Fall 2023

V&E Quarterly Securities & ESG Updates

Table of Contents

Letter from the Editors ... 3

SEC Watch Including Stock Exchange Rules and Delaware Corporate Laws ... 4
- Cybersecurity Disclosure Rules ... 5
- SEC Issues C&DIs Regarding Rule 10b5-1, Insider Trading Plans, and new Form F-SR ... 6
- SEC Adopts Final Amendments to the Fund "Names Rule" ... 7
- SEC Enforcement Division Sends Document Requests to Asset Managers Over ESG Disclosure, and Deutsche Bank Subsidiary DWS Settles SEC ESG Investigation ... 8
- SEC Adopts Final Rules for Private Funds ... 9
- SEC Provides Guidance on XBRL Disclosure ... 10
- Nasdaq Adopts Amendments regarding Code of Conduct Waivers and Proposes Amendments regarding Reverse Stock Splits and Regulatory Halts ... 11
- NYSE Requires Confirmation of Clawback Policy Adoption ... 12
- Delaware Implements Amendments to DGCL ... 12
- U.S. House of Representatives Proposal regarding Rule 14a-8 ... 13

Climate Change Legislative and Litigation Updates ... 14
- California Climate Reporting Laws ... 15
- Montana Climate Case – Held v. State of Montana ... 16
- California Launches Division of Petroleum Market Oversight ... 16

Artificial Intelligence and Corporate Governance ... 17

DEI Initiatives in Light of the Supreme Court's Affirmative Action Ruling ... 20

Greenwashing Update ... 22
- Delta Lawsuit ... 23
- Washington Gas ... 23
- Vanguard Investments ... 24

Taskforce on Nature-related Financial Disclosures Launches Final Framework ... 25

Growing Debate Over Certain Aspects of ESG Metrics in Compensation ... 27

The Increasing Role of ESG in M&A ... 29

Carbon Reporting – E-commerce Giant Flexing its Muscle ... 31

The Expansion of Pass-Through Voting Marches On ... 33

Corporate Transparency Act ... 34
- The Who, What, and When of FinCEN's New Beneficial Ownership Reporting Requirements ... 37
- Overview of the Rule ... 37
- Who Must Report ... 38
- What Must Be Reported ... 39
- When Must It Be Reported ... 39
- How Will FinCEN Receive and Store BOI? Who will have Access to the Reported Information? ... 40
- Action Takeaways ... 40

Endnotes ... 41

Editors ... 43

Guest Editors ... 43

Key Contact ... 44

CTA Taskforce ... 45

Letter from the Editors

Welcome to Vinson & Elkins' Securities and ESG Updates. Our aim is to provide insights into notable developments in securities reporting and the environmental, social and governance space over the quarter and, where applicable, offer calls to action for contacting V&E.

It is no secret that public backlash to "ESG" (environmental, social, governance) has been mounting over the past couple of years. Anti-ESG efforts at the state level have proliferated over the past year, and as discussed on page 13, many conservative politicians in the federal government have taken up the anti-ESG mantle in recent months. Anti-ESG sentiment also played a noteworthy role in the 2023 proxy season. The number of anti-ESG shareholder proposals rose to new heights (though continued to garner minimal support from major shareholders), and anti-ESG backlash may have contributed to a decline in support for pro-ESG shareholder proposals compared to recent years.

It is therefore not surprising that large investors, companies, and other market participants have begun moving away from using the term "ESG." Larry Fink, BlackRock's CEO, stated that he is no longer using the term "ESG" because it has been politically "weaponized" and "misused by the far left and the far right." In BlackRock's 2023 Investment Stewardship Guidelines, the term "ESG" is nowhere to be found, after appearing seven times in the 2022 edition. Furthermore, it has been reported that S&P 500 companies used the term "ESG" only 74 times during earnings conference calls conducted between March 15 through June 9 of 2023, the lowest number of citations of the term "ESG" for any quarter going back to Q2 of 2020 (57 citations). By contrast, artificial intelligence ("AI"), which we further discuss on page 17, was mentioned 110 times in S&P 500 earnings calls during the same period. In a recent survey of bankers, money market managers, and other financial market participants, Bloomberg found that about two-thirds of respondents said that they will stop using the term "ESG" in conversations with clients.

Nevertheless, the fact that there is movement away from using the acronym "ESG" does not mean that companies, investors, and other financial market participants are no longer incorporating ESG considerations into their strategies or pursuing ESG initiatives. Indeed, Larry Fink stated that BlackRock has not changed its stance on ESG issues. And a recent study by JUST Capital of Russell 1000 companies did not find evidence of companies pulling back on ESG investments, engagements, or reporting. The Bloomberg survey also noted that only 18% of respondents using ESG in their work stated that backlash to the term "ESG" will stop them from incorporating climate change factors into their decision making.

While there can be risks associated with ESG-related reporting (see our Greenwashing Update on page 22), there are plenty of reasons companies, investors, and other financial participants continue to see value in incorporating ESG factors into their practices and disclosing ESG-related metrics and initiatives. For example, as discussed further on page 29, properly identifying and assessing ESG factors can be important for value creation and risk management when it comes to M&A transactions. The Biden administration recently issued a proposed rule that would revise the Federal Acquisition Regulation to incentivize federal government buyers to prioritize the acquisition of sustainable products and services, as further discussed in this V&E Insight. Furthermore, ESG-related regulation and disclosure regimes, both voluntary and mandatory, continue to expand at the state (see page 14 for a discussion of the new California climate legislation), federal (see page 4 for a discussion of the Securities and Exchange Commission's ("SEC") final rule regarding cybersecurity disclosure and enforcement actions relating to ESG marketing), and international levels. Regulators and investors alike will likely expect further ESG-related reporting in the near future.

Thus, while descriptive language may change, it is likely that ESG-related considerations are here to stay for the foreseeable future—whether that pertains to stakeholder engagement, business strategy, voluntary reporting, compliance with applicable rules and regulations, risk mitigation, or all of the above. V&E continues to track the developments in this space, whatever its title may be, and is here to help make sense of this complex landscape.

SEC Watch Including Stock Exchange Rules and Delaware Corporate Laws

Cybersecurity Disclosure Rules

As discussed in this V&E Cybersecurity Update, on July 26, 2023, the SEC approved final rules governing cybersecurity disclosures of public companies. The final rules make meaningful changes to the current and periodic reporting process and add additional—and time sensitive—steps to incident response by requiring companies to disclose:

New Item 1.05 of Form 8-K

- any material cybersecurity incidents within four business days after determining an incident is material (subject to a national security or public safety exception as determined by the U.S. Attorney General).

New Item 106 to Regulation S-K

- a description of the company's processes (if any) for assessing, identifying and managing material cybersecurity risks;
- a discussion of whether previous cybersecurity incidents have materially affected or are reasonably likely to materially affect the registrant; and
- management's role and expertise in assessing and managing cybersecurity risks.

Companies will be required to make disclosures about their cybersecurity governance, risk management, and strategy pursuant to New Item 106 to Regulation S-K within their annual reports on Form 10-K for fiscal years on or after December 15, 2023. Compliance with the final rules modifying Form 8-K Item 1.05 will be required beginning on December 18, 2023.

To prepare for the final rules, public companies should:

- Consider assembling a cross-functional team to ensure any incident and its effects are understood and any necessary filings describing the incident are made on a timely basis;
- Review incident response plans to include processes for making a determination as quickly as possible whether any identified cybersecurity incident is, or is likely to be, material to the company such that it would require an 8-K filing within four business days;
- Review incident response plans to include processes for monitoring the incident to—in addition to taking any necessary remedial steps to mitigate the event—determine whether any amended 8-K filings would be required to disclose additional information about the severity or consequences of the event or whether there is any new and material information that must be disclosed;
- Ensure that procedures are in place to allow the team conducting investigations of potential breaches or cybersecurity incidents to convey the details of any such incidents timely to the team responsible for making public disclosures related to the incident, such as the legal or finance department; and
- Establish and be ready to describe processes by which management and the board oversee cybersecurity risks. In so doing, it should be noted that the SEC did not adopt its proposed rule addressing "Board of Director Expertise," but hinted that comparable disclosure may still be required if the registrant determines that "board-level expertise is a necessary component to the registrant's cyber-risk management." As of November 2022, 91 S&P 500 Companies disclose they have a director with professional expertise in cybersecurity.

Prior results do not guarantee a similar outcome.

Vinson&Elkins

SEC Issues C&DIs Regarding Rule 10b5-1, Insider Trading Plans, and new Form F-SR

On August 25, 2023, the SEC posted five new Compliance and Disclosure Interpretations ("C&DIs") relating to the amendments to Rule 10b5-1 and related disclosure requirements regarding insider trading plans adopted last December, as follows:

- **120.29:** For the purposes of determining the cooling off-period applicable to directors and officers under Rule 10b5-1(c)(1)(ii)(B)(1) (the later of 90 days after adoption of the plan or two business days following disclosure of the company's financial results in a Form 10-Q or 10-K for the completed fiscal quarter in which the plan was adopted), the date of disclosure of the company's financial results is the filing date of the relevant Form 10-Q or Form 10-K, the first business day would be the next business day that follows the filing date, and whether a form is filed before or after trading opens on a given day has no bearing on the calculation (*e.g.*, if the relevant form is filed on a Monday, trading may commence under the plan on Thursday, assuming no intervening federal holidays).

- **120.30:** For participants relying on Rule 10b5-1 to participate in a 401(k) plan, in an exception to the "single plan" rule under Rule 10b5-1(c)(1)(ii)(E), the Rule 10b5-1 affirmative defense is still available for a second, concurrent plan for open-market purchases or sales.

- **120.31:** The Rule 10b5-1(c) check box on Form 4 for transactions made pursuant to a Rule 10b5-1 plan should not be checked for Rule 10b5-1 plans adopted before the effective date of the amendments to Rule 10b5-1 (February 27, 2023).

- **133A.01:** Under Item 408(a)(1) of Regulation S-K, disclosure of the termination of director and officer Rule 10b5-1 plan and non-Rule 10b5-1 trading arrangements is not required for plans that end pursuant to the existing terms of the plan.

- **133A.02:** Item 408(a) applies to any Rule 10b5-1 trading plan or non-Rule 10b5-1 trading arrangement covering securities in which an officer or director has a direct or indirect pecuniary interest that is reportable under Section 16 and that the officer or director has made the decision to adopt or terminate.

On August 30, 2023, the SEC also posted three new C&DIs regarding new Form F-SR, which foreign private issuers ("FPIs") must use to provide quarterly tabular disclosure regarding their repurchase activity pursuant to the SEC's new repurchase disclosure rules. The new C&DIs provide:

- **113.01-113.02:** A Form F-SR is not required to be filed if during the covered fiscal quarter the FPI or its affiliated purchaser did not repurchase any of the FPI's equity securities, even if the FPI would otherwise need to check the box on the form for trades in the company's equity securities by directors or senior management within four business days of the FPI's key public announcements about its repurchase program.

- **113.03:** A Form F-SR is required for the final quarter of the fiscal year if the FPI or its affiliated purchaser engaged in the covered quarter, and the form must be filed within 45 days of the end of the quarter; this means that FPIs are not allowed to wait to report the relevant repurchases in their Form 20-Fs for that fiscal year.

SEC Adopts Final Amendments to the Fund "Names Rule"

As discussed in this V&E Insight, on September 20, 2023, the SEC adopted final amendments to Rule 35d-1 of the Investment Company Act of 1940 (the "Names Rule"). Under the Names Rule, originally adopted in 2001, registered funds may not use names that are deceptive or inconsistent with their investments. The amendments expand these requirements to cover more than three-quarters of U.S. registered investment funds. Thus, under the final amendments, registered funds with names suggesting that they focus on particular characteristics (*e.g.*, names that use terms like "growth" or "value") or that include terms that reference a thematic investment focus (*e.g.*, terms touting the incorporation of one or more environmental, social, or governance ("ESG") factors into investment decisions, such as "sustainable," "green," or "socially responsible") will be subject to increased regulation. The amendments to the Names Rule also update notice requirements, establish certain recordkeeping requirements, and require increased disclosure in prospectuses and on Form N-Port.

