April 2024

In this quarterly newsletter, we highlight key developments relating to environmental, social and governance ("ESG") topics since December 2023, with a focus on developments of interest to U.S. public and private companies, and companies operating in the United Kingdom and European Union. We also provide links to significant ESG developments that are expected in the near future. Our previous newsletter is available here.

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

- Emissions and emissions reductions disclosure
- Supply chain due diligence
- ESG enforcement and greenwashing
- Corporate compliance and fiduciary duties
- AI and cybersecurity
- Anti-ESG at the US state level

Key Quarterly Developments

- **New Climate Disclosure Rules Adopted – and Stayed – by the SEC, with Challenge to be Heard by the Eighth Circuit**. On March 6, 2024, the U.S. Securities and Exchange Commission ("SEC") adopted final climate-related disclosure rules in a 3 to 2 vote split along party lines. The final rules were less prescriptive than the rules that were proposed in March 2022, including eliminating the requirement to disclose Scope 3 greenhouse gas ("GHG") emissions, and eliminating the financial impact metrics, which would have required disclosure of climate-related impacts on each line item of a company's consolidated financial statements. For large accelerated filers, the earliest disclosures under the new rules would be required in 2026, in annual reports for the fiscal year beginning in calendar year 2025, with limited assurance attestation required from 2030. A flurry of petitions filed so far challenging the rules (discussed below) will be consolidated and heard by the U.S. Court of Appeals for the Eighth Circuit, as determined by a random draw held on March 21, 2024 by the Judicial Panel on Multidistrict Litigation.

  On March 15, 2024, the U.S. Court of Appeals for the Fifth Circuit granted a stay of effectiveness over the rules, in response to petitions for review and motion for an emergency stay filed by Liberty Energy, Inc. and Nomad Proppant Services LLC, the Attorneys General from Louisiana, Texas and Mississippi, and the U.S. Chamber of Commerce and other groups. That stay has since been lifted, in light of the challenge to be heard in the Eighth Circuit. On April 4, 2024, the SEC issued its own order staying the rules, pending the outcome of that challenge. In that order, the SEC states that it will "continue vigorously defending the Final Rules' validity in court and looks forward to expeditious resolution of the litigation."

  Other challenges to the rules were filed in the Second Circuit (by the Natural Resources Defense Council), Sixth Circuit (by the Attorneys General of Ohio (on behalf of the Ohio Bureau of Workers' Compensation), Kentucky and Tennessee), Eighth Circuit (by the Attorneys General from Iowa, Arkansas, Idaho, Missouri, Montana,

Nebraska, North Dakota, South Dakota and Utah, and the American Free Enterprise Chamber of Commerce), and Eleventh Circuit (by the Attorneys General from West Virginia, Georgia, Alabama, Alaska, New Hampshire, Indiana, Oklahoma, South Carolina, Wyoming and Virginia). An additional challenge filed in the DC Circuit by the Sierra Club and Sierra Club Foundation argues that the rules as adopted were not prescriptive enough, because Scope 3 emissions disclosure is not required.

For more information, see our prior alert, SEC Adopts Less Prescriptive Climate-Related Disclosure Rules but Challenges Remain.

- **Developments Regarding New California Laws Requiring Climate-Related Disclosures by Large Public and Private Entities, and Disclosures Relating to Carbon Offsets and Emissions Reductions Goals.** On January 30, 2024, the U.S Chamber of Commerce, along with the American Farm Bureau Federation, California Chamber of Commerce, Central Valley Business Federation, Los Angeles County Business Federation, and Western Growers Association, filed a lawsuit against the state of California in the U.S. District Court for the Central District of California arguing that two new climate-related disclosure laws enacted in October 2023, SB 253 and SB 261, are unconstitutional because they violate the First Amendment and Dormant Commerce clause, and are precluded by federal law (namely, the Clean Air Act). The Climate Corporate Data Accountability Act (SB 253) and Climate-Related Financial Risk Act (SB 261) will require entities (corporations, partnerships, limited liability companies and other business entities) formed in the U.S. that have total annual revenues exceeding $1 billion (SB 253) or $500 million (SB 261) and that do business in California to publicly disclose, starting in 2026, their annual Scope 1 and Scope 2 GHG emissions, and, starting in 2027, their annual Scope 3 GHG emissions (SB 253), and annually disclose a report disclosing the entity's climate-related financial risk and measures adopted to reduce and adapt to climate-related financial risk (SB 261). For more information, see our prior alert, A New Benchmark for Corporate Transparency on Climate.

