CLEARY GOTTLIEB

29 November 2022

Climate and the Financial Sector

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

EU Updates

General

22 November: **UK FCA convenes new working group to develop a voluntary Code of Conduct for ESG data and ratings providers.**

The UK's Financial Conduct Authority (FCA) has announced the creation of a taskforce charged with establishing industry-led solutions for financial firms' use of third-party ESG data and ratings services. The UK Government has been considering whether to extend the FCA's regulatory perimeter to include authorisation and oversight over the sector, following the FCA's suggestion raised through "Feedback Statement on ESG integration in UK capital markets (FS22/4)". In the meantime, the FCA has decided to convene and encourage industry participants to develop and follow a voluntary Code of Conduct such as to fosters an effective, trusted and transparent market. The group should meet for the first time before the end of 2022. (link - link)

23 November: **EFRAG delivers first set of CSRD reporting standards.**

The European Financial Reporting Advisory Group (EFRAG) has submitted to the Commission the first set of draft EU sustainability reporting standards (ESRS) that would apply under the future Corporate Sustainability Reporting Directive (CSRD). The package includes (*i*) general reporting rules (such as with regards to double materiality and the format applicable to sustainability reporting), (ii) cross-sectorial disclosure requirements, (*iii*) environment-specific disclosure standards (covering the Taxonomy's 6 environmental sustainability objectives), (*iv*) social-specific disclosure standard (covering firms' workforce, supply chain, affected communities and customers and end-users) and (*v*) governance-specific standards (covering firms' business conduct). The Commission is set to approve these standards by means of Delegated Acts within June 2023. EFRAG will next work on sector-specific standards, to be adopted in 2024. (link)

23 November: **Large Swiss companies to roll out public climate disclosures starting in 2024.**

The Swiss Federal Council has approved new rules providing for the mandatory implementation of the Task Force on Climate-related Financial Disclosures' (TCFD) recommendations by large Swiss listed companies, banks and insurers. Similarly to EU rules, disclosures will be based on a "double materiality" perspective – *i.e.*, looking at companies' own climate risk exposures as well as negative impacts on third parties. Companies will also be required to set reduction targets direct and indirect GHG emissions, and related implementation plans (link).

25 November: **Upcoming EU sustainability due diligence requirements may not apply to certain financial sector activities.**

National negotiators meet ahead of EU Council meeting of 1 December, to make progress on new compromise text of the upcoming Corporate Sustainability Due Diligence Directive (CS3D). One battled point concerns the potential exclusion of investment activities from the scope of the new requirements (such that only lending, provision of guarantees and commitments, and insurance and reinsurance activities would be caught with respect to financial sector firms). ESG due diligence obligations may also end up being limited to goods' supply chain, distribution, transport, storage and disposal of products, and not also to customers and other established business relationships belonging to the wider concept of "value chain". (link)

Banking

18 November: **The City of Lyon will assess the environmental impact of its lenders**

France's third largest city has decided to send to applicant lending institutions an annual questionnaire regarding the banks' impacts on the environment and human rights. Support for fossil fuels, new oil exploration projects and deforestation will exclude banks from the public loan race (here).

22 November: **Commission calls for EBA advice over green loans and mortgages.**

The EC requested the European Banking Authority's (EBA) views on green loans, as it prepares new measures to encourage the development of the related market. While certain retail loans (including mortgages) are covered by banks' green asset ratio (GAR) disclosure requirement, other SME exposures are not. The Commission plans to consider whether to change this as part of its 2024 review of the Taxonomy Delegated Act, as well as the review of the Mortgage Credit Directive (2014/17/EU). The EBA's advice will consider the merits of a regulatory definition for green loans and mortgages, and potential measures to encourage their uptake. The advice is expected to be delivered within December 2023 (link - link).

24 November: **Bank of Italy follows ECB's thematic review on the management of climate risk by local less significant institutions.**

Following the publication of its April 2022 guidance on the management of climate risk by Italian banks, and acting in parallel to the ECB's thematic review, the Italian banking supervisor published the results of its own assessment on banks under its remit. In its report, the Bank of Italy requests banks' boards to set out plans to fully integrate climate change as part of their ordinary risk management procedures, within the next 3 years (link).

Asset management

22 November: **Top EU asset managers announce downgrading of Article 9 funds ahead of entry into force of SFDR RTS.**

Lack of clarity around Sustainable Finance Disclosure Regulation (SFDR) rules continues to wreak havoc in the EU asset management industry. Several leading fund managers were reported as having decided to reclassify some of their "dark green" funds to the "lighter green" Article 8 category, just weeks ahead of the entry into force of the SFDR regulatory technical standards (RTS). The decision follows the Commission's repeated indication that Article 9 funds should be interpreted as being required to exclusively hold investments in "sustainable" activities (subject to very limited exclusions). Only 26 funds have been reported to have achieved the 100% sustainable investment bar so far, raising questions about the practicability and reasonableness of the Commission's interpretation. (link)

25 November: **ESMA prepares to lead coordinated supervision exercise with NCAs on funds' ESG disclosures in Q2 2023.**

Speaking at the European Fund and Asset Managers Association's (EFAMA) summit in Bruxelles, Executive Director of the European Securities and Markets Authority (ESMA) Natasha Cazenave announced that the authority will lead a joint supervisory effort on sustainability risks and disclosures next year. The exercise will be joined by national competent authorities (NCAs), and be aimed also at harmonising supervision and enforcement in this space. Greenwashing is expected to remain at the front and centre of the EU regulatory agenda throughout 2023. (link)