras disposiciones",
https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=40032.

What are the penalties if a public company fails to disclose all material information?

Article 209 and 211 of Decree 663 of 1993 (Estatuto Orgánico del Sistema Financiero) provides for both personal and institutional sanctions in the event entities under the supervision of the SFC, such as securities issuers that must follow disclosure obligations, do not comply with legal obligations. Failure to comply with disclosure requirements may result in fines by the SFC. Although an interested party cannot participate in the enforcement process of such fines, the civil liability of the company is not precluded. The company and its legal representatives, directors, and officers may be liable for damages caused to legal entities or persons as a result of failing to comply with disclosure requirements. Moreover, under Colombian law, during an ordinary meeting of the shareholders, any director or shareholders can propose the inclusion of matters to be deliberated and decided upon at the meeting.[217]

NGOs are active by objecting to some companies' projects. Nevertheless, NGOs do not directly criticize the company but some of the projects they carry out. These critics usually reach a jurisdictional level by arriving into the high courts of Colombia. On the other hand, Colombia has no cases of shareholder activists forcing the adoption of ESG policies in companies. Shareholders' agreements are usually private and confidential, with the exception of public companies registered in the National Registry of Securities and Issuers.

[217] See Article 182 of the Colombian Code of Commerce.

EUROPEAN UNION

EU law does not provide specific legal obligation on ESG, although environmental concerns have been crucial for the development of the broader EU environmental policy agenda which includes ESG standards. The EU has also been instrumental in the increased global emphasis on sustainability and corporate supply chain accountability, with the introduction of a proposed EU Directive on corporate sustainability due diligence in early 2022. The aim of this Directive is to foster sustainable and responsible corporate behavior and to anchor human rights and environmental considerations in companies' operations and corporate governance. Through this proposed mechanism, sustainability considerations will take on increased prominence. At the same time, work is ongoing to strengthen the already existing disclosure framework—the Non-Financial Reporting Directive (NFRD)—which provides for a company to report on its ESG policy and its performance in the form of key performance indicators, as well as a description of the main ESG risks and how the company manages them. It is important to note that, in addition to specific EU legislation (where applicable), individual Member States enact legislation in relation to ESG matters in their own capacities, guided by EU directives and policies.

Current most prevalent ESG issues[218]

Environmental Issues

In the European Union, environmental concerns are very important. EU environmental policy is based on four fundamental principles: precaution; prevention; correction of environmental damage; and the "polluter country" principle.[219]

In December 2008, the EU adopted an "energy-climate" plan to reduce GHG emissions, increase the use of renewable energy and save 20% of energy consumption by 2020.[220] In 2014, the new energy-climate plan set the EU's target for 2030: a 40% reduction in GHG emissions compared to 1990; a minimum proportion of 27% for renewable energies; and an improvement of at least 27% in energy efficiency. The Financial Instrument for the Environment (LIFE+) program was aimed at financing improvements and research in the field of nature protection and biodiversity, as well as the preservation of air and water quality. It had a budget of more than €3 billion from 2014-2020. The new budget is €5.4 billion from 2021-2027.[221]

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[218] This chapter was last updated on September 27, 2022.

[219] European Parliament. "Environmental policy: general principles and basic framework", https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework.

[220] European Commission. "National energy and climate plans", https://ec.europa.eu/info/energy-climate-change-environment/implementation-eu-countries/energy-and-climate-governance-and-reporting/national-energy-and-climate-plans_en.

[221] "The LIFE Program,"

https://life-mybuildingisgreen.eu/en/the-life-program/#:~:text=The%20LIFE%20programme%20is%20the,projects%20with%20European%20added%20value.

Notable actions of the European Commission's environmental policy

1) For the period 2021-2027, the European Commission has drafted a plan to act against climate change.[222]

2) In December 2020, given the need to raise its level of climate ambition, as also required by the Paris Agreement, the European Council approved a new emissions reduction target for 2050: the carbon neutrality of the EU. The new key objectives for 2030 are: the reduction of GHG emissions by at least 55% compared to 1990 levels; increasing the share of renewable energies to at least 32%, and improving energy efficiency by at least 32.5%.

Social Issues

The EU has many objectives regarding social policy: promotion of employment; improved living and working conditions; guarantee of adequate social protection; social dialogue; development of human resources; and prevention of social exclusion. The EU can legislate on social matters, but to a limited extent. In practice, the Member States retain most of the powers in this area. However, social policies have been present in European texts since the Treaty of Rome in 1957.[223] This Treaty

[222] European Commission. "2030 Climate Target Plan", https://ec.europa.eu/clima/eu-action/european-green-deal/2030-climate-target-plan_en#:~:text=With%20the%202030%20Climate%20Target,below%201990%20levels%20by%202030.

[223] European Parliament. "Treaty of Rome (EEC)", https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-rome.

includes a chapter on social policies but does not give European institutions the capacity to regulate on that matter. The EU has set several minimum conditions with which Member States must comply, particularly with regard to labor law. For example, limiting weekly working hours to 48 hours; minimum legal age to work is 15 years; measures regarding the safety of workers against chemical, physical and biological agents; etc. In 2017, the European Commission, Council and Parliament adopted the European Social Rights Base. This text, which is not legally binding, sets a framework and objectives in social matters and has inspired several initiatives, such as the directive on work-life balance. In 2019, the EU created a European Labour Authority (ELA). ELA was created to help Member States and the European Commission to ensure that EU rules on labor mobility and social security coordination are enforced in a fair, simple and effective way.[224] The European Commission has proposed, among other things, a reference framework for minimum wages in the Member States in October 2020. During the Porto Social Summit, the Member States discussed an action plan, which contains three main objectives in terms of employment, training, and the fight against poverty to be achieved by 2030: employment rate of 78% for 20-64 year old individuals (compared to 72.4% in 2020); participation in training activities for at least 60% of adults each year (37% in 2016); a decrease of the number of Europeans at risk of poverty and social exclusion (15 million Europeans, including 5 million children compared to nearly 30 million over the 2011-2019 decade).[225]

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[224] European Labour Authority (ELA). "ELA's mission", https://www.ela.europa.eu/en/elas-mission.

[225] "The European Pillar on Social Rights Action Plan", https://www.2021portugal.eu/en/porto-social-summit/action-plan/.

Most recently, the EU has shown particular interest in the issue of forced labor. The European Commission issued a legislative proposal on September 14, 2022, which aims to ban and prohibit the marketing of goods that have been produced by forced labor. The proposal follows different international standards and definitions, and looks to provide all national authorities with the authority to withdraw market products made with forced labor from the EU, following an investigation.[226]

Governance Issues

The EU is founded on a set of values including equality, and therefore promotes gender equality, diversity, and inclusion in the world of work. Since 2004, 26 Member States have put in place diversity charters which support and encourage good practices in diversity management among thousands of multinationals, public bodies, and non-profit organizations.[227] The European platform of diversity charters now includes the 26 national diversity charters, representing more than 12,000 signatory organizations and over 16 million employees. The EU strategy for diversity and inclusion focuses on four main target groups: women, people with disabilities, people from the LGBT+ community, and seniors. It includes both cross-cutting and specific measures to address the concerns of each of these groups, such as specific management programs and support for existing and new women's networks, involvement of people with disabilities in the planning of access and mobility facilities in Commission buildings, awareness-raising activities and training for

[226] European Commission. "Commission moves to ban products made with forced labour on the EU market" https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5415.

[227] European Parliament. "EU Platform of Diversity Charters", https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/tackling-discrimination/diversity-and-inclusion-initiatives/eu-platform-diversity-charters_en#sharinggoodpractices.

managers and other staff members to dispel any unconscious prejudices towards LGBTQ+ people, and follow-up to establish whether elderly individuals are discriminated against when applying for a new position.[228]

Is ESG reporting mandatory or otherwise regulated in the European Union?

In the EU, ESG reporting is mainly governed by European regulations: NFRD, SFDR, the December 2019 European Green Deal which proposes three measures to strengthen the basis for sustainable investment by improving corporate reporting of environmental issues,[229] and the Taxonomy Regulation 2020/852 which came into force in July 2020 and has been applicable since January 2022. It aims to standardize definitions and processes to be used when determining whether an activity is environmentally sustainable for disclosures under SFDR and NFRD.[230] Under French law, ESG principles are organized through the AMF's regulations and guidelines. The majority of the relevant provisions can also be found in articles L. 225-102-1 and R. 225-104 et seq. of the French Commercial Code.[231]

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[228] European Commission. "People first – Diversity and Inclusion", https://ec.europa.eu/info/about-european-commission/organisational-structure/people-first-modernising-european-commission/people-first-diversity-and-inclusion_en#:~:text=In%20its%20new%20HR%20strategy,parity%20at%20all%20management%20levels.

[229] European Commission. "A European Green Deal", https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[230] "Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance)" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32020R0852.

[231] "French Commercial Code," https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf.

ISO 26000: An overview

For businesses and organizations committed to operating in a socially responsible way, ISO 26000 is the most widely used reporting standard in Europe.[232] As well as being the "right thing" to do, application of ISO 26000 is increasingly viewed as a way of assessing an organization's commitment to sustainability and its overall performance.

ISO 26000 contains seven core subjects: (1) community involvement and development; (2) human rights; (3) consumer issues; (4) fair operating practices; (5) environment; (6) labor practices; and (7) organizational governance. EU Member States need to comply with these standards.

In 2014, the EU set up common ESG reporting rules for its members as part of the NFRD. This document states the most significant information regarding the company's business model, risk analysis, and key extra-financial performance indicators.[233] To have standard reporting rules, the EU has created the European Financial Reporting Advisory Group (EFRAG)—a local, non-profit organization set up

[232] International Organization for Standardization. "ISO 26000 and OECD Guidelines – Practical overview of the linkages," https://www.iso.org/publication/PUB100418.html.

[233] Deloitte. "EU Parliament adopts ESG disclosure Directive for large companies and groups", https://www.iasplus.com/en-gb/news/2014/04/eu-parliament-esg-dislosure-directive.

in 2001—to advise the European Commission on financial reporting.[234] If the standard reporting presented by EFRAG is adopted, it will be applied for the first time in 2024 for 2023 accounts and will be completed the following year. Specific topics may be addressed at a later date. European companies have also used the International Financial Reporting Standards' (IFRS) standards for transparency, accountability, and efficiency to the world's financial markets.[235] France was the first country in 2001 to require companies to provide this information under the New Economic Regulations law (NRE), which set up a set of measures divided into three parts: financial regulation, competition regulation, and company regulation. All the information related to the company's ESG principles should be made public on the company's website. In accordance with the SFDR, companies must publish on their websites their policies on integrating sustainability risks in investment decisions and the principal adverse consequences of those decisions. The NFRD provides that whenever required, the companies should also publish their extra-financial performance statement (extracted from the management report) on their website. Companies should also ensure that published information is kept up to date. In case of amendment to such information, a clear explanation shall be published on the same website.

A proposal for a directive amending the 2014 directive on extra-financial reporting was adopted by the European Commission in April 2022. The final vote by the European Parliament is expected in the fall of 2022. Following the vote, Member

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[234] IFRS Foundation. "Who uses IFRS Accounting Standards", https://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/.

[235] Ibid.

States will have two years to introduce its contents in their national laws. The directive revises and strengthens the already existing rules introduced by the NFRD. The directive wants companies to publish reliable and comparable sustainability information in line with the needs of investors and other stakeholders. The goal would be to improve the consistency of the sustainability information flow within the financial system. Companies are currently required to disclose a non-financial statement that includes information on at least environmental, social, human rights, and anti-corruption issues. The proposed directive requires disclosure of the information necessary to understand the impact of the company on sustainability factors as well as information on how these factors affect the development, performance, and position of the company.

In France, since March 27, 2017, the Law on the Duty of Care of Parent and Ordering Companies[236] requires a vigilance plan for companies, which includes the following provisions:

- risk mapping intended for identification, analysis, and ranking;
- procedures for assessment, on a regular basis, on the situation of subsidiaries, subcontractors, or suppliers with whom an established commercial relationship is maintained, taking into account the above risk mapping; adapted actions to mitigate risks or prevent serious harm; a mechanism for alerting and collecting alerts on the existence or the realization of risks, drawn

[236] Simmons & Simmons. "Introduction of a new corporate duty of care into French Law", https://www.simmons-simmons.com/en/publications/ck0ac3tqu6mnl0b9498j29fe8/030317-new-french-law-duty-of-care-for-parent-companies.

up in consultation with the representative trade union organizations in the said company; and

- a mechanism for monitoring the measures implemented and evaluating their effectiveness.

Moreover, a draft law on the civil liability of companies dated February 23, 2021, aims at implementing a new principle of civil liability applicable to all companies, regardless of their size and sector of activity. The purpose is to compel companies, in a flexible way proportionate to their means, to anticipate the infringements to these values. However, they would also commit themselves to account for behavior that is contrary to the general interest. In addition, the government has set up an "Impact" platform that will allow companies to monitor their social and environmental data.

Industry-Specific Reporting

There is no evidence that mining, transportation, or hydropower specific associations are requiring ESG reporting from their members. However, the data show that an increasing number of companies are integrating human rights and environmental issues into their public reporting. For example, in the mining industry, the French branch office of Tetra Tech and SGS preconize new policies within the company including ESG reporting; the most important French companies in the transport sector (SNCF, GRT, Keolis, and Transdev) developed and included ESG in their short, middle, and long-term programs; the French companies

specializing in hydropower (EDF, Véolia, Altran, and Vinci Energie) include commitments on ESG in their annual reports.

On the other hand, the Non-Financial Reporting Directive (NFRD) requests, only from certain large companies and groups, reporting on the company's ESG policy and its performance in the form of key performance indicators, as well as a description of the main ESG risks, and how the company manages them. It is nevertheless a voluntary process. However, once the company decides to publish its reports on non-financial and diversity information, it will be bound by its publications and may incur sanctions for their inaccurate nature or non-compliance in practice. Each EU Member State has its specificities due to the transposition of the NFRD. In France, any company may, regardless of size, status, or sector of activity, implement an ESG approach (i.e., implementation of sustainable development objectives taking into account societal and environmental impacts) on a voluntary basis. However, under French law, certain ESG reporting obligations are mandatory for certain categories of companies.[237]

The non-financial performance statement must present, for the most relevant social, environmental, and societal risks (materiality principle): (1) a description of the main risks related to the company's activity; (2) a description of the policies applied by the

[237] Article R. 225-104 of the French Commercial Code (the thresholds assessed at the closing date of the financial year are set at 100 M€ for the balance sheet total, 100M€ for the net sales figures and 500 for the average number of permanent employees during the year.

company, including, where applicable, the due diligence procedures implemented to prevent, identify, and mitigate the occurrence of these risks; and (3) the results of these policies, including key performance indicators (KPIs). The risks include those generated by the company on its environment (emissions of atmospheric pollutants, overexploitation of soils, etc.), but also the risks it may face (rising prices of raw materials or supply difficulties, depletion of natural resources, climate change, natural or technological risks, etc.). The non-financial statement or extra-financial performance declaration (Déclaration de Performance Extra-Financière – DPEF) which includes companies' societal commitments in favor of sustainable development, the circular economy, etc., must be published in the company's annual management report prepared by the board of directors or the management board at the same time as the financial statements to which it relates. It must also be made public on the company's website within eight months of the end of the financial year and remain available for five years. These reporting obligations, when applicable, also require the intervention of an independent third-party body that is regularly accredited (by COFRAC or by any accreditation body signatory to the multilateral recognition agreement established by the European Coordination of Accreditation Bodies). The French Financial Markets Authority (Autorité des Marchés Financiers – AMF) is qualified to control that this publication and filing obligation are complied with. In the event of failure, its sanctions commission may issue financial penalties.

The EU Commission provides non-binding guidelines, for example on non-financial reporting, specifying the methodology for reporting non-financial information, including key performance indicators of a non-financial, general, and sector-specific nature. In June 2019, the European Commission also published a 30-page

supplement on climate reporting to complete the existing guidelines document.[238] However, besides this document which clarifies the principles laid down by the NFRD, the EU regulations lay out only a general framework. Thus, each Member State issues its own guidelines and recommendations. In France, the AMF publishes a report on the social and environmental corporate liability of listed companies (once every three years since 2010 and most recently in November 2019).[239] The AMF also reviews the DPEF published by a sample of listed companies and formulates guidelines to help companies in drafting their DPEF. In the event of failure to comply with this obligation, the managers of the companies concerned may be subject to financial penalties pronounced by the AMF's sanctions commission. The MEDEF (main French employers' organization) has published a guide for drafting the DPEF and each year reviews the DPEF of a sample of French listed companies and publishes a report. The purpose of these annual reviews is to analyze the choices made in presenting the DPEF, to share best practices and to identify ways of improving non-financial information.

What are the penalties, if any, for failing to comply with ESG reporting requirements?

No sanctions are specifically provided at the EU level. Sanctions are defined by the States. Under Article L. 225-102-1 of the French Commercial Code, companies must

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[238] European Commission. "Guidelines on reporting climate-related information", https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf.

[239] AMF France. "Report on the Social, Societal and Environmental Responsibility of Listed Companies", https://www.amf-france.org/sites/default/files/2020-02/report-2019-on-the-social-societal-and-environmental-responsability-of-listed-companies.pdf.

publish an annual DPEF. No specific sanction is attached for failure to do so. However, since the Declaration must be included in the company's management report, the applicable sanctions will be those incurred in the event of failure to publish this report. The company may thus be held criminally liable via a fine of up to €1,500 and up to €3,000 in the event of a repeated offense (Article R. 247-3 of the French Commercial Code) for an individual, multiplied by 5 for a legal entity, i.e., €7,500 or €15,000 (Article R. 131-38 of the French Criminal Code), and the company may be held civilly liable via being summoned to file the reports within one month under penalty. The European Commission intends to modify the NFRD. The new measures, which should be applicable in 2023, include a more demanding verification of reporting by an independent third-party organization. It will not only focus on the accuracy of the information transmitted, but also on its consistency with the company's sustainability objectives, or on the relevance of the indicators used.[240]

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

No legislation or sanctions are specifically provided for in EU law. However, on February 23, 2022, the European Commission presented a proposal for a European directive imposing a duty of due diligence on companies.[241] This text could require

[240] Ernst & Young (EY). "Sustainability reporting" what to know about the new EU rules," https://www.ey.com/en_no/assurance/how-the-eu-s-new-sustainability-directive-will-be-a-game-change

[241] European Commission. "Proposal for a directive of the Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937" https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071

Member States to transpose its provisions within two years (from the entry into force of the directive once voted). Its scope of application covers:

- companies established within the EU with more than 500 employees and a net turnover of more than €150 million;
- companies with more than 250 employees and net sales of more than €40 million, as long as they generate more than 50% of their sales in certain sectors listed (textile and footwear industry, agriculture, fishing, food processing, extraction of mineral resources, metal production, etc.);
- companies established in third countries when they exceed certain thresholds in terms of net sales (€150 million during the year preceding that of the last closed fiscal year or €40 million if they operate in the sectors mentioned above).

This proposed directive asks the States to provide for a series of obligations to be complied with by the companies concerned and to implement a civil liability in case of breach of those obligations. Companies concerned will have to prevent all serious human rights and environmental breaches generated by their activities, including those of their subsidiaries or operators (direct or indirect suppliers). The last update on that proposal was on July 19, 2022.

ESG regulation is specific to each State within the European Union. For example, in France:

I. The non-financial report must be included in the company's management report. Civil and criminal sanctions may be applicable in case of failure to publish it.

II. Companies have to prevent and manage some risks particularly in environmental matters. The breach of the rules concerning the protection of nature and environment and the working conditions of employees may lead to up to two years' imprisonment and a fine of up to €18,000. Preventions and measures may be promoted in the non-financial report to avoid penalties.

III. According to the French Criminal Code, the opportunity to implement their non-financial reporting obligations may be used by the companies concerned to take all necessary measures to avoid criminal liability.

IV. Under Article L. 4741-1 of the French Labor Code, if an employer breaches the provisions related to health and safety it could be punishable by a fine of up to €10,000 in case of personal fault.