The Names Rule amendments are effective for all registered funds, including existing registered funds, 60 days after publication of the final rule in the Federal Register. All registered funds falling within the newly expanded scope of the Names Rule, *i.e.*, at least 75% of all U.S. registered investment funds, will need to be in compliance (which could entail changing their names or adopting an 80% policy) by the following dates depending on their size:

- **Larger Entities (*i.e.*, registered funds that have net assets of $1 billion or more as of the most recent fiscal year):** 24 months following the amendments' effective date
- **Smaller Entities (*i.e.*, registered funds that have net assets of less than $1 billion as of the most recent fiscal year):** 30 months following the amendments' effective date

The goal of the amendments is to enhance truth in advertising, with a particular eye towards combatting "greenwashing," the practice of claiming that one's practices, products, or services are more environmentally friendly or sustainable than they really are. The adopting release specifically cautions that the breadth of ESG-related terms in the investment fund space, as well as evolving investor expectations around terms such as "sustainable" or "socially responsible," have increased the likelihood of investor confusion and compounded the potential for greenwashing in fund names. Commissioner Lizárraga's statement noted that the amendments aim to provide investors clarity and an enhanced investing experience at a time when increasing popularity of ESG investment products has been accompanied by a "concerning" trend in disclosures that "fail to accurately support the underlying investment mix" (also known as greenwashing). That being said, the final amendments do not include the strict limits on ESG fund names previously proposed: the proposed amendments would have prohibited registered funds from using ESG terms in their names if they consider non-ESG factors alongside ESG factors when making investment decisions. However, the SEC did state that it would reconsider this issue in later rulemaking that is more narrowly focused on ESG.

As covered in the Greenwashing Update below, we continue to monitor developments in the greenwashing space.

SEC Enforcement Division Sends Document Requests to Asset Managers Over ESG Disclosure, and Deutsche Bank Subsidiary DWS Settles SEC ESG Investigation

It has been reported that, in 2023, the SEC's enforcement division sent numerous document requests, including subpoenas, to multiple asset managers regarding their ESG marketing disclosure. According to these reports, the SEC is looking into conventional investment funds that have repurposed themselves as ESG funds, as well as funds offered both in the U.S. and Europe that may share strategies, holdings, or portfolio managers, but offer differing amounts of information in the U.S. versus Europe.

Which asset managers have received these requests is not public information, but the former head of the SEC's San Francisco office opined, "ESG remains a priority area for the SEC and I would expect to see some enforcement cases before the agency's fiscal year in September." In fact, on September 25, 2023, DWS Investment Management Americas Inc. ("DWS"), a subsidiary of Deutsche Bank, was charged with two enforcement actions, one for failure to develop a mutual fund anti-money laundering program and the other for misstatements regarding its ESG investment process. DWS settled the matter by agreeing to pay a $25 million penalty. Pursuant to the SEC's order, DWS made materially misleading statements about its controls for incorporating ESG factors into research and investment recommendations for ESG products. The SEC found that, while DWS marketed itself as a leader in ESG and claimed to adhere to specific policies for integrating ESG considerations into its investments, from August 2018 through 2021 it failed to implement certain provisions of its ESG integration policy adequately despite leading clients and investors to believe that it would. The SEC also determined that DWS failed to adopt and implement policies and procedures reasonably designed to ensure that its public statements about ESG products were accurate.

This enforcement action was not a surprise; the SEC's 2023 Examination Priorities stated that ESG investing is a notable, new, and significant focus area, and that the division would "continue its focus on ESG-related advisory services and fund offerings, including whether funds are operating in the manner set forth in their disclosures." More ESG-related actions may come.

Prior results do not guarantee a similar outcome.

SEC Adopts Final Rules for Private Funds

As discussed in this V&E Insight, on August 23, 2023, the SEC adopted final rules under the Investment Advisers Act of 1940 designed to enhance the regulation of private fund advisers and update the rules applicable to all investment advisers. The SEC's purpose in adopting the new rules is to protect private fund investors by increasing transparency, competition, and efficiency in the private funds market.

Under the final rules, private funds will now be subject to six additional requirements:

- **Quarterly Statement Rule:** Private fund advisers are now required to provide quarterly statements to private fund investors. The statements must include broad disclosures regarding costs of investing in the fund and the fund's performance. The statements must be distributed within 45 days after the end of each of the first three quarters of each fiscal year and 90 days after the end of each fiscal year. If the fund is a "fund of funds," the deadlines are 75 days and 120 days, respectively.

- **Audit Rule:** All private fund advisers are required to undergo an independent financial statement audit, in conformity with generally accepted accounting principles by an auditor examined by the Public Company Accounting Oversight Board, to be completed within 120 days after the end of each fiscal year.

- **Restricted Activities Rule:** Private fund advisers are restricted from engaging in certain compensation schemes, sales practices, and conflicts of interest. Advisers are prohibited from (1) charging or allocating to a private fund fees or expenses associated with an investigation of the adviser by the government, (2) charging the private fund for regulatory, examination or compliance fees or expenses of the adviser, (3) reducing the amount of any adviser clawback by taxes applicable to the adviser, (4) charging or allocating fees related to a portfolio investment on a non-pro rata basis, and (5) borrowing money, securities, or other private fund assets from a client. Under the final rule, unlike the rule proposed in February 2022, each of the restricted activities are subject to either consent-based or disclosure-based exceptions.

- **Adviser-led Secondaries Rule:** Private fund advisers are required to provide investors with a fairness opinion where the adviser offers fund investors the option between selling their interests in the private fund, and converting or exchanging them for new interests in another vehicle advised by the adviser.

- **The "Preferential Treatment Rule":** This rule is significantly different from the rule proposed in February 2022, which would have prohibited granting any investor in a private fund the right to redeem its interest on terms that the adviser reasonably believes will have a negative effect on other investors in the fund and would have also prohibited providing any information to any investor if the adviser reasonably expects that the information would have a negative effect on investors in the fund. The final rule offers exceptions if the adviser has offered the same redemption ability or information to all existing investors.

Unless stayed by a federal court, the final rules will go into effect on November 13, 2023. After the rules take effect, there will be 18-month transition periods for the Audit Rule and Quarterly Statement Rule. For the Adviser-led Secondaries Rule, the Preferential Treatment Rule, and Restricted Activities Rule, advisers with less than $1.5 billion will have 18-month transition periods and advisers with $1.5 billion or more in assets under management will have 12-month transition periods.

Prior results do not guarantee a similar outcome.

Vinson&Elkins

SEC Provides Guidance on XBRL Disclosure

On September 7, 2023, the SEC's Division of Corporation Finance issued a sample comment letter to provide companies guidance regarding their XBRL disclosure. The Corporation Finance Staff has made a practice of issuing these types of letters where an emerging disclosure or market-related issue is affecting many companies. It is unsurprising that the Division has issued a letter in this space given (1) the expansion of XBRL requirements under the current administration and (2) the passage of the Financial Data Transparency Act in December 2022, which requires the SEC to establish a program to improve the quality of corporate financial data filed or furnished under the Securities Act and the Exchange Act. The letter highlights areas where companies should be vigilant of their XBRL practices in their disclosure, including disclosures relating to:

- Pay-Versus-Performance
- Financial Statements and Supplementary Data
- Cover Pages

The letter urges companies to consider these sample comments and additional guidance in this area as they prepare their disclosure documents.

Nasdaq Adopts Amendments regarding Code of Conduct Waivers and Proposes Amendments regarding Reverse Stock Splits and Regulatory Halts

Code of Conduct Waiver:

- On August 21, 2023, Nasdaq proposed with the SEC, and on September 5, 2023, the SEC posted a notice of filing and ***immediate effectiveness*** of, a rule to modify the requirements relating to the waiver of a code of conduct under Listing Rules 5610 and IM-5610. The rule provides that waivers of the code for directors and officers must be approved by the board of directors or a committee of the board, thereby adding a new committee approval option whereas the rule previously only allowed for board approval. The rule also adds a requirement for foreign private issuers to disclose such waivers within four business days (a requirement that was already applicable to domestic listed companies).

Reverse Stock Split and Regulatory Halts Proposals:

- On July 21, 2023, and September 12, 2023, respectively, the Nasdaq proposed rules with the SEC to (1) establish listing standards regarding notification and disclosure of reverse stock splits and (2) amend the rules regarding regulatory halts.

- Specifically, the proposed rules would require companies conducting reverse stock splits to notify Nasdaq about certain details of the reverse stock split at least five business days (no later than 12 p.m. ET) prior to the anticipated market effective date and make public disclosure about the event at least two business days (again, no later than 12:00 p.m. ET) prior to the anticipated market effective date.

- Furthermore, Nasdaq has proposed to amend Rules 4120 and 4753 to set forth requirements for halting trading in a security subject to a reverse stock split and resume trading using the Nasdaq Halt Cross. The proposed amendments regarding regulatory halts will be specific to the automatic initiation, pre-market trading and opening of a Nasdaq-listed security undergoing a reverse stock split.

- Nasdaq notes that there has been an increase in reverse stock split activity over the past couple of years, generally by smaller companies that do not have broad media or research coverage, in order to maintain compliance with Nasdaq's $1 bid price requirement. Nasdaq additionally notes that the current Rule 4120 does not specifically list rule reverse stock splits in its numerated circumstances in which Nasdaq may halt trading in a security. The purpose of the proposals is to enhance the ability of market participants to process these reverse stock splits accurately, and thereby maintain fair and orderly markets.

Prior results do not guarantee a similar outcome.

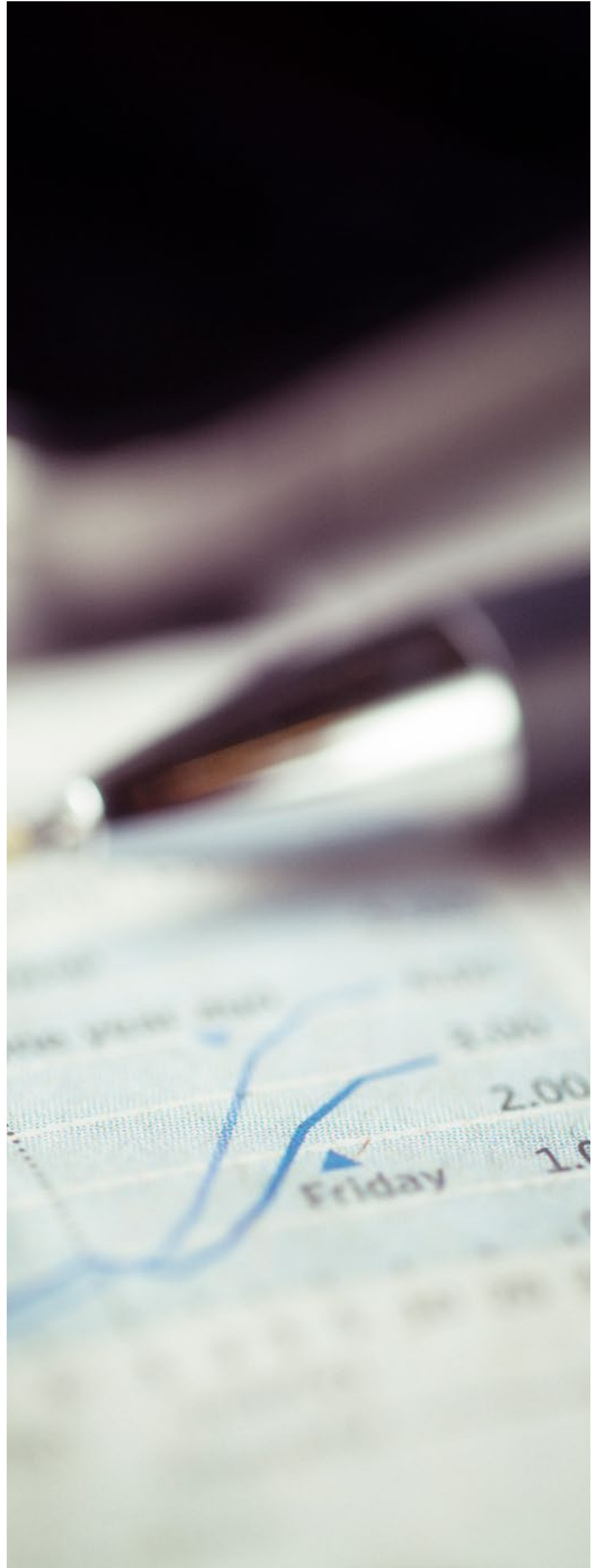
Vinson&Elkins

NYSE Requires Confirmation of Clawback Policy Adoption

The New York Stock Exchange ("NYSE") has notified listed companies that, in addition to requiring the adoption of clawback policy compliant with new Section 303A.14 of the Listed Company Manual by December 1, 2023, listed companies must confirm via Listing Manager that they have adopted a policy by that date or that they are relying on an applicable exemption. Initial listing applications and companies applying to list their securities on or after October 2, 2023, must also provide such a confirmation. The NYSE indicated that it will provide further details in the fourth quarter.

