The Sustainable Finance Law Review

Editor
Anna-Marie Slot

The Law Reviews

© 2022 Law Business Research Ltd

THE SUSTAINABLE FINANCE LAW REVIEW

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2023
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Anna-Marie Slot

THE LAWREVIEWS

© 2022 Law Business Research Ltd

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Katie Hodgetts

SENIOR BUSINESS DEVELOPMENT MANAGER
Rebecca Mogridge

BUSINESS DEVELOPMENT MANAGER
Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Isabelle Gray

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Janina Godowska

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
© 2022 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at December 2022, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-80449-122-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARENDT

ASHURST LLP

BANWO & IGHODALO

DECHERT LLP

DENTONS LLP

MAYER BROWN

NAGASHIMA OHNO & TSUNEMATSU

PINHEIRO NETO ADVOGADOS

TALWAR THAKORE & ASSOCIATES

URÍA MENÉNDEZ ABOGADOS, SLP

© 2022 Law Business Research Ltd

CONTENTS

PREFACE.. v
Anna-Marie Slot

Chapter 1 BRAZIL.. 1
Tiago Araujo Dias Themudo Lessa, Rafael José Lopes Gaspar, Renata Gaspar Barbosa Corrêa and Victor Galembeck Ahern Miranda

Chapter 2 CANADA.. 10
Bill G Gilliland

Chapter 3 COP27.. 26
Anna-Marie Slot and Eileen Kelly

Chapter 4 HONG KONG.. 31
Mark Uhrynuk, Francis K W Chen, Dion K Y Yu, Angie N K Chan and Wei Na Sim

Chapter 5 INDIA.. 42
Rahul Gulati, Saara Ahmed and Dwiti Goyal

Chapter 6 JAPAN.. 59
Hiromi Hattori, Yuichi Miyashita and Takuma Kaneko

Chapter 7 LUXEMBOURG.. 70
Emmanuelle Mousel, Philippe Harles, Antoine Peter, Antoine Portelange, Dino Serafini, Clara Bourgi and Laura Archange

Chapter 8 NIGERIA.. 87
Seyi Bella, Boluwatife Anjola, Bukola Alada and Ayomide Agbaje

Chapter 9 SINGAPORE.. 103
Timothy Goh and David Good

© 2022 Law Business Research Ltd

Chapter 10 SPAIN 116
Jesús Sedano Lorenzo and Luis Villar González

Chapter 11 UNITED KINGDOM 125
Anna-Marie Slot and Eileen Kelly

Chapter 12 UNITED STATES 137
J Paul Forrester and Jennifer Kratochvil

Appendix 1 ABOUT THE AUTHORS 146
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 158

© 2022 Law Business Research Ltd

PREFACE

Sustainable finance is a relative youngster in the world of finance, but it is growing up fast. Public and private financing of sustainable/green projects, or those with provisions in line with borrowers' and issuers' environmental, social and governance (ESG) commitments, has exploded.

Since the signing of the Paris Agreement in 2015, more than 100 countries have committed to net zero emissions targets. Countries have also acted at a national level with ambitious target-setting and nationally determined contributions (NDC) pursuant to the Paris Agreement. They are not alone. By mid-2022, more than one-third of the world's largest publicly traded companies had net zero targets. Financial institutions have also engaged with various policies introduced to enshrine ESG commitments, in terms of both their own lending targets and the carbon emissions linked to those targets. Investors at both retail and institutional levels increasingly look to the financial markets as an important lever in achieving such targets.

For over three decades the United Nations has brought together almost every country on earth for the global climate summits – known as the Conference of the Parties (COP). At COP26 in 2021, private finance showed up in force to play its role in the transformation of the business ecosystem as we know it. Precisely what that role entails is a live debate and the discussions regarding the purpose of sustainable finance cover a wide spectrum of issues – from greenwashing, to the fundamental shift of credit including the risks and opportunities of ESG considerations. We saw that debate play out in real time during COP27.