V. Articles L. 231-21 to L. 232-23 of the French Commercial Code provide that companies are subject to an obligation to publish their accounts, which must be accompanied by several documents, including the non-financial report. Failure to comply with this obligation is punishable by a fine of up to €1,500 and up to €3,000 in the event of a repeated offense.

VI. Article L. 225-102-1 of the French Commercial Code provides that all reports related to financial years beginning on or after August 1, 2017, must include a non-financial performance statement.

VII. According to the Law on the Duty of Care of Parent Companies and Ordering Companies effective on March 27, 2017, all companies headquartered in France and employing more than 5,000 employees in France or headquartered in France or abroad and employing more than 10,000 employees worldwide, must set up vigilance plans. A vigilance plan

includes reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health, and safety of persons and environment resulting from the activities of the company and of the companies it controls, either directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established business relationship is maintained.

VIII. More generally, under French law, ordering companies must verify the registration of their subcontractors with the tax and social security authorities and their compliance with various French social security and labor law obligations.

Industry-specific regulations

As mentioned previously, the EU proclaims, through its directives and regulations, ESG principles, the actors responsible for their application, and their respective obligations. At a national level, the AMF regularly introduces guidelines that inform companies about the interpretation of their obligations regarding material information that should be disclosed. Auditors who do not comply with their obligations may be subject to disciplinary measures, although there is no indication that any such penalties have been imposed.

What can be expected on the development of ESG requirements over the short-, medium-, and long-term?

For the short-term, the EU intends to set up standard reporting rules. This circumstance will require European companies to increase their ESG measures to comply with EU legislation.

Furthermore, medium-term indications but to the enactment of a new EU policy built on the Sustainable Development Goals (SDGs) that emerged at the Rio Conference on Sustainable Development (Rio+20) in 2012 and that were adopted three years later in September 2015, by 193 countries at the UN as part of the 2030 Development Agenda, requests for non-financial reporting will likely be reinforced and redefined by the EU commission, environmental and social requirements will also increase, and companies will be subject to more pressure to comply with obligations regarding diversity, inclusion, and a healthy work environment. For governance issues, companies will likely be required to strengthen their criteria for equity, diversity and inclusion, particularly for board positions.

Finally, new issues may be introduced and/or consideration of ESG issues re-prioritized in the long-term. For example, the impact of climate change will lead governments to act more in favor of sustainable energy and new ways of consuming. One of the key aspects of the current economic recovery would be to take into consideration these issues on a long-term basis to avoid new pandemics, fight against climate change (to which pandemics are directly linked), and take into account the interests of future generations.

The underlying logic of the adoption of various legislation in the field of corporate social responsibility aims at implementing an effective contribution of companies to the resolution of environmental and social problems: this is the notion of "social utility." Thus, the basic trend that is emerging is to consider the company not only as an instrument for making profits, but as a tool for social development. In particular, the reporting tools and the new provisions related to the civil liability of companies in connection with the ecological or social damage that they may cause by their activities appear to be an important driver of the legislative philosophy in the European Union. It is therefore to be expected that the obligations contained in the regulations or directives of the EU may, in the years to come, see their scope of application extended to smaller companies in order to subject them to the same measures.

ESG-related legal challenges in the European Union

French law does not provide for specific sanctions when a French company fails to take social and environmental issues into account. Under French law, a company or a board member would be held liable for failing to take ESG measures into account in the management of the company when there is (i) a fault; (ii) damages; and (iii) a causal link (Article 1240 of the French Civil Code). ESG is reflected in a responsibility to be accountable, coupled with a transparency obligation, without being systematically accompanied by legal sanctions (soft law). The system assumes that the market will sanction either investors, which are liable, or consumers, who are gaining ground and importance in the global governance of the companies. However, if the failure to produce reporting documents is not sanctioned (soft law), corporate officers may be held liable for false, inaccurate or misleading presentation

of these documents, as the management report is an act of governance for which they are liable vis-à-vis the shareholders. While this is not specific to ESG issues, companies should remain aware of potential claims arising from their voluntary ESG disclosures.

Highlighted cases in France and the EU

The Samsung case[242]

Since 2013, human rights and workers' NGOs have filed several claims against Samsung Electronics and its subsidiaries before several French courts. According to these NGOs, Samsung's ethical commitments constitute misleading advertising in light of evidence of alleged human rights breaches in the company's factories in China, Vietnam, and South Korea.

After a judicial enquiry in June 2018, the French investigating judge (*juge d'instruction)* stated, in April 2019, that there was sufficient evidence to conclude that Samsung could be held liable for false advertising.

[242]Centre de Ressources sur les Entreprises et les Droits de l'Homme. "Procès Samsung (pour publicité mensongère et violations du droit du travail", https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/proc%C3%A8s-samsung-pour-publicit%C3%A9-mensong%C3%A8re-et-violations-du-droit-du-travail/.

In April 2021, the claim was judged inadmissible and the company's indictment was quashed. The judicial judge followed Samsung's arguments according to which the NGOs were not entitled to file a claim for deceptive marketing practices. The NGOs decided to lodge an appeal.

Subsequently, on March 30, 2022, the French Supreme Court (*Cour de Cassation*) confirmed the decision of the Paris Court of Appeal (March 2021) rejecting the NGOs Sherpa and Actionaid-Peuples' action because the NGOs were not authorized to take legal action against unfair commercial practices (*pratiques commerciales trompeuses*). This decision is definitive.

Consequently, criminal proceedings for unfair commercial practices seem to be reserved for a limited number of NGOs with special accreditation.

However, "*UFC-Que Choisir,*" a French NGO, filed a claim against Samsung in September 2020 for unfair commercial practices before the Paris Civil Court (*Tribunal judiciaire de Paris*). *UFC-Que Choisir* has pointed out the gap between the "ethical" marketing practices emphasized by Samsung and accusations of human rights breaches, in particular in China where Samsung allegedly benefited from the forced labor of an ethnic minority or in the Democratic Republic of Congo

where children were allegedly employed in the cobalt mines. However, no decision has yet been rendered.[243]

The Lafarge case

Lafarge SA is suspected of having paid in 2013 and 2014, through its subsidiary Lafarge Cement Syria (LCS), nearly €13 million to terrorist groups, including the Islamic State, and to intermediaries, to maintain the activity of its site in Syria as the country was in war. Lafarge is also suspected of selling cement from the plant to the Islamic State and paying intermediaries to source raw materials from jihadist factions.

An internal report commissioned by LafargeHolcim had highlighted payments from LCS to intermediaries to negotiate with "armed groups." But Lafarge SA has always denied any liability for the destination of these payments to terrorist organisations.

In 2019, the Paris Court of Appeal had initially invalidated the charge of "complicity in crimes against humanity," finding that there was no "serious or concordant evidence of complicity" by Lafarge in the crimes committed by the Islamic State.

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[243] Center for Business and Human Rights. "UFC-Que Choisir dépose plainte contre Samsung pour "pratiques commerciales trompeuses" https://www.business-humanrights.org/es/%C3%BAltimas-noticias/ufc-que-choisir-d%C3%A9pose-plainte-contre-samsung-pour-pratiques-commerciales-trompeuses/.

However, in its decision on September 7, 2021, the French Supreme Court overturned this decision, arguing that "one can be an accomplice to crimes against humanity even if one does not intend to be associated with the commission of these crimes."

On May 18, 2022, the Paris Court of Appeal confirmed the French Supreme court decision on September 7, 2021 against Lafarge for complicity in crimes against humanity following a complaint filed by the NGOs ECCHR and Sherpa and 11 former Syrian employees of Lafarge.

The judges also upheld Lafarge's sentence for endangering the lives of Syrian employees.

Following this decision, the Lafarge group announced that it would appeal against this decision. It should be noted that it is the first time that a company is sentenced for complicity in crimes against humanity.[244]

[244] Doughty Street Chambers. "Paris Court of Appeal confirms charges against French multinational Lafarge for complicity in crimes against humanity committed by ISIS," https://www.doughtystreet.co.uk/news/paris-court-appeal-confirms-charges-against-french-multinational-lafarge-complicity-crimes.

Are companies required to disclose information related to ESG issues?

Under EU law, more specifically the NFRD and the SFDR, an extra-financial report consists of a company communicating the social, environmental, and societal implications of its activities as well as its mode of governance. According to the NFRD, the non-financial information statement should include:

- a brief description of the company's business model;
- a description of the company's policies in relation to these issues, including the due diligence procedures implemented;
- the results of these policies;
- the main risks associated with these issues in relation to the company's activities; and
- key non-financial performance indicators related to the activities in question.

This new approach is based on the concepts of "materiality" and "relevance of information" for stakeholders and the companies themselves, instead of the completeness of the information as observed in the past. The focus is on the concept of materiality and relevance of the information as the relevant information regarding these topics should be published to the extent necessary to understand the company's situation, the development of its business, its economic results, and the impact of its activity.

The SFDR requires financial market participants and financial advisors to publish, on their websites, their policies for addressing sustainability risks. They also have to publish information on how these risks are incorporated into their remuneration

policies. A description of the policies and due diligence applied by the company including, where applicable, the due diligence procedures implemented to prevent, identify and mitigate the occurrence of these risks is also required. Thus, financial market participants and financial advisors will have to publish, on their websites, their due diligence regarding the main negative impacts of investment decisions (or advice) on sustainability factors, or at least why they do not take these negative impacts into account (comply or explain policy).

Furthermore, the information regarding the results of these policies, including KPIs, the risks generated by the company on its environment (emissions of atmospheric pollutants, overexploitation of the soil, etc.), and also the risks it may be subject to (rising prices of raw materials or supply difficulties, depletion of natural resources, climate change, natural or technological risks, etc.), and the objectives, are also to be published by the company. The extra-financial performance statement must be designed, foremost, as a tool for steering the company's strategy. It also allows the company to promote its ESG actions and respond to a demand for transparency from stakeholders (public authorities, employees, customers, suppliers, subcontractors, investors, NGOs, and citizens).

In June 2017, the European Commission implemented non-binding guidelines in order to specify the methodology for reporting non-financial information, including KPIs of a non-financial, general, and sector-specific nature. This document allows the companies to more easily identify the information that should be provided, and provide this information with concrete examples. Furthermore, in June 2019, the European Commission introduced the second interpretation of the "materiality concept" by implementing a 30-page supplement on climate reporting to

complement the existing guidelines document. Thus, two perspectives on the concept of materiality have to be taken into account by the company:

- financial materiality (i.e., any factor that must be taken into account to understand the development or performance of company); and/or
- environmental and social materiality (i.e., any factor that must be taken into account to understand the external impacts of a company).

For investment products that promote, inter alia, ESG characteristics, the pre-contractual information must specify how the ESG characteristics are met and, if a benchmark is designated, how this benchmark is appropriate. In addition, their periodic reports must describe the extent to which ESG characteristics have been met.

For investment products that have sustainable investment as an objective, financial actors and advisors must set out in the pre-contractual documents how this objective is to be achieved, either by setting out how the chosen benchmark is aligned with this objective, or, if the objective is carbon reduction, an indication of its compliance with the objectives of the “Paris Agreement.” Periodic reporting should specify the overall sustainability impact of the financial product. If there is a benchmark, the financial actor should also compare the performance of this index with another broader market index. Under French law, for example, these requirements on the extra financial performance statement are stated in article L. 225-102-1 et seq. of the French Commercial Code.

The EU Parliament and Council adopted the Directive of October 23, 2019, on the protection of persons who report breaches of Union law. This directive covers a fairly

broad scope. In particular, it concerns whistleblowers in matters of public health, environmental protection, privacy, and personal data protection. The directive provides the creation of communication channels (internal, external, and public) as well as a duty of confidentiality regarding the identity of the whistleblower and, finally, support and protection measures. The whistleblower directive imposes a stronger protection than French law but is limited to the competencies of the EU law and is denser and more detailed than the French Sapin II law. However, the Member States may include the EU provisions in the general status of whistleblowers, beyond the competencies of the EU. Currently, the French Sapin II law provides that the whistleblower must engage in "disinterested manner and good faith." The "disinterested manner" is replaced by the absence of "direct financial consideration" and good faith is not specified. As provided for in the directive and in the French Sapin II law, defense secrecy, medical secrecy, secrecy of the investigation, and secrecy of relations between a lawyer and his/her client are excluded from the whistleblowing regime. The new directive broadens the scope of protected natural or legal persons beyond the whistleblower: they include possible facilitators such as trade unions, persons linked to the whistleblower, or to their company (e.g., if it is a subcontractor or a client) will be covered. The new directive should be transposed in France before the end of the year.

What are the penalties if a public company fails to disclose all material information?

EU regulations do not provide for sanctions for such breaches. Thus, they leave it to national legislation to regulate this point. For example, as a general rule, French law does not provide for specific sanctions if French companies do not take into account

social and environmental issues. Although some penalties are provided by the French Environment Code (Article L. 415-3 of the French Environment Code). However, the rules of ordinary law will mostly apply in this situation. For example, an action for breach of the company's duty of care could be filed for which sanctions are as follows:

- After a formal notice has remained without effect for more than three months, any person with an interest in the case may resort to the competent court which may order the company to comply with its obligations under Article L. 225-102-4 of the French Commercial Code, which—in view of the text—should be able to include, a priori, the drawing up, implementation, and publicizing of the due diligence plan.
- Failure to comply with the obligations defined in Article L. 225-102-4 of the French Commercial Code "engages the liability of its author and obliges him/her to compensate for the damage that the performance of his/her obligations would have made it possible to avoid", under "the conditions provided for in Articles 1240 and 1241 of the Civil Code," the text expressly specifies that the competent court on the matter may order, under a fine, the enforcement of its decision, the publication, dissemination, or posting of the decision, and that the costs are to be borne by the convicted person.

ESG has become a main topic in general meetings:

- At GDF SUEZ, Gérard Mestrallet introduced the Annual General Meeting with a presentation of the Group's key financial and non-financial figures (renewable energies, biodiversity, health and safety, training, gender diversity, shareholding, etc.).

- Bouygues, since 2011, has opened its annual General Meeting with the Group's main social indicators (workforce, health and safety, employee shareholding) and includes non-financial indicators in its business review alongside financial and operational indicators. Each year, Total reports on its non-financial performance using various international reporting standards.
- Since 1997, Shell has published an annual report on its environmental and social performance.
- Since 1997, BP has been implementing several measures to address environmental issues while developing natural gas production.
- Increasingly large companies have measures about environmental and social issues.
- There are also lobbies and activists that continue to use direct action to promote ESG concerns.

All of these actions are subject to the classic conditions of admissibility of legal action defined by the French Code of Civil Procedure, and more particularly Article 31, which states: "The action is open to all those who have a legitimate interest in the success or rejection of a claim, subject to the cases in which the law attributes the right to act only to those persons whom it qualifies to raise or combat a claim, or to defend a specific interest." Any claimant must therefore have the capacity and interest to act, the lack of which is sanctioned by a dismissal, as well as the damaging fact, the prejudice that this has caused, and the link between the two.

Enforcement for Shareholders in the European Union

According to the EU Directive dated July 11, 2007, on the exercise of certain rights of shareholders in listed companies, Member States must ensure that shareholders, acting individually or collectively, with respect to their participation in meetings:

- have the right to place items on the agenda of the general meeting, provided that each such item is accompanied by a justification or a draft resolution to be adopted at the general meeting; and
- have the right to table draft resolutions concerning items included or to be included in the agenda of the general meeting
- As such, they can propose orientations or projects concerning the company's ESG policy.

In France, the shareholder has the right to participate in collective decisions. During the meeting to which they are invited, they may be asked to vote on the past management of their representatives, i.e., the company's directors, and on the future direction that these directors should take in the coming years.

PERU

Formal ESG regulatory frameworks have not to date been developed in Peru. Notwithstanding this, ESG related matters including human rights, environmental and social impacts on communities, the care and conservation of the environment, climate change, and biodiversity have long been a focus for business in Peru and are, in many instances, the subject of specific legislation. In addition, regulatory agencies as well as government bodies are actively developing ESG informed policies and guidelines to be applicable on an industry basis and are considering ESG disclosure frameworks. Interest in ESG is further being generated through activity in the sustainable bond market, and ESG has gained prominence with the addition of an ESG index to the Lima Stock Exchange.

Current most prevalent ESG issues[245]

Environmental Issues

There have been a number of environmental issues gaining relevance in Peru. These include water-related risks,[246] corporate policies regarding the care and

[245] This chapter was last updated by October 28, 2022

[246] The OECD identifies as major risks related to water the following: risk of too much, too little and too polluted water; and overall disruptions to freshwater systems. Additionally, lack of access to water supply or sanitation can be considered water-related risks. https://www.oecd.org/water/risks-disasters-and-climate-change.htm#:~:text=The%20OECD%20identifies%20for%20major,as%20another%20water%2Drelated%20risk.

conservation of the environment, climate strategy, and biodiversity.[247] Most particularly, Peru has enforced eco-efficiency measures which allow the continuous improvement of the public sector through the use of fewer resources as well as the generation of fewer negative impacts on the environment.[248]

On August 15, 2022, the Minister of the Environment, Modesto Montoya, stated that the environmental sector will prepare a legislative proposal for the creation of a guarantee fund for the occurrence of possible environmental disasters, which all companies will have to assume before starting their productive activities in the country.[249] At the time of drafting this report, the bill has not yet been drafted or sent to the Council of Ministers for approval.

National Decree #009-2009 on "Eco-efficiency measures for the Public Sector"

On May 14, 2009, the President of Peru signed National Decree #009 that called on the national government to enforce eco-efficiency measures to generate savings in public spending. These measures were defined

[247]El Comercio, & Malpartida, N. M. "¿Qué son los criterios ESG y cómo afectarán a las empresas listadas en la BVL?" *El Comercio Perú*, July 27, 2021. https://elcomercio.pe/economia/peru/que-son-los-criterios-esg-y-como-afectaran-a-las-empresas-listadas-en-la-bvl-nndc-noticia/.

[248]Presidencia de la República de Perú. Decreto Supremo No. 009-2009 MINAM "Medidas de Ecoeficiencia para el sector público", https://www.minam.gob.pe/wp-content/uploads/2013/09/ds_009-2009-minam.pdf.

[249]El Peruano. "Minam elabora propuesta para crear un fondo de garantia ante eventuales desastres ambientales", https://elperuano.pe/noticia/179716-minam-elabora-propuesta-para-crear-un-fondo-de-garantia-ante-eventuales-desastres-ambientales.

as actions to improve public service by enabling the use of fewer resources and generating fewer negative impacts on the environment. Among the proposed measures, the government was asked to implement strategies to save paper and related materials, segregate and recycle solid waste, and implement energy-saving devices and eco-friendly machinery by all government agencies. This decree also pointed out the need to report the results in the implementation of these measures and the generation of eco-efficiency and institutional monitoring reports for these measures on a regular basis.

Social Issues

There are also significant prevalent social issues in Peru. For instance, the development of human capital where Peru aims to generate greater confidence in company stakeholders. Another important social issue is labor indicators, also known as a company's management towards people who may be most impacted by its activity (such as employees, the community, suppliers, and customers). Furthermore, human rights, corporate citizenship, social impact on communities, and quality management and product recalls are very prevalent issues as well.

Governance Issues

Salary discrimination is forbidden in Peru by Law No. 30709 issued in December 2017[250] and its regulations issued in March 2018.[251] These regulations determine a set of categories, roles, and remunerations that enable the application of an "equal pay for equal work" principle in all companies in the country. This law also ensures the exercise of women's economic rights. Its objective is to reduce institutional barriers that hinder equality in the private workplace between men and women.

Additionally, Peru has enacted regulation specifically for the promotion, protection and development of persons with disabilities. Law No. 29973 issued in December 2012[252] and its regulations issued in April 2014[253] establish a legal framework for their full and effective inclusion in political, economic, social, and cultural life and technology, by ensuring that companies with more than 50 employees are obligated to hire people with disabilities in a proportion of not less than 3% of their entire workforce.

Is ESG reporting mandatory or otherwise regulated in Peru?