Delaware Implements Amendments to DGCL

On August 1, 2023, the amendments to the DGCL, including amendments to Section 242, became effective. The amendments affect several sections of the DGCL and seek to, among other things, clarify issues relating to the issuance of stock, rights, and options; simplify procedures in connection with the ratification of certain deceptive corporate acts; and change the procedures for amending the certificate of incorporation. For more information on these amendments, see the Summer 2023 edition of our newsletter.



U.S. House of Representatives Proposal Regarding Rule 14a-8

In July 2023, the Republican politicians that lead the U.S. House Financial Services committee held hearings and voted on bills designed to attack various aspects of ESG, dubbing their efforts "ESG month." Several resulting bills, including the "The Protecting Americans' Retirement Savings from Political Acts" (H.R. 4767) and the "Business Over Activists Act" (H.R. 4655) relate to Rule 14a-8 shareholder proposals.

- **H.R. 4767:** The bill calls for, among other things, (1) allowing companies to exclude shareholder proposals with an "environmental, social or political (or a similar . . .)" subject matter; (2) prohibiting the SEC from finalizing its proposed amendments to Rule 14a-8 to revise the bases of exclusion relating to duplication, resubmission or substantial implementation and barring the SEC from providing no-action relief related to such a proposal; and (3) substantially raising the threshold for resubmitting shareholder proposals. H.R. 4767 also contains several provisions relating to proxy advisory firms and institutional investors that would in practice likely decrease the support of these organizations for shareholder proposals.
- **H.R. 4655:** The bill calls for the elimination of the SEC's authority to require companies to include or discuss shareholder proposals in their proxy statements.

While these bills are unlikely to be passed into law given the current administration in the White House and the makeup of the Senate, this activity, along with previous public statements by Republican SEC commissioners, signal potential SEC priorities should the GOP take control of the executive branch in 2024.

Please contact V&E to discuss these developments and their implications.

Prior results do not guarantee a similar outcome.

Climate Change Legislative and Litigation Updates

California Climate Reporting Laws

As public companies anticipate the SEC's final climate disclosure rules, which are expected to be released sometime in the fourth quarter of 2023, California has beaten the federal government to the punch. As discussed in this V&E Insight, on September 12, 2023, the California State Senate passed the Climate Corporate Data Accountability Act (SB 253) ("CCDAA"), which could quickly affect many companies (both public and private) based both in California and in the United States, and may also ultimately require more disclosure regarding the carbon emissions (Scopes 1, 2, and 3 GHG emissions) of those companies. The passage of the bill is just one of many recent moves that demonstrate California's aggressive stance on climate issues.[1] Alongside the CCDAA, the California Legislature also passed a companion bill, the Climate-Related Financial Risk Act (SB 261) ("CRFRA"), which would require large companies to publicly disclose their climate-related financial risks on a digital platform (and mirrors key components of the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD")).

California's Governor signed both the CCDAA and the CRFRA into law on October 7, 2023. In so doing, the Governor warned that the implementation timelines of both laws are likely insufficient, that the CCDAA's reporting protocol "could result in inconsistent reporting across businesses," and that he was concerned about the legislation's "overall financial impact . . . on businesses." The Governor noted that his administration would work with the authors of the bills to address these issues, and that he has instructed the California Air Resource Board to monitor the cost impact as it implements the new legislation and make recommendations to streamline the programs. It is therefore is possible that certain aspects of the laws, including the timelines for reporting, could be subject to change. Nevertheless, these new laws signal a new era for sustainability disclosure and presage the overlapping and inconsistent approaches to climate disclosures required from corporations by a growing number of jurisdictions. In addition to the forthcoming SEC rule on climate-related disclosures, the European Union has also taken drastic steps in the last year with passage of the Corporate Sustainability Reporting Directive ("CSRD"), and now, with California's new laws, it will be difficult for larger companies to avoid being subject to some, if not all, of these rules. These rules are often at odds with one another and will have different jurisdictional nexus triggers. Moreover, the rules will require differing disclosures regarding levels of greenhouse gas ("GHG") emissions and climate change risks.[2]

The CCDAA and CRFRA could have sweeping implications well beyond California's borders. The state is currently the fifth largest economy by gross domestic product (GDP) and is close to eclipsing Germany and taking the fourth spot globally, behind the United States, China, and Japan. And, if history is any guide, when California lawmakers legislate on environmental matters, they can change the de facto standards globally. This is based both on the sheer heft of the state's economy and the fact that many companies would prefer creating one, universally applicable set of products and services that meet California's high bar to providing disparate products and services in separate markets based on various state or international standards.[3]

It should be noted that some commentators have hypothesized that the CCDAA may provide the SEC with some political cover to push more aggressive positions in its own final climate rules, as the California law would already provide significant burdens related to Scope 3 GHG emissions reporting for a large swath of publicly listed companies that would be swept under both reporting mandates given their size and California nexus.

It is very likely that the California laws will face staunch legal challenges, including to the state's authority to force companies—both public and private—to report their GHG emissions, especially for those companies with relatively minimal footprints in the state. Regardless of the timing of or outcome of any such litigation, however, businesses with a nexus in California should proactively prepare for these impending laws. Large companies should initiate an action plan for climate disclosure now, because gathering emissions data and climate risk information for fiscal year 2025 will, as of now, be subject to disclosure in 2026.

Montana Climate Case – Held v. State of Montana

In August 2023, a district court judge in Montana ruled in favor of a group of sixteen young people that argued that the state's failure to consider climate change when approving new fossil fuel projects was unconstitutional. Specifically, the judge found that the right under the Montana constitution to a "clean and healthful environment" includes climate, and that a provision in the Montana's Environmental Policy Act that bars state agencies from considering the effects of climate change in permitting energy projects is unconstitutional. In so doing, the judge rejected the state's arguments that Montana's contributions to global warming was relatively small compared to other sources.

While the state has vowed to appeal the case to the Montana Supreme Court, the verdict could spur additional climate-related litigation. For example, following the ruling, plaintiffs appealing the dismissal of a similar case in Utah pointed to the Montana verdict as precedent in the hopes that the Utah State Supreme Court would allow the case to proceed to trial. The Montana verdict could also have other implications for climate-related litigation, which has been growing steadily around the world in recent years. Such litigation includes claims by states and cities against large energy companies (including the lawsuit filed by California on September 15 against several large oil and gas companies and the American Petroleum Institute) arguing that they are responsible for the harmful consequences of climate change or have been misleading about their purported knowledge of the dangers of climate change, and suits by individuals against states and federal governments arguing that they have failed to protect their citizens from the harms of climate change. We will continue to monitor developments in this space.

California Launches Division of Petroleum Market Oversight

As discussed in this V&E Insight, on June 26, 2023, California's new gas price gouging law went into effect. The law imposes new reporting requirements on energy companies operating in the state. Firms engaging in spot oil transactions must now submit daily price reports to the California Energy Commission ("CEC"), and refineries must submit monthly reports detailing "the gross gasoline refining margin of gasoline sold in that month" as well as pre-report any scheduled or unscheduled maintenance work that could spike gas prices.

The legislation also created the Division of Petroleum Market Oversight (the "Division") within CEC—the first agency of its kind in the United States. The Division, "independent" from the CEC's authority, will act as a "watchdog" over the industry and seek to identify "unethical or illegal behavior." On August 1, 2023, Governor Newsom unveiled his pick to head up the Division: Tai Milder, a prosecutor with antitrust enforcement experience at both the state and federal levels. Because the Division was only recently established, the precise contours of its authority are fuzzy. Nothing in the text of the law suggests that the Division has independent authority to launch enforcement actions. Nevertheless, the Division has sweeping investigatory powers, which may result in increased enforcement.

Energy firms engaged in transactions or conduct that may subject them to California's jurisdiction should be aware of the creation of the new Division of Petroleum Market Oversight and Mr. Milder's appointment. Both events signal a more aggressive enforcement posture towards energy companies doing business in the Golden State. As Governor Newsom stated in his announcement, "California is serious about holding Big Oil accountable. Tai Milder has an impressive record of going after companies that rip off consumers, and that's exactly what he'll be doing—serving as a watchdog over the oil and gas industry and protecting Californians."

Please contact the V&E Team to discuss the potential effects of this legislation and these events on your business and how you should be preparing for these developments.

Artificial Intelligence
and Corporate
Governance

Generative AI has arrived and has extensive and growing capabilities to augment or perhaps replace human work on a wide variety of tasks. Many companies (or their employees) have adopted or considered adopting some form of AI usage. In fact, a recent survey of public companies of varying sizes and industries found that the majority of respondents were focused on or considering AI usage in some area (only 34% of respondents indicated that the question was not applicable), with sales/marketing (42%) being the most common response, followed by product development (35%).

With these powerful tools come new considerations, including those relating to compliance with applicable laws and regulatory requirements, intellectual property ownership, and risk appetite and management. AI usage may entail risks relating to:

- **Intellectual Property.** As further discussed in this V&E Insight, works produced through AI may not be copyrightable or patentable under current law. Furthermore, AI may occasionally reproduce data or images on which it was trained, but to which the AI's owners may not have a license (see this V&E Insight for more discussion on this risk). If companies rely on AI output without verification and validation, they may risk infringing the intellectual property ("IP") of third parties.

- **Errors.** Generative AI is subject to errors. The training data may be out of date or training data may be inaccurate. Additionally, AI may "hallucinate" by providing persuasive, plausible answers based on false information. These hallucinations may be difficult to distinguish from truth. If output from AI is unverified, individuals or companies may come to rely on inaccurate information with serious consequences.

- **Data Privacy and Confidentiality.** When you share a prompt with an AI program that is not locally hosted, you share that information with the company hosting the AI. If an employee includes personal information or confidential information in a prompt to an AI service, expect the company hosting the AI to have access to that information. Prompt data is often used to train models, so there is a risk that the input will become accessible not only to the company hosting the AI, but to other users of that AI service.

- **Cybersecurity.** AI models involve novel cybersecurity issues and vulnerabilities. Systems may be manipulated or compromised in ways that are unanticipated. Cybersecurity risks are systemic—reliance on an AI service requires reliance on the cybersecurity of the company hosting the AI.

- **Bias.** AI is driven by large collections of data, and data can reflect human bias. For example, researchers have found that training language models on news articles can cause them to exhibit gender stereotypes. Thus, there may be a risk that AI bias results from an AI model producing output based on biased data.

- **Reputation.** Occurrence of any of the adverse events described above can hurt a company's reputation.

Given the rapid pace of development in this space, it is likely that many risks are not fully understood at this time. There will likely be other types of risk associated with AI usage that will emerge as this technology and its use continue to expand.

Before adopting AI, companies should ensure that they have proper corporate governance and risk management policies, structures, and processes in place to address the multitude of considerations and risk attached to this technology and that such structures acknowledge the inherent uncertainty of this fast-evolving space. Despite the vast interest in using AI, many companies have not yet considered the risks and opportunities associated with AI at the board level or established policies governing the use of this technology. The aforementioned survey found that, for 44% of respondents, AI-related topics have not been included on the full board or committee meeting agenda. Furthermore, the survey found that only 13% of companies have an AI use framework, AI policy or policies, or AI code of conduct in place, with 36% of companies indicating that they are "currently considering," 33% responding "no," and 17% responding "don't know/not applicable."

AI is already probably a part of many companies' businesses in some form, and companies' employees are likely already using it in one way or another, whether or not that use is formally sanctioned by their employer. Companies should therefore consider whether to take the following steps in connection with formally adopting AI policies and procedures into their business:

- Provide for a discussion between responsible executives and the full board or a board committee on the risks and opportunities associated with AI usage and how AI fits into the company's business strategy.

- Create an overall AI strategy based on these discussions that takes into consideration the risks and opportunities of formally introducing AI into the company's business and setting in place rules and procedures for the use of AI tools by your company's workforce.

- Adopt an employee-facing AI policy (which can be included in the employee handbook) to manage the risks of AI and make sure employees are aware of and regularly trained on the AI policy. The policy should guide employees on when AI may be used, and if so, what information may be shared with it, and what output may be used. The Board or a delegated committee of the board (for instance the committee that oversees cybersecurity matters) should review the content of the policy and approve it for adoption by the company. ***For an example of such a policy, please contact the V&E team.***

- Delegate continued oversight responsibility for the AI policy to the board or a board committee and ensure that the policy is reviewed for updates from time to time, given the developing nature of AI risks, opportunities and best practices.