  On January 3, 2024, the California Assembly's Daily Journal published a letter of legislative intent indicating that the effective date of the Voluntary Carbon Market Disclosures Act (AB 1305) is intended to be January 1, 2025, instead of January 1, 2024. As of the time of the writing, the California legislature has not yet implemented this change. The new law requires businesses operating in California that market or sell voluntary carbon offsets, or make claims regarding the achievement of net zero emissions, carbon neutral status about the company or a product, or significant carbon emissions reductions to make certain disclosures regarding these activities on the company's website including whether data and claims have been verified by an independent third-party.

- **Corporate Sustainability Due Diligence Directive Approved by the European Union Council.** The Corporate Sustainability Due Diligence Directive ("CSDDD") moved closer to finalization, with approvals by the Legal Affairs Committee of the European Parliament on March 19, 2024, and the Permanent Representatives' Committee of the European Union Council on March 15, 2024. The CSDDD still requires ratification by the European Parliament, which is expected to occur in April 2024, as well as transposition into law by the EU Member States. As a result of negotiations over the past several weeks, the current text of the CSDDD has been significantly reduced in scope. If approved, the CSDDD will apply to (among others) EU companies and parent companies with over 1,000 employees and annual worldwide turnover of more €450 million, and non-EU companies and parent companies with annual turnover in the EU of more than €450 million. This is up from the thresholds as originally proposed in 2022, of over 500 employees and more than €150 million annual turnover; and lower thresholds for companies in "high impact" sectors have been removed. If approved, the CSDDD will require companies to integrate risk-based due diligence processes into policies and risk management systems, to prevent, end or mitigate adverse impacts from their activities on the environment (including biodiversity loss, pollution and destruction of natural heritage) and human rights (including slavery, child labor and labor exploitation). The CSDDD will also impact companies' upstream partners working in design, manufacture, transport and supply, and downstream partners, including those dealing with distribution, transport and storage. The CSDDD will require companies to adopt and put into effect a transition plan for climate change mitigation which aims to ensure through best efforts that their business model and strategy are compatible with limiting

global warming to 1.5°C in line with the Paris Agreement. Supervisory authorities designated by Member States would be responsible for monitoring, investigating and imposing penalties for non-compliance, which could include fines of up to 5% of companies' net worldwide turnover.

United States

ESG-Related Enforcement & Greenwashing

- **SEC Continues to Target Agreements that Violate Whistleblower Protection Rules.** On January 16, 2024, the SEC announced settled charges and an $18 million civil penalty payable by a financial services firm for violating the whistleblower protection rules in Exchange Act Regulation 21F (specifically, Rule 21F-17(a)), which prohibits taking any action to impede an individual from communicating directly with the SEC staff about possible securities law violations. The firm had regularly asked certain advisory clients and brokerage customers to whom it had issued a credit or settlement over $1,000 in value to sign a confidential release agreement that impeded the clients from disclosing potential violations of the federal securities laws to the SEC unless responding to an inquiry from the SEC. This enforcement action continues a trend of the SEC bringing charges for violating the whistleblower protection rules, as discussed in our prior Sustainability & ESG Quarterly Roundup, and is an example of a Rule 21F-17(a) violation outside of the employment agreement context. As noted on the SEC website, "Rule 21F-17 violations are not limited to language contained in severance agreements, non-disclosure agreements, or confidentiality agreements. Improperly restrictive language included in a company's internal policies, procedures, and guidance, such as codes of conduct, compliance manuals, training materials, and other such documents may also violate Rule 21F-17(a)."
- **New York Sues Major Beef Producer Over "Net Zero by 2040" Claims.** On February 28, 2024, the New York Attorney General filed a lawsuit in the Supreme Court of the State of New York charging a major beef producer over "fraudulent and illegal environmental marketing practices," involving commitments to be "Net Zero by 2040" but with no viable plan to meet this commitment. These claims were also the focus of June 2023 proceedings before the National Advertising Review Board, the appellate advertising body of Better Business Bureau National Programs.

Corporate Compliance and Fiduciary Duties

- **New Department of Justice Whistleblower Incentives Program.** On March 7, 2024, Deputy Attorney General Lisa O. Monaco of the Department of Justice ("DOJ") announced a new whistleblower reward program for individuals who assist the DOJ to discover significant corporate or financial misconduct. While the details of the program are to be developed over the next several months, the basic guardrails have been established, including offering payments: 1) only after all victims have been properly compensated; 2) only to those who submit truthful information not already known to the government; 3) only to those not involved in the criminal activity; and 4) only in cases where there is no existing financial disclosure incentive (such as *qui tam* or another federal whistleblower program).
- **Supreme Court Clarifies Requirements for Whistleblower Retaliation Claims.** On February 8, 2024, the U.S. Supreme Court upheld a former employee's claim for retaliation under Section 1514A of the Sarbanes-Oxley Act, after he was fired for internally reporting suspected trading desk research fraud. The court held that a whistleblower who invokes Section 1514A must prove that the protected activity was a contributing factor in the employer's unfavorable personnel action, but need not prove that the employer acted with "retaliatory intent" (*Murray v. UBS Securities, LLC* (No. 22-660 (Feb. 8, 2024)).
- **Delaware Court of Chancery Applies Entire Fairness Scrutiny to Board Decisions, and Delaware Supreme Court Confirms when Entire Fairness Scrutiny Shifts to Business Judgment Rule.** The Delaware Chancery Court recently issued two decisions invalidating board decisions after applying the entire