ESG reporting is not specifically regulated under any legislation in Peru for its general application. However, there are some regulations for certain sectors that require the application of ESG matters such as the following acts and resolutions:

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[250] Available at www.ilo.org/dyn/natlex/docs/ELECTRONIC/106703/131013/F530032286/PER-106703.pdf.
[251] Available at https://www.gob.pe/institucion/mtpe/normas-legales/2253-002-2018-tr.
[252] Available at https://leyes.congreso.gob.pe/Documentos/Leyes/29973.pdf.
[253] Available at https://www.gob.pe/institucion/mimp/normas-legales/1599384-002-2014-mimp.

- Resolution 033-2015-SMV/01. Issued by the Peruvian Securities Authority (Superintendencia de Mercado de Valores – SMV), which requires that companies listed in the Lima Stock Exchange shall disclose annual sustainability reports jointly with their Annual Reports. The information to be presented refers to the actions and standards implemented by the company in relation to its economic, environmental, and social development impact.
- Directive 068-2015/DE-FONAFE. Through this directive the National Holding Fund for State Enterprises (Fondo Nacional de Financiamiento de la Actividad Empresarial del Estado – FONAFE) approved the Guidelines for Corporate Social Responsibility, applicable to 32 state-owned companies that span the electric, financial, oil and gas industries, among others. These guidelines seek to direct the formulation, approval, follow-up, and reporting of social responsibility plans and programs in the companies of the FONAFE Corporation.
- Resolution 1928-2015. By this resolution, issued by the Banking and Insurance Superintendence (Superintendencia de Banca y Seguros – SBS), the SBS requires the application of Equator Principles[254] in loans that exceed USD10 million granted to execute investment projects. The objective of this resolution is to avoid the exposure of the financing system to social and environmental risks related to the execution of said projects.

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[254] The Equator Principles (EP) are intended to serve as a common baseline and risk management framework for financial institutions to identify, assess, and manage environmental and social risks when financing projects.

Additionally, environmental regulation applicable to extractive sectors in Peru requires the application of social indicators,[255] as part of the social responsibility programs implemented by companies and included in their environmental assessments. However, supervision of the implementation of these programs has not been advancing properly, which has deterred the imposition of sanctions.

Reporting requirements and guidance for companies listed on domestic stock exchanges are expanding over time. The Lima Stock Exchange (BVL) announced the incorporation of the ESG index to the local market by the end of 2021. This index replaced the S&P/BVL IBGC which was designed originally to indicate how prices of the shares of Peruvian companies reacted to the adoption of good corporate governance practices. Under this original index, each constituent's weight is a result of its free-float adjusted capitalization multiplied by a corporate governance factor.[256]

The S&P/BVL Peru General ESG Index

The S&P/BVL Peru General ESG Index measures the performance of securities based on a series of sustainability criteria, applying exclusions

[255] Commonly used social indicators in Peru can be drawn from the World Economics Social Impact Index that covers health factors such as life expectancy and median age; education in terms of years of schooling and expenditure on education and employment weighted in population in work and population in poverty. Results of the Index can be found here: https://www.worldeconomics.com/ESG/Social/Peru.aspx.

[256] Bolsa de Valores de Lima. "What is the S&P/BVL IBGC Index?", https://www.bvl.com.pe/en/market/indexes/spbvl-ibgc-index.

from non-compliance with UN Global Compact principles, ESG business activities, or involvement in ESG controversies per S&P Global's Media and Stakeholder Analysis. Peruvian companies are selected based on their S&P DJI ESG score, which comes from the S&P Corporate Sustainability Assessment (CSA). Selection for inclusion into this index is a result of ESG scoring determined by the S&P/BVL Peru General Index, where companies with results equal to or greater than the median of the General Index, as well as companies with a score between the median and 25% lower in proportion to the median score, are selected.[257]

There are a number of other ways that ESG reporting has been advanced in Peru over time. For example, in 2018, the BVL and the British Embassy published Green Bond Guidelines for Peruvian issuers. These constitute a non-mandatory framework, which outlines general terms for the issuance of green bonds in the local market. This guide reaffirms the commitment that exists between the UK and Peru to jointly address climate change through financial innovation. Some of the issuers with corporate bonds issued in Peru are Productos Tissue del Perú S.A.C. and Corporación Financiera de Desarrollo S.A. COFIDE. In February 2020, SMV launched an update to the annual sustainability report including features in line with the new advances and

[257] S&P Dow Jones Indices. "S&P/BVL Peru General ESG Index", https://www.spglobal.com/spdji/en/indices/esg/sp-bvl-peru-general-esg-index/#overview.

trends of sustainability practices. In April 2020, the Responsible Investment Program (Programa de Inversión Responsable - PIR), which is a non-profit association that emerged from the Peruvian financial sector in 2014, published Guidelines for a Responsible Investment Policy, advocating for institutional investors to consider a sustainability approach in their investment decisions. Currently, 10 institutions are part of the PIR: A2G, Agrobanco, Bolsa de Valores de Lima, Cofide, LarrainVial, ONP, Prima AFP, Profuturo AFP, Rimac Seguros, and Sura Perú.

Additionally, State action has been crucial to the development of the local capital markets regarding ESG implementation in different transactions. The National Development Bank of Peru (COFIDE) is committed to the social, sustainable, and inclusive development of the country. It is the largest issuer of ESG bonds in Peru, having issued both Green and Sustainable Bonds, which have been certified by Vigeo Eiris.[258] This trend is expected to continue, as COFIDE has announced that it is evaluating the possibility of issuing the first blue bond in Peru. According to the 2021 report, the Green Bond funds were allocated to the RenovAndes H1 hydroelectric power plant, which is a project in the renewable energy category. The BVL is prepared to attract funds of investors committed to ESG practices. In recent months its website has been updated and official—yet limited—information for the issuance of ESG bonds has been published. Further, Companies that have securities registered in the "Public Registry of the Securities Market" are required to disclose their good corporate governance practices to the public. They report their adherence to the principles contained in the "Code of Good Corporate Governance for Peruvian

[258] Vigeo Eiris is an independent international provider of ESG research and services for investors and public & private organizations.

Companies" (Código de Buen Gobierno Corporativo para las Sociedades Peruanas), and file their report as indicated in Resolution SMV No. 012-2014-SMV/01. Finally, since none of the ESG reporting standards are of general application, it is difficult to delineate which is the most widely used.

What are the penalties, if any, for failing to comply with ESG reporting requirements?

In general, there are no penalties for not complying with the ESG reporting requirements. Environmental regulation applicable to the extractive sectors in Peru (i.e., mining, oil & gas, electricity) requires the application of social indicators as part of the social responsibility programs implemented by companies and included in their environmental assessments.

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

There is no legislation in Peru that mandates incorporating ESG issues into corporate governance or other decision-making structures. As discussed, there is some regulation for certain sectors that requires the application of ESG matters and also some proposed legislation. Namely, the Lima Stock Exchange (BVL) incorporated an ESG index to the local market in November 2021.

What can be expected on the development of ESG requirements over the short-, medium-, and long-term?

In the short-term, the incorporation of the ESG index to the local market by the end of 2021 is expected, including the type of security, selection criteria, calculation method, update periodicity, and dissemination. This should generate the invalidation of the S&P/BVL IBGC index. In the medium-term, an improvement in terms by replacing the current S&P/BVL IBGC with ESG criteria is expected. Also, expect the government's best efforts to facilitate the implementation of ESG criteria in companies, through its regulatory powers, so that the initiative can move forward. In the long-term, the hope is that the legal regulation can be consolidated, considering the market's evolution on these issues. Thus, ESG criteria will be standardized.

ESG-related legal challenges in Peru

At the time of the drafting of this guide, there have been no legal challenges to companies in Peru regarding ESG.

Are companies required to disclose information related to ESG issues?

Reporting requirements for publicly listed companies in Peru are set forth in the Capital Markets Law (Ley del Mercado de Valores) and the regulations on disclosure of relevant matters (Reglamento de Hechos de Importancia e Información Reservada). Further, the regulations include an exhibit with a long list of indicative or referential events, facts, actions, and transactions that would typically meet this materiality threshold, and therefore, would need to be reported to the market via

Hecho de Importancia. This list of referential or indicative matters includes "Information related to effects that have a social or environmental nature with respect to the operations that the company performs and that may affect its sustainability." Thus, Peruvian reporting requirements do not expressly mention or include ESG reporting standards, but certain ESG-related events or issues may reasonably fall within the materiality threshold and/or be material for a relevant issuer, and therefore, would trigger reporting obligations under the existing rules. An interested party (other than a shareholder or bond holder) can report material events that have not been disclosed/fully disclosed to a regulator. This may be done via a claim (denuncia) before the Peruvian securities regulator. Once a claim is filed, the regulator will notify the public company (issuer) to confirm, disclose, and/or disregard said claim. Further, the regulator may open an investigation, and if there is merit or indication that an infraction has been committed, said regulator may open an administrative sanctioning proceeding and/or report the matter to other competent authorities, as applicable. Finally, the concept of "double materiality" is not recognized under Peruvian reporting rules.

What are the penalties if a public company fails to disclose all material information?

Penalties for a public company's failure to disclose all material information are typically economic fines imposed by the regulator, which considers the severity of the infraction. The regulator can impose a fine or other measures based on a proportional and reasonable basis, for infractions that cause adverse effects on the market, the issuer, its business, other investors, etc. There is no legal impediment for an interested party to participate in the context of a sanctioning proceeding, if so

required by the regulator. Typically, these proceedings are conducted by the regulator against the issuer; however, it is conceptually feasible for the regulator to request the participation of interested third parties, witnesses, experts, etc. Also, the regulator is entitled to apply other sanctions instead of fines and corrective measures, such as effective impediments for a responsible person to participate as officers in a public company and/or forcing the issuer to disclose or make public the undisclosed matter.

Under Peruvian corporate law, one or more shareholders that represent 20% or more of the total shares with voting rights may request that the Board call for a shareholders' meeting to address a specific agenda or proposal. If the Board does not comply, then a Public Notary or judge may proceed to make such a call upon request of these shareholders. If the company has the corporate form of a Sociedad Anónima Abierta, it will be legally required to be publicly listed in Peru and the threshold to request (and enforce) a call is lower: at least 5% of the voting shares. These shareholders' rights may be used to add or include proposals to be reviewed at an annual general meeting. There are no known precedents where this mechanism has been used in Peru for the adoption of ESG policies, to elect ESG activists to the board, or similar. Nonetheless, these shareholders' rights have been used in the past for other comparable relevant issues, or purposes; therefore, it is reasonable to expect to see this kind of activism in the near future. It is very likely that an ESG activist will also disclose the issues or its claims to the local media, seek to contact or file claims against officers of the company, make formal information requests to the company and file related claims, and/or notify material clients or providers of the company regarding these issues, etc. These approaches have been

adopted in the past by shareholders and other activists in Peru to gain power, notoriety, and/or negotiate and obtain certain benefits or rights.

UNITED KINGDOM

The United Kingdom (UK) has a vast array of regulatory, legislative, and industry frameworks addressing specific aspects of ESG applicable to different industries. From capital market participants to private corporate and financial institution organizations, the UK has been directing ESG engagement through a range of tools. Although the environment and climate change have recently taken center stage and have resulted in significant policy developments, the UK also continues to address significant social issues such as modern slavery from a legislative and regulatory perspective, and has a history of meaningful engagement on governance issues. This chapter seeks to provide some insight into how ESG matters are coming to the forefront in the UK, whether through regulatory agency action, government, and legislative intervention or use of the judiciary in enforcing legal obligations, whether generated under domestic or international law.

Current most prevalent ESG issues[259]

Environmental Issues

The market for ESG investments in the United Kingdom has grown dramatically in recent years, and there have been a number of legal developments in the UK from an ESG perspective, with increasing requirements and focus on companies' activities.

[259] This chapter was last updated on November 18, 2022.

In October 2021, the UK Government released "Greening Finance: A Roadmap to Sustainable Investing,"[260] which sets out an overview of the Government's strategy to ensure there is a better flow of decision-useful information on environmental sustainability to financial market participants. In its roadmap, the Government notes how the demand for sustainable products in the UK is high, with 70% of the UK public wanting their money to go towards making a positive difference to people and the planet. It further notes how the market is responding with data from the Investment Association, finding that 49% of the £9.4 trillion in UK assets were integrating ESG in their investment processes in 2020, up from 37% in 2019. Addressing climate change and reducing GHG emissions has continued to be a prevailing focus of the UK Government's environmental agenda in recent years. The UK has legislated binding emissions reduction targets through the 2008 Climate Change Act (CCA). The CCA originally required the UK to achieve an 80% reduction in greenhouse gas levels (below 1990 levels) by 2050. The CCA creates a system of "carbon budgets" which sets limits on the net UK carbon account over five-year periods. In 2019, the UK's reduction target was increased from 80% to 100% (i.e., a net zero emissions target) by 2050. In April 2021, the UK Government announced that it "will set the world's most ambitious climate change target" to reduce emissions by 78% by 2035 compared to 1990 levels as part of its sixth budget.[261] Against this backdrop, the UK has issued a

[260] Government of the United Kingdom. "Greening Finance: A Roadmap to Sustainable Investing", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031805/CCS0821102722-006_Green_Finance_Paper_2021_v6_Web_Accessible.pdf

[261] "Britain's net-zero carbon target is one of the world's most ambitious" *The Economist.* May 2, 2019. https://www.economist.com/britain/2019/05/02/britains-net-zero-carbon-target-is-one-of-the-worlds-most ambitious?utm_medium=cpc.adword.pd&utm_source=google&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=Cj0KCQjw94WZBhDtARIsAKxWG-9zgNFuNAdpk1wHvMHbulls1K2QzjHl83Ippzdm7kmubhA7I1DqUgwaAt1jEALw_wcB&gclsrc=aw.ds.

range of regulatory measures that seek to achieve its net zero target and a heightened focus by investors and regulators on companies' GHG emissions footprint. Greater attention has also been given to other environmental topics beyond reducing GHG emissions, such as the importance of biodiversity, water pollution, and circular economy initiatives. To this end, the 2021 Environment Act received Royal Assent on November 9, 2021. The Bill was initially introduced into Parliament in January 2020, but its passage has been subject to a number of delays and amendments. Broadly speaking, the Environment Act will establish a post-Brexit set of environmental principles and a framework for setting environmental targets, as well as establishing an Office for Environmental Protection.

Social Issues

In the UK, there have been various legal developments focused on how companies manage relationships with employees, suppliers, customers, and the communities in which they operate. Issues of employee relations, health and safety at work, and human rights throughout supply chains have been particularly relevant in this instance. Some initiatives of note include:

I. UK businesses are required to comply with various legal requirements related to equal pay, inclusion, and non-discrimination. For financial years beginning on or after April 6, 2017, large employers (with at least 250 relevant employees) are subject to mandatory gender pay reporting under the 2010 Equality Act. The UK Government has also consulted on proposals to introduce mandatory ethnicity pay gap reporting.

II. From a supply chain and human rights perspective, since 2015, the UK's 2015 Modern Slavery Act has required large commercial organizations to prepare and publish an annual modern slavery statement. In September 2020, the UK Government announced a draft of proposed changes to enhance these requirements via a Modern Slavery (Amendment) Bill (the "Amendment Bill). While the Amendment Bill will not progress,[262] a new Modern Slavery Bill was proposed in the Queen's Speech to the UK Parliament of May 2022. The proposed Modern Slavery Bill incorporates many of the recommendations and conclusions that were to be reflected in the Amendment Bill. Though the text of the proposed Modern Slavery Bill has yet to be published, it is expected to: (i) strengthen the requirements on in-scope businesses to set out the steps they have taken to prevent modern slavery in their operations and supply chains; (ii) provide for certain areas of content to be mandatory in any modern slavery statement; (iii) introduce civil penalties for organizations that fail to comply with the statutory requirements; and (iv) mandate that modern slavery statements be published on the UK Government-run reporting service, in addition to an organization's own website.

[262] UK Parliament. "The 2021-2022 session of Parliament has prorogued and this Bill will make no further progress." Accessed on November 18, 2022, https://bills.parliament.uk/bills/2892/news.

The modern slavery statement in the United Kingdom

In March 2020, pursuant to the 2015 Modern Slavery Act, the UK government issued its first modern slavery statement.[263] The statement was the first of its kind, and highlighted the government's efforts towards eradicating modern slavery from its supply chains. Some of the measures put in place included direct engagement with suppliers and training to over 250 government commercial staff. The statement also presented a series of goals for ministerial departments.

All statements can be found in the Modern Slavery Statement Registry,[264] which is publicly available and currently houses over 29,000 statements.

More recently, especially against the backdrop of the COVID-19 pandemic, there has been an increasing focus on mental and physical health and well-being in the workplace, as well as ensuring that there is a meaningful commitment to diversity. For example, in July 2021, the UK Government published its response to a consultation on sexual harassment in the workplace. As part of this response, the Government announced its intention to introduce a duty requiring employers to take all

[263] Government of the United Kingdom. "UK Government Modern Slavery Statement", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875800/UK_Government_Modern_Slavery_Statement.pdf.

[264] Government of the United Kingdom. "Modern slavery statement registry", https://modern-slavery-statement-registry.service.gov.uk/search-results?Search=.

reasonable steps to prevent harassment, introducing workplace protections against third-party harassment. In July 2020, the UK Government launched a Global Human Rights sanctions regime to impose sanctions on legal and natural persons involved in serious human rights violations. A 2021 UK Government Report[265] found that 73 individuals and six entities are targeted under the Global Human Rights regime. The introduction of a specific human rights sanctions regime is in line with the EU, US, and Canadian governments' respective sanctions policies.

Governance Issues

A key recent development in the UK is that, in March 2021, the UK Government published a consultation paper proposing major reforms to the UK audit industry and corporate governance regime. The proposals have been made in the wake of a number of sudden and major corporate collapses (namely the insolvencies of BHS and Carillion plc[266]). The proposals include:

I. more stringent reporting and audit requirements for very large non-listed companies through the expansion of a definition of public interest entities;

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[265] Foreign, Commonwealth & Development Office "Sanctions Regulations Report on Annual Reviews 2021" (11 January 2022)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052217/The_Sanctions_Regulations_Report_on_Annual_Reviews.pdf.

[266] Ashworth, Lance & Bryan, Zahler. "Carillion Liquidation: questions to answer" *Thomson Reuters*, February 1, 2018.

https://content.next.westlaw.com/practical-law/document/I6f8a5035036711e89bf099c0ee06c731/Carillion-liquidation-questions-to-answer?viewType=FullText&originationContext=document&transitionType=DocumentItem&ppcid=b20d84b417934720a397e22481536557&contextData=(sc.RelatedInfo).

II. introducing new directors' duties related to internal controls and risk management and reporting on anti-fraud measures (as well as a claw-back of bonuses if a company fails/there are serious director failings within two years of the award);

III. creation of a new audit profession, along with various reforms to increase competition and reduce potential for conflicts of interest in the audit industry;

IV. requirements for companies to set out their approach to audit through the publication of an audit and assurance policy; and

V. the creation of a new audit regulator.

In the wake of the internationalization of the Black Lives Matter movement, there has been an even greater focus on board diversity. Recent developments of note in the UK include the publication by the UK's Financial Conduct Authority (FCA) of its final policy decision (PS22/3) to change its Listing Rules to require in-scope companies to disclose publicly in their annual report whether they meet specific board diversity targets related to gender (at least 40% of the board should be women and at least one senior board position should be a woman) and ethnicity (at least one member of the Board should be from a non-White ethnic minority) on a "comply or explain" basis. Alongside this, the FCA is proposing that in-scope companies publish standardized data on the composition of their board and most senior level of executive management by gender and ethnic background. The new listing requirements are proposed to apply to accounting periods starting on or after April 1, 2022.