- Determine whether the company's risk management framework adequately addresses known risks associated with AI, such as IP misappropriation, reputational harm or data privacy breaches, and continue monitoring this space to ensure coverage of emerging risks. Issues that are likely to arise from AI in these existing enterprise risk framework categories should generally be processed through those existing oversight structures and shared with the board or an appropriate committee when warranted.

- Perform due diligence on the IP, cybersecurity, and data privacy practices of AI vendors, potential acquisition targets, JV partners or other significant business partners.

Please contact V&E to discuss AI and its implications on corporate governance.

DEI Initiatives in Light of the Supreme Court's Affirmative Action Ruling

As discussed in this V&E Insight, commentators continue to ask how the Supreme Court's decision striking down race-conscious admissions systems of two universities (the "SFFA Decision")[4] may affect corporate diversity, equity, and inclusion ("DEI") initiatives.

The position of the Equal Employment Opportunity Commission is that the SFFA Decision does not affect on corporate DEI initiatives because "[i]t remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunities in the workplace."[5]

Moreover, large institutional investors such as BlackRock, Vanguard, and State Street Global Advisors ("SSGA"), which hold significant shares of stock of most publicly listed companies,[6] have not revised their policies or publicly made any statements walking back their previous commitments to DEI goals and initiatives, such as those relating to board diversity.[7]

Nonetheless, questions continue surrounding litigation or threatened litigation regarding corporate DEI initiatives. Certain recent attempts by shareholders to challenge DEI initiatives have not met with success. In 2022, a conservative advocacy group filed a derivative action against a public company, its board and officers alleging that the company's DEI initiatives violated federal and state laws and that the company's board and employees breached their fiduciary duties in adopting the initiatives. In August 2023, the Federal District Court for the Eastern District of Washington dismissed the case with prejudice, reasoning that the board was well within its rights under the business judgment rule to adopt DEI initiatives. The court described the action brought by the advocacy group as "nothing more than a political platform." In June 2023, the Delaware Chancery Court came to a similar conclusion regarding a shareholder books and records request based on a claim that the company's directors breached their fiduciary duties in opposing Florida legislation seeking to limit gender identity and sexual orientation instruction in Florida schools. The court denied the request, writing that Delaware's business judgment rule gives directors "significant discretion to guide corporate strategy—including on social and political issues."

We also continue to monitor the Fifth Circuit for a decision regarding a challenge to the Nasdaq Board Diversity Rule (the "Rule") that requires Nasdaq-listed companies (subject to certain exceptions and phase-in periods) to publicly disclose Board diversity data and have, or explain why the company does not have, at least two diverse directors. The SEC approved the Rule in 2021, calling it a "step forward for investors on board diversity." Petitioners to the Fifth Circuit have argued that the Rule violates constitutional equal protection rights of potential board members and compels disclosure of information in violation of the First Amendment. Following the SFFA Decision, the Petitioners cited it as an example of striking down programs with "popular support" that fail to meet legal standards. Respondents have argued the SFFA Decision is irrelevant to a private actor such as Nasdaq. The Fifth Circuit heard argument on August 29, 2022, and has not yet issued an opinion.

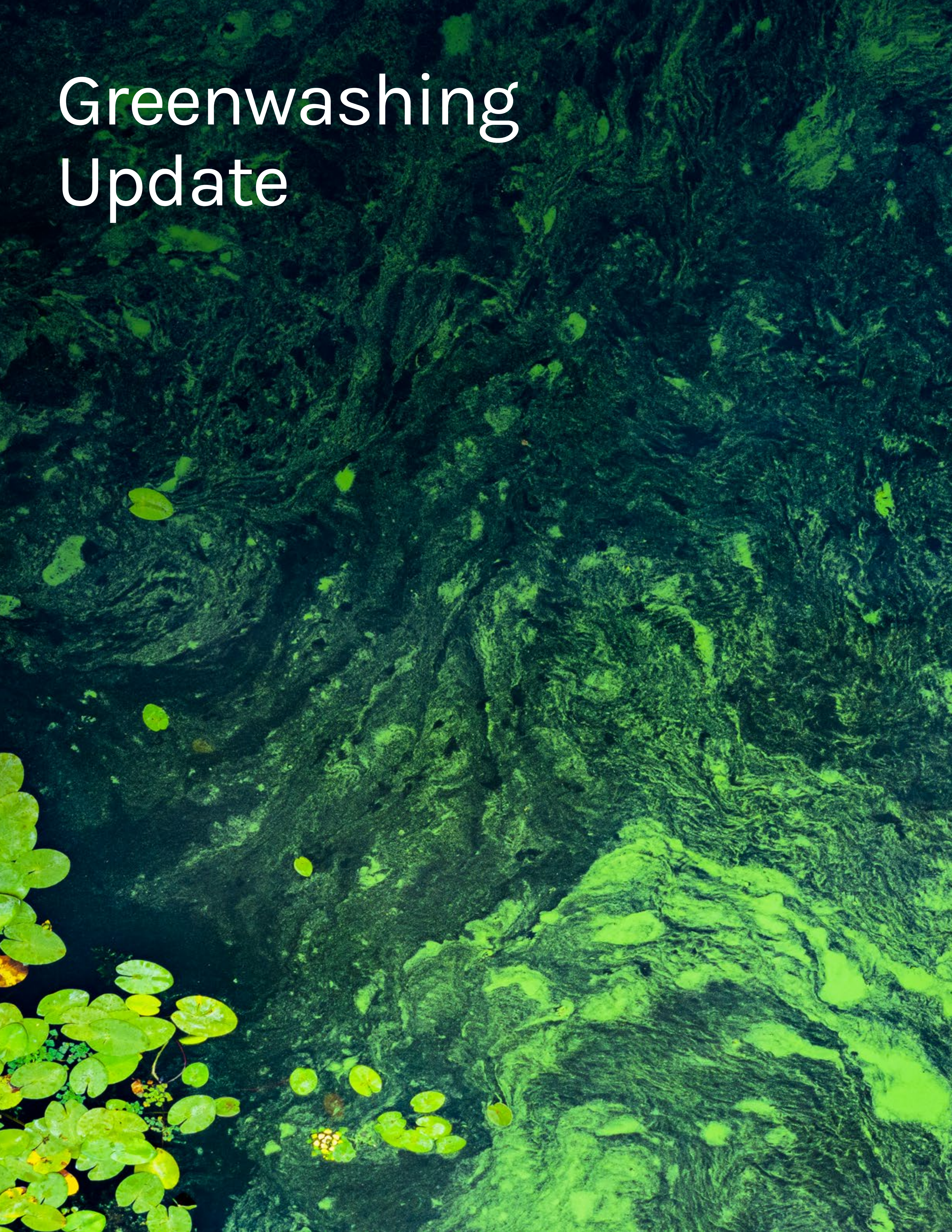
While we continue to monitor pending legislation and litigation, we also continue to advise companies to work with counsel to ensure that all employment, ESG- and DEI-related policies, disclosures, webpages and efforts are in compliance with Title VII and other applicable employment anti-discrimination laws, and to keep up-to-date on developments in the law. These steps will help companies mitigate risks related to potential anti-DEI litigation in the wake of this decision by the U.S. Supreme Court. Companies may also consider public messaging around how DEI programs advance long-term shareholder value and relate to their business strategy: for example, how seeking a broader talent pool allows the company to hire the highest caliber of talent.

Please contact the V&E Team to discuss these developments and their implications.

Prior results do not guarantee a similar outcome.

Vinson&Elkins

Greenwashing Update



Delta Lawsuit

Companies continue to find themselves subject to scrutiny and potential claims of "greenwashing" for false or misleading statements regarding the environmental consequences or sustainability of a particular practice or activity. As we reported, in May 2023, a class action lawsuit was filed against Delta Airlines ("Delta") alleging that the airline's representations regarding the environmental effects of its business are false and misleading.

In August 2023, Delta filed a motion to dismiss that is set for hearing in December 2023. In the motion, Delta argues that the plaintiffs' claims are preempted by the Airline Deregulation Act ("ADA"), which bars a state from enforcing a law or regulation "related to a price, route, or service of an air carrier,"[8] reasoning that the allegations establish a "clear connection to Delta's rates" since plaintiffs allege that Delta made representations regarding carbon neutrality with the intent to encourage air travel on Delta at a certain rate. Even if the various claims survive ADA preemption, Delta contends that plaintiffs' claims under the California False Advertising Law and the Unfair Competition Law, which are equitable in nature, should be dismissed because the plaintiffs have an adequate remedy under California's Consumer Legal Remedies Act. Lastly, Delta argues that the plaintiffs do not have standing to bring the claim because they have not expressed an intent to purchase future Delta flights so there is no risk of future harm to them.

Washington Gas

In July 2022, Client Earth, U.S. PIRG Education Fund, and Environment America Research and Policy Center filed a lawsuit in the D.C. Superior Court against Washington Gas Light Company ("Washington Gas"), alleging that the company had made statements and advertisements that were false and misleading representations in violation of the D.C. Consumer Protection Procedures Act ("CPPA"). The allegedly false and misleading statements and advertisements included bills that Washington Gas sent directly to clients describing natural gas as "clean" and as a "smart choice for the environment," the claim on the company's website that natural gas is the "cleanest fossil fuel on the market today," and other statements on the website and within the company's Climate Business Plan. The plaintiffs argued that a reasonable consumer would not associate natural gas with "clean" energy, which is typically thought to include "truly sustainable energy alternatives such as renewables."

The claims against Washington Gas were dismissed, and such dismissal was largely based on the Public Service Commission's ("PSC") jurisdiction,[9] which the court acknowledged was originally intended to extend to matters concerning services to customers, such as "bills and rates." The language of the CPPA expands the PSC's jurisdiction to include large scale consumer protection complaints. The case was dismissed prior to reaching the merits, so the likelihood of success of these greenwashing claims cannot be fully evaluated. This case, nevertheless, exemplifies the various jurisdictional and standing obstacles that can affect greenwashing claims under consumer protection laws.

Vanguard Investments

In July 2023, the Australian Securities and Investments Commission ("ASIC") lodged penalty proceedings in the Federal Court of Australia against Vanguard Investments Australia ("Vanguard") alleging that Vanguard made statements and engaged in conduct intended to mislead the public as to the ESG exclusionary screens applied to investments in a Vanguard fund. Around August 2018, Vanguard commenced operation of the Vanguard Ethically Conscious Global Aggregate Bond Index Fund ("Fund"), the composition of which is based on Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index ("Index"). As of February 2021, the Fund contained over $1 billion in assets.

From 2018–2021, Vanguard made various representations about the application of ESG criteria used for the Fund. Product disclosure statements referred to facts sheets for the Index, which stated that the Index removes issuers with "evidence of owning fossil fuel reserves" and "[a]ll companies that have an industry tie to fossil fuels (thermal coal, oil and gas) – in particular, reserve ownership, related revenues and power generation." Vanguard made similar statements about the Fund in media releases, interviews, presentations, and on its website. For example, Vanguard's website described that the Fund "excludes companies with significant business activities involving fossil fuels."

ASIC alleges that Vanguard's representations that the Fund's securities were researched and screened according to certain ESG criteria are false because only issuers registered as publicly listed companies were researched and screened, and for public companies with multiple issuing entities, only the company's largest outstanding debt was researched and screened. ASIC alleges that, in February 2021, 42 issuers for the Index and 14 issuers for the Fund did not meet the applicable ESG criteria. This proceeding marks the second greenwashing claim ASIC has brought against Vanguard, and the ASIC continues to commence penalty proceedings against companies for potential claims of greenwashing.[10]

Please contact the V&E Team to discuss these developments and their implications.

Taskforce on Nature-related Financial Disclosures Launches Final Framework

On September 18, 2023, after releasing several beta frameworks, the Taskforce for Nature-related Financial Disclosures ("TNFD") released its final recommendations. In its recommendations, the TNFD notes that there is growing evidence that the destruction of nature and biodiversity presents increasingly frequent and severe risks for businesses, capital providers, financial systems and economies (*e.g.*, water stress, availability of nature-based commodities, or lack of pollination). Thus, at a time when nature is deteriorating globally and biodiversity is declining faster than any time in human history, the TNFD recommendations aim to provide reporting companies and financial institutions with a risk management and disclosure framework to identify, assess, manage and, where appropriate, disclose nature-related issues.