fairness standard (discussed below). Since those decisions, the Delaware Supreme Court held that shifting the standard of review from entire fairness to business judgment for all types of transactions where the controlling shareholder stands on both sides and receives a non-ratable benefit requires approval by a well-functioning and fully independent board committee *and* the affirmative vote of the fully informed uncoerced minority shareholders (*In re Match Group, Inc. Derivative Litigation* (Del. Apr. 4, 2024)). For more information, see our prior alert, Delaware Supreme Court Confirms MFW Framework For Shifting the Standard of Review from Entire Fairness to Business Judgment in All Conflicted Controller Transactions.

- On January 30, 2024, in a post-trial decision, the Delaware Court of Chancery held that the performance-based equity compensation plan awarded by the board of directors of Tesla, Inc. to founder and CEO Elon Musk was invalid and ordered rescission (*Tornetta v. Musk* (Del. Ch. Jan. 30, 2024)). The plan had a $55.8 billion maximum value and $2.6 billion grant date fair value, and was the largest potential compensation opportunity ever observed in public markets by orders of magnitude. The court held that the plan was subject to review under the entire fairness standard because of Mr. Musk's control of Tesla. The court invalidated the plan because the defendants bore the burden of proving that the compensation plan was fair, and they failed to meet their burden. While Delaware law allows defendants to shift the burden of proof under the entire fairness standard where the transaction was approved, among other things, by a fully informed vote of the majority of the minority shareholders, the defendants were unable to prove that the shareholder vote was fully informed because the proxy statement inaccurately described key directors as independent and omitted details about the process driven by Mr. Musk to negotiate the plan. Mr. Musk then announced that two of his companies had reincorporated out of Delaware -- SpaceX to Texas, and Neuralink to Nevada.
- On February 20, 2024, in a case involving the conversion of TripAdvisor, Inc. from Delaware to Nevada, the Delaware Court of Chancery denied the defendant's motion to dismiss, holding that the plaintiffs' allegations supported an inference that the conversion was not procedurally fair (*Palkon v. Maffei* (Del. Ch. Feb. 20, 2024)). The court noted that as depicted, the conversion constitutes a self-interested transaction effectuated by a shareholder controller that would benefit, together with the directors, from the reduction in the unaffiliated shareholders' litigation rights under Nevada law. The non-rateable benefit conferred by the conversion triggered entire fairness review, which standard of review was not lowered by approval by a disinterested special committee and a majority of the minority shareholders. The court held that the allegations supported an inference that the conversion was not procedurally fair. The court refused to grant an injunction against the conversion, so the conversion could potentially proceed with a risk of money damages.

- **Delaware Court of Chancery Invalidates Expansive Governance Provisions in Shareholder Agreement, and Delaware State Bar Association Proposes Statutory Amendments.** On February 23, 2024, the Delaware Court of Chancery invalidated shareholder agreement provisions that gave the company's founder, CEO and Chairman expansive rights over the company's governance (*West Palm Beach Firefighters' Pension Fund v. Moelis & Company* (Del. Ch. Feb. 23, 2024)). Under the terms of the shareholder agreement, the board of directors were required to obtain the founder's prior written consent before taking eighteen different categories of action, which "encompass virtually everything the Board can do." Other provisions around board size, nominations and board recommendations for nominees compelled the board to ensure that the founder could select a majority of the board, even when the founder controlled less than a majority of the company's voting power, and populate board committees with at least a majority of designees of the founder. Vice Chancellor Laster held that internal corporate governance arrangements that do not appear in the charter and deprive boards of a significant portion of their authority contravene Section 141(a) of the Delaware General Corporation Law ("DGCL"). He held the provisions to be invalid, except for those allowing the founder to identify and nominate candidates for the board, and requiring the company to use reasonable efforts to enable the founder's designees to be elected and continue to serve. He also noted that rewriting the requirements as vetoes would not change the analysis.

