CLEARY GOTTLIEB

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Climate and the Financial Sector

This weekly newsletter highlights climate-related regulatory, litigation and enforcement developments relevant to the financial sector.

General

23 January 2023 [EU] – **Classification of nuclear and natural gas activities under the EU Taxonomy is challenged before the ECJ**

On 7 October 2022, Austria filed a lawsuit seeking the annulment of the delegated act that includes, as of 1 January 2023, certain nuclear and gas activities in the EU Taxonomy. It argues that the delegated act is inconsistent with several provisions of the Taxonomy Regulation itself. Luxembourg has announced its support for the lawsuit. [link]

24 January 2023 [EU] – **ECB publishes a first set of climate-related statistical indicators to bridge the data gap and better assess climate-related risks in the financial sector**

The European Central Bank (ECB) has developed climate-related statistical indicators designed to better assess climate-related risks in the financial sector. So far, these indicators cover three areas: sustainable finance, carbon emissions and physical risks in loan and securities portfolios. This first publication is intended to facilitate public debate on how to better capture data relating to climate risk and green transition. [link]

25 January 2023 [France] – **HCJP releases report on Say on Climate resolutions**

The Haut Comité juridique de la place financière de Paris (HCJP) concludes that "Say on Climate" shareholder resolutions, which aim to provide a consultative opinion on the board's climate strategy, do not infringe on the powers of the board, nor do they modify its liability regime as a matter of French law. Nonetheless, the HCJP recommends the introduction of a soft law framework enshrining the legality and regime of such resolutions in order to facilitate shareholder dialog. [link]

26 January 2023 [EU] – **ESAs issue opinions on the draft CSRD reporting standards**

In November 2022, the European Commission asked the European Supervisory Authorities (ESAs) to provide an opinion on the first set of draft Corporate Sustainability Reporting Directive (CSRD) reporting standards, which companies subject to the CSRD will have to use from 1 January 2024.

1. European Banking Authority (EBA): The EBA considers that the draft CSRD reporting standards are generally consistent with international standards and relevant EU legislation, which is essential to ensure consistent and comparable reporting by EU and international entities. In addition, the EBA welcomes phase-in provisions allowing companies sufficient time to prepare for the CSRD reporting requirements. However, it points out technical aspects that deserve further consideration, including interoperability with international standards, clarification of materiality assessments and implementation of the value chain concept for financial institutions. [link - link]
2. European Insurance and Occupational Pensions Authority (EIOPA): The EIOPA considers that the draft CSRD reporting standards generally promote high-quality sustainability information and support sectoral and international interoperability. However, the EIOPA notes the same issues as the EBA and stresses that insurance companies with low risk profiles should be allowed to apply simplified sustainability reporting standards to ensure a level playing field with the banking sector. [link - link - link]
3. European Securities and Markets Authority (ESMA): ESMA considers that the draft CSRD reporting standards largely meet the objective of fostering investor protection and not undermining financial stability. Nevertheless, it finds that some technical issues should be addressed to ensure that objective is fully achieved, including improvements in the level of consistency with the requirements of the CSRD and other EU legislation, clarifications of definitions and, as noted by the EBA and the EIOPA, further guidance on the materiality assessment process. [link - link]

Asset management

19 January 2023 [EU] – **Securities and Markets Stakeholder Group response to the ESAs' call for evidence on greenwashing**

The Securities and Markets Stakeholder Group (SMSG) highlights in its submission the need to clarify (i) the definition of greenwashing and closely related terminology, (ii) the scope of Article 8 and 9 products and (iii) the responsibility for greenwashing along the value chain. In addition, the SMSG argues that unintentional misrepresentation should not be considered as greenwashing and points out that "green-bleaching", that is where market participants prefer not to claim ESG features of their products to avoid additional regulation and potential legal risks, is also problematic. [link]

25 January 2023 [EU] – **Responses to FCA's consultation on Sustainability Disclosure Requirements and investment labels**

The Financial Conduct Authority (FCA) seeks input from financial market participants on Sustainability Disclosure Requirements (SDR) and investment labels. The FCA's consultation closed on 25 January 2023. Notable submissions include the following:

1. the UK Sustainable Investment and Finance Association (UKSIF) strongly supports the proposed approach, but believes that the FCA should further consider the applicability of the labels to a range of asset classes other than equities, the treatment of funds of funds and certain aspects of the qualification criteria. [link]
2. the International Swaps and Derivatives Association (ISDA) supports the FCA's approach of not developing derivatives-specific rules, but monitoring developments and implementing guidance to increase transparency in the use of derivatives in sustainable investment products. It recommends that the FCA pursue a principles-based approach to establishing SDR and investment labels while focusing on international consistency and interoperability of rules. [link]
3. the Institutional Investors Group on Climate Change (IIGCC) emphasizes the need to consider institutional investors, not just retail investors. It highlights the difficulty of applying the mutually exclusive "sustainable focus", "sustainable improver" and "sustainable impact" labels to institutional investors and calls for clarity on terminology and extension of the scope of the plan to overseas and pension products. [link]

26 January 2023 [International] – **The PRI releases a new reporting framework**

The Principles for Responsible Investment (PRI) 2023 Reporting Framework updates the 2021 Reporting Framework to provide the more than 5,000 signatories with greater clarity on terminology, as well as consistency and applicability, including a clearer structure that is better aligned with other widely recognized frameworks such as TCFD and ISSB. The PRI also reduces reporting granularity requirements, the overall number of indicators, and the structure of indicators. The new framework is published with supporting guidance and a mapping resource. [link]

26 January 2023 [EU] – **Downgrade of Article 9 funds ahead on the entry into force of SFDR RTS**

Since the entry into force on 1 January 2023 of the regulatory technical standards (RTS) issued under the EU's Sustainable Finance Disclosure Regulation (SFDR), asset managers are required to disclose additional information on their funds' environmental, social, and governance approaches, sustainability risks and principal adverse impacts in precontractual documents and periodic reports. According to Morningstar quarterly report focused on public funds, since September 2022, asset managers have reclassified a significant number of funds from Article 9 to Article 8 products. Specifically, 307 products were downgraded from Article 9 to Article 8, representing 40% of the Article 9 category. The report also notes that only a quarter of Article 8 funds with "sustainable" in their names would meet the ESMA's proposed rule on fund names, while most Article 9 funds would meet the requirement. The ESAs are expected to publish new set of Q&As under SFDR shortly. [link]



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