The final recommendations, which have been designed to build upon and be consistent with the approach of the TCFD, the Global Reporting Initiative ("GRI") and the IFRS International Sustainability Standards Board ("ISSB"), include 14 recommended disclosures covering nature-related dependencies, impacts, risks, and opportunities. The TNFD aims to be accommodating to different approaches to materiality, providing that the recommendations can be interpreted through both the financial and impact materiality lenses. Like the TCFD, the TNFD recommendations include four disclosure pillars: Governance, Strategy, Risk & Impact Management, and Metrics & Targets. There are, however, some distinct departures from the TCFD framework that speak directly to nature and biodiversity considerations. For example, in addition to describing the board's oversight of and management's role in assessing and managing nature-related dependencies, impacts, risks, and opportunities, the Governance pillar includes a recommendation to describe the organization's approach to human and indigenous rights. Further, in addition to recommendations that can be analogized to those of the TCFD under the Strategy pillar, the TNFD framework includes a recommendation to disclose the locations of assets and activities in the organization's direct operations and, where possible, *upstream and downstream value chains* that meet the criteria for "priority locations." The TNFD defines "priority locations" as those locations where (1) an organization has identified material nature-related dependencies, impacts, risks and opportunities in its value chain or (2) locations where assets or activities in an organization's value chain interface with nature in certain areas (*i.e.*, those that are important for biodiversity, have high ecosystem integrity, where there is a rapid decline in ecosystem activity, where there is high physical water risk, or that are of importance for ecosystem service provision including benefits to Indigenous Peoples, local communities, and stakeholders).

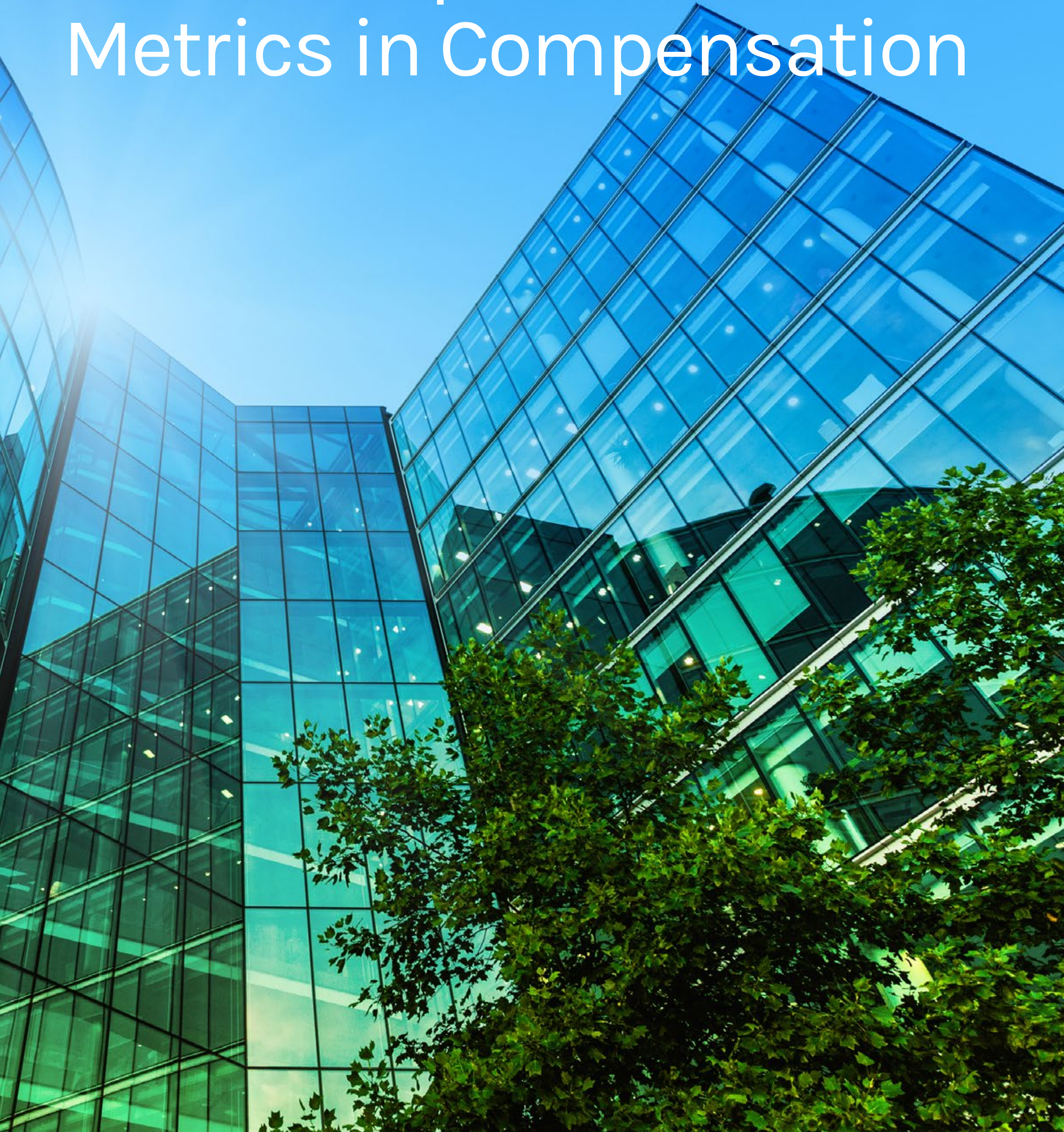
It is likely that the TNFD recommendations will grow more prominent in financial reporting in the years to come. As previously covered by our Summer Update, biodiversity is becoming an important issue for corporate stakeholders worldwide, and companies and financial institutions may be increasingly called upon to make biodiversity-related disclosures. Almost 200 governments have committed to the Kunming-Montreal Global Biodiversity Framework to halt and reverse nature loss by 2030. Further, CDP, which runs a global environmental disclosure platform for corporations, has announced its intention to align with the recommendations. The Chair of the ISSB also previously signaled that the ISSB will draw on the TNFD's approach in the development of its own sustainability reporting framework. And, as covered in our Spring Update, BlackRock's 2023 proxy voting guidelines added an expectation for companies to disclose their reliance on and use of natural capital, specifically calling out the then-emerging TNFD recommendations (though, as previously discussed, many of the world's largest asset managers voted against shareholder proposals intended to protect biodiversity during the 2023 proxy season). The release of the TNFD recommendations may attract more attention to this issue and spur further calls for reporting biodiversity-related financial information.

Organizations should consider whether biodiversity dependencies, impacts, risks and opportunities are relevant for their businesses, and if so, consider assessing any existing disclosures against the TNFD framework and determining relevant gaps in reporting.

Please contact the V&E Team to discuss these developments and their implications.

Prior results do not guarantee a similar outcome.

Growing Debate Over Certain Aspects of ESG Metrics in Compensation



As discussed in our previous Securities and ESG Update, companies continue to tie ESG metrics to executive compensation. A recent study by Meridian Compensation Partners found that 73% of S&P 500 companies included at least one ESG metric in short-term incentive or long-term incentive plans in 2023, with social metrics (*e.g.*, diversity and inclusion; employee engagement; recruitment, retention and turnover) by far constituting the most common type of ESG metric used.

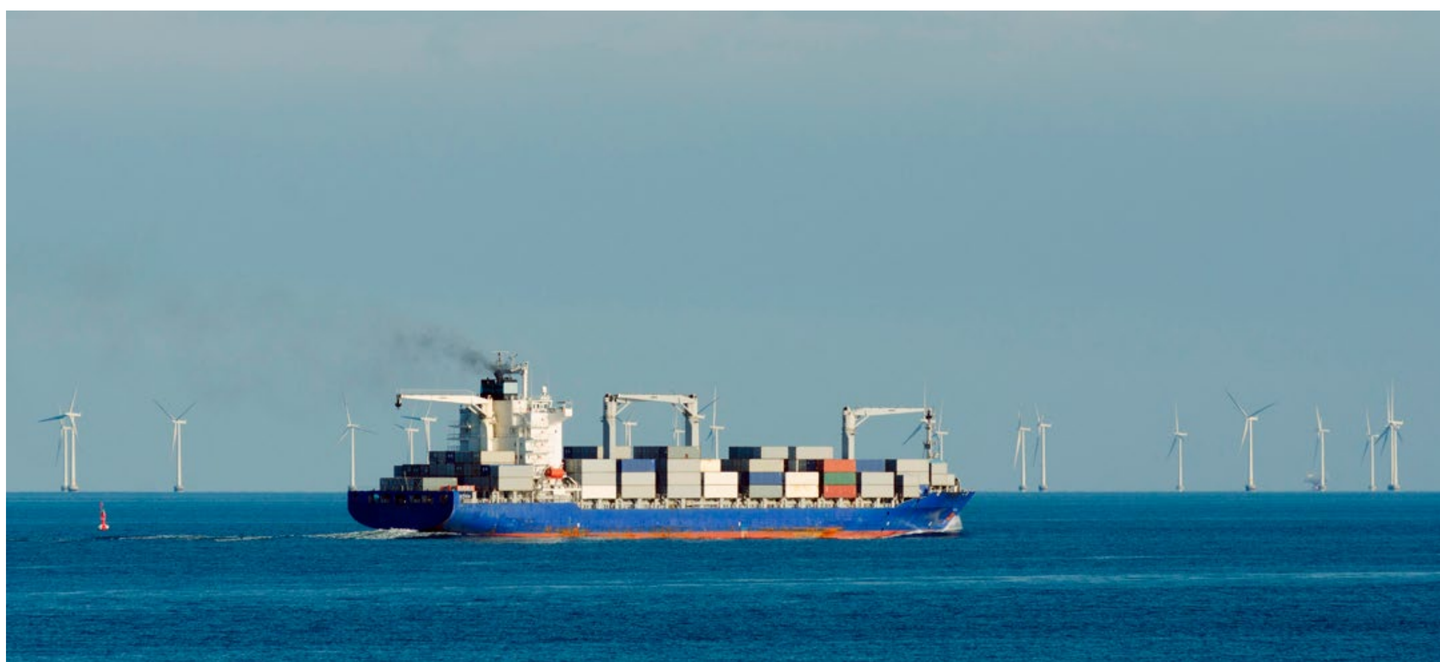
Alongside this growing trend, criticism regarding the types of ESG metrics used and quality of disclosures provided by companies relating to executive compensation continue to increase, with concerns from some investors that ESG metrics could be used to game an increase in executive pay.

The head of stewardship at SSGA, Ben Colton, recently expressed skepticism at the use of ESG metrics in compensation, stating that they are "very subjective, fluffy and easily gamed." Similarly, the head of U.S. stewardship at Legal & General Investment Management ("LGIM") took aim at employee engagement (a social metric, typically evaluated on a subjective basis) being used as an ESG metric, calling it a "poor submetric," saying that LGIM has "never seen a company ever score under median," and expressing concern that it "can be gamed." Conversely, LGIM stated that net-zero carbon emissions targets (an environmental metric, typically evaluated on an objective basis) should be linked to long-term executive pay by 2025.

The RBC Global Asset Management 2022 Responsible Investment Survey indicates that 67% of global investors used ESG in their investment approach in 2022, but only 32% of global investors were satisfied with the quality of ESG-related disclosure (41% were neutral and 27% were dissatisfied). In January 2022, Caroline A. Crenshaw, Commissioner of the U.S. Securities and Exchange Commission, reiterated a prior statement that, "without reliable and consistent disclosures" about ESG targets, there is a question as to whether "investors and Boards have the tools to accurately assess if such targets have been met and if that alignment between executive pay and ESG targets has been achieved." In a January 2023 article, two Harvard professors found that a lack of sufficient disclosures (including a failure to disclose relevant targets and actual outcomes) relating to ESG metrics utilized by S&P 100 companies made it "difficult, if not impossible, for outside observers to assess whether these metrics provide valuable incentives or merely line CEO's pockets with performance-insensitive pay."

In light of these developments, companies should consider whether the types of ESG metrics they use, such as a social metric (particularly one that is evaluated on a subjective basis), could draw scrutiny from certain investors. Further, companies should evaluate whether they are providing robust disclosures regarding ESG metrics used in executive compensation that would allow investors to review the level of achievement and assess the meaningfulness of the link between ESG and compensation.

Please contact your V&E Team to discuss these matters and how they may be relevant for your company.



Prior results do not guarantee a similar outcome.

The Increasing Role of ESG in M&A

As further discussed in this V&E Insight, various recent surveys underscore a growing trend in M&A deals: ESG considerations provide value creation and differentiation for potential target companies, and acquirers should incorporate these considerations into their M&A due diligence. According to KPMG's ESG Due Diligence Survey (2023), nearly 62% of U.S. investors say they attach a premium to targets with an ESG profile that complements their ESG goals.