Notwithstanding ongoing considerations about the purpose of sustainable finance, financial market participants have reacted by creating a wide variety of financial products marketed as sustainable, green or ESG-friendly. The rapid increase in both supply of and demand for sustainable investment products has, at times, resulted in a lack of consistency, transparency and reliability of disclosures and metrics. Governments and regulatory bodies are increasingly focused on imposing guidelines and frameworks to address these issues.

Although sustainable finance continues to elude strict definition at present, significant efforts are being made globally to ensure quality and transparency in the industry, to impose consistent frameworks such as the International Sustainability Standards Board (ISSB) and disclosure requirements such as those of the Task Force on Climate-related Financial Disclosures (TCFD) that support comparability and interoperability among firms and products, and to provide investors with sufficient information to monitor the impact of their investments.

© 2022 Law Business Research Ltd

In this inaugural edition we aim to:

a provide a snapshot of the current state of sustainable finance and the status of regulatory efforts across multiple jurisdictions; and

b track the evolution of sustainable finance and outline key trends for the near future.

I thank all of the contributors for their expertise, hard work and dedication in producing this volume.

Anna-Marie Slot
Ashurst LLP
London
December 2022

© 2022 Law Business Research Ltd

Chapter 11

UNITED STATES

J Paul Forrester and Jennifer Kratochvil[1]

I INTRODUCTION

In the United States, at the current time a company's decision to engage in sustainable finance is voluntary. Companies consider the reputational and financial benefits for doing a sustainable finance transaction when deciding whether to enter or participate in the market. There are industry guidelines for green, social and sustainable bonds and loans and sustainability-linked bonds (SLBs) and loans, as published by the International Capital Markets Association (ICMA) and the Loan Syndications and Trading Association (LSTA). While these are just that – guidelines – they are increasingly being viewed in the US sustainable finance market as standards or expectations. In addition to market practices and guidelines, the federal government has recently introduced rules and regulations specifically related to ESG matters, but until those rules are formalised, existing securities laws will continue to govern sustainable finance.

Recent trends in sustainable finance in the United States are primarily driven by the current political environment, with certain lawmakers moving forward to regulate and promote sustainable finance and climate change initiatives and certain other lawmakers taking steps to restrict ESG investments and penalise market participants that disfavour companies that do not engage in positive climate transition steps. The current political environment has resulted in increased scrutiny of ESG investments and sustainable finance products, resulting in an optimistic, but cautious, mood for sustainable finance investors and issuers.

II YEAR IN REVIEW

The year 2022 saw both developments and setbacks in the sustainable finance market in the United States. The most significant development was the announcement of various proposed Securities and Exchange Commission (SEC) rules that may affect sustainable finance, but as further discussed in Section III, those rules have not yet been formalised and are therefore not yet in effect. While 2021 and early 2022 showed increased activity in sustainable finance products, the volume has slowed in 2022, although there continues to be significant market interest, especially in sustainability-linked loans (SLLs) and SLBs. The increased focus on sustainable finance in the political landscape has also resulted in both investors and issuers more carefully evaluating the reputational risks of sustainable finance initiatives.

1 J Paul Forrester and Jennifer Kratochvil are partners at Mayer Brown LLP.

© 2022 Law Business Research Ltd

III REGULATION AND POLICY

In the United States, one of the significant obstacles to moving sustainable finance initiatives forward and addressing climate change issues is the tension between federal initiatives and state and local government statutes and policies. While the federal government under the Biden Administration is working to advance ESG-related enforcement and disclosure initiatives, certain states are passing various 'anti-ESG' legislation for their states. This section discusses the regulatory landscape related to ESG matters at the federal level as well as challenges at the state level.

i Federal government

On 4 March 2021, the SEC launched the Climate and ESG Task Force within the Division of Enforcement (Task Force). Its aim is to 'develop initiatives to proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment'.[2] The Task Force is 'using sophisticated data analysis to mine and assess information for registrants, to identify potential violations including material gaps or misstatements in issuers' disclosure of climate risks under existing rules, and disclosure and compliance issues relating to investment advisers' and funds' ESG strategies'.[3] The Task Force has brought several actions against companies for alleged violations that have been the subject of wide attention and further focused attention on related reputational risks.