Since April 2021, the UK Government has been able to impose sanctions on legal and natural persons involved in serious corruption. Currently, 27 persons are targeted. This development follows greater latitude to create sanctions afforded by the UK's exit from the European Union and is in line with the US Government's sanctions policy. In July 2021, the Bank of England/Prudential Regulation Authority and FCA published a discussion paper (DP21/2) setting out policy options to drive diversity and inclusion in financial services. The regulators have set out policy options, including the use of targets for representation, measures to make senior leaders directly accountable for diversity and inclusion in their firms, linking remuneration to diversity and inclusion metrics, and the regulators' approach to considering diversity and inclusion in non-financial misconduct. The UK's Bribery Act 2010 (UKBA) introduced a new criminal offense of commercial organizations failing to prevent bribery by "associated persons." The UKBA provides a defense if commercial organizations can show that they have in place adequate procedures designed to prevent bribery. The introduction of the UKBA was a key policy initiative to prompt commercial organizations to assess whether they have adequate anti-bribery policies and procedures.

Is ESG reporting mandatory or otherwise regulated in the United Kingdom?

In the UK, a patchwork of laws and other regulatory materials relate to public disclosure of certain ESG topics. This guide has sought only to cover the key and most commonly applied laws and frameworks in this regard. It considered only entity-level and public reporting requirements and not disclosure requirements

more broadly; for example, in relation to consumer or financial products or disclosures for the purposes of listing on stock exchanges, etc.

Reporting on ESG topics in annual reports is mandatory to some extent in the UK. The key piece of legislation is the 2006 Companies Act, but reporting on ESG topics is also governed by supplementary regulations, such as the 2008 Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations (as amended). The annual reporting legislative framework requires various disclosures in annual reports on ESG matters, depending on the size and categorization of the organization and, in some cases, the appropriateness, relevance, and importance of the information. Examples of information required to be disclosed include:

I. disclosures made under the streamlined energy and carbon reporting regime on greenhouse gas emissions, energy consumption, energy efficiency action, emissions intensity ratios, and methodologies applied (for quoted and large unquoted companies and large LLPs);
II. disclosures on environmental matters (including the impact of the business on the environment), employees and social, community and human rights issues, and any policies on these issues (and the effectiveness of those policies) (for quoted companies);
III. non-financial key performance indicators (KPIs), including information related to environmental matters and employee matters (for quoted and other public companies and large unquoted companies and large LLPs);
IV. a “section 172(1) statement” describing the responsibility directors have for the impact of the company’s operations on the community and the environment when performing their duty to promote the success of the

company (for quoted and other public companies and large unquoted companies). Companies must also publish their section 172 statement on their website as soon as practicable;

V. a "non-financial information statement" covering, a description of the organization's principal risks related to environmental, employee, social, human rights, anti-corruption, and anti-bribery matters, and how it manages these policies in place in relation to these matters (and their outcomes), as well as non-financial KPIs relevant to the organization's business (for large public interest entities);

VI. a breakdown of the number of persons of each sex who are directors, senior managers, and employees (for quoted companies);

VII. a statement on the company's engagement with employees and how the directors have had regard to the need to foster the company's business relationships with suppliers, customers, and others (for large companies);

VIII. information on corporate governance arrangements (by certain large companies, excluding premium listed companies who are under a separate corporate governance statement requirement, as outlined further below). This includes a requirement to make the statement of corporate governance arrangements available online; and

IX. information on the CEO to workforce pay ratio (large quoted and unquoted traded companies).

The Listing Rules and the Disclosure Guidance and Transparency Rules made by the FCA also require companies with a premium UK listing to include in their annual reports statements setting out:

I. whether the company has made climate-related disclosures consistent with the Taskforce on Climate-related Financial Disclosures (TCFD) framework. If so, the company must identify where the disclosures are contained, or if not, the company has to explain why not, describe any steps it is taking in order to make the disclosures in the future, and provide an indication of when the disclosures will be made (this requirement also applies to companies with a standard UK listing, including GDRs);

II. its corporate governance arrangements, including, diversity policies and how they are implemented; and

III. how the company has applied the UK Corporate Governance Code's (the "Code) main principles, and whether the company has complied with the Code's provisions (and explaining and justifying any non-compliance). The Code includes various principles and provisions related to governance issues (e.g., board leadership, composition and division of responsibilities; executive remuneration; and risk management), and extends to some extent into other aspects of ESG, including an emphasis on stakeholder engagement and a reference to companies "contributing to a wider society.

Further, guidance associated with the Code recognizes that environmental impacts can be one of the main factors affecting the long-term success and viability of a company, and identifies various frameworks and guidance documents on ESG matters (including the TCFD recommendations) that can help identify relevant social and environmental considerations.

There are also various other requirements or expectations in relation to disclosure on ESG topics, including:

I. legal requirements under the Modern Slavery Act 2015 on certain commercial organizations to publish an annual standalone modern slavery statement on what action they have taken to ensure their business and supply chains are slavery free;

II. legal requirements under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 for certain companies to prepare an annual standalone gender pay gap report;

III. legal requirements under the Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 on trustees of occupational pension schemes to publish a standalone TCFD report relevant to the scheme (e.g., information on how the trustee maintains oversight over climate risks and opportunities relevant to the scheme; the climate risks and opportunities identified for the scheme; climate impacts on the scheme's investment strategy; etc.);

IV. expectations on institutional investors to publicly disclose in standalone stewardship reports certain matters under the UK Stewardship Code, including all the Principles, and underlying reporting expectations of the Stewardship Code, that are relevant to the firm. This might include governance structures and processes; effectiveness in identifying and responding to systemic risks (such as climate change); the issues that have been prioritized for assessing investments, including ESG issues; and the processes used to integrate material ESG issues; and

V. supervisory expectations on banks under Supervisory Statement SS3/19 (and later "Dear CEO" letter from the Prudential Regulation Authority (PRA)) to fully implement their approach to managing climate-related risks by the end of 2021, and engage with the TCFD framework in developing their climate-related financial disclosures. The location of TCFD disclosures is not mandated, but the TCFD framework itself encourages disclosures to be made in annual financial reports.

Key regulators are as follows:

I. the Financial Reporting Council (FRC) in relation to annual reporting requirements and disclosures made in relation to the UK Corporate Governance Code (and the UK Stewardship Code);
II. the FCA in relation to the Listing Rules and the Disclosure Guidance and Transparency Rules;
III. the PRA in relation to its supervisory statements;
IV. the Pensions Regulator in relation to the TCFD requirements imposed on trustees of occupational pension schemes;
V. the Home Office in relation to statements made under the Modern Slavery Act 2015 disclosure requirements; and
VI. and the Equality and Human Rights Commission can take enforcement action in relation to "unlawful acts," which may include failures to prepare a gender pay gap report (however, the Commission's powers in this respect have been the subject of debate).

There is a patchwork of laws and regulatory expectations in respect to such disclosures. For example, the FCA has published guiding principles on the design,

delivery, and disclosure of ESG and sustainable investment funds (which outlines the FCA's expectations on ESG disclosures to minimize greenwashing). The London Stock Exchange (LSE) has issued guidance for issuers on the integration of ESG into investor reporting and communication (LSE Guidance). The LSE Guidance is based on the UN Sustainable Stock Exchanges Initiative's Model Guidance on Climate Disclosure,[267] which is in line with the recommendations of the TCFD. The LSE Guidance contains information on the key global ESG reporting frameworks and how to report ESG data. There is no penalty for failing to apply the LSE Guidance. Note that the legal listing rules applying to listed companies are set by the FCA rather than the domestic stock exchanges. Stock exchanges can, however, impose standards and rules for securities and other instruments admitted or seeking to be admitted to trading. In reviewing the LSE's Admission and Disclosure Standards, the LSE Rules, and the AIM Rules, no ESG-specific reporting obligations have been identified under these rules and standards. Breaches of such standards or rules can give rise to enforcement, including warning notices, suspension, or cancellation of trading in an issuer's securities or fines.

Mandatory ESG reporting in the UK is advanced by various departments of the UK Government and regulators.

[267] Sustainable Stock Exchanges. "Model Guidance on Climate Disclosure", https://sseinitiative.org/wp-content/uploads/2021/06/Model-Guidance-on-Climate-Disclosure.pdf.

The TCFD Roadmap

Currently, the UK Government is particularly active on climate disclosure, with HM Treasury having released in November 2020 a roadmap towards mandatory climate-related disclosures aligned with the recommendations of the TCFD (the "TCFD Roadmap).[268] The TCFD Roadmap sets out a series of actions to be taken by regulators and Government departments (the Pensions Regulator and the Bank of England/PRA), the FCA, and the Department for Business, Energy, & Industrial Strategy (BEIS) until 2025 to implement TCFD reporting requirements across the UK economy.

UK regulators had advanced TCFD-aligned reporting through research and regulatory action, with some of the actions identified in the TCFD Roadmap having been completed or in progress at the time the TCFD Roadmap was published, including the reporting requirements or expectations mentioned prior. More broadly, the FRC, through the development of the UK Corporate Governance Code and UK Stewardship Code, has been active in promoting ESG-related reporting. These Codes are not currently mandatory, but rather apply to:

[268] Government of the United Kingdom. "A Roadmap towards mandatory climate-related disclosures", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933783/FINAL_TCFD_ROADMAP.pdf.

I. UK premium listed companies on a “comply or explain” basis (for the UK Corporate Governance Code); or

II. UK asset managers and asset owners (and the service managers that support them) on an “apply or explain” basis (for the UK Stewardship Code).

The Stewardship Code in particular notes that environmental, particularly climate change- related, and social factors, in addition to governance, have become material issues for investors to consider when making investment decisions and undertaking stewardship. The FRC is also active in seeking to improve the quality of ESG-related disclosures. As part of this, it publishes thematic reviews across a range of topics—such as climate—sharing examples of good practice reporting and highlighting areas where improvements can be made. Another initiative spearheaded by the FRC is the Financial Reporting Lab, which provides a space for investors and companies to come together to develop pragmatic solutions to investors’ reporting needs. The Lab is currently undertaking a project concerning the production, distribution, and consumption of ESG data. The FRC, together with the PRA (which is a part of the Bank of England), co-chair the Climate Financial Risk Forum (CFRF), which builds capacity and shares best practice across financial regulators and industry to advance the sector’s responses to the financial risks from climate change. One of the CFRF’s working groups is the Disclosure Working Group, which produces guidance highlighting the legal risks associated with publishing a climate-related disclosure and how these risks can be effectively managed. Other activities that the Bank of England has undertaken to advance ESG reporting include working with the FCA in the multinational arena, such as the Network for Greening the Financial System (NGFS), a group of Central Banks and Supervisors, to accelerate the

scaling up of green finance and develop recommendations for central banks' role in combating climate change. The NGFS has three dedicated work streams, one of which is responsible for assisting climate risk disclosure by financial institutions and providing options to encourage disclosure. It is expected that most legal requirements will be in place by 2023, although the Roadmap outlines actions until 2025. Even prior to these legal requirements, the TCFD framework was seen as the leading reporting framework for climate-related financial information in the UK, and had received support from various regulators and organizations. However, there is the recognition in the UK that this falls short of a corporate reporting standard for climate issues. The UK Government and UK financial regulators have jointly supported the work of the IFRS in developing an international sustainability corporate reporting standard. During COP26, the IFRS announced the creation of the ISSB, which sits alongside the International Accounting Standards Board and is tasked with delivering a global baseline of sustainability-related disclosure standards covering sustainability-related risks and opportunities. The ISSB has been consulting on a draft of climate-related standards, and it will then expand its standard-setting to broader environmental and sustainability factors. The ISSB aims to establish the key elements of such standards by the end of 2022. In terms of public access to annual reports:

I. Under the Companies Act 2006, quoted companies and traded companies (broadly, public companies) must publish their annual accounts and reports on their websites and provide access to the same free of charge. Such reports and accounts must also be filed with Companies House (an executive agency sponsored by BEIS) and are available on the Companies House website free of charge. In addition, there are a number of private online services (such as AnnualReports.com) which offer access to

databases of company annual reports. The coverage of individual websites varies.

II. Companies which are not quoted companies or traded companies (broadly, private companies) are not subject to the requirement to publish annual reports on their websites. However, under the Companies Act 2006, where the private company is required to include a "section 172(1) statement" in their annual report, it must ensure that the statement is made available on its website free of charge. Large UK-incorporated private companies will need to include in their annual directors' reports a statement about their corporate governance arrangements.

III. Expectations on institutional investors to publicly disclose on the signatory's website, or, if they do not have a website, in another accessible form in standalone stewardship reports certain matters under the UK Stewardship Code, including governance structures and processes; effectiveness in identifying and responding to systemic risks (such as climate change); the issues that have been prioritized for assessing investments, including ESG issues; and the processes used to integrate material ESG issues.

IV. The location of TCFD disclosures, the subject of the supervisory expectations on banks under Supervisory Statement SS3/19, and later "Dear CEO" letter from the PRA are not mandated, but the TCFD framework itself encourages disclosures to be made in annual financial reports.

Industry-specific disclosure requirements

Transport: There is a wide range of trade associations and support organizations for the UK transport sector; however, from publicly available information on the websites of these associations, no ESG disclosure requirements for members have been identified.

Mining: From publicly available information on the websites for mining associations, no ESG disclosure requirements are enforced.

Hydropower: The British Hydropower Association is the non-governmental professional trade body dedicated to representing the UK hydropower industry and associated stakeholders. Its members include design and consulting engineers, developers/owners, contractors, operators, manufacturers and suppliers, project managers, financiers and investors, insurers, and environmental specialists. No requirements for members to disclose ESG reporting as a condition of membership have been identified.

As outlined above, there is a patchwork of laws and other materials which regulate public entity-level disclosures on specific ESG topics. However, oftentimes a broad range of enforcement mechanisms will be available to regulators, including working with companies to correct disclosure. In relation to annual reporting, broadly, the FRC is responsible for monitoring compliance of company annual reports with the relevant reporting requirements under the Companies Act 2006. The FRC has the

power to inquire into cases where it appears that relevant disclosures have not been provided and seeks to work, by agreement, with companies whose reports it reviews. Typically, the FRC takes a collaborative approach to enforcement in this way. However, it does also have the power to apply to the court for a declaration that a company's annual report does not comply with the Companies Act 2006 and for an order requiring the directors to prepare a revised report.

By way of example of FRC enforcement, in July 2010, the FRC received a complaint about the business review included in Rio Tinto's report and accounts for the year ending December 2008. As a result of discussions between the FRC and the company, the directors of the company included in their report and accounts more information about environmental matters, social and community issues, and related reputational risks. In some cases, directors may also face liability for misleading disclosures or material omissions in annual reports. In particular, under section 463 of the Companies Act 2006, a director is liable to compensate the company for any loss suffered by the company as the result of any untrue or misleading statement in, or any omission from, certain sections of the annual report (i.e., the strategic report, directors' report, directors' remuneration report, and any separate corporate governance statement) and where a director knows the statement to be untrue or misleading or has not taken the relevant degree of care. Separately, section 90A (and Schedule 10A) of the Financial Services and Markets Act 2000 (FSMA) allows shareholders to sue UK listed companies where they have suffered a loss as result of a misleading statement or dishonest omission in information published by the company (including annual reports). Schedule 10A also provides that a person other than the company (e.g., a director) is not subject to any liability, other than to the company. In effect, this mirrors section 463 of the Companies Act 2006, which also

provides that directors are only liable to the company. Also of note is that disclosures in strategic and directors' reports must be approved by the board of directors and signed by a director or secretary of the company. If approved reports do not comply with the requirements of the relevant sections of the Companies Act 2006, then every director of the company who knew that it did not comply, or was otherwise reckless, and failed to take reasonable steps to secure compliance, or prevent the report from being approved, commits an offense and may be liable to a financial penalty. Similarly, the failure of a UK public company to ensure that the section 172(1) statement is available on its website can trigger criminal offenses and fines for directors. Large companies that fail to make the statement of corporate governance arrangements available on a website for its financial year will in some cases commit an offense (e.g., where there is no reasonable excuse). Further, each officer of the company will be in default and may be required to pay a fine. In the annual reporting context, note that failure to make certain filings (such as a strategic report and directors' report) can attract the same penalties as late financial filing, and a director may face financial penalties with respect to such failure. The Conduct Committee of the FRC also has authority to apply to the courts for an order requiring directors to prepare revised reports where the reporting requirements have not been met. Breaches of the Listing Rules and/or Disclosure Guidance and Transparency Rules (including failures to set out corporate governance arrangements, report against compliance with the UK Corporate Governance Code or make a TCFD aligned disclosure) could expose a listed company to disciplinary action by the FCA, including a financial penalty. In addition, if a listed company fails to make a statement in its annual report regarding the disclosure of climate-related financial information under the TCFD framework, as required by the Listing Rules, the FCA will

require that company to publish the TCFD statement via a Regulatory Information Service as soon as possible after discovery.

What are the penalties, if any, for failing to comply with ESG reporting requirements?

Outside of the annual reporting context explained above, companies can also be exposed to penalties for breaches of ESG disclosure requirements. For example, in a case of failure to comply with the legal requirement under the Modern Slavery Act 2015 to produce a modern slavery statement, the Home Office may seek to ensure compliance via the courts (by obtaining an injunction or order for specific performance of a statutory duty). In the first instance, the Home Office would generally engage with the company with a view to correcting the non-compliance informally and without recourse to the courts. Where there is a failure to comply with the legal requirement under the 2010 Equality Act (Gender Pay Gap Information) Regulations 2017 to prepare a gender pay gap report, the Equality and Human Rights Commission (EHRC) has the power to take enforcement action, ranging from investigations to commencing proceedings for a court order requiring the employer to remedy the breach. According to their standard procedure, the EHRC would first seek to engage with the company with a view to correcting the non-compliance informally and without recourse to the courts.

Where there is a failure to comply with the legal requirement under the Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 to publish a TCFD report, the Pensions Regulator may take enforcement action, including the possibility of a financial penalty. The UK Stewardship Code does not provide for specific penalties for non-compliance as it applies on a “apply and

explain" basis for asset managers, asset owners, and service providers. Nevertheless, each year signatories will need to submit a report to remain a signatory. The FRC will assess each report and determine if the requirements are met each year. Therefore, non-compliance could result in removal of the signatory. The supervisory expectations on banks under Supervisory Statement SS3/19 (and later "Dear CEO" letter from PRA) set out expectations and therefore there is no penalty for non-compliance. However, non-compliance with the expectations may indicate broader non-compliances with legal requirements, which could give rise to disciplinary action by the PRA. The PRA's approach, prior to taking disciplinary action against a firm, is to investigate whether (and, if so, which) regulatory requirements have been breached.

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

Under the UK Corporate Governance Code (on a "comply or explain" basis), premium listed companies are expected to demonstrate, throughout their reporting, how the governance of the company contributes to its long-term sustainable success and achieves wider objectives for stakeholders. Guidance associated with the UK Corporate Governance Code identifies various frameworks and guidance documents on ESG matters (including the TCFD recommendations) that can help identify relevant social and environmental considerations. The UK Stewardship Code (which applies to asset owners and managers on an "apply or explain" basis) encourages the integration of ESG factors into investment decision-making.

The UK Stewardship Code calls all institutional investors to publicly disclose in standalone stewardship reports certain matters including governance structures and processes; effectiveness in identifying and responding to systemic risks (such as climate change); the issues that have been prioritized for assessing investments, including ESG issues; and the processes used to integrate material ESG issues.

Additionally, the Wates Corporate Governance Principles provide a framework to help large private companies meet the legislative requirement to report on their corporate governance arrangements under the 2018 Companies (Miscellaneous Reporting) Regulations. Companies choosing to adopt the Wates Principles as their corporate governance code must provide a short supporting statement for each principle explaining how it has been applied to achieve better outcomes. The Wates Principles provide that the board of directors should promote the long-term sustainable success of the company by identifying opportunities to create and preserve value and establishing oversight for the identification and mitigation of risks. Such systems should enable the board to make informed and robust decisions, including those associated with material ESG matters, such as climate change, workforce relationships, supply chains, and ethical considerations.