Acquiring leading ESG performers can be a primary deal driver and accretive to the pro forma combined company, enabling acquirers to accelerate innovation, enter new markets, or diversify business lines. For example, in July 2023, ExxonMobil announced a definitive agreement to acquire Denbury Inc. for $4.9 billion, touting Denbury's experience in carbon capture, utilization, and storage and emphasizing that the acquisition would "further accelerate ExxonMobil's Low Carbon Solutions business and create an even more compelling customer decarbonization proposition."

By contrast, problematic ESG traits can derail deals. The KPMG survey found that 53% of U.S. investors reported that adverse material ESG findings during due diligence contributed to their abandonment of a potential deal. Notably, 74% of respondents reported that their M&A evaluation criteria include ESG considerations, but only 51% felt they possessed a proper understanding of ESG risks and opportunities in evaluating an acquisition target.

From investors to employees, numerous key stakeholders expect ESG performance. Buying an "ESG halo" through M&A can often be faster, cheaper, and more credible than building it organically. Pursuing ESG enhancements through acquisition can accelerate capabilities, but companies should have a comprehensive understanding of how ESG issues can affect each step of an M&A transaction:

- Identifying acquisition targets
- Conducting due diligence and valuation
- Financing the deal and obtaining representation and warranty ("R&W") insurance
- Negotiating and closing the transaction
- Integrating the acquisition (or, for private equity acquisitions, establishing a strong standalone portfolio company), including preparing for (and pricing in) any necessary remediation steps post-closing.

Properly executed, M&A can help acquirers purchase assets that enhance their ESG profiles. However, a transaction process that fails to properly identify, assess and manage ESG risks can dilute the value of the acquired business and can cause a significant drag on the acquirer itself. Take, for example, Bayer AG's 2018 acquisition of Monsanto, the maker of Roundup (an herbicide). Within weeks of closing the $63 billion acquisition, Bayer lost a lawsuit alleging that Roundup causes cancer and was ordered to pay damages totaling more than $190 million.

Bayer's legal woes linked to the Monsanto acquisition have only continued: As of December 2022, it had paid approximately $11 billion in settlement agreements linked to Roundup lawsuits, and legal challenges for the company remain. Bayer is also facing a $2.5 billion class action lawsuit by its shareholders for allegedly making false and misleading statements to investors about the extent of its pre-acquisition due diligence. Regardless of the merits of the suit, Bayer seems to have misread the level of risk, financially and reputationally, that the acquisition posed.

Failing to understand the relevant ESG factors in an M&A transaction can lead to adverse results, and properly identifying and assessing these factors is critical for accurately valuing a target and integrating it post-closing (or, for a private equity acquisition, establishing a strong standalone portfolio company).

For more information on how to structure ESG considerations into M&A evaluations, mitigate related risks, and capture ESG opportunities associated with completed transactions, please contact the V&E Team.

Carbon Reporting – E-commerce Giant Flexing its Muscle

Much has been said about large asset managers' power to demand action and adoption by corporate issuers of ESG reporting frameworks, such as the Taskforce on Climate Related Financial Disclosures ("TCFD"). There has also been much ado about how regulators, including the SEC, will be demanding that corporate issuers disclose material climate-related topics to investors. What receives less public attention is the ability of large private economic actors to drive ESG enhancement and disclosure through de facto mandatory disclosures—and how those demands can affect both public and private companies alike.

Such is the case with leading e-commerce retailer, Amazon. Amazon, which boasts annual net sales in its U.S. retail division of more than $230 billion, has made numerous public declarations regarding its ESG goals, including a widely discussed climate pledge to reach net-zero carbon emissions by 2040. Its climate commitment includes a $2 billion investment in products, services, and technologies that Amazon says will enable it to meet its climate goals. In its recently published sustainability report, Amazon also previewed that it will be updating its Supply Chain Standards to require, rather than simply encourage, "regular reporting and emission goal setting."[11] While requesting information around supplier GHG emissions is not a novel concept (see, *e.g.*, Walmart's Project Gigaton), the breadth and prospective effect of Amazon's impending change demonstrates how businesses, alongside other high visibility stakeholders (*e.g.*, shareholders and regulators), are driving climate action. While we do not yet know the full scope of the change to Amazon's Supplier Standards (*e.g.*, whether they will affect all suppliers or only those selling above a particular dollar threshold or located in specified geographies; and how they will be enforced), this change from voluntary to—for all intents and purposes—mandatory disclosures is notable.

As the second largest U.S. retailer boasting more than 200 million Amazon Prime subscribers worldwide, Amazon's market share and importance to the consumer economy allow it to move corporate behavior quickly. Further, the logistical might, command of technology, and other attributes of Amazon's sprawling business allow the company to make significant changes in the economy even outside of the retail channel—Amazon's choices, for example, with regard to freight, logistics, fuel, shipping, web services, and even entertainment can have ripple effects throughout the wider economy. Thus, Amazon's Supply Chain Standards could lead to a sea change in corporate behavior for every type of consumer product supplier, including fast-moving consumer packaged goods companies ("FMCGs") to electronics and home hardware, but also to trucking companies, freight shippers, fuel and EV brands. Depending on the scope of applicability, it could cause many companies—both public and private—to be obligated to track and report their carbon emissions and set climate targets aligned with Amazon's expectations in order to maintain a working relationship with the retail giant.

This is not just a theoretical consequence for many companies. For manufacturers of consumer goods, Amazon is often a top—if not the top—retailer of their products. Additionally, as several commentators have noted,[12] Amazon has the ability to use its algorithms to elevate or deprioritize products in its searches, and being a top hit for any given product category can make or break a product. Thus, to further its Climate Pledge, Amazon could, in theory, algorithmically prioritize products that help it achieve its carbon reduction goals (*e.g.*, by prioritizing concentrated liquid products for more efficient shipping and less resulting greenhouse gas emissions or adding "sustainable" badges or filters to aid shoppers looking to buy more climate-friendly products) and de-prioritize others. While Amazon has been silent on whether it would leverage this power to nudge supplier behavior for climate-specific reasons, it's been alleged by the Federal Trade Commission ("FTC") that Amazon has the power to leverage its algorithms in furtherance of its business objectives—and has a prior history of doing so. For instance, in an antitrust lawsuit filed against Amazon on September 26, 2023, the FTC alleged that Amazon has intentionally "warped" its own algorithms to promote favored products over those that may be of higher quality. Further, it has been previously reported, and the FTC has argued, that many suppliers feel that they must play by Amazon's rules (*e.g.*, purchase advertising in addition to paying Amazon's various fees) to maintain contracts, reach shoppers and stay afloat in its retail ecosystem. According to the FTC's complaint against Amazon, "[s]ellers note that because they depend on Amazon, they effectively have no choice but to submit to Amazon's growing demands." It is not a stretch to imagine that Amazon may extend this alleged algorithmic power to accomplish other key objectives, such as meeting its sustainability goals, especially when such goals might help its bottom line.

Prior results do not guarantee a similar outcome.

Amazon also signaled that it would seek to work with partners that help further its environmental goals, for instance in its 2022 Sustainability Report, stating, "We know that to further drive down emissions, we must ensure those in our supply chain make the operational changes necessary to decarbonize their businesses. . . . We will use our size and scale to benefit businesses that are committed to decarbonizing by providing products and tools to both track emissions and help decrease them. And we will continue to look for suppliers that help us achieve our decarbonization vision as we select partners for business opportunities." Further, being favored by Amazon for sustainability-related reasons may give suppliers a leg up, from branded partnerships to large procurement opportunities (such as Amazon's commitment to roll out 100,000 Rivian electric delivery vehicles by 2030). Thus, helping Amazon achieve its sustainability commitments may be necessary for certain companies to survive (and in some cases, allow companies to thrive) in its ecosystem.

Amazon's Supply Chain Standards update announcement comes at a time when climate disclosure requirements are expanding worldwide. For example, the SEC is in the process of finalizing a rule to enhance and standardize public company climate-related disclosures for investors, which may include requirements for disclosure of Scope 1, Scope 2, and in certain cases, Scope 3, GHG emissions. California has also recently passed new laws, as described in Climate Change Legislative and Litigation Updates — California Climate Reporting Laws above, requiring public and private company GHG emissions reporting in compliance with the GHG Protocol (including Scope 3 GHG emissions) and climate-related financial risk reporting in line with the TCFD by 2026 (with certain phase in-periods). Further, in June 2023, ISSB (which since took over responsibility for monitoring the TCFD) published climate-related disclosure requirements, including requirements for disclosure of Scope 1, 2, and 3 GHG emissions, for which voluntary reporting is expected to begin on or after January 1, 2024. The European Union has also adopted the first set of EU-wide European Sustainability Reporting Standards ("ESRS") supplementing the Corporate Sustainability Reporting Directive ("CSRD"), which include a standard on climate change (ESRS E1), for which reporting will be required as early as 2025 for some companies. These disclosure developments all draw inspiration from the recommendations of the TCFD, which emphasizes metrics and targets for the disclosure of Scope 1, Scope 2, and, where applicable, Scope 3 GHG emissions. The TCFD also calls for the disclosure of established climate-related targets and performance. Amazon's impending enhancements to its Supply Chain Standards line up with many of the tenets of these new disclosure regimes. As Amazon's suppliers adhere to these new standards, they may also find themselves better positioned to meet increasing voluntary and regulatory GHG emissions disclosure demands.

To successfully navigate this fast-changing landscape, businesses should consider preparing for the Supply Chain Standards now. It is likely that companies will continue to feel pressure to meet the climate-related demands of their stakeholders—from institutional investors requesting decarbonization goals and climate reporting (despite some recent rhetorical pullback) to U.S. and international regulators continuing to push new disclosure obligations within their jurisdictions. Companies should also stay on the lookout for "soft power" demands of major market participants, like Amazon, that can effectively wield market strength to compel companies throughout their value chain to enhance their climate reporting and goals.

Please contact V&E if you would like to discuss the implications of these developments and how to prepare for these ever-increasing disclosure demands.

The Expansion of Pass-Through Voting Marches On

Large institutional investors are continuing to expand their "voting choice" programs:

- **Vanguard:** In February 2023, Vanguard launched a pilot for investors in certain equity index funds to participate in a voting choice program. Under the program, investors can choose from different proxy voting policy options and thereby direct how Vanguard votes on certain ballot items in proportion to investors' ownership of the fund. The policy options under consideration for the pilot include (1) casting votes consistent with a company board's recommendations; (2) relying on guidance from an independent third-party provider; (3) asking Vanguard to continue voting on the investor's behalf; (4) using the Funds' proxy voting policy; or (5) giving investors the choice not to vote.

- **SSGA:** In May 2023, SSGA announced an expansion of its voting choice program to include over 80% of eligible index equity assets by the end of 2023, including all U.S. institutional index equity funds and certain eligible U.S. index equity SPDR and ETFs and U.S. mutual funds. The SSGA program allows eligible investors to choose from various voting policies made available by ISS to direct the voting of shares held in funds in which they are invested. Investors in eligible funds can also continue to delegate their voting to the SSGA Stewardship team. These policies include the ISS Sustainability Policy, the ISS Catholic Faith-Based Policy, and the ISS Global Board Aligned Policy (for U.S. funds only).

- **BlackRock:** In July 2023, BlackRock announced that it would expand its voting choice program to its largest ETF (iShares Core S&P 500, which has more than $300 billion in assets under management), thereby covering more than half of its global index equity assets under management. The program allows eligible investors to choose from multiple policy options (including policies offered by ISS and Glass Lewis) which are then used to split ballots based on pro-rata fund ownership. BlackRock's Investment Stewardship team will continue to vote the pro-rata shares for investors that choose not to or are not eligible to participate in the program.

The extent to which these programs will affect proxy voting and companies' behavior is unclear, though there have been several hypotheses of what this movement towards proxy choice could mean. Some predict that these programs allow large institutional investors to wield less power to influence companies, since they may not control some of the vote for the shares that they hold. In response, companies may choose to engage with their large institutional holders as well as individual investors (*e.g.*, by launching mass social-media campaigns), incurring additional costs and burdens. More dispersed voting power could also cause companies to become less motivated to account for certain shareholder considerations because less concentrated voting power may dampen the ability of any shareholders to demand accountability. Voting choice could also mean that proxy advisory firms amass even greater influence over the proxy voting process, since certain policy options provided by institutional investors are aligned with proxy advisory firm guidelines.