Under existing laws, the applicable reporting requirements fall into two categories: reporting requirements for issuers and reporting requirements for investment advisers and investment companies.

Reporting requirements for issuers

For issuers, disclosure requirements for SEC registrants are currently principles-based with some specific line item disclosure requirements based on materiality. If something is material to a company, the company needs to disclose it, but companies have some flexibility to determine what is material and what is disclosed. ESG-related information is disclosed in the same way that other information is disclosed, which is based on that principles-based materiality disclosure standard. SEC registrants are also subject to the 2010 Commission Guidance Regarding Disclosure Related to Climate Change,[4] which specifies that certain disclosures may not be explicitly referenced in Regulation S-K, but disclosure is required if it is material. For example, the business description, legal proceedings, risk factors, and management's discussion and analysis may need to discuss climate change if it is material for a particular company. In 2022, the SEC staff sent comment letters to SEC registrants based on this guidance.

The SEC has also made new disclosure proposals, which would shift reporting requirements to prescriptive disclosure for certain ESG-related matters instead of the

2 Securities and Exchange Commission, Spotlight on Enforcement Task Force Focused on Climate and ESG Issues: https://www.sec.gov/spotlight/enforcement-task-force-focused-climate-esg-issues.

3 id.

4 Securities and Exchange Commission, Commission Guidance Regarding Disclosure Related to Climate Change (2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf.

© 2022 Law Business Research Ltd

principles-based requirements with the goal of achieving consistent and comparable disclosure among SEC registrants. These proposals are discussed below, but at this time, they are proposed rules that have not been finalised and made effective.

SEC Climate Change Disclosure Rules

On 21 March 2022, the SEC issued the SEC Climate Change Disclosure Rules,[5] a 490-page set of proposed rules that would require extensive reporting by public companies of climate change-related disclosures and expand reporting beyond the current materiality standard. The proposed rule draws many aspects of reporting requirements from the Task Force on Climate-Related Financial Disclosures (TCFD). Among other things in the proposed Rule, public companies would be required to report:

a direct greenhouse gas (GHG) emissions (Scope 1) and indirect GHG emissions from purchased electricity and other forms of energy (Scope 2); and
b indirect emissions from upstream and downstream activities in a company's value chain (Scope 3), if material, or if the company has set a GHG emissions target or goal that includes Scope 3 emissions.

Among the SEC's proposed rules is a change to Regulation S-X that would require companies to include climate-related disclosures in a note to their audited financial statements, including climate-related impacts on line items in their financial statements. Since this climate-related information would be part of a company's audited financial statements, it would be subject to audit by the company's auditors. The financial statement disclosures would also require the company to include reporting on activities the company is undertaking to mitigate the impact of climate change, such as GHG emission reductions. The proposed rules also include changes to Regulation S-K that require climate change reporting outside the financial statements, including with respect to corporate governance oversight as it relates to climate change. In addition to board oversight, companies would need to disclose management's role in assessing and managing climate change risks. There are a number of other reporting requirements that companies will need to complete under the proposed SEC rules. The comment period for the proposed SEC rules initially ended on 20 May 2022, but was subsequently extended to 17 June 2022 and, due to a technical glitch, was further extended to 1 November 2022. While the comment period has ended, around 16,000 comment letters were submitted, and as of today, the SEC has not issued the formal climate-related disclosure rules. The SEC frequently changes rules from the initial drafts following the comment period, so it remains unclear what the final rules will be as well as the timeline for implementing those rules.

Reporting requirements for investment advisers and investment companies

Currently, asset managers are required to disclose material information about a fund to investors and potential investors. Investment companies are also subject to Rule 35d-1 under the Investment Company Act of 1940 (commonly referred to as the Names Rule),[6] which prohibits investment companies from using materially deceptive or misleading names. Currently, if a registered investment company's name suggests that it makes investments of a

5 Securities and Exchange Commission, The Enhancement and Standardization of Climate-Related Disclosures for Investors (2022), https://www.sec.gov/rules/proposed/2022/33-11042.pdf.
6 17 CFR § 270.35d-1.