Other legal provisions to consider are, as follows:

I. Under the 2021 Greening Finance Strategy, pensions and investment sectors will be expected to integrate ESG considerations into investment decision-making, monitoring and engagement strategies (e.g., by challenging investee companies' boards and management on their strategies to generate long-term sustainable value, and when setting clear expectations and monitoring the investment managers), collaborating

with other investors, firms to amplify their stewardship, and incorporating ESG into voting practices (when exercising their shareholder rights, this includes "being ready to vote against directors, corporate actions or other resolutions). To strengthen the use of voting throughout the investment chain, the Taskforce on Pension Scheme Voting and Implementation released a report in September 2021 suggesting measures to improve pension scheme trustees' focus on stewardship and enhance asset manager reporting standards and accommodation of trustees' voting preferences. As of October 2021, trustees of pension schemes will be required to establish and maintain oversight of relevant climate-related risks and opportunities. This includes a requirement for trustees to put in place processes to ensure that any person who undertakes governance activities in relation to the scheme or is an adviser to the trustees (other than a legal advisor) takes adequate steps to identify, assess, and manage relevant climate-related risks and opportunities.

II. The TCFD framework – which is the basis for the new mandatory climate reporting requirements in the UK provides a framework through which a company can approach governance on climate issues. Companies reporting in line with the TCFD framework must disclose the board's oversight of climate-related risks and opportunities. Guidance associated with the TCFD framework provides that this should include, disclosure of (a) the processes and frequency by which the board and/or board committees are informed about climate-related issues; (b) whether the board and/or board committees consider climate-related issues when reviewing and guiding strategy, major plans of action, risk management

policies, annual budgets, and business plans as well as setting the organization's performance objectives, monitoring implementation and performance, and overseeing major capital expenditures, acquisitions, and divestitures; and (c) how the board monitors and oversees progress against goals and targets for addressing climate-related issues. In this way, the TCFD framework is increasingly being seen as not just a disclosure framework, but also a framework through which to approach governance to climate issues.

III. More generally, there is a growing recognition that the directors' duties under the 2006 Companies Act most relevant to climate change (and potentially broader ESG matters) are the duty to promote the success of the company and to exercise reasonable care, skill, and diligence. In discharging the former duty, there is an obligation under the Companies Act to consider the impact of the company's operations on the community and the environment and the likely consequences of any decision in the long term. Breaches of directors' duties can give rise to action – generally by the company, although there is also the risk of shareholder and/or derivative action. Notably, the environmental NGO ClientEarth in March 2022 initiated a legal action[269] against the oil and gas company Shell's Board of directors over alleged mismanagement of climate risk, alleging

[269] ClientEarth, ClientEarth starts legal action against Shell's Board over mismanagement of climate risk, 15 March 2022. https://www.clientearth.org/latest/press-office/press/clientearth-starts-legal-action-against-shell-s-board-over-mismanagement-of-climate-risk/

that the directors are in breach of their duties under the 2006 Companies Act (specifically sections 172 and 174).[270]

IV. In terms of supply chain transparency, the key legislative requirement in the UK is section 54 of the Modern Slavery Act which requires commercial organizations (which supply goods or services and have a minimum total turnover of £36 million per year) to prepare a slavery and human trafficking statement for each financial year. Commercial organizations in this context means both bodies corporate and partnerships (wherever formed) that carry on a business or part of a business in the UK. UK Government guidance notes that a common sense approach applies when assessing whether an organization is regarded as carrying on business in the UK (but that ultimately it will be for the courts to decide). The statement must include either a statement (i) of the steps the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business; or (ii) that the organization has taken no such steps.

The MSA does not dictate the exact detail that a statement must include or how it should be structured. It does, however, provide a non-exhaustive list of information that may be included, namely: (i) the organization's structure, business and supply chains; (ii) its policies; (iii) its due diligence

[270] Section 172 states that a director of a company "must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole…" On the other hand, Section 174 states that a director of a company "must exercise reasonable care, skill and diligence."

processes; (iv) the part of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (v) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains; and (vi) the training about slavery and human trafficking available to its staff.

The Modern Slavery Act does not currently specify any direct penalties that apply for failure to comply with these requirements. Rather, the Secretary of State may enforce the duty to prepare a statement in civil proceedings by way of injunction. If the organization fails to comply with the injunction, it will be in contempt of a court order and that would be punishable by an unlimited fine.

Although not UK-specific, financial institutions and other lenders are increasingly incorporating ESG issues into their decision-making and investment decisions, and there are a number of associations and initiatives that lenders may participate in, including:

I. The United Nations' Principles for Responsible Investment (PRI), which are a set of global voluntary guidelines for institutional investors on integrating ESG issues into investment decisions;

II. The Equator Principles (EP), which is a risk management framework adopted by financial institutions for determining, assessing, and managing environmental and social risk in projects. The EPs apply globally, to all industry sectors and to five financial products: Project Finance Advisory Services; Project Finance; Project-Related Corporate Loans; Bridge Loans; Project-Related Refinance; and Project-Related Acquisition Finance.

III. The International Finance Corporation (IFC) Performance Standards define IFC clients' responsibilities for managing their environmental and social risks. The Standards provide guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way.

IV. The United Nations Guiding Principles on Business and Human Rights (UNGPs), which provide guidance for companies to report on how they respect human rights. Specifically, the guidance requires businesses to take steps to address adverse human rights impacts with which they are involved, including not only adverse human rights impacts they have caused or contributed to through their own activities, but also those that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts. The UN Office of the High Commissioner for Human Rights has issued guidance detailing how the UNGPs apply to the banking sector. Specifically, it noted that "a bank can contribute to an adverse impact through its own activities (actions or omissions) – either directly alongside other entities, or through some outside entity, such as a client;" and

V. The OECD guidance on Due Diligence for Responsible Corporate Lending and Securities Underwriting, which provides a global framework for financial institutions to identify, to respond to and publicly communicate on environmental and social risks associated with their clients. It also provides practical considerations for financial institutions at each step of the due diligence process.

In the UK, a relevant membership organization for sustainable and responsible finance is the UK Sustainable Investment and Finance Association (UKSIF). The UKSIF has been active in efforts to support the sustainable finance agenda. Specifically, the UKSIF lobbies the government and regulators on topics including the EU and UK taxonomies, sustainability disclosure rules, net zero, green investment, and a sustainable Covid-19 strategy;

What can be expected on the development of ESG requirements over the short-, medium-, and long-term?

In the short-term, it is expected that climate change will continue to be a dominant focus, especially in the wake of COP26 as governments firm up their climate commitments and set emissions reduction targets. The UK Government is particularly focused on the role of finance in the transition to a green economy and, in light of the Greening Finance Roadmap, a number of reporting and disclosure initiatives are expected to be launched. In addition, increasing focus on biodiversity and protection of habitats can be expected, especially with the introduction of the 2021 Environment Act. For instance, new clauses have been introduced to prevent illegal deforestation. These will apply to large businesses with a turnover over a specified threshold and will have some distinct effects in terms of:

A. prohibiting businesses from using a forest risk commodity or a product derived from that in their UK commercial activities unless relevant local laws on that commodity were complied with; and

B. requiring businesses to establish and implement a due diligence system for any forest risk commodity or a product derived from it used in their UK commercial activities, and report annually on their due diligence.

For the medium-term, the use of climate change (and broader ESG) litigation will continue to increase as there is a growing sense of urgency that ESG issues need to be tackled. In particular, the range of claims and defendants is likely to diversify. Corporations can expect to be more scrutinized, especially those in heavy emitting industries, to ensure that they are setting reduction targets and implementing strategies, which then need to be implemented throughout their supply chains. In turn, it is likely that a rise of greenwashing based claims/actions across a range of financial and non-financial products will occur in the UK Social and natural aspects of sustainability will also continue to gain further traction. Furthermore, the UK's trade policy is expected to increasingly incorporate policies to support the "green" agenda. That could include:

A. using the UK's membership in the "trade and environmental sustainability structured discussions" to re-launch discussions on the Environmental Goods Agreement;
B. helping shape green policies as part of the Government Procurement Agreement at the World Trade Organization (WTO); and
C. seeking "best in class" free trade agreements based on liberal green trade principles.

Finally, as for long-term expectations, the UK government might experience increasing pressure to convert its targets into meaningful action. A tightening on carbon pricing mechanisms (i.e., through a more stringent ETS) and policies that

drive investment into green projects and target greenwashing will likely continue to prevail. In that sense, the role of litigation and shareholder action will continue to play a role as private actors push for faster action. There will likely be a significant focus on biodiversity. In addition, reporting requirements will also likely harden from a comply or explain basis to more prescriptive content requirements.

ESG-related legal challenges in the United Kingdom

In the UK, climate/environment-related cases have primarily been brought against the government rather than private actors. On the other hand, cases related to social issues are more likely brought against private actors. A number of key environmental cases filed in the UK have been made by overseas claimants against local subsidiaries plus their UK-domiciled parents.

ESG-related challenges to companies in the UK

1) Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] before the UK Supreme Court

Around 40,000 Nigerian individuals, largely from the Ogale and Bille communities, brought a claim against Royal Dutch Shell Plc (Shell), domiciled in the UK, and its Nigerian subsidiary in relation to environmental and human rights violations by the subsidiary. The claimants sought damages in respect to oil spills allegedly caused by the subsidiary, which operated a pipeline in Nigeria. The human rights

implications of the pollution were allegedly that local communities could not safely use the natural water sources for drinking, washing, agricultural, fishing, or recreational purposes. The claimants claimed that the oil spills were caused by the subsidiary's negligence, allegedly including failure to protect the oil infrastructure against the risk of damage caused by the criminal acts of third parties. The claimants argued that Shell was directly responsible for the actions of its Nigerian subsidiary and consequently owed them a duty of care in this respect. The UK Supreme Court ruled, on February 12, 2021, that the English court has jurisdiction to hear a claim by the Nigerian individuals against Shell and its Nigerian subsidiary. The matter will now revert to the High Court in which the case will be assessed on its merits. This will be subject to any renewal of outstanding jurisdictional challenges not resolved at first instance.

2) ClientEarth complaint against BP [2020] before the OECD

In December 2019, ClientEarth, an international environmental law charity, submitted an Organization for Economic Co-Operation and Development (OECD) complaint against the formerly known British Petroleum Company or BP alleging that its "Possibilities Everywhere" advertising campaign did not constitute "clear, honest or accurate" public communication regarding its renewables credentials.

BP subsequently withdrew the campaign. In June 2020, it was announced that, had BP not committed to do so, the complaint would have proceeded on the basis that the OECD had assessed the complaint as material and substantiated.

3) Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents) [2019] before the UK Supreme Court

This case involved (mass) tortious claims against a company headquartered in the UK but with respect to the operations of an overseas subsidiary for alleged environmental damage in the country of operation of its subsidiary (Zambia). The Supreme Court held that the claimants (being 1,800 Zambian citizens) had established jurisdiction in England and that the claim could proceed before the English High Court. This was based on a "substantial justice" issue whereby the Supreme Court (agreeing with the High Court) found that the claimants would not obtain substantial justice in Zambia.

4) R. (on the application of Friends of the Earth Ltd) (Applicants) v Heathrow Airport Ltd (Respondent) [2021] before the UK Supreme Court

The Supreme Court overturned a Court of Appeal decision that government policy favoring the development of a third runway at

Heathrow Airport was unlawful because the Secretary of State for

Transport had failed to adequately consider the United Nations Framework Convention on Climate Change (the Paris Agreement). The Secretary of State had taken the Paris Agreement into account and lawfully exercised his discretion as to how much weight to attribute to it. The court construed the Planning Act 2008 Part 2, section 5(8), particularly the phrase “Government policy,” to ensure that the provision was able to operate sensibly.

5) Boohoo investigations

The Manchester-based fashion retailer, Boohoo and its subsidiaries, PrettyLittleThing and Nasty Gal, have been subject to investigations by regulators in the US and UK. An independent report by Alison Levitt QC on 24 September 2021, found widespread evidence of unacceptable conditions at some of Boohoo’s suppliers, including failure to pay minimum wage and falling below fire safety standards. However, the report stated that the company did not intentionally profit from or cultivate such conditions. There is little information on case progress in the UK. There is also a VAT fraud and money laundering National Crime Agency investigation into one of Bohoo's suppliers.

6) Milasi Josiya & 7,262 Others v British American Tobacco and Imperial [2021] EWHC 1743 (QB)

A claim has been brought by approximately 7,000 tobacco farmers

(including on behalf of over 3,000 children) against British American Tobacco (BAT) and Imperial. The claimants allege that the two companies are responsible for farmers being exploited on Malawian tobacco farms. They also argue that BAT and Imperial have been unjustly enriched because the tobacco is being produced in conditions that amount to child labor and forced labor.

On June 25, 2021, the High Court dismissed the Defendants' application to strike out the claims, finding that the claimants had properly pleaded the central allegation that they had grown tobacco that had been purchased by BAT and/or Imperial and used by them to make cigarettes and other tobacco products. The claims are now set to progress towards full trial.

7) [X] v PGI Group and Lujeri Tea Estates Ltd

A number of women are bringing a claim against Lujeri and its British parent company PGI in connection with alleged systemic sexual abuse including rape, sexual assault, and discrimination. The employees, who work on southern Malawi plantations, allege 22 instances of sexual harassment, 13 instances of sexual assault, 11 instances of coerced sexual relations, and 10 instances of rape. The claimants argue that PGI and Lujeri had a duty of care towards the female employees and were negligent for failing to protect them. While the claim against PGI and

Lujeri is being brought in England, it will be determined under Malawian

law. According to the most recent update, in September 2021, the High Court struck out an application by the Defendant for a costs capping order.

8) AAA and others v Unilever PLC and Unilever Tea Kenya Limited [2018] EWCAAAA and others v Unilever PLC and Unilever Tea Kenya Limited [2018] EWCA

The Claimants (218 Kenyan nationals) were attempting to bring mass tort claims against Unilever Plc and its Kenyan subsidiary, the owner of a tea plantation in Kenya, at which the Claimants allegedly suffered ethnic violence at the hands of third-party criminals. In this instance (and in contrast to Vedanta), the claimants could not demonstrate at first instance or on appeal that they have a good arguable claim against Unilever PLC as anchor defendant for their claim in the English courts because an arguable duty of care as between Unilever PLC and the Claimants was not made out.

9) Friends of the Earth v UK Export FinanceFriends of the Earth v UK Export Finance

In September 2020, Friends of the Earth England, Wales, and Northern Ireland filed suit in the High Court of Justice challenging the UK government's decision to provide GBP$1 billion in financing to support

liquefied natural gas development in Mozambique. The financial

decision amounted to one of the largest single financing packages for a fossil fuel project ever offered by the UK export credit agency. Permission to proceed to judicial review was granted in April 2021.

Are companies required to disclose information related to ESG issues?

UK companies must comply with certain reporting disclosures on climate-related and environmental matters in their annual reports. These reporting requirements vary depending on the type of company. For example, more detailed requirements apply to quoted companies, premium listed companies and large companies, while less stringent requirements apply to medium-sized and small companies. Public companies whose shares are traded on the London Stock Exchange (LSE) are required to comply with the UK Listing Rules (LRs) in the case of companies traded on the main market of the LSE or the Alternative Investment Market Rules for Companies (the AIM Rules) in the case of companies traded on the LSE's AIM market.

In addition, all companies whose shares are traded on the LSE's main market and AIM are required to comply with the UK Market Abuse Regulation (UK MAR), which sets out the regulatory framework on insider dealing, disclosure of inside information, and other forms of market abuse. UK MAR requires issuers (i.e., companies whose shares are traded on the LSE's main market or AIM) to inform the public as soon as possible of "inside information" which directly concerns that issuer, subject to certain limited exceptions. Inside information is information which is of a precise nature, has not been made public, relating, directly or indirectly, to one or more issuers or to one

or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. Information is likely to have a significant effect on the price of financial instruments and related derivative financial instruments if a reasonable investor would be likely to use that information as part of the basis of his or her investment decision. In addition to complying with UK MAR, companies which are admitted to trading on AIM are required to comply with the AIM Rules, which include a requirement to issue notification without delay of any new developments that are not public knowledge and, if made public, would be likely to lead to a significant movement in the price of its securities. This may include matters concerning a change in the company's financial condition, sphere of activity, performance of its business, or expectation of its performance. Information that would be likely to lead to a significant movement in the price of its securities includes but is not limited to information which is of a kind which a reasonable investor would be likely to use as part of the basis of his or her investment decision.

The LRs require companies with a premium listing on the LSE's main market to disclose certain information in their annual reports. In particular, LR 9.8.6R(8) requires a commercial company (including sovereign-owned commercial companies) with a premium listing, and LR 14.3.27R requires certain standard listed companies, to include a statement in its annual report on whether it has made climate-related financial disclosures which are consistent with the recommendations and recommended disclosures of the TCFD, with effect for accounting periods beginning on or after January 1, 2021 (in the case of a premium listed company) and January 1,

2022 (in the case of a standard listed company).[271] The TCFD was established in 2015 to identify the information needed by investors, lenders, and insurance underwriters to assess the climate-related risks and opportunities faced by companies. The government has published a roadmap setting out when mandatory TCFD reporting requirements will be applied to other companies.[272] Guidance provided in the LRs states that premium listed companies should consider whether those disclosures provide sufficient detail to enable users to assess the company's exposure and approach to addressing climate-related issues, and that the company should carry out its own assessment to ascertain the appropriate level of detail to be included in its climate-related financial disclosures, taking into account such factors as the level of its exposure to climate-related risks and opportunities, and the scope and objectives of its climate-related strategy, noting that these factors may relate to the nature, size, and complexity of the company's business. The Financial Conduct Authority (FCA) has adopted the new disclosure requirements on a "comply or explain" basis. If a company chooses not to make disclosures in line with all the TCFD recommendations and recommended disclosures, it must include a statement in its annual report setting out the reasons why it has omitted said disclosure(s), details of any steps it is taking to make those disclosures in the future, and the timeframe within which it expects to be able to make those disclosures. However, the FCA is already considering strengthening the compliance basis of the rule which could result in these disclosures becoming mandatory at a future date. Currently, the FCA's expectation is that relevant listed companies will be able to make climate-related

[271] Financial Conduct Authority. "LR 14.3.27R. Information to be included in annual report and accounts" Accessed on September 20, 2022, https://www.handbook.fca.org.uk/handbook/LR/14/3.html

[272] Government of the United Kingdom. "A Roadmap towards mandatory climate-related disclosures",

financial disclosures consistent with the TCFD recommendations and recommended disclosures, except where the company faces transitional challenges in obtaining relevant data or embedding relevant modeling or analytical capabilities.

As a result of the efforts of the TCFD and other activists, it is now widely accepted that climate-related impacts on a company can be considered material and therefore require disclosure in accordance with relevant requirements as set out above. The LRs also require premium listed companies to comply or explain against the provisions of the 2018 UK Corporate Governance Code. The Code covers a wide range of governance themes, including corporate culture, purpose, strategy, board diversity, succession planning, engagement with shareholders and other stakeholders, executive remuneration, and risk management.[273] The Companies Act 2006 (CA 2016) requires directors of large and medium-sized companies to produce an annual strategic report that sets out various matters, including disclosures related to ESG matters such as employees, vulnerable supply chains, climate change/the environment, and human rights issues.[274] The strategic report of certain large companies must include a statement that describes how the directors have had regard to their duties to promote the success of the company for the benefit of its members. Another example is section 124 of the 2021 Pension Schemes Act which from 1 October 2021 requires that trustees or managers of occupational pension schemes with relevant assets of £5 billion or more publish an annual TCFD report

[273] Financial Reporting Council. "The UK Corporate Governance Code" https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF

[274] Ibid.

that details the potential effects of climate change on the scheme.[275] In October 2021, the UK Government published its policy paper on Greening Financing: A Roadmap to Sustainable Investing. This provides further detail on new sustainability disclosure requirements (SDRs) introduced by the UK Chancellor at his Mansion House speech in July 2021, inspired by the work of the TCFD[276]. On 25 October 2022, the FCA published a consultation paper on SDRs in line with the Roadmap to Sustainable Investing. The Consultation Paper proposes investment labels and corresponding product and entity-level disclosures and naming and marketing rules. Further, a general anti-greenwashing rule is proposed for all regulated firms to ensure that sustainability-related claims, naming and marketing are clear, fair, and not misleading, and consistent with the sustainability profile of the products. The FCA is seeking comments by 25 January 2023, and intends to set out final rules in a policy statement by the end of the first half of 2023. In principle, any person may report events that a company has not disclosed or fully disclosed to its relevant regulator on a voluntary basis. For example, if a commercial company with a UK premium listing fails to set out in its annual financial report whether they have made disclosures consistent with the TCFD's recommendations and recommended disclosures, any person could report this to the FCA, as the competent regulator for enforcing compliance with the LRs. Any person could also report to the FCA such a company's failure to include information related to environmental matters

[275] Government of the United Kingdom. "Pension Schemes Act 2021", https://www.legislation.gov.uk/ukpga/2021/1/contents/enacted

[276] Government of the United Kingdom. "Chancellor sets out how UK financial services can create prosperity at home and project values aborad in first Mansion House speech", https://www.gov.uk/government/news/chancellor-sets-out-how-uk-financial-services-can-create-prosperity-at-home-and-project-values-abroad-in-first-mansion-house-speech

necessary for an understanding of the development, performance or position of the company's business in the company's annual financial report, as required by the Disclosure Guidance and Transparency Rules. Another example would be if a pension scheme fails to comply with regulations regarding pension trustees' governance duties in relation to climate change risk, any person could report this failure to the Pensions Regulator. In July 2021, ClientEarth, a non-governmental organization, publicized the fact that it had reported two UK listed companies, Just Eat and Carnival cruises, for investigation and enforcement action to the FCA for allegedly breaching their legal obligations by failing to report on climate-related risks to their investors.[277] Previously in 2019, ClientEarth publicized the act that it had also reported four companies, including EasyJet, to the Financial Reporting Council for inadequately disclosing climate change risks in their annual reports, in breach of the CA 2006, the Disclosure Guidance and Transparency Rules as well as the LRs.[278]

What are the penalties if a public company fails to disclose all material information?

