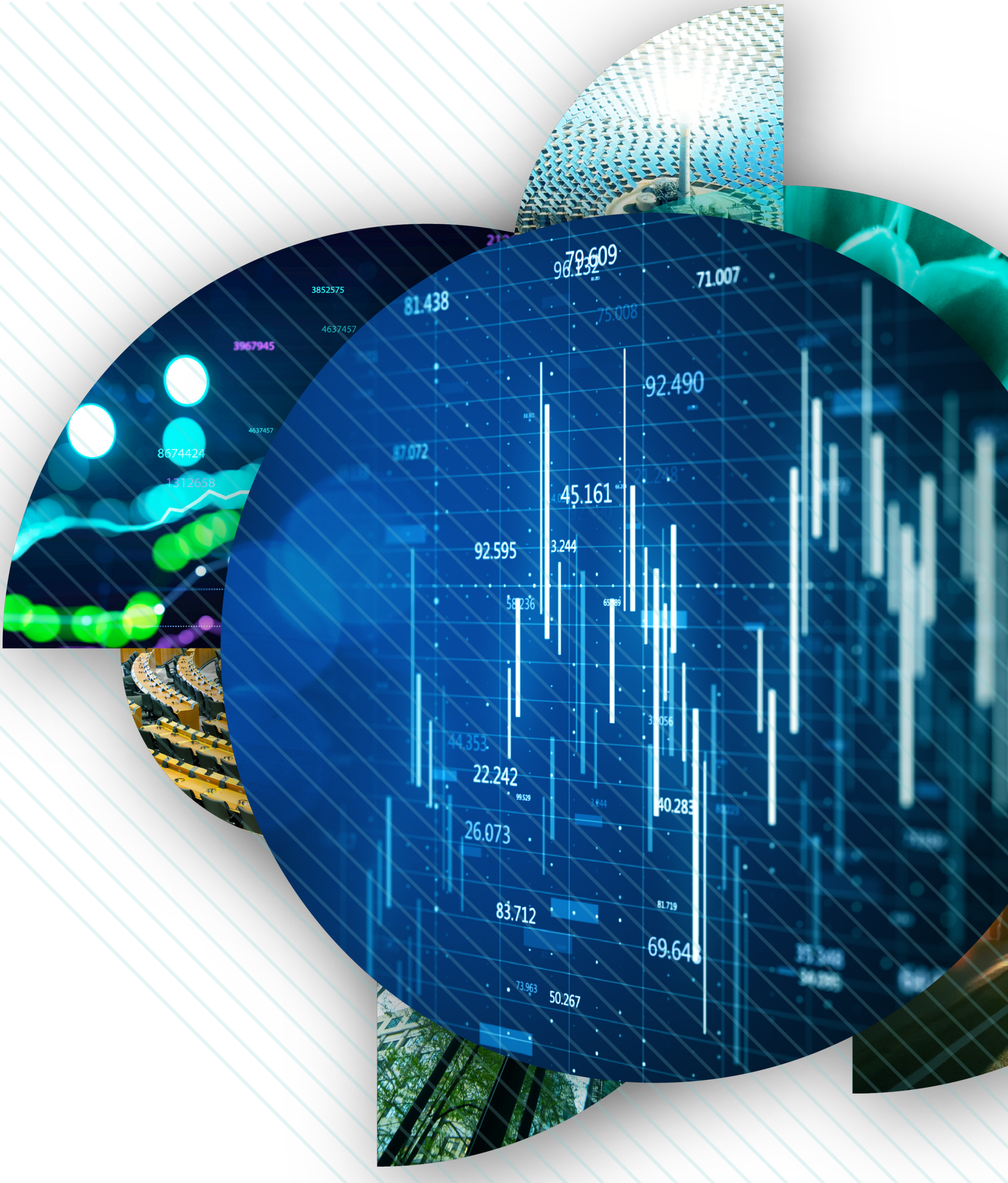
NORTON ROSE FULBRIGHT

ESG | Sustainability

Financial Services regulatory ESG updater

6 August – 10 September 2024



Introduction

Environmental, Social and Governance (ESG) is changing the landscape for financial institutions as a wide range of stakeholders including investors increasingly expect them to make their operations more sustainable. Financial services regulators also view ESG as a priority, embedding the principles of climate-related financial risks into their supervisory frameworks and dealing with institutions that may be making exaggerated or unsubstantiated sustainability-related claims that do not stand up to closer scrutiny (so-called 'greenwashing'). However, the key problem for institutions, particularly those operating cross border, is that there is limited uniformity in regulation, financial services regulators are at different stages in developing their ESG regulatory framework particularly in relation to disclosures and taxonomy. It is therefore critical that institutions monitor the latest announcements from the regulators.

The purpose of this updater is to track ESG regulatory developments from the period 6 August 2024 to 10 September 2024, from the United Kingdom, France, European Union, the Netherlands, United States, Australia, and certain international regulators.

This month's highlights

10 September 2024 - New NRF briefing note: 'Climate adaptation: What steps should financial institutions be taking now?'
We have published a new briefing note 'Climate adaptation: What steps should financial institutions be taking now?'

10 September 2024 - New Global Regulation Tomorrow Plus podcast: Let's talk asset management: Episode 5 - Updated Q&As on SFDR: Key issues for fund managers
In our new podcast series, Let's talk asset management, partners from our financial services and asset management teams provide listeners with a crash course on one or more hot topics in the asset management sector. By doing this, listeners will be able to build their knowledge and get insights on recent regulatory developments and market trends.

In this podcast Cédric Danois discusses some of the key issues that ESMA and the other ESAs raise in the updated Q&As on the SFDR:

- Sustainable investment definition
- Website disclosures
- Principal adverse impact indicators

United Kingdom

19 August 2024 - FCA publishes downloadable labels for distributors subject to SDR and investment labelling regime

The Financial Conduct Authority (**FCA**) updated its webpage on the sustainability disclosure requirements (**SDR**) and investment labelling regime, to include a new section on downloadable labels.