© 2022 Law Business Research Ltd

certain type, under the Names Rule, the company must invest at least 80 per cent of the value of its assets in investments of that type. Neither of these rules is specific to ESG reporting, but the SEC has proposed two new rules related to asset managers and funds that specifically relate to ESG, each of which is further described below.

ESG Disclosure Proposal

On 25 May 2022, the SEC announced the ESG Disclosure Proposal, which is a proposed rule that would require enhanced disclosure by investment funds and advisers regarding ESG.[7] The proposed rule would require investment funds and advisers that claim to consider ESG factors to disclose in their prospectuses and annual reports the ESG factors they consider as well as their strategies, specific ESG criteria and data. It would also require certain ESG funds to disclose ESG metrics they consider such that a fund that considers GHG emissions in its investment decisions would have to disclose the GHG emissions of the companies in its portfolio. The proposed rule provides for a standard table for ESG funds to disclose information, which would allow investors to more easily and efficiently compare data across ESG funds.

The amount and type of disclosure by funds and advisers varies depending on the degree to which ESG factors into the fund's strategy. The proposal identifies three types of funds:

a integration funds, which incorporate both ESG and non-ESG factors in their investment decisions, would be required to disclose how ESG plays a role in their investment criteria;

b ESG-focused funds, for which ESG factors are a significant focus of their investment decisions, would be required to submit detailed disclosures, including information about their strategies, impacts they are pursuing and any inclusionary or exclusionary screens they are using; and

c impact funds, which are a subset of ESG-focused funds, and pursue a specific ESG-related impact, would be required to disclose how they measure progress and a summary of progress toward achieving their stated ESG goals.

The comment period for these proposed rules ended on 16 August 2022, and final rules have not yet been issued.

Proposal to amend the Names Rule

The SEC has also proposed changes to the Names Rule.[8] As it currently exists, the Names Rule requires certain funds to invest 80 per cent of their assets in investments that align with the name of the fund. The proposed changes to the Names Rule would amend it so that it applies to funds that have names that imply the fund focuses on investments that have certain characteristics. A fund that has 'ESG', or any other ESG-related term, in its name would be subject to the Rule because inclusion of such terms in the name suggests that the fund makes decisions based on ESG factors. Under the proposal, funds would have to define the terms

7 Securities and Exchange Commission, Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (2022), https://www.sec.gov/rules/proposed/2022/ia-6034.pdf.

8 Securities and Exchange Commission, Investment Company Names (2022), https://www.sec.gov/rules/proposed/2022/33-11067.pdf.

© 2022 Law Business Research Ltd

used in their names; a fund that uses ESG factors, along with other non-ESG factors, where the ESG factors are not relied on more heavily than the non-ESG factors, would not be able to use 'ESG' in its name.

In addition to the SEC's proposed rules and formation of the Task Force, in 2021 the SEC announced an 'all agency' focus on ESG, including in the SEC's Division of Examinations. Various other federal agencies have made statements or taken other actions demonstrating the Biden administration's commitment to addressing climate change. For example, in September 2022, the board of governors of the Federal Reserve System announced that it would conduct a climate scenario analysis exercise with six of the largest US banking organisations, and in June 2022, the US Commodity Futures Trading Commission released a request for information on how climate-related financial risk is related to the derivatives markets and underlying commodities markets.

ii State government

States also enact ESG-related legislation, and the recent trend in some state governments is anti-ESG initiatives. For example, a Texas statute was recently passed that prohibits state investment in financial companies that do not invest in certain energy companies based on ESG metrics.[9] In Florida, a proposed law would prevent state fund managers from considering ESG factors when investing state money; such fund managers would only be allowed to invest state funds with the goal of 'maximizing financial return', thereby making profit the only measure for analysing investments. Other states are also seeking to limit or prohibit ESG considerations when investing state funds. Those states include Texas, Oklahoma, Kentucky, Ohio, Arizona, Idaho and West Virginia. The bills passed in these states are representative of the different types of anti-ESG legislation taking hold in some parts of the United States. That legislation generally takes three forms:

a Legislation that prohibits state agencies from doing business with financial companies that do not invest in certain industries for environmental, social or governance reasons. This legislation often focuses on industries that are important to a particular state's economy, such as fossil fuel production, mining and certain types of agriculture. States justify this legislation on the basis that their citizens are harmed by the non-investment in an industry that makes up a substantial part of a state's economy.