The extent to which any of these predictions becomes a reality is dependent on multiple factors, including the number of investors actually choosing to opt into the program and the voting options which are offered. It is unlikely that voting choice initiatives will have any meaningful effects on proxy voting outcomes in the immediate term, while investors—especially retail investors—evaluate the costs and benefits of performing their own research or directing their own votes, but these developments could lead to changes in voting outcomes and corporate engagement strategies over time. We will continue to monitor the trends in this space.

Please contact V&E to discuss pass-through voting programs and their implications.

Corporate
Transparency Act

The Who, What, and When of FinCEN's New Beneficial Ownership Reporting Requirements

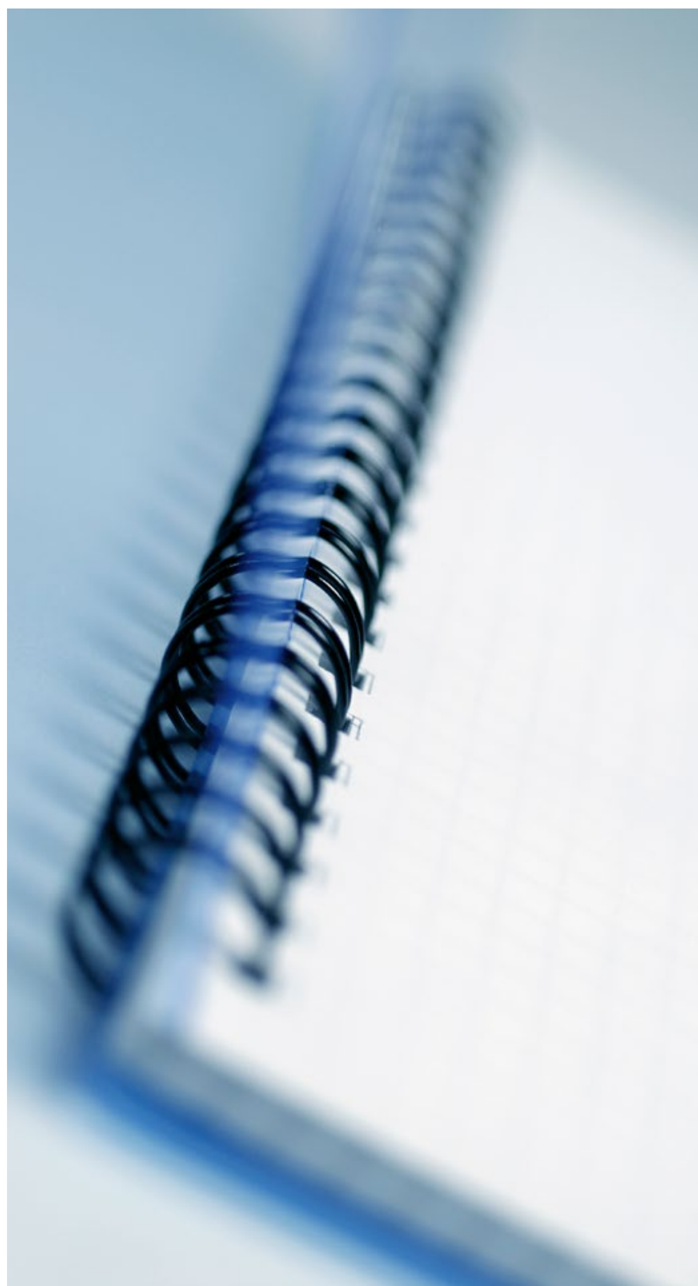
New corporate ownership reporting requirements are on the horizon in the United States. In Fall 2022, the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") issued its final rule on "Beneficial Ownership Information Reporting Requirements" under the Corporate Transparency Act ("CTA"). In a departure from the typical ability to remain anonymous through corporate structures formed under various state laws, the U.S. Congress passed the CTA to prevent "malign actors" from concealing their ownership of corporate entities within the United States. While the beneficial owner information reported to FinCEN pursuant to the CTA will not be publicly available and must be kept confidential in a secure, private database, federal, state, and some foreign law enforcement and other agencies engaged in certain activities may access the information upon request to the Department of Treasury. The new requirements will apply to certain entities, namely smaller and otherwise unregulated companies, as further discussed below.

Although this rule does not take effect until January 1, 2024, companies should begin gearing up to ensure they have identified and assessed the information required for full compliance with this new regulatory framework. While many of the readers of this newsletter will be focused on public companies and their subsidiaries (which are generally exempt from the CTA), the complexity of corporate structures could require the reporting of ownership information for some subsidiaries or affiliates of public companies even if the parent corporate entity is exempt.

The V&E CTA Taskforce is prepared to assist with questions about the applicability and implications of the CTA.

Overview of the Rule

A company that meets the definition of a "reporting company" under the CTA must comply with the ownership reporting requirements of the CTA. The purpose of the CTA is to ensure that the government has access to the beneficial ownership information ("BOI") of corporate entities of the type believed to be more likely to be involved in money laundering, financing of terrorism, and other crimes.[13] Its enactment follows a trend of similar registries being adopted by countries around the world, including in the European Union. This article summarizes who must report this information, what must be reported, and when it must be reported.



Prior results do not guarantee a similar outcome.

Who Must Report

Companies that are formed in the United States and foreign companies registered to do business in the United States must file reports under the CTA. Specifically, companies are required to file reports if they are created or registered by filing a document with the secretary of state or similar office of any state in the U.S.[14]

While that definition is very broad, the regulations provide twenty-three exemptions that are designed to reduce the reporting burden for larger companies that are believed to be unlikely to be used to conceal criminal activity.[15] The CTA exempts from the BOI reporting requirements certain entities that are already subject to government oversight through various regulatory and reporting structures. These exemptions, which FinCEN says are to be narrowly interpreted, include, among others: [16]

- Public companies;
- Large operating companies; *i.e.*, companies employing more than 20 full-time employees in the United States where those companies: (a) have an operating presence at a physical office within the United States, and (b) filed a federal income tax or return in the United States for the previous year demonstrating more than $5,000,000 in gross receipts or sales (including for a consolidated return for an affiliated group of corporations);
- Brokers or dealers;
- Investment companies and registered investment advisers (*e.g.*, mutual funds and certain private equity firms);
- Banks, bank holding companies, and credit unions;
- Insurance companies, public accounting firms, and public utilities; and
- Charitable 501(c) organizations.

Additionally, any corporation, limited liability company, or "other similar entity" controlled or wholly owned, directly or indirectly, by one or more of the entities described above (*e.g.*, a subsidiary) is exempt.[17] FinCEN specifically noted that the phrase "wholly owned" is intended to prevent entities that are partially owned by exempt entities (but controlled by other persons) from escaping reporting obligations, and that the term "controlled" is intended to be interpreted broadly.[18]

Although exempt companies are not required to file a form or document claiming their exemption, for a variety of reasons, companies should document their analyses contemporaneously in writing. For example, the regulations require that an exempt entity file a report within 30 days of any change that results in the applicable company no longer being exempt. Thus, ongoing tracking and analysis will be important.

Exempt companies should also consider any indirect reporting obligations they may have as a non-controlling member of a jointly owned business venture that does not fall under any of the enumerated exemptions. While the CTA specifically contemplates reporting requirements and liability for non-controlling members of joint business ventures,[19] it does not provide any legal mechanism for a non-controlling member to ensure that the joint business venture is meeting its reporting obligations.[20] Notwithstanding this silence, non-controlling members without legal mechanisms to require compliance should use reasonable, good faith efforts to advocate compliance with the BOI reporting requirements—*e.g.*, ensuring that the joint business venture is aware of the BOI reporting obligations, requesting compliance with those obligations, providing any available information necessary for reporting compliance, and advocating compliance as board members.

Prior results do not guarantee a similar outcome.

Vinson&Elkins

What Must Be Reported

The CTA requires reporting information on three categories of persons or entities: (1) the reporting company itself (see detail discussed above); (2) each "beneficial owner" of the reporting company; and (3) each "company applicant" of the reporting company. The definition of "company applicant" is a straightforward determination of the individual actually making the filing and the person who is primarily responsible for the filing.[21]

Determining who constitutes a "beneficial owner"—a term made explicitly broad by the CTA—will generally be the more challenging analysis for a reporting company. Once that determination has been made, the type of information required for each category constitutes fairly standard identification information.

Under the CTA, a "beneficial owner" is any individual who, directly or indirectly, either (1) exercises "substantial control" over the reporting company, or (2) owns or controls at least 25% of the ownership interests of the reporting company.[22]

- **Substantial Control** – The CTA identifies several indicators of "substantial control" over a reporting company, including senior officer status, appointment authority, and influence over decision-making. It also provides a "catch-all" provision for "any other form of substantial control."[23]

- **Ownership Interest** – Similar to "substantial control," the CTA identifies more common examples of ownership interest, *e.g.*, owning equity or stock, and then sets out a catch-all provision for "[a]ny other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership."[24] The CTA also recognizes such ownership might be indirect, such as through intermediary entities, and lays out the method for calculating ownership percentage.

The hard part is over once a reporting company has determined the beneficial owners and company applicants for whom information must be provided. CTA reporting generally requires basic identifying information that should not be difficult to prepare.[25] The CTA also provides a process by which reporting companies can report a unique identifier[26] for individual beneficial owners and company applicants in lieu of the relevant information itself, which provides the benefit of not having to repeatedly provide reporting information for individuals who are affiliated with numerous entities. The CTA also provides a safe harbor from penalties for reports containing inaccurate information if the information is corrected within 90 days after the report with the inaccurate information is filed. The safe harbor runs from the date of the report, and not from the date a reporting company discovers an inaccuracy. Note that reporting entities in existence before January 1, 2024, will not be required to disclose to FinCEN the identity of the company applicant.

When Must It Be Reported

The CTA provides timelines for both initial reports of BOI and the issuance of updated or corrected reports. Reporting companies ***created before January 1, 2024, have until January 1, 2025***, to submit an initial report.[27] Reporting companies ***created after January 1, 2024, have 30 days from the date of creation or registration to submit a report.***[28] As noted in the previous section, any entity that no longer qualifies for exemption status has 30 days from that loss of status to file an initial report.[29]

For updated and corrected reports, the CTA prescribes a 30-day deadline from the date of any change in required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, or date the reporting company becomes aware or has reason to know of an inaccuracy in any submitted report, respectively. Although an already-exempt entity is not required to submit an initial report of its exemption, the CTA does require a newly exempted entity that has already submitted an initial report to submit a timely updated report indicating that it is now exempt from reporting obligations.

How Will FinCEN Receive and Store BOI? Who will have Access to the Reported Information?

FinCEN is in the process of developing a secure database called the “Beneficial Ownership Secure System” (BOSS) to receive, store, and maintain BOI reports electronically. Beneficial owner information that will be reported to FinCEN will not be publicly available and must be kept confidential in a secure, private database.

Federal, state, and some foreign law enforcement and other agencies engaged in criminal investigations, national security and intelligence may access, upon request to the Department of Treasury, the BOI information held by FinCEN. The Department of Treasury is required to develop protocols and procedures for federal agencies and state, local and tribal law enforcement agencies to request and receive beneficial ownership information from FinCEN.

Action Takeaways

FinCEN has recently released its compliance guide, and clients should be preparing for compliance with the reporting obligations beginning January 1, 2024. In connection with this, we recommend:

- Developing and implementing procedures for complying with the CTA reporting requirements, including, most importantly, being prepared to comply with new entity creations or registrations beginning January 1, 2024, to be filed within 30 days after creation or formation;
- Reviewing existing subsidiaries and other affiliated entities that may be subject to the reporting requirements in order to prepare a plan for filing initial beneficial ownership reports for all applicable reporting companies by before January 1, 2025.

The V&E CTA Taskforce contact attorneys are happy to assist in preparing for implementation of the CTA, including determining the status of companies under the CTA and any reporting obligations beneficial owners may have for existing entities or the requirements for newly formed entities following January 2024.

Endnotes

[1] For instance, on September 15, 2023, the state filed a complaint in the San Francisco County Superior Court alleging five of the largest oil and gas companies (ExxonMobil, Shell, Chevron, ConocoPhillips and BP) had actively engaged in a "decades-long campaign of deception" regarding climate change and the risks posed by fossil fuels. As a result of this purported deception, the California complaint asserts that the state has spent tens of billions of dollars to address the damage caused by and to adapt to climate change and would likely have to continue to spend multiple billions of dollars in the future.

[2] There are likely to be some exemptions within the various reporting frameworks, if the reporting entity already complies with a similarly robust framework elsewhere, but the specific details of the exemptions remain to be seen.