The new section is intended for distributors who are subject to the new requirements in ESG 4.1.16R to 4.1.19R, which were introduced into the Handbook as part of the SDR and investment labelling regime. It provides distributors with access to each of the investment labels – 'sustainability mixed goals', 'sustainability improvers', 'sustainability impact' and 'sustainability focus' – as well as information on their terms of use.

On the updated webpage, the FCA also flags its exclusive rights to the trademarked investment label logos under UK law, noting that it prohibits any unauthorised use, reproduction, or modification without its prior written consent. Anyone downloading an investment label is agreeing to those trademark terms of use.

9 September 2024 - FCA sets out temporary measures for firms on 'naming and marketing' sustainability rules

The FCA published a new webpage stating that it was offering firms temporary flexibility to comply with the 'naming and marketing' rules under the Sustainability Disclosure Requirements (**SDR**).

The FCA states that:

- The new anti-greenwashing rule took effect from 31 May 2024.
- Since 31 July 2024 managers of UK-based investment funds have been able to use investment labels on their products.
- Firms should now be taking all reasonable steps to ensure compliance with the 'naming and marketing' and disclosure rules, which come into force from 2 December 2024.

The FCA states that the new SDR raises the bar and that it has become clear that it has taken longer than expected for some firms to make the required changes. In particular, some firms wishing to use an investment label, or which need to change the names of their products, require more time to meet the higher standards and prepare the disclosures needed for FCA approval.

Given the importance of getting the SDR right for investors the FCA is taking a pragmatic approach and is offering limited temporary flexibility until 5pm on 2 April 2025 for firms to comply with the 'naming and marketing' rules in relation to a sustainability product which is a UK authorised investment fund in exceptional circumstances where the firm:

- has submitted a completed application for approval of amended disclosures in line with ESG 5.3.2R for that fund by 5pm on 1 October 2024; and
- is currently using one or more of the terms 'sustainable', 'sustainability' or 'impact' (or a variation of those terms) in the name of that fund and is intending either to use a label, or to change the name of that fund.