b Legislation that prohibits use of a state's funds for environmental and social investments, in which people who enter into contracts on behalf of the state or invest funds on behalf of state entities (such as pension funds) are prohibited from doing so with companies that are deemed to 'discriminate' against certain companies because of ESG concerns.

c States sometimes achieve anti-ESG legislation by passing laws or regulations that specify that a state agency can only make investment decisions for the purposes of maximising returns, which would prevent a state agency from making an investment decision based on ESG factors.

Attorneys general in some states have also taken action against certain banks to investigate antitrust and consumer protection law violations arising from those banks' involvement in the United Nations' Net-Zero Banking Alliance. Kentucky was among the states that joined

9 Tex. Gov't Code Sec. 809.051.

© 2022 Law Business Research Ltd

that action, and in response to the action of the Kentucky attorney general, the Kentucky Bankers Association sued the Kentucky attorney general in state court alleging that the attorney general exceeded his authority in making these investigative demands of banks.

The full impact of state anti-ESG measures has yet to be seen, but the anti-ESG wave creates uncertainty as to whether meaningful change can be achieved through sustainable finance in the United States.

IV SUSTAINABLE FINANCE INSTRUMENTS

In the United States, green, social and sustainable bonds and loans, and SLBs and SLLs are supported. The key defining feature of a green, social or sustainable bond or loan is that the proceeds must be used for green, social or sustainable projects. In contrast, SLLs and SLBs do not have to be used for a specific 'green' purpose. Instead, SLLs and SLBs are used to incentivise the borrower to achieve certain predetermined sustainability goals. Green, social and sustainable loans and bonds are also expected to meet certain criteria with respect to project evaluation and selection, management and reporting of the use of proceeds. On the other hand, SLBs and SLLs should include key-performance indicators (KPIs) and sustainability performance targets (SPTs) consistent with the Sustainability-Linked Loan Principles (SLLPs) published by the APLMA, LMA and LSTA. The SLLPs specify that KPIs should be 'relevant, core and material to the borrower's overall business' and should be measurable on a consistent basis. The SPTs should be ambitious, which means that they should 'represent a material improvement in the respective KPIs and beyond a "business as usual" trajectory'. When determining KPIs and SPTs, lenders and borrowers face a challenge of ensuring that the KPIs and SPTs remain ambitious for the borrower following a change in the borrower's circumstances, such as following an acquisition or a divestiture, or after a change in law. If a change in law results in the SPTs being the same as the minimum required by law, lenders and borrowers alike should consider whether those SPTs need to be modified, since at that point they are arguably not ambitious. Similarly, lenders should also consider whether the loan documents should include a mechanism for adjusting the SPTs following a material acquisition or divestiture since that acquisition or divestiture could allow the borrower to more easily meet its SPTs than had initially been intended, resulting in the ongoing metrics not being at the intended level of ambitiousness.

Since SLLs and SLBs do not finance a specific green project, lenders and investors in SLLs and SLBs face increasing scrutiny with respect to the loans they are making and whether they are truly moving the needle to advance companies' green initiatives or whether they constitute greenwashing. In SLBs and SLLs, the issuer or the borrower receives a financial incentive for achieving its SPTs with respect to the selected KPIs. To avoid claims of greenwashing, it is increasingly important for lenders to ensure that the KPIs that are selected are material and relevant to the borrower and are sufficient in number to incentivise meaningful change by the borrower. Similarly, the SPTs need to be ambitious and meaningful. When lenders agree to make an SLL, they should be performing diligence on the borrower's business, ESG policies and strategies and reporting, while giving special consideration to the borrower's locations and the nature of the borrower's business. Another key question related to SLLs and SLBs is whether the financial incentive for meeting the SPTs is sufficient to cause the borrower to change its practices and become more green. If the KPIs and SPTs are set

© 2022 Law Business Research Ltd

at levels that the borrower can achieve while maintaining business as usual and the financial incentive for making ESG-related changes is not significant for that particular borrower, lenders, as well as borrowers, put themselves at risk for claims of greenwashing.