In response to the decision, in March 2024, the Council of the Corporation Law Section of the Delaware State Bar Association proposed amendments to Section 122 of the DGCL to set forth certain types of provisions that may be included in contracts between a corporation and current or prospective shareholders or beneficial owners of its stock, even if those provisions are not set forth in, or referenced as a fact ascertainable in, the certificate of incorporation. Proposed new Section 122(18) provides a non-exclusive list of provisions by which a corporation may agree to restrict or prohibit future specific corporate actions (even if those actions require board approval), require the approval or consent of one or more persons or bodies (including the board or one or more current or future directors, shareholders or beneficial owners of stock) before the corporation may take actions specified in the contract, and covenant that the corporation or one or more persons or bodies (including the board or one or more current or future directors, shareholders or beneficial owners of stock) will take, or refrain from taking, future actions specified in the contract. Proposed new Section 122(18) would not relieve directors, officers or shareholders of any fiduciary duties they owe to the corporation or its shareholders, including with respect to decisions to cause the corporation to enter into, perform and/or breach the contract. Also proposed, among other things, is an amendment to Section 122(5) of the DGCL clarifying that contracts appointing or delegating authority to an officer or agent to act on behalf of the corporation continue to be subject to Section 141(a) and the related common law addressing an over-delegation of duties and authority by a board of directors. If enacted, the amendments will become effective on August 1, 2024, and will apply to all contracts made by a corporation whether made or approved before or after August 1, 2024.

Sustainable Financing and Investment

- **Withdrawal of Proposed New NYSE Listing Standards for Natural Asset Company Equity Securities.** On January 17, 2024, the SEC withdrew the proposed rule filed in September 2023 by the New York Stock Exchange ("NYSE") to adopt new NYSE listing standards for common stock of a new type of public company, a Natural Asset Company. For more information about the proposed rule, see the December 2023 edition of our roundup.

Diversity, Equity & Inclusion, Labor & Human Rights

- **DOJ Independent Contractor Rule.** On January 10, 2024, the U.S. Department of Labor published a final rule, effective March 11, 2024, that sets forth guidance for determining employee or independent contractor status under the Fair Labor Standards Act. The rule addresses six factors that guide the analysis of a worker's relationship with an employer, including any opportunity for profit or loss a worker might have; the financial stake and nature of any resources a worker has invested in the work; the degree of permanence of the work relationship; the degree of control an employer has over the person's work; whether the work the person does is essential to the employer's business; and a factor regarding the worker's skill and initiative.

Emissions, Climate Change & Public Health

- **Challenge to EPA Methane Limits.** On March 8, 2024, the Attorney General of Texas filed a lawsuit in the U.S. Court of Appeals for the D.C. Circuit to petition for review a final rule adopted by the U.S. Environmental Protection Agency ("EPA") in December 2023 and published in the Federal Register in March 2024 that would reduce methane emissions from oil and gas, and set emission guidelines for states to follow in developing, submitting and implementing state plans to establish performance standards to limit GHG emissions from existing crude oil and natural gas sources.
- **Challenge to Biden Administration's Pause of New LNG Export Licenses.** On March 21, 2024, Attorneys General from 16 states (a Louisiana-led coalition also including Alabama, Alaska, Arkansas, Florida, Georgia, Kansas, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, West Virginia and Wyoming) filed a lawsuit in the U.S. District Court in the Western District of Louisiana to overturn President Biden's order pausing the issuance of new liquefied natural gas ("LNG") export licenses. On January 26, 2024, the Biden-

Harris Administration announced a temporary pause on pending decisions on exports of LNG to non-free trade agreement countries until the U.S. Department of Energy can update the underlying analyses for authorizations, including studying how gas exports impact the climate, national security and the economy.

- **EPA Rules Regulating Light- and Medium-Duty Vehicle Emissions.** On March 20, 2024, the EPA announced a final rule pursuant to the Clean Air Act, Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, that requires further reductions of GHG emissions from light-duty and medium-duty vehicles starting with model year 2027. These standards will phase in over model years 2027 through 2032.