The FCA adds that:

- where firms can comply with the rules without requiring this flexibility, they should do so. The FCA also expects firms to comply with the rules as soon as they can, without waiting until 2 April 2025;
- firms must continue to comply with all other relevant rules, including the anti-greenwashing rule; and
- these temporary measures do not apply to funds using other sustainability-related terms in their names that are not specified above.

The FCA also states that it has received some queries about the authorisation of mergers, wind-ups or terminations before 2 December 2024. It explains that it will take a supportive, proportionate and outcomes-based approach in these circumstances. Firms with questions can contact their supervisor or usual supervisory contact to discuss on a case-by-case basis.

European Union

7 August 2024 - FAQs on the implementation of the EU corporate sustainability reporting rules
The European Commission (**Commission**) published frequently asked questions (**FAQs**) intended to clarify the interpretation of certain provisions on sustainability reporting introduced by the Corporate Sustainability Reporting Directive.

The FAQs also include a limited number of clarifications concerning the interpretation of certain provisions of the first set of European Sustainability Reporting Standards (Commission Delegated Regulation (EU) 2023/2772), where legal interpretation from the Commission has been deemed to be necessary.

The FAQs take into account input received from companies and cover issues such as the scope of the rules, application dates, and exemptions. For example, they clarify when companies may use estimates rather than having to collect value chain information from suppliers or partners.

21 August 2024 - ESMA's guidelines on funds' names start applying from 21 November 2024
The European Securities and Markets Authority (**ESMA**) announced that it had published the translations in all official EU languages of its guidelines on funds' names using ESG or sustainability-related terms.

Following the publication of the translations:

- Member State competent authorities must notify ESMA by 21 October 2024 whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines.
- The guidelines start applying from 21 November 2024.
- The transitional period for funds existing before the application date will be six months after that date (i.e., 21 May 2025). Any new funds created on or after the application date should apply the guidelines immediately.

Following the announcement of ESMA's guidelines, we have updated our briefing note – please see here to read the full article.

France

There have been no reported updates from France this month.

The Netherlands

There have been no reported updates from the Netherlands this month.

United States- SEC and CFTC

There have been no reported updates from the U.S. this month.

Australia

22 August 2024 - Mandatory climate reporting Bill passes the Senate

The Australian Senate passed the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (Bill), with minor amendments. One of the purposes of the Bill is to implement Australia's climate-related financial disclosure (**CRFD**) regime.

The CRFD regime now requires entities to include a more detailed scenario analysis for a high warming scenario. Under this amendment, entities must analyse and report on a scenario where the increase in average global temperature:

1. significantly exceeds 2 degrees Celsius above pre-industrial levels; and
2. is limited to 1.5 degrees Celsius above pre-industrial levels.

Scenario analyses constitute a 'protected statement' under the regime, meaning that reporting entities have a limited immunity from claims brought in relation to these disclosures during the first three years the regime is in force.

The CRFD regime will be phased in over several years, as organisations of different sizes are brought under its scope, based on their revenue, the value of their assets, and/or number of employees. Our article provides a detailed analysis of the entities subject to the regime.

The Bill will go back to the House of Representatives (**House**) for a vote before it is considered final approved legislation. The House is next scheduled to sit in the week beginning 9 September 2024 and the CRFD regime is set to take effect from 1 January 2025.

23 August 2024 - ASIC publishes report on interventions on greenwashing misconduct: 2023-2024

The Australian Securities and Investments Commission (**ASIC**) published a report into regulatory interventions it has made in 2023-2024 concerning greenwashing (**Report**). ASIC has made clear that it remains concerned about greenwashing and that it will continue to "*strategically act on greenwashing misconduct to protect investors and maintain market integrity*".

The Report states that between 1 April 2023 and 30 June 2024, ASIC has issued 8 infringement notices, obtained 37 corrective disclosure outcomes, commenced 2 civil penalty proceedings, and imposed $11.3 million in civil penalties. From 2022 to 2024, ASIC has issued $270,360 worth of infringement notices due to greenwashing.