Another key distinguishing feature of SLBs and SLLs as compared to green bonds and green loans is reporting. Whereas green loans and green bonds require specific reporting as to the use of proceeds for the project, SLLs and SLBs have a more general reporting requirement as to the KPIs and SPTs that should be determined prior to making the loan. Discrepancies in reporting requirements among a company's reports to its lenders, its offering documents, its marketing materials and its corporate sustainability reports can also lead to claims of greenwashing. As scrutiny of SLLs and SLBs increases, it is especially important to ensure that reporting requirements are consistent not just for an individual company but also across all borrowers to ensure SLLs and SLBs that are offered are based on consistent and comparable data. Recently, the LSTA has been working to provide resources to harmonise ESG reporting and diligence questions to achieve the goal of consistent and comparable reporting, particularly with respect to private companies whose ESG strategies and progress are not as widely reported as for public companies and who will also not be subject to enhanced SEC disclosure rules (once those rules are finalised). For lenders and investors, being able to access similar data across borrowers will be especially important as those lenders and investors face heightened reporting requirements with respect to their ESG loans and investments.

In addition to sustainability loan products, social bonds and social loans are also being offered in the United States, although the market for social and governance-focused loan products has not developed as quickly.

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

The United States has not adopted the Task Force on Climate-related Financial Disclosures (TCFD) framework, although the proposed SEC Climate Change Disclosure Rules discussed above are similar in many ways to the TCFD. As noted above, at this time, however, those rules are only proposed rules and are not yet in effect. The United States has also not adopted a specific taxonomy for ESG-related disclosures. One of the challenges to adopting a taxonomy in the United States are the multiple federal and state agencies that issue rules and regulations governing disclosures by market participants and the agencies that oversee and take enforcement actions against market participants. Adoption of a uniform taxonomy will require coordination among those agencies.

VI ESG DATA AND REPORTING

As discussed above, the SEC has proposed rules that would require reporting related to sustainable investments, but there are not yet formalised ESG reporting rules related to sustainable investments. ESG data reporting requirements for public companies or for ESG funds, other than the general existing reporting rules and regulations, do not yet exist. Coverage of Scope 1, 2 and 3 level emissions in reporting is not yet required.

© 2022 Law Business Research Ltd

VII SUSTAINABLE FINANCE INCENTIVES

The federal government does not currently offer incentives for general sustainable finance investments (there are some targeted incentives for certain renewable energy and energy transition investments, including carbon capture, sequestration and utilisation, hydrogen and offshore wind). Thus far, those incentives are offered in the private market, such as the interest rate reductions available if the SPTs are met in SLLs.

VIII GREEN TECHNOLOGY

There is currently debate as to the extent to which emerging technologies should be included in sustainable finance investments. As the market expands and a taxonomy for sustainable finance in the United States is developed, there may be greater clarity as to the degree to which emerging technologies, such as hydrogen, ammonia and carbon trading, are influencing sustainable finance.

IX CLIMATE CHANGE IMPACT

As discussed in Section III, the SEC Division of Enforcement formed the Task Force in March 2021. The formation of the Task Force was a significant step by the SEC toward ensuring that representations in offering materials and other statements by companies, funds and investment advisers are accurate and reflect the actual nature of the ESG investment products. As the proposed rules discussed above have not yet been formalised, the Task Force is currently identifying disclosure and compliance issues related to ESG investments under the SEC's existing rules. There have been a few notable enforcement actions taken by the Task Force in the past few years.

In April 2022, the SEC brought an enforcement action against Vale SA, a Brazilian mining company, alleging material misstatements about dam safety. The SEC's complaint was filed in the US District Court for the Eastern District of New York. It charged Vale with violating antifraud and reporting provisions of the federal securities laws and sought injunctive relief, disgorgement plus prejudgment interest and civil penalties. The complaint alleged that, beginning in 2016, Vale 'deliberately manipulated multiple dam safety audits; obtained numerous fraudulent stability declarations; and regularly and intentionally misled local governments, communities, and investors about the dam's integrity'[10] through Vale's ESG disclosures as well as its SEC regulatory filings. While, ultimately, the Vale enforcement action is about alleged fraud, there is an environmental and social angle that the SEC highlights in its complaint. This case underscores the SEC's attention to ESG disclosures, both in required public filings as well as in voluntary corporate sustainability reports.