Cybersecurity / Privacy / Technology

- **SEC Enforcement Actions Target "AI Washing."** In recent weeks, the SEC has announced charges against investment advisers and others for allegedly making false and misleading statements about their purported use of artificial intelligence. Companies are increasingly including AI-related information in public filings, as discussed in our prior alert, SEC Disclosures of Artificial Intelligence Technologies. For more information, see our prior alert, SEC Charges Advisers with Marketing Rule Violations Regarding Statements about Performance and Use of AI, including Inability to Substantiate Marketing Claims upon Demand.
  - March 18, 2024: Charges brought against investment adviser that allegedly falsely claimed to "use[] machine learning to analyze the collective data shared by its members to make intelligent investment decisions" and "put collective data to work to make our artificial intelligence smarter so it can predict which companies and trends are about to make it big and invest in them before everyone else" (see order here).
  - March 18, 2024: Charges brought against investment adviser that allegedly falsely claimed it utilized algorithms to make investment allocation recommendations to clients and that its technology incorporated expert AI-driven forecasts (see order here).
  - February 2, 2024: Charges brought against a company and its founder around allegedly false claims that an unlaunched hedge fund's investment strategies would use AI technology and trading strategies involving crypto assets to generate returns (see release here).
- **FBI Memo Relevant to Determinations on Delaying Cybersecurity Breach Disclosure on Grounds of National Security or Public Safety.** On December 6, 2023, the U.S. Federal Bureau of Investigation ("FBI") issued a Policy Notice establishing procedures by which FBI personnel will document requests by public companies to delay their public disclosure of cybersecurity incidents, related incident details and U.S. government national security or public safety checks (Cyber Victim Requests to Delay Securities and Exchange Commission Disclosure Policy Notice 1297N). The Policy Notice also establishes the roles, responsibilities, and procedures by which FBI personnel will send relevant forms to DOJ to facilitate delay determinations. For more information on the SEC's cybersecurity breach disclosure rules, see our prior alert, SEC Adopts Cybersecurity Disclosure Rules as Security Incidents Become More Frequent.
- **Revised NIST Cybersecurity Framework.** On February 26, 2024, the National Institute of Standards and Technology ("NIST") released an updated version of its Cybersecurity Framework, which provides guidance for reducing cybersecurity risk. The revised framework has an expanded scope that goes beyond protecting critical infrastructure, such as hospitals and power plants, to all organizations in any sector. It also has a new focus on governance, which encompasses how organizations make and carry out informed decisions on cybersecurity strategy, emphasizing that cybersecurity is a major source of enterprise risk that senior leaders should consider alongside others such as finance and reputation.

Anti-ESG – Selected State Developments

- **Idaho.** On March 29, 2024, the Governor signed into law S 1291, which provides that a public entity may not enter into certain contracts with companies for goods or services unless the contract contains a written certification that the company is not currently engaged in and will not engage in a boycott of any individual or company that engages in or supports the exploration, production, utilization, transportation, sale or manufacture of fossil fuel-based energy, timber, minerals, hydroelectric power, nuclear energy or agriculture, or engages in or supports the manufacture, distribution, sale or use of firearms.
- **South Carolina.** On February 5, 2024, the Governor of South Carolina signed into law the ESG Pension Protection Act (H 3690), which requires retirement system proxy voting and investment decisions to be based on consideration of pecuniary factors only. "Pecuniary factor" is defined in the statute to exclude "nonpecuniary factors", meaning "any factor or consideration that is collateral to or not reasonably likely to effect or impact the financial risk and return of the investment and include, but are not limited to, the promotion, furtherance, or achievement of environmental, social, or political goals, objectives, or outcomes."
- **Texas.** On January 26, 2024, the Texas Attorney General announced he was adding Barclays to the list of banks that are banned from underwriting Texas's municipal bonds after failing to respond to requests for information concerning its "net zero" carbon emissions commitments.

UK / EU

- **Revised UK Corporate Governance Code**. On January 22, 2024, the Financial Reporting Council ("FRC") published the UK Corporate Governance Code 2024. The 2024 Code will generally apply to fiscal years beginning on or after January 1, 2025. The 2024 Code continues to operate on a "comply or explain" basis. Key changes to the 2018 version of the Code include a new provision (effective January 2026) stating that boards should monitor the company's risk management and internal control framework, review the framework's effectiveness at least annually and declare in the annual report whether material controls are effective. The 2024 Code also indicates that director controls include clawback provisions, which should be described in the annual report. Provisions relating to audit committees have been removed from the 2024 Code, to reduce repetition now that audit committee requirements are included in the FRC's Audit Committees and the External Audit: Minimum Standard (published May 2023). On January 29, 2024, the FRC issued an updated version of its Corporate Governance Code Guidance, which addresses the new Code requirements.
- **UK Taskforce on Social Factors Guide to Considering Social Factors in Pension Scheme Investments.** On March 7, 2024, the UK Taskforce on Social Factors issued Recommendations to Improve the Integration of Social Factors and its new Guide to Considering Social Factors in Pension Scheme Investments. The Taskforce on Social Factors was established in February 2023 following the Department for Work and Pensions' consultation on consideration of social risks and opportunities by occupational pension schemes. The Guide aims to provide pension trustees with the tools to identify and monitor social risks and opportunities of investments.
- **UK Competition and Markets Authority Investigation Leads to Fashion Retailer Undertakings.** On March 27, 2024, after an investigation that commenced in 2022, the UK Competition and Markets Authority announced that several large fashion retailers have signed formal undertakings that commit them to an agreed set of rules around the use of green claims, which must be accurate and not misleading. Among other requirements, the percentage of recycled or organic fibers must be clearly displayed and easy for customers to see, "natural" imagery such as green leaves, logos or icons cannot be used to suggest a product is more environmentally friendly than it actually is, and claims made to consumers about environmental targets must be supported by a clear and verifiable strategy, and customers must be able to access more details about such targets (including

what the target is aiming to achieve, the date by which it is expected to be met, and how the company in question will seek to achieve that target).