If the FCA determines that a listed entity has breached its disclosure obligations, the UK Listing Authority has the power under the 2000 Financial Services and Markets Act (FSMA) to impose unlimited penalties on both the listed entity and on any director or former director of the issuer who knowingly abetted the contravention. This can take

[277] ClientEarth. "ClientEarth files complaints against Just Eat and Carnival over climate failings", https://www.clientearth.org/latest/press-office/press/clientearth-files-complaints-against-just-eat-and-carnival-over-climate-failings/

[278] ClientEarth. "EasyJet among companies reported to regulator by ClientEarth", https://www.clientearth.org/latest/latest-updates/news/easyjet-among-companies-reported-to-regulator-by-clientearth/

the form of a financial penalty, private warning or public statement of censure. Similarly, the FCA or the Prudential Regulation Authority in conjunction with the Secretary of State may apply to the court for injunctions or restitution orders in case of a breach of the LRs. A restitution order offers two primary benefits:

I. it can be made against anyone who has contravened a LR or been “knowingly concerned” in the contravention; and it is not necessary that the person has profited from the contravention; and
II. it is sufficient if any person has suffered loss or been otherwise adversely affected.

Furthermore, non-compliance with LRs can also result in the issuer’s discontinuance and suspension of listing. Issuers may be found liable for publicized information that is deemed to have omissions and/or include misleading or false statements. In practice this covers all regulatory publications made by an issuer, including its annual financial report, its half yearly financial reports, interim management statements, and Regulatory Information Service announcements. In such instances, the listed entity may be required to compensate the person who suffers a loss with respect to acquired, disposed, or held securities as a result of:

I. any untrue or misleading statement in that published information; and
II. the omission from that published information of any matter required to be included in it.

Issuers may also be found liable for a dishonest delay in publishing information related to securities, where an investor suffers a loss as a result of the delay. Although no cases have been identified involving disclosure obligations pertaining to

ESG-related matters, Section 90A of the FSMA would be a likely avenue to make such a claim. For example, in *SL Claimants v Tesco plc*, shareholders of Tesco filed a suit against the company alleging that they made substantial losses because of false information published by Tesco.[279] The shareholders consequently sought to recover those losses. Directors are required to call a general meeting (GM), which includes the annual general meeting (AGM), if requested by shareholders representing at least 5% of the company's paid-up voting share capital (excluding treasury shares). For public companies, the notice of GM must include additional disclosure, such as a statement in relation to:

I. details of any forms to be used for the appointment of a proxy; and
II. the right of members to ask questions of a director.

There are additional requirements to publish information on the website such as members' statements, members' resolutions, and members' matters of business received by the company after the first date on which notice of the GM is given. There is no express power that allows shareholders in advance of a GM to include proposals in a public company's proxy circular to be voted on. It is generally assumed that the directors have the right to place "advisory" resolutions on the GM agenda, there is no right under general law for shareholders to do so. There are, however, powers for shareholders to:

I. require the circulation of resolutions for AGMs; and
II. add an item to the agenda of an AGM.

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[279] Maitland Chambers. "SL Claimants V Tesco PLC (2019)", https://www.maitlandchambers.com/resources/cases/sl-claimants-v-tesco-plc-(2019)#:~:text=An%20investor%20who%20held%20securities,and%20Markets%20Act%202000%20s

Directors are required to give notice of a resolution to be moved at the next AGM if requested either by shareholders with at least 5% of the total voting rights (excluding treasury shares) or by 100 shareholders with an average holding of £100. There is no limit on the topics of matters, only the qualities evident in the matter. There are three circumstances where a resolution will not satisfy this requirement:

I. it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise);
II. it is defamatory of any person; or
III. it is frivolous or vexatious.

Shareholders may vote to include a matter on the AGM agenda. While this cannot be a resolution, the matter may be on substantively the same issue. As such, activists can seek a non-binding vote in order to gauge shareholders' public sentiment on the issue. Note also the AGM notice must set out shareholders' rights to include a matter on the AGM agenda. The same thresholds and restrictions apply as those with respect to shareholders' power to circulate resolutions for AGMs. The request must be received by the company at least (i) six weeks before the meeting or, if later, (ii) the time at which notice is given for the meeting. In 2011, Laxey Partners used this tactic in its activist campaign to reform Alliance Trust. Laxey Partners split its 1.3% ownership stake in Alliance Trust between 100 different nominee accounts and placed resolutions at the AGM to force a share buyback. Generally, strategies that involve the initiation of resolutions (in conjunction with private discussions) have been used to push the needle on board engagement with ESG and climate change policy. Some examples include the following:

I. In 2019, investors acting as part of Climate Action 100+ initiated a resolution requiring BP to set a business strategy that is consistent with the goals of the Paris Agreement on climate change; after constructive engagement with BP's board and other shareholders, the resolution was passed with 99.14% of shareholders voting in favor.

II. In May 2020, ShareAction and 100 other investors filed a resolution requesting Barclays Bank to bring its energy financing in line with the goals of the Paris Agreement. While this resolution was not recommended by the board of directors and was not passed (receiving only 23.95% support), Barclays was required to formally respond to its shareholders as the resolution passed a 20% threshold.

Shareholder activists have privately approached boards of directors to voice their concerns. These "soft" or "non-legal" methods may be a precursor to tabling a resolution (which an activist will use to gauge support for their resolutions, and engage with the board to garner support for it), or may itself be the means by which the activist negotiates for change. In an unfair prejudice claim, a shareholder can claim that the company is conducting its affairs in a manner unfairly prejudicial to the member's interests as a member. While the scope of conduct caught is vast, a common remedy is for the shares of the claimant to be purchased by the other members, thereby defeating the purpose of the petition (that is, to change the course of action of the company). In a derivative action, a shareholder can bring proceedings with respect to a cause of action vested in the company, or seeking relief on behalf of the company. Shareholder activists in the UK have used media platforms to voice their concerns and put public pressure on companies, or as spaces for sharing knowledge and strategies with other shareholder activists. Say On

Climate (sayonclimate.org), is an initiative that encourages asset owners, asset managers, companies, and proxy advisers to make public commitments to align their shareholder voting with net zero transition action. Prominent investors involved include JPMorgan Asset Management and M&G. Share Action (ShareAction.org) coordinates programmes such as the Investor Decarbonization Initiative where investors can collaborate and share data, and the “Resolutions to Watch” list which tracks key shareholder resolutions in terms of ambition and impact. Note that shareholder activists must be careful to avoid making defamatory statements or disclosing insider information in breach of the UK MAR.

UNITED STATES OF AMERICA

The discourse around ESG and ESG related matters in the United States has been driven and, to some extent, defined by the market, with significant investor groups and shareholder activists driving the agenda. From a regulatory perspective, increased interest with respect to public company ESG actions and disclosures, particularly in the climate space, has led the Securities and Exchange Commission (SEC) to develop targeted proposals which, if implemented, would subject regulated entities to more defined standards of disclosure around certain ESG matters. Although recent interest has been focused on the climate sphere, governance has historically played an important role, with legislation and regulatory disclosure requirements being used to drive board diversification and governance frameworks. In addition to regulatory developments, interested parties have at their disposal, and have used, alternative forms of pressure, including shareholder proposals, litigation, the judiciary, and other regulatory frameworks such as consumer protection legislation. The debate around ESG in the United States has become politicized with widely diverging views as to its role in the evaluation of business activities.

Current Most Prevalent ESG Issues[280]

Environmental Issues

For these particular issues, it is important to review the regulation that has been provided by the SEC.[281] The SEC is a federal administrative agency in charge of oversight and control of markets and securities laws.[282] In March 2022, the SEC proposed its much-anticipated rules requiring climate change disclosure.[283] The final rules have not yet been released, and as such, no additional climate change disclosure is yet required as of November 2022. The SEC has also recently proposed rules on other ESG-related topics, including: mandatory ESG disclosures by registered investment advisors and certain exempt reporting advisers, corporate board diversity, Human Capital Management disclosure, and cybersecurity, among others. On the other hand, in the last five years, there has been a significant increase in the number of Exchange Traded Funds (ETFs)[284] that track investments with sustainability themes and in the value of assets under management of those funds. According to the SEC, ETFs offer investors a way to pool their money in a fund that makes investments in different assets and, in return, to receive an interest in that investment

[280] This chapter was last updated by November 21, 2022

[281] The US Securities and Exchange Commission is an independent agency of the United States federal government. The SEC oversees securities exchanges, securities brokers and dealers, investment advisors, and mutual funds in an effort to promote fair dealing, the disclosure of important market information, and to prevent fraud.

[282] Legal Information Institute, Cornell University. "Securities and Exchange Commission (SEC).", https://www.law.cornell.edu/wex/securities_and_exchange_commission_(sec)

[283] SEC, "SEC proposes rules to enhance and standardize climate-related disclosures for investors", https://www.sec.gov/news/press-release/2022-46

[284] As of 2020, there are 7,602 ETFs globally, which have increased from 276 in 2003 and 7,083 in 2019. See Huhulea, Irene. "The Future of ETFs." Investopedia, accessed on 20 September 2022, https://www.investopedia.com/the-future-of-etfs-4772514

pool. However, ETF shares are traded on a national stock exchange and at market prices that may or may not be the same as the net asset value (NAV) of the shares.[285]

Issues of climate change and climate resilience have increasingly received more attention than other environmental issues, particularly following the adoption of the Paris Agreement at the Conference of Parties 21 (COP 21) in 2015[286] and the proposed SEC regulations on climate change discussed above.

Social Issues

On the social aspect of ESG, the US has taken some steps towards equal board representation. Public companies are increasingly under pressure to diversify their boards of directors, particularly with respect to race and gender. Some states, such as California, enacted laws aimed at increasing representation of women and underrepresented communities on the boards of companies headquartered in those states. However, that law was recently declared unconstitutional, so it is unclear what impact these laws will have going forward. Additionally, increased attention has been given to the pay gap between men and women. In the last five years, a number of public companies, such as Citi, have also started disclosing the pay gaps at their

[285] Office of Investor, Education and Advocacy, Securities and Exchange Commission. “Investor Bulletin: Exchange-Traded Funds (ETFs).”, https://www.sec.gov/investor/alerts/etfs.pdf

[286] United Nations Framework Convention on Climate Change (UNFCC). “What is the Paris Agreement.”, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement

companies, in an effort to be transparent on their progress towards diverse and inclusive workforces.[287]

Corporate board representation of women and minorities in California and Illinois

The Women on Boards regulation (SB 826) was signed into law in 2018 by the state of California and became the first state regulation in the nation to require all publicly held domestic or foreign corporations whose principal executive offices are located in California to have at least one female director on their boards by December 31, 2019. According to California's Secretary of State's office, by December 31, 2021, such publicly held corporations were required to have minimum numbers of female directors based on the total size of the corporation's board of directors.[288] However, at the time of the publication of this guide, this regulation was on hold given two California trial court rulings against these regulations.[289]

Also in 2018, the Illinois´s General Assembly passed bill H.B 3394 that amended the Illinois Business Corporation Act to require all publicly

[287] Wechter, Sara. "Citi's Latest Update on Global Pay Equality.", https://blog.citigroup.com/2021/01/citis-latest-update-on-global-pay-equity/

[288] California Secretary of State. "Women on Boards.", https://www.sos.ca.gov/business-programs/women-boards

[289] Rubin, Jen. "Show of tell: A Road Map for delivery laws", https://news.bloomberglaw.com/daily-labor-report/show-or-tell-a-road-map-for-board-diversity-laws

traded businesses with principal executive offices in the state to report the number of women and minorities on boards, as well as their plans to promote diversity.[290]

Another social aspect of ESG that has gained attention with the rise of the gig economy is the application of employee laws to gig workers, which has become a prevalent issue in the US. Over the last five years, there have been notable examples of litigation like the cases of Uber and Postmates,[291] as well as a state referendum in California,[292] over the issue of whether such workers should be classified as "employees," and thus eligible for employment benefits such as overtime pay and employer-sponsored healthcare.

[290] Nagele-Piazza, Lisa. "New Illinois Law Aims to Promote Corporate Board Diversity" Society for Human Resources Management (SIRH), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-illinois-law-aims-to-promote-corporate-board-diversity.aspx

[291] In July 2022, attorneys for Uber Technologies Inc., Postmates Inc., and two gig workers requested a federal appeals court to invalidate California's worker classification law as unconstitutional and to block its enforcement. The decision by the US Court of Appeals for the Ninth Circuit on Wednesday looked to determine if California's law regarding who's an independent contractor and who's an employee is irrational, treats similarly situated individuals and professions disparately, and discriminates against certain technology platforms like Uber by exempting errand-based apps like TaskRabbit that use the same driver and courier model.(https://news.bloomberglaw.com/us-law-week/uber-appeal-of-california-gig-classification-law-at-9th-circuit?context=article-related)

[292] In November 2020, California voted a state referendum on Proposition 22, which sought to exempt these and other firms from Assembly Bill 5, a gig economy law that mandated that businesses exercising particular controls over workers would have to classify them as regular employees and grant them relevant benefits. 58% of the voters agreed with the exemption provided by this proposition.(https://www.brookings.edu/blog/techtank/2020/11/04/on-proposition-22-a-big-california-victory-for-the-gig-economy/)

Governance Issues

Shareholder and governance composition of companies has become a major governance issue in the US. For example, under federal law, most public companies are required to periodically (at least every three years) conduct an advisory shareholder vote on the compensation of certain highly compensated officers and disclose how their compensation policies and decisions have taken into account the results of their most recent say-on-pay vote[293].

Governance composition has been influenced through the election of climate scientists to the boards of directors at some companies (notably, Exxon). Additionally, shareholder activism has become greater to promote environmental and social issues, including proactive stances by major asset managers, such as at Blackrock, and other institutional investors.

More companies are conditioning bonuses on achievement of set performance metrics, instead of awarding guaranteed or hours-based bonuses. Also, where granting stock options was once the norm, more companies are now granting restricted stock that vests over a multi-year period in an effort to better align the employee's interests with the long-term interests of the company. The SEC recently adopted additional "Pay-for-Performance" disclosure requirements to give

[293] Say-on-Pay vote asks investors to vote on the compensation of top executives of a company (e.g. the CEO, the Chief Financial Officer)

shareholders more insight into the connection between named executive officer's pay in light of the company's performance[294].

Is ESG reporting mandatory or otherwise regulated in the United States?

Reporting on certain ESG topics is mandated by the SEC. For example, with respect to Governance, Item 402 of Regulation S-K, promulgated by the SEC, requires tabular disclosure of the compensation of certain executive officers and other highly-compensated individuals. On the other hand, Item 406 requires companies to disclose whether or not it has adopted a code of ethics. Furthermore, Item 407 requires disclosure about the independence of a company's directors.

The Nasdaq Stock Market, for example, requires companies listed on any of its three market tiers in the United States to publicly disclose board-level diversity statistics on an annual basis and, if the company does not have at least two diverse directors, to explain its reasons for not doing so.

In the US, ESG regulation can be developed by federal regulators, such as the SEC, but only to the extent such regulation falls within the powers granted to the regulator by Congress. Congress can also pass new legislation to impose new reporting requirements. Given that ESG covers a wide spectrum of topics, there is no single ESG reporting standard in the United States. However, to access ESG-related reports, the US prescribes different requirements depending on the nature of such information.

[294] SEC, "SEC adopts Pay Versus Performance Disclosure Rules", https://www.sec.gov/news/press-release/2022-149

Reporting requirements for domestic public companies and private companies

Public companies:

Any domestic public company (meaning one that is registered with the SEC) must file annual and quarterly reports, as well as ongoing reports with respect to "material risks", with the SEC. These reports, along with all other filings, are publicly available on the SEC's electronic filing database, known as EDGAR, which is available free of charge at www.sec.gov.

Additional information relevant to ESG, to the extent not required to be filed with the SEC on EDGAR, may be found on a company's corporate or investor relations website.

Private companies:

For private companies, which are not subject to reporting requirements under the Exchange Act, the general public has to rely on information that the company voluntarily discloses on its website. Significant action on ESG in privately held companies in the U.S is being driven by investors.

What are the penalties, if any, for failing to comply with ESG reporting requirements?

With respect to prescribed ESG-related reporting requirements in a registration statement, an issuer is subject to class action liability under Section 11(a) of the

Securities Act for any untrue statements of material fact or omissions of material fact required to be stated in the registration statement or necessary to make the statements therein not misleading. In addition to class action liability, the SEC also has enforcement power to prosecute fraud under Section 17, among other enforcement provisions. In 2021, the SEC formed a Climate and ESG Task Force within its Division of Enforcement and has since brought at least three enforcement actions, with additional cases expected soon.

If a company fails to comply with requirements, it could be delisted from NASDAQ. Moreover, in 2022, the SEC has issued comment letters to public companies questioning the inconsistency in the level of ESG disclosure in documents filed with the SEC versus those not filed with the SEC. Additionally, in October 2022, the SEC finalized the "clawback rule" mandated by the Dodd-Frank Act requiring public companies to establish and enforce policies to recover excessive compensation from officers if amounts were based on material misstatements in financial reports.[295] The final rule directs the US stock exchanges to adopt listing standards to adopt and comply with a written clawback policy, to be effective within one year after the final rule's publication in the Federal Register.

[295] Skadden, "SEC adopts final clawback rules and disclosure requirements", https://www.skadden.com/insights/publications/2022/11/sec-adopts-final-clawback-rules-and-disclosure-requirements

Is there legislation that mandates incorporating ESG issues into corporate governance or other decision-making structures?

There is no legislation at the federal level in the United States that mandates incorporating ESG issues into corporate governance or other decision-making structures. Additionally, there are no industry or sector specific associations for financial institutions (including banks), project financiers, pension funds and insurers, that require their members to address ESG issues in their operations.

What can be expected on the development of ESG requirements over the short-, medium-, and long-term?

In the short-term, significant time and attention will likely be devoted to discussion and debate of ESG requirements at all levels of government, including by regulators and legislators at both the state and federal level. One of the most significant developments in the near- to mid-term is the SEC's proposed ESG disclosure rules and in what form they will be finalized.

This will give clarity to industry professionals while also providing investors with certain expectations. However, that will not be the end of the conversation and debate surrounding what level of ESG disclosure and enforcement is appropriate. On one hand, discussions will likely focus on what types of requirements will be effective in achieving ESG objectives, and on the other hand, there will be much debate on the appropriateness of ESG rulemaking. On the investor side, increased demand from

other investors and market participants will continue to require more transparency around ESG integration and the quality of ESG initiatives.