As part of its ongoing surveillance of greenwashing, ASIC has identified four broad areas of concern in the market:

1. underlying investments that are inconsistent with disclosed ESG investment screens and investment policies;
2. sustainability-related claims made without reasonable grounds;
3. insufficient disclosure on the scope of ESG investment screens and investment methodologies; and
4. sustainability-related claims made without sufficient detail.

While ASIC's civil penalty proceedings have focused on investment funds, its other greenwashing interventions have spanned varied sectors and industries including chemicals companies, mining and metals companies and energy companies.

The Report highlights the need for companies who make disclosures, or will be required to make disclosures under the incoming mandatory climate-related disclosure regime, to ensure disclosures are consistent with the relevant Australian Sustainability Reporting Standards (when published), investments are verified for consistency against disclosed investment strategies, and adequate explanations of investment exclusions or screening criteria are provided.

Our article provides further analysis on ASIC's key recommendations and findings, and key mitigation strategies companies should adopt.

26 August 2024 - AASB Board meeting regarding Australian Sustainability Reporting Standards

In November 2023, legislation was passed to enable the Australian Accounting Standards Board (**AASB**) to formally issue Australian Sustainability Reporting Standards (**ASRS**), which will provide reporting standards for companies required to disclose under the incoming CRFD regime.

The AASB has revised the titles and numbering of the draft ASRSs to align with the International Financial Reporting Standards (**IFRS**) Sustainability Disclosure Standards. AASB intends to publish two ASRSs:

1. **AASB S1 General Requirements for Disclosure of Sustainability-related Financial Information (AASB S1)**, which will be voluntary and closely follow IFRS S1, with some changes to accommodate its voluntary status. It will include specific guidance for not-for-profit entities.
2. **AASB S2 Climate-related Disclosures (AASB S2)**, which will be mandatory and will incorporate all requirements from IFRS S2 with some modifications, including omitting the no requirement for an entity to disclose industry-based metrics or consider those disclosure topics outlined in IFRS S2.

The AASB will review updated versions of AASB S1 and AASB S2 after the passage of the Bill.

The AASB also discussed the scope and indicative timing of a new project, 'Climate-related Disclosures: Industry-based Information.' They plan to start stakeholder consultations in March 2025 and aim to finalise industry-based disclosure requirements by 2030, aligning with the Treasury Policy Statement on mandatory climate-related disclosures from January 2024. This project will focus on defining industry-based disclosure topics and metrics as outlined in the Industry-based Guidance on Implementing IFRS S2.

International regulators – FSB, IOSCO, Basel Committee, NGFS, SASB, IFRS, ISSB

There have been no reported updates from the international regulators this month.

Resources

ESG is high on the regulatory agenda. Businesses, governments, regulators, financial services firms and individuals all have a part to play in tackling climate change and this view is increasingly shared across society. In terms of financial markets, investors are increasingly seeking sustainable financial products and ESG investing, traditional investing combined with sustainable or otherwise philanthropic aims, has seen huge growth in recent years. Regulated firms are also seeking to improve their own ESG performance more generally to build stronger relationships with their stakeholders, including those who use their services. Whilst the growing emphasis on ESG presents opportunities for financial services providers, it also brings with it a number of risks, which need to be properly managed with a view to avoiding future regulatory investigations and enforcement.

We have produced a number of resources, including articles, podcasts and newsletters, to help clients navigate this evolving, complex landscape:

Financial services: Regulation tomorrow

Our blog, Financial services: Regulation tomorrow offers a convenient resource for those keeping track of the evolving and increasingly complex global financial services regulatory environment.

Financial Services Regulatory Developments in ESG

Developed by our global financial services regulatory lawyers and integrated risk advisory group, our Financial Services Regulatory Developments in ESG Hub provides resources and insights to help clients stay informed of key regulatory developments in the sector.

ESG and Sustainability Insights newsletter

Our ESG and Sustainability Insights newsletter brings together recent insights and resources on key topics affecting your business, including climate change and regulation, business and human rights, sustainable finance, energy transition and more.

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