- **UK to Exit Energy Charter Treaty.** On February 22, 2024, the UK announced its withdrawal from the Energy Charter Treaty ("ECT"), after the "failure of efforts to align it with net zero" and modernize, which will take effect in 12 months. Nine EU-Member States, including France, Spain, Germany and the Netherlands, have also withdrawn or are in the process of withdrawing from the ECT. The ECT, originally signed in 1994, is a multilateral framework designed to promote international investment in the energy sector and facilitate reliable cross-border energy flows among contracting parties.
- **Judgment Against KLM in Greenwashing Case But No Penalties.** On March 20, 2024, the District Court of Amsterdam court held that KLM's sustainability advertising claims breached the EU Unfair Commercial Practices Directive by making "environmental claims based on vague and general statements about environmental benefits, thereby misleading consumers." KLM had claimed that it was "committed to the Paris Agreement climate goals" and its advertising had emphasized its use of sustainable aviation fuel and promoted reforestation schemes that customers could contribute to as a way of offsetting the carbon from their flights. The advertising claims are no longer in use. The suit was brought by Dutch NGOs Fossielvrij and Reclame Fossielvrij, together with ClientEarth. The court did not impose monetary penalties but emphasized to KLM that communications regarding sustainability must be honest and transparent. On December 6, 2023, the UK Advertising Standards Authority banned advertisements containing misleading sustainability statements by several airlines, including KLM's parent company.
- **EU Directive Banning Greenwashing and Regulating Consumer Advertising.** On March 6, 2024, the Official Journal of the EU published EU Directive 2024/825, amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information. The agreement updates the existing EU list of banned commercial practices and adds to it several marketing practices related to greenwashing and early obsolescence of goods. Among other things, the rules as proposed would prohibit generic environmental claims (such as "environmentally friendly", "natural", "biodegradable", "climate neutral" or "eco") without proof of recognized "excellent environmental performance relevant to the claim," and claims based on emissions offsetting schemes that a product has neutral, reduced or positive impact on the environment.
- **EU Artificial Intelligence Act Approved by European Parliament.** On March 13, 2024, the European Parliament approved the new Artificial Intelligence Act, which requires formal endorsement by the EU Council before becoming law. The new law, among other things, bans biometric categorization systems based on sensitive characteristics and untargeted scraping of facial images from the internet or CCTV footage to create facial recognition databases, as well as emotion recognition in the workplace and schools, social scoring, predictive policing (when it is based solely on profiling a person or assessing their characteristics), and AI that manipulates human behavior or exploits people's vulnerabilities. The law takes a risk-based approach to regulation, identifying various categories of AI systems as, in addition to unacceptable (and banned), high-, medium-, limited- and minimal-risk, with accompanying requirements, including transparency, accuracy, human oversight, and more. Transparency requirements also apply to general-purpose AI systems, and the models they are based on, and artificial or manipulated images, audio or video content (including "deepfakes") must be clearly labelled as such. The new law will enter into force twenty days after its publication in the Official Journal and various aspects of the law will begin to apply on a rolling basis as early as 6 months after its entry into force (for banned systems), with delayed applicability for some aspects of the law.