In the medium term, it is predicted that the market will coalesce around specific disclosure standards. It remains to be seen whether the standards will be consistent across industries and regions, or if the applicable ESG standards will be specific to a company's circumstances.

Finally, in the long term, there is possibility for expansive regulation on ESG topics building off of the regulatory proposals that are predicted to be enacted in the medium-term. The pressure on the market to move more on ESG issues will continue to increase to the extent there continues to be an increased sense of urgency to address pressing environmental and social issues.

ESG-related legal challenges in the United States

There has been a large number of legal challenges seeking to hold companies accountable for various ESG issues. For example, currently Exxon Mobil Corporation, a large oil company headquartered in Texas, is facing a lawsuit brought by the Commonwealth of Massachusetts accusing the company of misleading investors by downplaying the contributions of its products to climate change. The case survived a motion to dismiss and is continuing in state court.[296]

[296] Climate Case Chart. "Commonwealth v. Exxon Mobil Corp.", http://climatecasechart.com/case/commonwealth-v-exxon-mobil-corp/

Are companies required to disclose information related to ESG issues?

The threshold and categories of information that public companies are required to disclose to facilitate informed investment and proxy voting decisions in some jurisdictions is referred to as 'materiality.' The SEC describes this threshold in this way: "information is material if a reasonable person would consider it important." Under federal securities laws in the United States, the materiality standard applies to disclosure of every aspect of a company's business and operations, including ESG issues.

What is the materiality standard in the United States?

Materiality is intentionally not precisely defined and the meaning will depend on the facts of the situation. As articulated by the US Supreme Court, information is "material" if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or, in other words, the information would alter the total mix of available information. See TSC Industries, Inc. v Northway, Inc., 426 US 438 (1976) and Basic Inc. v Levinson, 485 US 224 (1988).

The SEC first issued guidance affirming that this materiality threshold applies to disclosure related to climate change in 2010.[297] Most recently, in April 2022, the SEC proposed amendments that would require public companies to disclose climate-related financial data, and greenhouse gas emissions insights, in public disclosure filings. With this new rule called the 'issuer rule,' US public companies would be required to release and disclose emissions they are directly responsible for, as well as emissions from their supply chains and products. Furthermore, the SEC has also issued an "investor rule," in May 2022, proposing ESG-focused funds and firms to disclose specific data on ESG strategies in materials like fund prospectuses and annual reports.[298]

Another applicable standard in reporting is "double materiality," where a company must disclose both the impact of climate on the company, as well as the company's impact on the climate, ESG, or other aspects of sustainability. The US does not recognize the concept of "double materiality." Currently, federal securities laws focus on the materiality of the impact an event has, or might have, on a company, and not on the impact a company has on others. However, to the extent a company makes a statement about its actions, such as its impact on the climate, federal securities laws require those statements to be true and not misleading.

In the US, when an interested party (other than a shareholder or bond holder) reports material events that have not been disclosed or fully disclosed to a regulator, there

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[297] Securities and Exchange Commission. 17 CFR PARTS 211, 231 and 241. [Release Nos. 33-9106; 34-61469; FR 82]. "Commission Guidance Regarding Disclosure Related to Climate Change", https://www.sec.gov/rules/interp/2010/33-9106.pdf

[298] Bloomberg Law. "Proposed SEC Climate Disclosure Rule", https://pro.bloomberglaw.com/brief/proposed-sec-climate-disclosure-rule/

are statutes that protect individuals who report misconduct, known as whistleblowers, to a regulator. For example, the Sarbanes Oxley Act (SOX) protects employees who report certain wrongdoings by their corporate employer.[299]

What are the penalties if a public company fails to disclose all material information?

If a public company fails to disclose all material information in the US it can be subject to class action liability under Section 11(a) of the Securities Act. The company will be liable if it makes any untrue statements of material fact or omissions of material fact required to be stated in the registration statement or necessary to make the statements therein not misleading. A class action lawsuit under Section 11 can only be brought by holders of the company's securities (i.e., stockholders or bondholders).

The US provides for a mechanism for shareholders to include proposals in a public company's proxy circular to be voted on at the company's annual general meeting. Under federal law, each public company is required to include a shareholder proposal in its proxy statement if the proposal meets certain conditions. The company can seek a no-action letter from the SEC to exclude the proposal. If the company is required to include the proposal, it is permitted to include a statement indicating that it is opposed to the proposal and the reasons why. This mechanism has been successfully used to elect ESG activists to the board of companies. For example, in 2021, Engine No.1, a climate-oriented activist investor, campaigned

[299] 107th Congress Public Law. "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. [H.R. 3763], https://www.govinfo.gov/content/pkg/PLAW-107publ204/html/PLAW-107publ204.htm

successfully to elect three of its nominees to the board of ExxonMobil over the opposition of the company.[300] In addition to shareholder proposals and class action lawsuits alleging securities law violations, some activists have had success in bringing lawsuits under alternative theories of liability. For example, the case by the Commonwealth of Massachusetts, discussed above, includes a claim under the state's consumer protection laws.

Failure to properly report GHG emissions to the EPA under its GHG reporting program subjects a regulated company to stringent penalties under the Clean Air Act[301].

[300] Phillips, Matt. "Exxon's Board Defeat Signals the Rise of Social-Good Activists" *New York Times*, June 9, 2021. https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html

[301] United States Environmental Protection Agency. "Greenhouse Gas Reporting program - GHGRP" Accessed on November 22, 2022, https://www.epa.gov/ghgreporting.

CONCLUSION

This guide considers a broad array of ESG issues in eight key jurisdictions, including three that hold significant influence over the governance of the Amazon river basin. One trend that emerged while researching this guide is that the general public in all of these countries supports ESG principles. This is demonstrated through political pressure, investment decisions, and shareholder activism. The EU and UK have well developed ESG due to decades of public and political support for it. Other nations historically have not focused on ESG for as long. The developing countries, Peru, Brazil and Colombia, have had to play catch up, as many ESG issues have risen to the forefront there only in recent years.

The trend is towards more uniformity in how nations measure ESG progress. This will include more robust disclosure requirements, heightened scrutiny, more severe penalties, and responsiveness to broader societal concerns. Companies will have to become more precise in their GHG emissions accounting and reporting, and more responsive to calls for increased diversity, equity, and inclusion. Companies increasingly are under pressure from shareholders and the public at large to go above and beyond regulatory requirements. As instances of greenwashing and faux ESG measures are exposed, public pressure with regards to compliance with ESG commitments will only increase.

In the Amazon basin in particular, ESG standards can play a key role in strengthening environmental regulations in the context of infrastructure projects carried out in this region. ESG standards should be considered in the early stages of project development, including the design phase, ensuring that local communities participate in these proceedings. Discussions of ESG frameworks are at the center of project development worldwide and offer civil society an opportunity to engage with a broad range of stakeholders to promote better environmental, social, and governance standards for project development in the Amazon Region and globally.

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ANNEX I: GLOSSARY

In this guide, the following words and expressions shall have the following meanings:

"Apply or explain" principle: Corporate governance principle that states that companies are called to express how compliance is achieved by deliberating on how their actions help the organization achieve its goals.

Black Lives Matter movement (BLM): A decentralized political and social movement against racism, colonialism, police brutality, and structural inequality. Both hyperlocal and transnational, the movement started in the US in 2013 with the acquittal of the killer of Trayvon Martin in Florida, and gained national traction in the US following the deaths at the hands of police officers of Michael Brown in Missouri and Eric Garner in New York, and subsequent related protests and unrest. The movement increased in size and reach, becoming international in scope, following the killing of George Floyd by police officers in Minnesota, and subsequent global protests.

Bonds: Debt instruments that represent a loan made by an investor to a corporate or government borrower. Bonds provide investors with regular or fixed income payments. A bond includes the loan details and its payments. Bonds are used to finance projects and operations.

Blue bonds: Used to finance projects related to ocean conservation and sustainable fishery.

Carbon budgets: Carbon budgets measure how much carbon dioxide (CO2) is produced by industries, homes and all other parts of the economy. This information is necessary to calculate how much emissions must be cut in order to reach net-zero emissions (i.e., achieving an equal balance between the carbon released into the atmosphere and removed from it).

Climate change: The long-term shifts in temperatures and weather patterns. These shifts may be natural, but since the 1800s, human activities have been the main driver of climate change, primarily due to the burning of fossil fuels (like coal, oil, and gas) which produces heat-trapping gasses.

Comply or explain principle: Describes a mechanism used to manage compliance with provisions that are not legally binding. The party can decide whether it accepts and complies with such provision or best practice or not, but should explain for its deviation.

Corporate governance: The combination of rules, processes, and laws by which companies are directed and controlled. Boards of directors are responsible for governing their companies, and shareholders have the role to appoint the directors and the auditors, as well as to ensure that an appropriate governance structure is in place.

Corporate social responsibility: A component of business management whereby companies acknowledge and integrate socially-driven concerns into their plans and

operations, by including specific actions and indicators related to social and environmental aspects of their activities.

ESG - Environmental, Social and Governance: Increasingly, these non-financial factors are being considered in an effort to identify material risks and growth opportunities.

ESG Bonds - Environmental, Social, and Governance Bonds: ESG bonds cover a variety of green bonds, sustainable development bonds, and social bonds. They fund projects that assist in combating environmental or social challenges.

ESG Materiality: Refers to those environmental, social, and governance issues that are likely to affect the financial condition or performance of a company within a specific sector.

Double Materiality: A situation in which a company must disclose both the impact of climate on the company, as well as the company's impact on the climate, ESG, or other aspects of sustainability.

ETF - Exchange Traded Funds: A type of investment composed of a set of assets that operate much like a mutual fund. The ETF will track a particular index, sector, or commodity but with the flexibility of being available to sell or purchase on a stock exchange as a regular stock.

GHG footprint - GreenHouse Gas Emission footprint: The total greenhouse gas emissions caused by an individual, event, organization, place, product or service.

Gig economy: A gig economy is one in which temporary, flexible jobs are commonplace and companies tend to hire independent contractors and freelancers instead of full-time employees.

GRI - Global Reporting Initiative: The independent, international organization that helps businesses and other organizations take responsibility for their impacts, by providing them with a global common language to communicate those impacts. GRI provides the world's most widely used standards for sustainability reporting – the GRI Standards.

Green bonds: Bonds to finance environmentally or socially beneficial projects, including green infrastructure or other projects to support climate change adaptation and mitigation.

Green finance: Green finance is any structured financial activity aiming to ensure a better environmental sustainable development.

NAV - Net Asset Value: NAV refers to a company's total assets minus its total liabilities.

Paris Agreement (also known as the Paris Accords or Paris Climate Accords): A legally binding international treaty on climate change adopted by 196 participating countries of the 21st Conference of the Parties of the United Nations Climate Change Conference (also known as COP21) in Paris, on 12 December 2015 and entered into force on 4 November 2016. The goal of the Paris Agreement is to limit global temperature increase to 2 degrees Celsius, preferably to 1.5 degrees Celsius, compared to pre-industrial levels.

SPO - Second Party Opinions: Concept or opinion by a Second Party Opinion provider that assures investors, governments, and all stakeholders involved in bond emissions that the bond framework and goals are compatible with accepted market practices and principles (e.g., the Green Bond Principles) and that the proceeds of the bond, as set out in the framework, align with expectations from the stakeholders and the community.

Securities: Financial instruments usually represented as assets in the financial market. Securities can be represented in multiple ways: as fractions of the ownership of a corporation represented in stocks; as particular or official credits represented in bonds or as rights to ownership as represented by an option.

Supply chain: The network of individuals, organizations, resources, activities and technology involved in the creation and sale of a product. A supply chain encompasses everything from the delivery of source materials from the supplier to the manufacturer through to its eventual delivery to the end user.

United Nations Global Compact: A non-binding United Nations pact to encourage businesses and firms worldwide to adopt sustainable and socially responsible policies, and to report on their implementation.

TCFD - Taskforce on Climate-related Financial Disclosures: The Financial Stability Board (FSB), an international body that makes recommendations about the global financial system, created the TCFD to develop recommendations on the types of information companies should disclose to support investors, lenders, and insurance underwriters in appropriately assessing and pricing a specific set of risks related to climate change.

WTO - World Trade Organization: International organization dealing with the rules of trade among nations. WTO agreements, negotiated and signed by the world's trading nations, are lengthy and complex because they are legal texts covering a wide range of activities.

ANNEX II: SURVEY TABLE SUMMARY

	Environmental	Social	Governance (including disclosure regimes)	ESG Expectations
Australia	• Public support towards renewable energy • Exports & jobs in natural resources present challenges for sustainability • Working to decarbonize mining/energy processes • All states committed to net-zero by 2050 • NGOs have pursued strategic climate litigation regarding careful management of funds • In 2025, the main industry group of mining companies will begin imposing a public report on metrics aimed at sustainable mining	• 2018 Modern Slavery Act require all eligible corporations to submit Statement describing, among other things, risks, mitigation actions and assessments associated with supply chain and operations • Workplace Gender Equality Act requires reporting on gender equality indicators related to composition of workforce, governing body, remuneration and family care	• Several governmental authorities and industry groups have introduced quasi-mandatory ESG-related disclosure obligations to address market expectations • General disclosure obligations under Corporations Act require material risk disclosures (enforced by the Australian Securities and Investments Commission and enforcement is possible where directors fail to identify such material risks)	• Regulators will implement minimum ESG-related reporting standards • Likely to require corporate disclosures including a realistic evaluation of ESG-related risks • ESG-related activism and legal actions from shareholders (see "Legal Challenges in Australia regarding ESG")

			• ASIC Reg. Guide 247 and 228 each provide guidance on disclosures • APRA anticipates final draft guidance on climate disclosure for financial institutions by year end 2021. • NGER Act—requires corporate registration for excess GHG scope 1 and 2 emissions (≥50 kilotonnes of CO2) or energy consumption (≥200 terajoules)	
Brazil	• Environment was previously thought of as just another risk factor • Brazil's Green Bond Market is attracting big financial institutions • Incentives for environmentally friendly businesses • There are reputational and credibility risks for companies harming the environment • Public supervision increased after two waste dams collapsed	• Less of a focus, none of the new ESG funds are exclusively social • Financing agreements for financial institutions have stipulated no child labor, slavery-like conditions, prostitution or gender/race-based discrimination • Increased focus on diversity on boards of directors	• Brazil Corporate Governance Index (BCGI) is raw average of six indices for corporate governance • Brazil's PNMA requires every level of government to protect the environment through licensing and auditing • No uniform reporting requirements, so companies must create their own principles or rely on foreign standards • Serious penalties for false reporting	• Hopeful for continued growth as ESG funds doubled from 2020 to 2021 • Central Bank of Brazil will have more ESG regulations • In 2016 Brazil launched a National Policy for Biofuels (Renovabio) to expand biofuel production and replace fossil fuels

Canada	• Carbon pricing regimes at the federal and provincial levels are shaping the cost of doing business in favor of sustainability • Legislative goal set for net zero by 2050 • Canada's lucrative oil sands have had high profile divestments • Institutional investors are making climate change a priority	• Created the Truth and Reconciliation Commission to focus on acknowledging and redressing injustices against Indigenous Canadians • New focus on women in the C-suite	• Mandatory disclosures regarding diversity • Ontario Securities Commission imposes penalties for disclosure failures	• Government is allowing registration as a benefit company, requiring a publicized annual report evaluating performance and opening directors to shareholder litigation if they fail to fulfill stated purpose • Litigation has gone forward against provincial government of Ontario for not setting science based emission reduction target
Colombia	• Columbia Stock Exchange has requirements for registration of ESG bonds to ensure the investment actually preserves, maintains or improves the environment • Government, through Ministry of Environment and Sustainable Development, promotes sustainable business practices through tax incentives	• Gender wage gap is not as severe as in other Latin American countries (12.9% in Colombia vs. 17% elsewhere) • Law 1496 of 2011 was enacted to eliminate gender discrimination	• Their disclosures recognize the materiality threshold • No penalties and legislation is scarce • Superintendencia Financiera de Colombia oversees the financial system • General Regulations of the Colombia Stock Exchange have certain requirements for registration of ESG bonds	• Hopeful in the short term that companies will adopt ESG due to stakeholder and market demands • Mandatory ESG disclosures for issuers will begin on February 10, 2023

			• Colombian issuers of securities most commonly use the Global Reporting Initiative (GRI) as their standard	
European Union	• European Commission has drafted a plan to act against climate change for 2021-2027 • Goal of carbon neutral by 2050 • LIFE+ program (Financial Instrument for the Environment) aimed at financing improvements and research in the field of nature protection and biodiversity and the preservation of air and water quality • SFDR requires companies to publish policies integrating sustainability risks in investment decisions on website	• EU has set several minimum conditions with which the Member States must comply, particularly with regard to labor law • ELA was created to help Member States and the European Commission to ensure that EU rules on labour mobility and social security coordination are enforced in a fair, simple and effective way • The European Commission issued a legislative proposal on September 14, 2022, which aims to ban and prohibit the marketing of goods that have been produced by forced labor	• Since 2004, 26 Member States have put in place diversity charters which support and encourage good practices in diversity management among thousands of multinationals, public bodies, and non-profit organizations • EU strategy for diversity and inclusion focuses on four main target groups: women, people with disabilities, people from the LGBT+ community, and seniors and includes both cross-cutting and specific measures to address the concerns of each of these groups	• ESG regulation is specific to each State within the European Union • European Commission presented a proposal for a European directive imposing a duty of due diligence on companies in commerce in the EU • The European Commission intends to modify the Non-Financial Reporting Directive of 2014 with new measures to be applicable in 2023, including a more demanding verification of reporting by an Independent third-party organization—will focus on accuracy of information transmitted and on consistency with the company's sustainability

			● ISO 26000 is the most widely used reporting standard for businesses and organizations committed to operating in a socially responsible way ● The EU has created the EFRAG (European Financial Reporting Advisory Group), a local, non-profit organization set up in 2001–to advise the European Commission on financial reporting. If adopted, it will be applied for the first time in 2024 for the 2023 accounts and will be completed the following year	objectives or on the relevance of the indicators used
Peru	● A number of environmental issues are gaining relevance in Peru, including water-related risks, corporate policies regarding care and conservation of the environment, climate strategy, and biodiversity	● Prevalent social issues include human rights, corporate citizenship, social impact on communities, and quality management (product recalls are commonly discussed)	● Peruvian Securities Authority is expanding through legislation ● The Lima Stock Exchange (BVL) has created reporting requirements and guidance	● Peru will be incorporating ESG index into the local market. The ESG criteria can be standardized through legal regulations which will track ESG criteria at companies

	• 2009 National Decree calling on government to enforce eco-efficiency measures to generate savings in public spending, including actions to improve public service by enabling the use of fewer resources and generating fewer negative impacts on the environment		• ESG index indicates how prices of the share of Peruvian companies react to the adoption of good corporate governance practices • In 2018, the BVL and UK embassy published Green Bond Guidelines for Peruvian issuers	• ESG activism, similar to the US, is being attempted in Peru, but there are not the same mechanisms/precedents for shareholder activism as in the US.
United Kingdom	• Prevailing focus on GHG reduction • UK has tried to make information about emissions more readily available • UK government released roadmap on green investing in 2021 • The UK underscores non-climate change challenges including preserving biodiversity and addressing water pollution • Have pledged large emission reductions	• The UK has placed an emphasis on eradicating modern day slavery and working towards improved mental and physical health in the work place • UK companies must comply with legal requirements for equal pay, inclusion and non-discrimination	• Required disclosures under the Modern Slavery Act • Equality act requires gender pay gap information • Severe penalties (including claw-back of directors' bonuses) for serious director failings related to internal controls, risk management and reporting on anti-fraud measures • The UK published proposed reforms to audit industry, in the wake of BHS and Carillion insolvencies	• The Financial Conduct Authority (FCA) is increasing the scope of disclosure for diversity targets, as part of the influence exerted by the US Black Lives Matter movement • Particular focus on role of finance in transition to green economy (i.e., Greening Finance Roadmap) will expand • More climate change (and ESG) litigation • More corporate scrutiny and oversight by NGOs and government authorities

			• A company must disclose whether it has made climate-related disclosures consistent with the TCFD framework and identify where they are disclosed among other things • Current working towards a TCFD Roadmap for climate-related disclosures • London Stock Exchange guidance on integration of ESG into investor reporting and communication is based on UN Sustainable Stock Exchange's guidance and aligned with TCFD	• Social aspects of green agenda will gain traction (i.e., sustainability in trade)
United States	• The SEC is using oversight power to enforce better environmental disclosure and social issues • EPA plays a role in enforcement as well as state governments	• States have had to take the lead for many social issues as the federal government has been slow to react • Illinois and California have signed legislation for gender equality	• Many large corporations and investment firms have taken governance issues into their own hands • NASDAQ requires listed companies to disclose diversity statistics • The SEC has released proposed rules on ESG but they are not yet final	• SEC adoption of ESG-related rules in the near future, but uncertainty will remain as administrations change unless congress acts • Continued investor activism to achieve ESG goals, including from institutional investors such as pension funds

			• SEC has to date enforced ESG/greenwashing using its existing false/misleading statement and omissions violation framework, and the SEC is continuing the look for these occurrences moving forward	• Going to continue to have litigation around who has the authority to require ESG-related disclosure and enforcement of such failures • Fiduciary duty discussions and litigation will play a large role in the long-term outlook of the US approach to ESG • Some states will require ESG-related disclosures and some will continue to expressly push back against ESG initiatives leaving investors with little to no guidance • The SEC will continue its sweep looking for ESG marketing that is false, misleading or omitting material information in communications with investors

ANNEX III: ORGANIZATIONS THAT WORK IN ESG

The following list includes different regulators or organizations of the subject jurisdictions of the guide that advance policy development related to ESG through research, white papers or other advocacy.