In May 2022, the SEC announced that it had charged 'BNY Mellon Investment Adviser, Inc. for misstatements and omissions about Environmental, Social, and Governance (ESG) considerations in making investment decisions for certain mutual funds that it

10 Securities and Exchange Commission (2022), Complaint, https://www.sec.gov/litigation/complaints/2022/comp-pr2022-72.pdf.

© 2022 Law Business Research Ltd

managed'.[11] The SEC's order found that despite BNY Mellon Investment Adviser's statements that all of the investments in the relevant funds had been subject to an ESG quality review, multiple investments in those funds had not undergone the ESG quality review. BNY Mellon Investment Adviser agreed to pay a US$1.5 million penalty to settle the charges. In the SEC's press release announcing the charges, Adam S Aderton, co-chief of the SEC Enforcement Division's Asset Management Unit and a member of the Task Force, said 'As this action illustrates, the Commission will hold investment advisers accountable when they do not accurately describe their incorporation of ESG factors into their investment selection process'.[12]

These SEC enforcement actions demonstrate that the Task Force is working to identify misstatements and omissions related to ESG disclosures and is willing to take actions when it identifies material issues. As noted above, these enforcement actions were based on existing securities rules and regulations. If the SEC's proposed ESG Disclosure Proposal and SEC Climate Change Disclosure Rules are adopted, they will add to the Task Force's ability to take enforcement actions with respect to ESG matters.

In addition to potential SEC enforcement actions, companies also face ESG-related litigation risks from various stakeholders. The groups of potential stakeholders related to ESG claims is broader than in 'traditional' litigation, which leads to a wider list of potential claimants. Those stakeholders have different goals for the litigation they engage in. Some claimants want to affect a company's ESG-related conduct by encouraging certain behaviours and discouraging others, and other claimants seek to raise awareness of issues. In either instance, the litigation can be expensive and result in significant reputational risk for a company.

X OUTLOOK AND CONCLUSIONS

While there are certainly challenges in the sustainable finance market in the United States, particularly given the current economic and political climate, there is much to be positive about as demand for sustainable finance products remains strong. Scrutiny of sustainable finance products and the related ESG strategies and claims by issuers will continue to increase. However, the market may see greater uniformity in reporting across companies and ESG-related funds following the issuance of the SEC's proposed rules.

11 Securities and Exchange Commission (2022), SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations, https://www.sec.gov/news/press-release/2022-86.

12 id.

© 2022 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

J PAUL FORRESTER

Mayer Brown LLP

J Paul Forrester is a Chicago-based corporate and securities partner who founded the firm's ESG group, which currently comprises over 130 lawyers from every office and practice group of the firm. Paul's practice is focused on structured credit, including collateralised loan obligations, energy (including oil and gas, utilities, shipping, refinery and pipeline) financings and project development, and financing (especially concerning renewable energy, industrial, petrochemical, power and transportation projects and infrastructure).

JENNIFER KRATOCHVIL

Mayer Brown LLP

Jennifer Kratochvil is a banking and finance partner in the Chicago office. She represents lenders and borrowers in syndicated secured and unsecured lending transactions, letter of credit transactions and other financing transactions. Her experience includes representation of borrowers and lenders in investment-grade credit facilities and secured financings. She is a member of the firm's ESG team, and she has worked on several sustainability-linked loan facilities.

MAYER BROWN LLP

71 S Wacker Drive
Chicago, IL 60606
United States
Tel: +1 312 782 0600
jforrester@mayerbrown.com
jkratochvil@mayerbrown.com
mayerbrown.com

© 2022 Law Business Research Ltd

ISBN 978-1-80449-122-5

© 2022 Law Business Research Ltd