- **EU Proposed Regulation to Ban Sale of Products Manufactured Using Forced Labor.** On March 5, 2024, the European Parliament and the EU Council reached a provisional agreement on a regulation that would prohibit products made using forced labor, including products made in the EU for domestic consumption and export, and imported products made available in the EU market. To become law, the provisional agreement must be approved by both the Parliament and the Council. The Regulation will be enforceable in a uniform way across the EU Member States. It will not need to await the (two-year) transposition process specific to EU directives but is intended to come into effect three years after the legislation is adopted – i.e., in 2027. The EU Commission will also establish a Forced Labor Single Portal to help enforce the new rules.
- **EU Proposed Rules on Packaging and Packaging Waste.** On March 4, 2024, the European Parliament and the EU Council reached a provisional agreement on new rules to reduce, reuse and recycle packaging, increase safety and boost the circular economy. The new measures require all packaging to be recyclable, ban the use of so called "forever chemicals" (per- and polyfluorinated alkyl substances or PFASs) in food contact packaging, set packaging reduction targets (5% by 2030, 10% by 2035 and 15% by 2040) and ban certain single use packaging formats from January 1, 2030. To become law, the provisional agreement must be approved by both the Parliament and the Council.
- **EU Proposed Carbon Removal Certification Framework.** On February 20, 2024, the European Parliament and the EU Council reached a provisional agreement on the Carbon Removal Certification Framework, which seeks to build a voluntary statutory framework for EU projects that generate carbon credits, in order to support net zero goals (by stimulating the development and investment of carbon removal activities). The Framework will cover carbon removal and carbon emission activities, including permanent carbon removal, temporary carbon storage in long-lasting products, temporary carbon storage from carbon framing, and soil emission reduction from carbon farming. The Framework is tentatively set to enter force by the end of 2024, with implementation following after this. Implementation will include the adoption of EU certification methodologies, third-party verification rules, EU recognition of certification schemes, and the set-up of an EU-wide registry. To become law, the provisional agreement must be approved by both the Parliament and the Council.
- **EFRAG Seeking Feedback on ESRS for Small and Medium Enterprises, ESRS Implementation Guidance and XBRL Taxonomy.** On February 8, 2024, EFRAG launched its public consultation into the draft XBRL taxonomy for the first set of European Sustainability Reporting Standards ("ESRS") under the Corporate Sustainability Reporting Directive ("CSRD"). The consultation closed April 8, 2024. On January 22, 2024, EFRAG published exposure draft ESRS that would apply to listed small and medium enterprises ("SMEs") and an exposure draft for the voluntary reporting standard for non-listed SMEs to assist them in responding to requests for sustainability information that they receive from business counterparts. The consultation is open until May 21, 2024. On December 22, 2023, EFRAG issued three draft ESRS Implementation Guidance documents, and sought public feedback by February 2, 2024. The Implementation Guidance drafts cover Materiality Assessment, Value Chain and ESRS Datapoints. EFRAG has also issued two batches of responses to questions submitted through its ESRS Q&A platform, which include technical explanations.
- **Delay in ESRS Adoption for Specific Sectors.** On January 12, 2024, the European Parliament and the EU Council reached a provisional agreement to postpone by two years the adoption of CSRD-related reporting standards for certain sectors and non-EU companies. Adoption of sector-specific standards (the oil and gas, mining, road transport, agriculture, motor vehicles, energy production, food and beverages, and textiles and jewelry sectors), standards for SMEs and for third-country companies subject to CSRD reporting had been scheduled for June 30, 2024, but the provisional agreement delays the adoption to June 30, 2026. To become law, the provisional agreement must be approved by both the Parliament and the Council.

International

- **SASB Standards Amended to Enhance International Applicability.** On December 19, 2023, the International Sustainability Standards Board published amendments to the Sustainability Accounting Standards Board ("SASB") standards to enhance their international applicability, by helping preparers apply SASB standards regardless of jurisdiction or generally accepted accounting principles used.
- **COP28 Agreement to Transition Away from Fossil Fuels.** On December 13, 2023, the United Nations Climate Change Conference ("COP28") closed with a "global stocktake" agreement that signals the "beginning of the end" of the fossil fuel era including by recognizing that global GHG emissions need to be reduced by 43% by 2030, compared to 2019 levels, to limit global warming to 1.5°C. The agreements calls on parties to triple renewable energy capacity and double energy efficiency improvements by 2030, and develop climate action plans that are aligned with the 1.5°C limit by 2025.
- **IOSCO Greenwashing Guidance.** On December 4, 2023, the International Organization of Securities Commissions ("IOSCO") issued its report on Supervisory Practices to Address Greenwashing. The Report discusses current regulatory best practices from around the world to address risks of greenwashing, and related challenges including data gaps, transparency, quality, and reliability of ESG ratings, consistency in labelling and classification of sustainability-related products, evolving regulatory approaches, and capacity building needs.