Global

- Association for Financial Markets in Europe (AFME): A European association which is considered to be a strong supporter of the EU's aim to be a leader in driving the development of a more sustainable financial system. Key areas of focus for AFME include enhancing ESG reporting and disclosure in the EU and globally, and supporting the incorporation of ESG and sustainable finance considerations across various capital markets product areas and business functions.
- Ceres: Ceres describes itself as advancing leadership among investors, companies and capital market influencers to drive solutions and take action on the world's most pressing sustainability issues.
- Climate Action 100+ (Climate Action): The investor signatories of Climate Action seek greater disclosure of climate change risks and robust company emissions reduction strategies.

- Environmental Defence Fund (EDF): EDF is a leading United States-based nonprofit environmental advocacy group. The group is known for its work on issues including global warming, ecosystem restoration, oceans, and human health.
- The Glasgow Financial Alliance for Net Zero (GFANZ): GFANZ is a global coalition of leading financial institutions committed to accelerating the decarbonization of the economy. GFANZ provides the tools and resources the financial sector needs to implement its net-zero commitments, which are made in accordance with the UN Race to Zero campaign's criteria.
- Global Future Council on Human Rights at the World Economic Forum (WEF): The Global Future Council on Human Rights at the World Economic Forum is a leading gathering of experts in the Business and Human Rights (BHR) space. One of the co-chairs is John Morrison of the Institute of Human Rights and Business (referenced immediately below). In May of 2022, the Council produced an Insight Report entitled "Engaging Affected Stakeholders: the Emerging Duties of Board Members."
- Global Reporting Initiative (GRI): GRI is an international independent standards organization that helps businesses, governments and other organizations understand and communicate their impacts on issues such as climate change, human rights and corruption.
- Institute for Human Rights and Business (IHRB): There are a number of organizations that have emerged following the passage of the UN Guiding Principles on Business and Human Rights (UNGP) in 2011. Two such organizations are: Shift (referenced below) and the IHRB led by John Morrison.

The IHRB is considered one of the leading organizations, along with Shift, in the BHR space.

- International Organization of Securities Commissions: A global cooperative of securities regulatory agencies which has as one of its aims to help members understand the implications of ESG ratings and data providers' activities and to mitigate against resulting risks.
- International Energy Agency (IEA): The IEA describes itself as situated at the heart of global dialogue on energy, providing authoritative analysis, data, policy recommendations, and real-world solutions to help countries provide secure and sustainable energy for all. It is one of the world's most important organizations in the area of energy policy.
- International Sustainability Standards Board (ISSB): The intention is for the ISSB to deliver a comprehensive global baseline of sustainability-related disclosure standards that provide investors and other capital market participants with information about companies' sustainability-related risks and opportunities to help them make informed decisions.
- International Swaps and Derivatives Association (ISDA): A international trade organization for the market over-the-counter derivatives which is developing standards and best practices for financial instruments that incorporate, or take into consideration, ESG-related factors. ISDA recently released KPI guidelines for Sustainability-Linked Derivatives.
- Partnership for Market Readiness (PMR): It is an international initiative led by the World Bank which aims to study and support the adoption of market instruments to mitigate the climate change process, in particular carbon pricing instruments. The initiative has 36 participating jurisdictions, among

which 19 are already adopting carbon pricing instruments, which means assigning a monetary value to GHG emissions

- **Principles of Responsible Investment (PRI):** This corporation is considered to be the international leader on responsible investment. It engages with global policymakers, conducts research and works with signatories on ESG issues. Institutional investor signatories to the PRI publicly commit to adopting and implementing various ESG-related principles, including to seek appropriate disclosure on ESG issues by the entities in which they invest and report on their activities and progress towards implementing the principles.
- **Sabin Center at Columbia Law School:** The Sabin Center develops legal techniques to fight climate change, trains students and lawyers in their use, and provides up-to-date resources on key topics in climate change law and regulation. They are an important resource related to trends in litigation risk related to climate change, among other resources.
- **Shift Project:** Shift, like the IHRB, has come to prominence in the decade following the release of the UNGP's (2011-2021) as the global community has attempted to "operationalize" the UNGP. Shift, led by its co-founders, Caroline Rees and Rachel Davis, arose out of the team assembled by Professor John Ruggie (2005-2011) for the purpose of drafting the UNGP.
- **Taskforce on Nature-related Financial Disclosures (TNFD):** This is a task force with representatives from preparers and users of financial information (e.g., financial institutions and corporates). The TNFD is in the process of developing a reporting framework for the disclosure of nature-related financial information, which will mirror and complement the TCFD framework.

- **World Economic Forum:** An international NGO which has released ESG reporting metrics to help companies report non-financial disclosures. Its "Stakeholder Capitalism Metrics" and disclosures can be used by companies to align their mainstream reporting on performance against ESG indicators and track their contributions towards the sustainable development goals on a consistent basis.

Brazil

- **Laboratory of Financial Innovation:** The Laboratory of Financial Innovation (LAB) is a forum for multisectoral interaction, created by the Brazilian Development Association (ABDE), the Inter-American Development Bank (IDB), and CVM, which, in partnership with Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, brings together government and society representatives to promote sustainable finance in Brazil. The objective of the LAB is to create innovative financing solutions to leverage private resources for projects with social and/or environmental impact.

  The Green Finance Working Group is one of the LAB's working groups and aims to promote the development of sustainable finance in Brazil, within the scope of the financial and capital markets. The group aims to disseminate information on sustainable finance and green emissions, especially to companies and investors. In addition, the group aims to propose regulatory improvements and collaborative interaction with the government and entities to strengthen sustainable finance in Brazil. There are also subgroups related to studies on energy, sustainable agriculture, water and sanitation.

Canada

- British Columbia Investment Management Corporation (BCI): A public investment organization that manages nearly CAD$200 billion in assets and uses their funds to advocate for changes to public policy and regulations to incorporate ESG principles into the Canadian regulatory framework.
- Caisse de dépôt et placement du Québec: It is the largest institutional investor managing pension funds in Quebec and actively invests to encourage a more sustainable world.
- Canadian Bankers Association (CBA): It is a trade association and lobby group representing 60 Canadian banks, including the five largest Canadian banks. Although the CBA does not mandate its members provide environmental disclosure, it does highlight their membership's activities and discusses the role of Canadian banks in encouraging environmental sustainability.
- Canadian Climate Institute: The institute is one of Canada's foremost organizations in driving conversations on climate change risk, mitigation and adaptation. It describes itself as Canada's leading climate change policy research organization, producing the rigorous analysis and evidence-based recommendations that are needed to advance climate resilience, chart net zero pathways, and drive long-term prosperity.
- Canada Climate Law Initiative (CCLI): CCLI operates out of the University of British Columbia's faculty of law. It acts as a climate governance knowledge mobilization and policy hub, partnering with businesses and practitioners who are active on climate and related governance questions. Its efforts include advising Canadian businesses and governments on how to respond to

today's urgent climate risks and opportunities through effective climate governance.

- Canadian Coalition of Good Governance: This organization is a prominent corporate governance organization in Canada that seeks to represent institutional investors and further good governance objectives in Canada. It primarily focuses on improving the regulatory environment "to best align the interests of boards and management with those of their shareholders" and on promoting "the efficiency and effectiveness of the Canadian capital markets."
- Canada's Expert Panel on Sustainable Finance: This panel was appointed by the Government of Canada in April, 2018 to deliver a report on the "opportunities and challenges facing Canada" in the realm of sustainable finance. The Panel's final report was published in 2019.
- Canadian Ombudsperson for Responsible Enterprise (CORE): The Canadian Ombudsperson for Responsible Enterprise (Sheri Meyerhoffer) was created by the Canadian Government in 2018 with responsibility for the human rights performance of Canadian companies, operating abroad, in the garment, mining, and oil and gas sectors. In 2022, CORE is focusing on the issue of child labour and the garment industry.
- Chartered Professional Accountants of Canada (CPA Canada): is the self-regulating professional body that manages accreditation for chartered professional accountants in Canada. They have provided guidance on how CPAs can address ESG and sustainability issues.
- Glass, Lewis & Co: It is a prominent proxy advisory firm which also provides various shareholder and corporate governance services related to ESG.

- **Global Risk Institute (GRI):** GRI is a think tank that focuses on emerging risks and trends for financial services organizations. Their objectives include improving risk management in the financial sector. They collaborate with academics, executives and other thought centers to publish on the subject of climate risk and sustainable finance.
- **Institutional Shareholder Services (ISS):** The largest proxy advisory firm in the world that provides various shareholder and corporate governance services to clients including supporting ESG initiatives.
- **Insurance Bureau of Canada:** It is the national industry association representing Canada's private home, auto, and business insurers. They have publicly spoken in favor of a long-term policy framework and road map for low emissions and climate-resilient growth.
- **Intact Centre on Climate Adaptation:** The Intact Centre is based at the University of Waterloo. It serves as an advocacy and research centre on the subject of climate adaptation, working with homeowners, communities, governments and businesses to identify, and reduce, the impacts of extreme weather and climate change.
- **Responsible Investors Association (RIA):** Canada's primary industry association that aggregates industry publications from around the world to demonstrate the value of responsible investing. This research often focuses on environmental and social issues.
- **The Shareholder Association for Research and Education (SHARE):** SHARE is an advocacy organization that aims to support corporate sustainability practices. Their efforts include support for proxy voting campaigns, as well as

campaigns and research related to transparency and accountability in capital markets.

- Smart Prosperity Institute: The Smart Prosperity Institute is a leading national research network and policy think tank based at the University of Ottawa. Its areas of focus include climate change and the transition to a sustainable economy.
- Supply Chain Canada: The largest association of supply chain professionals in Canada, and administers the Supply Chain Management Professional (SCMP) designation. They have provided guidance on establishing sustainable supply chains.

United States of America

- American Bar Association (ABA) Advisory Board to the Centre for Human Rights: The ABA Advisory Board to the Centre for Human Rights has done a considerable amount of work in the BHR space, including the creation of a repository of the leading materials connected with Business and Human Rights.
- Chartered Financial Analyst Institute (CFA Institute): A global association that sets professional standards for investment management practitioners, provides designations to finance professionals, and administers certification tests. The CFA Institute has published a Guide to ESG Investing for Investment Professionals.
- Climate Registry (TCR): A not-for-profit organization that empowers North American organizations to do more in the fight against climate change by providing services and tools that help them reduce their emissions.

- **Investor Stewardship Group (ISG):** An investor-led effort that has established a framework of corporate governance practices for US listed companies.
- **US SIF - The Forum for Sustainable and Responsible Investment:** A not-for-profit organization whose mission is to rapidly shift investment practices towards sustainability.

ANNEX IV: ESG RESOURCES

The following list includes resources that provide guidance on ESG-related topics that are relevant to the subject jurisdictions of the guide as well as others.

ESG General

- Mondaq ESG Comparative Guide. Published by Mondaq, this guide provides an overview of key areas of law and practice with respect to ESG across multiple jurisdictions.
- Invest Europe ESG Reporting Guidelines. A guide setting out ESG reporting recommendations that reflect market practices and expectations and needs of investors. A user-friendly guide in the European private capital sector.
- ESG Survey Results Reports: ESG in Latin America. A report prepared by the International Bar Association, Latin American Regional Forum, which provides an overview of ESG trends in Latin America, including ESG related regulations, disclosure obligations, taxonomies, stewardship codes, "B Corps", etc.
- The Responsible Investor ESG Yearbook 2022. A report published by Responsible Investor which summarizes key global trends with respect to ESG in 2022 and a review of global regulatory changes for Europe, the United States, Asia and globally.
- ESG Investing: Practices, Progress and Challenges. A report prepared by the OECD providing an overview of the global ESG financial ecosystem, rating

methodologies and investment approaches, and ESG-related policy developments.

- Nasdaq ESG Reporting Guide. A ESG reporting guide for public and private companies published by NASDAQ, which includes an overview of third-party reporting methodologies widely adopted by industry and aims to help companies navigate evolving standards on ESG data disclosure.
- UNEP FI: Show Me the Money: Linking Environmental, Social and Governance Issues to Company Value. A publication prepared by the UN Environmental Program Finance Initiative Asset Management Working Group on the financial materiality of ESG issues.
- Sustainable Finance in Europe: Regulatory State of Play - Key impacts for banks and capital markets. A practical guide prepared by the Association for Financial Markets in Europe and Linklaters on the regulatory framework for sustainable finance in the EU, the UK and Switzerland.
- Corporate Governance in Latin America and the Caribbean: Using ESG Debt Instruments to Finance Sustainable Investment Projects. A report prepared by the UN Economic Commission for Latin America and the Caribbean, which examines the potential for ESG bonds, including sustainability-linked bonds by Latin American and Caribbean corporate issuers as a source of financing for investment projects.
- Responsible Business Conduct in the Financial Sector in Latin America and the Caribbean (OECD). A report prepared by the Shareholder Association for Research and Education (SHARE) and the OECD Centre for Responsible Business Conduct which provides an overview of the financial sector across Latin America and the Caribbean, including the main ESG risks.

- The Global Risks Report 2022. The 17th edition of the global risk report prepared annually by the World Economic Forum which summarizes some of the top risks the international community faced in 2022, potential consequences and mitigation efforts.

Environmental

- The Investor Guide to Climate Collaboration. From COP 26 to Net Zero. A report prepared by the PRI and the London Stock Exchange Group which summarizes the various leading investor initiatives on climate change and the tools and frameworks that have been developed to help investors understand climate-related risk and opportunity.
- Scaling up Climate-Compatible Infrastructure. A report published by the OECD that provides insights from national development banks in Brazil and South Africa on their role in bridging the investment gap for climate-compatible infrastructure in developing countries.
- The Investor Guide to Deforestation and Climate Change. A guide prepared by Ceres for investors which provides a framework to understand and engage on deforestation-driven climate risks across their portfolios.
- Beyond the Carbon Footprint: Biodiversity is the (Near) Future of ESG. An article published by GRESB which discusses an increasing attention on biodiversity loss and its consequences in the corporate sustainability/ESG discussion.
- Biodiversity Impact Assessment Tool. A tool provided by Institutional Shareholder Services (ISS) that assists investors assess the impact of business and supply chain activity on biodiversity.

Social

- Guidance Note. Board Duties in Ensuring Company Engagement with Affected Stakeholders. A guidance document prepared by the Global Future Council on Human Rights of the World Economic Forum for boards of directors and senior executives on the oversight of human rights issues through identification and engagement with affected stakeholders.
- Engaging Affected Stakeholders: The Emerging Duties of Board Members. An insight report prepared by the Global Future Council on Human Rights of the World Economic Forum which provides supporting documentation to the "Guidance Note: Board Duties in Ensuring Company Engagement with Affected Stakeholders" linked above.
- Engaging with Companies on Modern Slavery – A Briefing for Investors. A document prepared by CORE with contributions from Anti-Slavery International, Business and Human Rights Resource Centre and UNICEF UK, which provides guidance to investors to engage with companies on their actions to address potential modern slavery and human trafficking in their operations and supply chains.
- Supply Chains Transparency and Due Diligence Legislation to Prevent Child and Forced Labour: A Guide for Policy Makers and Legislators. A guide prepared by the International Council for Criminal Law Reform and Criminal Justice Policy that provide an overview of modern slavery legislation in Canada and internationally and a range of legislative options that policymakers and legislators may consider in developing supply chain transparency and due diligence legislation.
- Beyond Compliance: Effective Reporting under the Modern Slavery Act: A civil society guide for commercial organizations on the transparency in supply

chains clause. A document prepared by CORE, with contributions from Amnesty International UK, Anti-Slavery International, CAFOD, Focus on Labour Exploitation, Know the Chain, Quakers in Britain, ShareAction, Traidcraft and UNICEF UK, which provides guidance on how provisions on transparency in supply chains in the Modern Slavery Act 2015 (UK) can be used to help prevent slavery and forced labour from occurring.

- United Nations Guiding Principles on Business and Human Rights. A set of principles on business and human rights developed by the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other businesses.
- Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains. A set of principles launched by Canada, Australia, New Zealand, the United Kingdom and the United States which provides guidance to governments on combating human trafficking in global supply chains.

Governance

- ESG oversight: The corporate director's guide. A guide for boards of directors which provides an overview of leading practices and questions that boards should consider when determining the governance structure that is most appropriate for overseeing ESG matters given a company's industry, size, growth trajectory and strategy.
- The Directors' E&S Guidebook. A guidebook prepared by the Canadian Coalition for Good Governance which provides insights and recommendations for effective board oversight and company disclosure of environmental and social matters.

- Study on Directors' Duties and Sustainable Corporate Governance. A study prepared by Ernst and Young for the European Commission DG Justice and Consumers that assesses the root causes of short termism in corporate governance, discusses their relationship with current market practices and regulatory frameworks and identifies possible EU-level solutions.
- Corporate Governance and ESG Disclosure in the EU. A report prepared by the CFA Institute which identifies how ESG developments and corporate governance policies may merge into new regulatory frameworks aims at strengthening the link between companies and broader society.

ESG Reporting Standards and Frameworks

- Climate Disclosure Project Guidance. Guidance prepared for companies, states, regions and cities on environmental reporting, including with respect to climate change, deforestation and water security. The CDP is fully aligned with the TCFD Recommendations.
- GRI Standards. Sustainability reporting standards prepared by the Global Reporting Initiative.
- TCFD Recommendations. Recommendations on climate-related financial disclosures prepared by the Taskforce on Climate-related Financial Disclosures.
- TNFD Framework. The framework being developed by the Taskforce on Nature-related Financial Disclosures which sets out disclosure and communication guidance for corporate entities to the financial community on nature-related dependencies, impacts, risks and opportunities. The final TNFD Framework is expected to be launched in September 2023.

- Principles for Responsible Investment. A set of six principles developed by an international group of institutional investors and convened by the United Nations Secretary General. It provides direction to investors on the incorporation of ESG issues into investment practice.
- SASB Standards and Guidance. A set of sustainability-related standards prepared by the Sustainability Accounting Standards Board that identify a subset of environmental, social and governance issues most relevant to financial performance in 77 industries, designed to help companies disclose financially-material sustainability information to investors.

ESG STANDARDS, REGULATIONS, AND IMPLEMENTATION

Reference Guide on Australia, Brazil, Canada, Colombia, the European Union, Peru, the United Kingdom, and the United States

ISLP International Senior Lawyers Project

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