[3] For example, in August 2022, the California Air Resources Board approved regulation to phase out new internal combustion cars, requiring that by 2035, 100% of new cars and light trucks sold in the state will be zero-emission vehicles. *See California moves to accelerate to 100% of new zero-emission vehicle sales by 2035*, CAL. AIR RES. BD. (Aug. 25, 2022), https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035.

[4] *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 U.S. 2141 (2023).

[5] *See* Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Affirmative Action Programs, EEOC (June 29, 2023), available at https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action/.

[6] BlackRock, Vanguard, and SSGA collectively cast around 25% of the votes at S&P 500 companies and could control as much as 40% of such votes within the next two decades. Bebchuk & Hirst, T*he Specter of the Giant Three*, BOSTON UNIV. L. REV. (March 20, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385501.

[7] BlackRock, Vanguard, and SSGA each provide certain expectations regarding board diversity disclosure and membership in their 2023 proxy voting guidelines, with consequences for companies that do not meet their expectations (*e.g.*, SSGA may vote against the nominating chair of all companies that do not have at least one woman director, Russell 3000 companies that do not have at least 30% women directors, and S&P 500 companies that do not have at least one director from an underrepresented racial/ethnic community).

[8] 49 U.S.C. § 41713(b)(1).

[9] In August 2023, the court granted Washington Gas' Motion to Dismiss finding that the court lacked subject matter jurisdiction over plaintiff's CPPA claims. The court, applying the plain language of the CPPA, found that Washington Gas' status as a gas company explicitly exempted it from the enforcement procedures under the CPPA. The CPPA provides a specific exemption for entities regulated by the Public Service Commission ("PSC"), including gas companies such as Washington Gas. The court rejected plaintiff's argument that the D.C. Public Utilities Code, which specifically preserves the ability of consumers to bring claims against "natural gas suppliers" for violation of local and federal consumer protection laws, authorizes a CPPA claim against Washington Gas. The court cited its "duty to interpret statutory provisions in a manner that does not render other provisions obsolete" in finding that Washington Gas, as a "gas company," is not a "natural gas supplier" under the Public Utilities Code. Therefore, reading the two statutes together, the court found that the CPPA explicitly exempts Washington Gas from its subject matter jurisdiction.

[10] Media Release, ASIC, ASIC commences greenwashing case against Vanguard Investments Australia (July 25, 2023), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-196mr-asic-commences-greenwashing-case-against-vanguard-investments-australia#!page=1&search=greenwashing. See Media Release, ASIC, Update on ASIC's recent greenwashing actions (May 10, 2023), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-121mr-update-on-asic-s-recent-greenwashing-actions#!page=1&search=greenwashing; Media Release, ASIC, ASIC commences greenwashing case against Active Super (Aug. 11, 2023), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-215mr-asic-commences-greenwashing-case-against-active-super/.

[11] For any company, including Amazon, obtaining details on supplier Scope 1 and Scope 2 GHG emissions can help monitor and report the company's own Scope 3 GHG emissions. Given Amazon's declared ambition to achieve Net Zero carbon emissions by 2040, which includes certain Scope 3 GHG emissions, Amazon will need to understand its Scope 3 GHG emissions. Thus, an important step for Amazon in reaching its Net Zero goal will include collecting GHG emissions data from its supply chain, which is comprised of both public companies (which are accustomed to some level of GHG reporting) and private companies (which generally have limited legal or investor pressure to report on GHG emissions).

[12] For example, the Online Merchants Guild reported to a US House of Representatives subcommittee in 2020 that, "[i]t is now common belief in the Amazon seller community that the only way to sell on Amazon is through Amazon's Pay-Per-Click ('PPC') offering." See Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of the House of Representatives Investigation of Competition in Digital Markets (originally released October 2020, published July 2022), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

[13] H.R. 6aa395, 116th Cong. (2020) § 6402 (stating the reasoning and purpose behind the CTA); 87 Fed. Reg. 59,498 (Sept. 30, 2022) (same).

[14] *Id.* at 59,536–39.

[15] 31 U.S.C. § 5336(a)(11)(B)(i)–(xxiii).

[16] The regulations provide that these twenty-three exemptions are "intended to be narrowly interpreted," and companies should therefore be wary of classifying themselves under an exemption without adequate review. 87 Fed. Reg. at 59,540. [Consider: Listing all 23 here or in an attachment.]

[17] Note, however, that subsidiaries within certain private equity structures and pooled investment vehicles are not exempted by the CTA and would be deemed Reporting Companies unless subject to another exemption (*e.g.*, the large operating company exemption). Please contact the V&E CTA Taskforce to discuss the applicability of the CTA to such structures or entities.

[18] 87 Fed. Reg. at 59,543.

[19] 31 U.S.C. § 5336(b)(2)(B) (entitled "Reporting requirement for exempt entities having an ownership interest").

[20] It appears that there were a number of comments submitted regarding "minority shareholder protections" in the context of determining when an individual is categorized as a beneficial owner due to their "substantial control." 87 Fed. Reg. 59,526.

[21] The Final Rule defines a "company applicant" as both (1) the individual who directly files the document to create or register the reporting company; and (2) the individual who is primarily responsible for directing or controlling the filing. 87 Fed. Reg. 59,536. By design, the company applicant is therefore limited to one (if a single person performed both functions) or two individuals.

[22] *Id.* at 59,525.

[23] *Id.* at 59,526–27.

[24] *Id.* at 59,595.

[25] **For the reporting company:**

- Full legal name;
- Any trade name or "doing business as name";
- For companies with a principle place of business in the United States, the street address of the principle place of business;
  - Otherwise, the street address of the primary location in the United States where the reporting company conducts business;
- The State, Tribal, or foreign jurisdiction of formation;
- For a foreign reporting company, the State or Tribal jurisdiction where the company first registers; and
- The Taxpayer Identification Number ("TIN") or, where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction.

For every non-excepted beneficial owner and company applicant:

- Full legal name;
- Date of birth;
- Residential street address, except for a company applicant who forms or registers an entity in the course of the company applicant's business, in which case the street address of the business;
- A unique identifying number and the issuing jurisdiction from: (1) a non-expired United States passport; (2) a non-expired state, local, or tribal identification document; (3) a non-expired state driver's license; or (4) a non-expired foreign passport if the individual does not possess (1), (2), or (3); and
- An image of the document from which the unique identifying number was obtained.

[26] To receive that identifier, the individual must submit the relevant information directly to FinCEN.

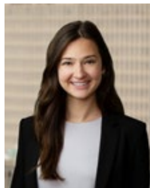
[27] *Id.* at 59,511.

[28] *Id.* at 59,510–11.

[29] There are reports that several industry groups are seeking to extend these time frames, but it is unclear whether they will be successful in doing so.

Editors

Kelly Rondinelli
Associate
Environmental & Natural Resources
Washington, D.C.
+1.202.639.6795
krondinelli@velaw.com



Chloe Schmergel
Associate
Mergers & Acquisitions and Capital Markets
Houston
+1.713.758.3290
cschmergel@velaw.com

Josh Rutenberg
Associate
Capital Markets and Mergers & Acquisitions
Houston
+1.713.758.2544
jrutenberg@velaw.com

Jon Solorzano
Counsel
Environmental & Natural Resources
Los Angeles
+1.213.527.6427
jsolorzano@velaw.com

E. Phileda Tennant
Counsel
Labor & Employment
Houston
+1.713.758.2378
eptennant@velaw.com

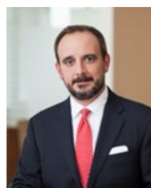
Matthew Dobbins
Partner
Environmental & Natural Resources
Houston
+1.713.758.2026
mdobbins@velaw.com

Sarah K. Morgan
Partner
Capital Markets and Mergers & Acquisitions
Houston
+1.713.758.2977
smorgan@velaw.com

Guest Editors

Robert L. Kimball
Partner
Mergers & Acquisitions and Capital Markets
Dallas
+1.214.220.7860
rkimball@velaw.com

Katherine Frank
Partner
Capital Markets and Mergers & Acquisitions
Dallas
+1.214.220.7869
kfrank@velaw.com



Jeff Johnston
Partner
Gov't Investigations & White Collar Criminal Defense, Shareholder Litigation & Enforcement
Houston
+1.713.758.2198
jjohnston@velaw.com

Rajesh D. Patel
Counsel
Technology Transactions & Intellectual Property
Houston
+1.713.758.3849
rdpatel@velaw.com

Dario Mendoza
Partner
Executive Compensation & Benefits
Dallas
+1.214.220.7796
dmendoza@velaw.com

Alyssa Sieja
Associate
Environmental & Natural Resources
Washington, D.C.
+1.202.639.6532
asieja@velaw.com

Prior results do not guarantee a similar outcome.

Key Contacts

Matthew Dobbins
Partner
Environmental & Natural Resources
Houston
+1.713.758.2026
mdobbins@velaw.com

Jon Solorzano
Counsel
Environmental & Natural Resources
Los Angeles
+1.213.527.6427
jsolorzano@velaw.com

Sarah K. Morgan
Partner
Capital Markets and Mergers & Acquisitions
Houston
+1.713.758.2977
smorgan@velaw.com

Rebecca L. Baker
Partner
Labor & Employment
Houston
+1.713.758.2518
bbaker@velaw.com

Laurence S. Elbaum
Partner
Shareholder Activism
New York
+1.212.237.0084
lelbaum@velaw.com

Katherine Frank
Partner
Capital Markets and Mergers & Acquisitions
Dallas
+1.214.220.7869
kfrank@velaw.com

Patrick Gadson
Partner
Shareholder Activism and Mergers & Acquisitions
New York
+1.212.237.0198
pgadson@velaw.com

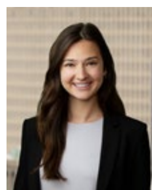
Robert L. Kimball
Partner
Mergers & Acquisitions and Capital Markets
Dallas
+1.214.220.7860
rkimball@velaw.com

Michael Kurzer
Partner
Technology Transactions & Intellectual Property
New York
+1.212.237.0028
mkurzer@velaw.com

Brenda Lenahan
Partner
Capital Markets and Mergers & Acquisitions
New York
+1.212.237.0133
blenahan@velaw.com

Rajesh D. Patel
Counsel
Technology Transactions & Intellectual Property
Houston
+1.713.758.3849
rdpatel@velaw.com

Kelly Rondinelli
Associate
Environmental & Natural Resources
Washington, D.C.
+1.202.639.6795
krondinelli@velaw.com



Chloe Schmergel
Associate
Mergers & Acquisitions and Capital Markets
Houston
+1.713.758.3290
cschmergel@velaw.com

Corinne Snow
Counsel
Environmental & Natural Resources
Washington, D.C.
+1.212.237.0157
csnow@velaw.com

E. Phileda Tennant
Counsel
Labor & Employment
Houston
+1.713.758.2378
eptennant@velaw.com

Ronal J. Tenpas
Partner
Environmental & Natural Resources
Washington, D.C.
+1.202.639.6791
rtenpas@velaw.com

Prior results do not guarantee a similar outcome.

CTA Taskforce

Brian Howard
Counsel
Gov't Investigations & White Collar Criminal Defense
Washington, D.C.
+1.202.639.6620
bhoward@velaw.com

Dan Komarek
Partner
Mergers & Acquisitions and Private Equity
New York
+1.212.237.0258
dkomarek@velaw.com

Elizabeth McIntyre
Counsel
Gov't Contracts, Export Controls & Economic Sanctions
Washington, D.C.
+1.202.639.6593
emcintyre@velaw.com

Milam Newby
Partner
Mergers & Acquisitions and Venture Capital
Austin
+1.512.542.8846
mnewby@velaw.com

Chris Rowley
Partner
Mergers & Acquisitions and Private Equity
Dallas
+1.214.220.7972
crowley@velaw.com

Jon Solorzano
Counsel
Environmental & Natural Resources
Los Angeles
+1.213.527.6427
jsolorzano@velaw.com

Bob Denby
Partner
Office of the General Counsel, with an emphasis on professional responsibility and risk management
Houston
+1.713.758.2095
rdenby@velaw.com

Prior results do not guarantee a similar outcome.

Vinson&Elkins

LinkedIn: Vinson & Elkins

Twitter: @VinsonandElkins

Vinson & Elkins LLP Attorneys at Law Austin Dallas Dubai Houston London Los Angeles New York Richmond San Francisco Tokyo Washington

velaw.com

This information is provided by Vinson & Elkins LLP for educational and informational purposes only and is not intended, nor should it be construed, as legal advice. Prior results do not guarantee a similar outcome.

©2023 Vinson & Elkins LLP