ESG Developments On the Radar

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

United States

- **SEC rulemaking:**
  - Final rules on enhanced disclosures by certain investment advisers and investment companies about ESG investment practices (April 2024)
  - Proposed rules on human capital management disclosure (April 2024)
  - Proposed rules on board diversity disclosure (October 2024)
  - Final amendments to PCAOB Auditing Standards related to a company's noncompliance with laws and regulations (NOCLAR)
- **Other federal agency rulemaking:**
  - Final Federal Supplier Climate Risk and Resilience Rule
  - Final Federal Sustainable Products and Services procurement rule (April 2024)
  - Final EPA standard on truck emissions (2024)
  - Final EPA drinking water regulation (September 2024)
  - Final EPA standards limiting power plant GHG emissions
  - Final U.S. Federal Trade Commission ("FTC") rules on non-compete clauses (2024)
  - Revised FTC Guides for the Use of Environmental Marketing Claims ("Green Guides")
- U.S. Court of Appeals for the Fifth Circuit decision on challenge to Nasdaq board diversity rules (*Alliance for Fair Board Recruitment and the National Center for Public Policy Research v. SEC* (Case 21-60626)) (en banc hearing scheduled for May 2024)
- U.S. Supreme Court decision on whether shareholders can sue companies for fraud when they fail to disclose trends and uncertainties as required by Item 303 of SEC Regulation S-K, even in the absence of an otherwise misleading statement (*Macquarie Infrastructure Corp. v. Moab Partners, L.P*. (Case 22-1165))
- U.S. Supreme Court decision on challenge to constitutionality of SEC administrative enforcement proceedings seeking civil penalties (*SEC v. Jarkesy, et al.* (Case 22-859))
- U.S. District Court for the Northern District of Texas, Fort Worth Division, decision on substantially similar shareholder proposals relating to climate; proposals had been withdrawn but the suit continues (*Exxon Mobil Corp. v. Arjuna Capital, LLC* (Docket 4:24-cv-00069))
- **State legislation:**
  - Illinois HB 4268
  - New York SB 7704 / SB 5437
  - New York SB 7705 / SB 897

- New York AB 4056 / SB 212
- Washington SB 6092

UK/EU

- UK Sustainability Disclosure Standards (based on ISSB / IFRS1, UK endorsement expected by July 2024)
- UK Financial Conduct Authority guidance on the anti-greenwashing rule in FCA ESG sourcebook (2024)
- UK Artificial Intelligence (Regulation) Act
- UK regulation on ESG ratings
- Draft sector-specific and foreign parent-specific European Sustainability Reporting Standards
- EU Green Claims Directive (position adopted by European Parliament, expected to be law in 2026)
- Prospective IFRS Sustainability Disclosure Taxonomy (Q2 2024)
- EU Energy Performance of Buildings Directive (text agreed, adoption expected 2024)
- European Securities and Markets Authority guidelines on funds' names using ESG or sustainability-related terms (approval expected Q2 2024, will apply 3 months after date of publication)
- EU Artificial Intelligence Act (text agreed, adoption expected 2024)
- EU regulation prohibiting products made using forced labor (text agreed, awaiting adoption by European Parliament and Council)
- EU regulation on ESG ratings (text agreed, awaiting adoption by European Parliament and Council)
- Proposed revised SFDR
- Final EFRAG Implementation Guidance for Materiality Assessments, Value Chain, and ESRS Data Points (2024)

International

- Final UN Business and Human Rights Treaty
- Proposed UN Global Plastics Treaty
- Proposed UN Net Zero Recognition and Accountability Framework and Implementation Plan
- Final International Standard on Sustainability Assurance (ISSA) 5000, General Requirements for Sustainability Assurance Engagements (2024)
- Final Basel Committee on Banking Supervision framework on Disclosure of Climate-Related Financial Risks
- Proposed Taskforce on Inequality and Social-related Financial Disclosures

* * *

"Sustainability & ESG Quarterly Roundup" is published by the Sustainability & ESG Group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, www.weil.com.

If you have questions concerning the contents of this issue of "Sustainability & ESG Quarterly Roundup", or would like more information about Weil's Sustainability & ESG Group, please speak to your regular contact at Weil, or to the authors listed below:

Author:			
Rebecca Grapsas (NY)	View Bio	rebecca.grapsas@weil.com	+1 212 310 8668
Contributing Editors:			
John Barry (NY)	View Bio	john.barry@weil.com	+1 212 310 8150
Lyuba Goltser (NY)	View Bio	lyuba.goltser@weil.com	+1 212 310 8048
Olivia Greer (NY)	View Bio	olivia.greer@weil.com	+1 212 310 8815
Rebecca Sivitz (NY, Boston)	View Bio	rebecca.sivitz@weil.com	+1 617 772 8339
Annemargaret Connolly (DC)	View Bio	annemargaret.connolly@weil.com	+1 202 682 7037
Matthew Morton (DC)	View Bio	matthew.morton@weil.com	+1 202 682 7053
Robert Stern (DC)	View Bio	robert.stern@weil.com	+1 202 682 7190
James Bromley (LO)	View Bio	james.bromley@weil.com	+44 20 7903 1067
Christopher Marks (LO)	View Bio	christopher.marks@weil.com	+44 20 7903 1363
Marc Schubert (LO)	View Bio	marc.schubert@weil.com	+44 20 7903 1128
Amy Waddington (LO)	View Bio	amy.waddington@weil.com	+44 20 7903 1469
Romain Ferla (Paris)	View Bio	romain.ferla@weil.com	+33 1 4421 9797