Akin

Speaking Sustainability

Sustainability/ESG Policy and Regulatory Update

June 2024

Akin’s newsletter on environmental, social and corporate governance (ESG) policy and regulatory developments, provides a timely digest of ESG topics, news items and other relevant information regarding significant ESG policy headlines and debates concerning each ESG pillar. We also keep you up to date on activities in the state legislatures across the country. This newsletter is a companion to our existing weekly Climate Policy Update, which you can find at our Speaking Sustainability site.

Key ESG Topics

The Biden administration released guidance on May 28 targeted at improving the integrity of voluntary carbon markets (VCMs). The “Joint Statement of Policy and new Principles for Responsible Participation in Voluntary Carbon Markets” (the Joint Statement) was announced by The White House, the U.S. Department of Treasury (Treasury), U.S. Department of Agriculture (USDA), the U.S. Department of Energy (DOE) and identifies seven governing principles to improve the quality of carbon credits and enhance reporting disclosures (outlined below). The new guidance is in addition to the rulemaking action expected from the U.S. Commodity Futures Trading Commission (CFTC) later this year on the listing of voluntary carbon credit derivative contracts.

The Biden administration issued the Joint Statement, including the associated principles therein, “because we believe they can and should play a meaningful role in facilitating global greenhouse gas emissions reductions and removals and helping to reach global net-zero emissions by 2050 and limit warming to 1.5° C.”

As indicated, the Joint Statement includes the principles enumerated below in order to “encourage the U.S. private sector and other stakeholders in the carbon credit value chain to responsibly participate in VCMs.” From the Joint Statement:

- Carbon credits and the activities that generate them should meet credible atmospheric integrity standards and represent real decarbonization.

- Credit-generating activities should avoid environmental and social harm and should, where applicable, support co-benefits and transparent and inclusive benefits-sharing.

- Corporate buyers that use credits (credit users) should prioritize measurable emissions reductions within their own value chains.

- Credit users should publicly disclose the nature of purchased and retired credits.
- Public claims by credit users should accurately reflect the climate impact of retired credits and should only rely on credits that meet high integrity standards.
- Market participants should contribute to efforts that improve market integrity.
- Policymakers and market participants should facilitate efficient market participation and seek to lower transactions costs.

The European Securities and Markets Authority (ESMA) released final guidance covering the use of ESG- and sustainability-related terms in investment fund names. The final guidance sets forth minimum investment thresholds for sustainable investment funds and establishes a new category for transition-related terms. The goal is to promote the green energy transition and foster a positive evolution towards climate-related targets.

- The new category of transitional terms is designed to promote the green energy transition and include words such as "improving", "progress/ion", "evolution", "transformation" and any related words.
- The use of these terms in fund names has increased significantly over the last ten years, prompting ESMA to initiate development of the guidelines in order to ensure investors are protected against "unsubstantiated or exaggerated sustainability claims" and provide asset managers with "clear and measurable" data.
- The final guidelines differ from ESMA's original proposal, which tied the 80% requirement to ESG-related words and included a 50% threshold for sustainability-related terms. The final guidelines eliminate the 50% requirement, presumably in response to criticisms during the comment period from investors who may not distinguish between ESG and sustainability.
- The final guidelines go into effect three months after being published in all applicable languages on ESMA's website.

The European Council (EC) announced that the full enactment of the Corporate Sustainability Reporting Directive (CSRD) will be delayed by two years and occur on a phased-in basis. Specifically, the decision delays the adoption of sector-specific sustainability standards, as well as reporting obligations for non-EU companies until June 2026.

- EC believes the delay will "allow companies to focus on the implementation of the first set of European Sustainability Reporting Standards (ESRS) and limit the reporting requirements to a necessary minimum."
- The first set of ESRS took effect in late July 2023 and laid out sector-agnostic sustainability reporting requirements. Relevant EU-incorporated companies are required to publish inaugural CSRD reports in early 2025. Other EU- and non-EU companies (including companies with securities listed on EU-regulated markets) will be required to publish CSRD reports thereafter, depending on the application of relevant criterial.
- The second set of ESRS under the CSRD will target sector-specific reporting requirements and originally required adoption by the end of June 2024, before the two-year delay was announced.
- The sectors covered in the now-delayed second round include oil and gas, mining, road

transport, food, cars, agriculture, energy production and textiles.

- We encourage you to consult with counsel in relation to when your company (or companies) may be subject to these reporting requirements.

SEC Chair Gensler recently offered remarks of relevance to the asset management industry. The remarks, which may be found here, were made during a conference hosted by the SEC's Division of Investment Management, and focus on emerging trends in asset management.

- Chair Gensler noted that registered investment advisers "advise 57 million clients with respect to $129 trillion in assets." One takeaway of note: Chair Gensler appears to be focused on potential regulatory gaps in the financial sector and indicated that he has asked SEC staff to "consult with bank regulators on how to best mitigate for regulatory gaps between collective investment funds and open-end funds."

Key Environmental Developments

IRS Issues Proposed Rules on New Tech-Neutral Clean Energy PTC and ITC (*Akin Client Alert*)

Akin discusses the latest regulations proposed by the Internal Revenue Service and Treasury Department while addressing the new technology-neutral clean electricity production tax credit and the clean electricity investment tax credit.

'Historic' Advisory Opinion on Climate Change Says Countries Must Prevent Greenhouse Gases From Harming Oceans (*Inside Climate News*)

The International Tribunal on the Law of the Sea stated in an advisory opinion that human-caused greenhouse gas emissions are a form of marine pollution as defined by the U.N. Convention on the Law of the Sea (UNCLOS), and listed a series of "stringent" legal obligations that governments must meet to "prevent, reduce, and control" emissions and to "protect and preserve" oceans from climate change impacts. The opinion intends to clarify that governments must meet their climate obligations under international law and cannot make climate contributions under the Paris Agreement alone.

Republican AGs Ask Supreme Court to Block Climate Change Lawsuits (*AP News*)

Republican attorney generals in nineteen states are requesting the Supreme Court to block several climate change-related lawsuits brought by California, Connecticut, Minnesota, New Jersey and Rhode Island against the oil and gas industry for allegedly intentionally deceiving the public about their products' contribution to climate change.

Alive & Kicking - The Future of ESG (*Corporate Compliance Insights*)

With legal challenges mounting towards the Securities and Exchange Commission's (SEC) new climate disclosure rules and its subsequent decision to put the rules on hold pending judicial outcome, some companies are pausing their ESG efforts and commitments as they wait for the litigation to reach a conclusion. This article discusses why that business decision may ultimately hinder the corporate bottom line as other stakeholders begin to scrutinize environmental initiatives.

Key Social Developments

Final Approval of Ground-Breaking EU AI Act (*Akin Client Alert*)

Akin discusses final approval of the landmark EU Artificial Intelligence Act (AI Act). The AI Act is a first of its kind, sector-agnostic law with extra-territorial impact, regulating general-purpose AI models, imposing obligations regarding high-risk AI systems and low-risk AI systems on developers, deployers, and a wide range of other participants in the AI value chain (i.e., supply chain), and prohibiting certain AI systems.

Colorado Passes New Watershed AI Consumer Protection Bill (*Akin Client Alert*)

Akin discusses Colorado's latest efforts to regulate artificial intelligence through a series of new obligations for developers and deployers of high-risk AI systems, including risk management and governance obligations to prevent algorithmic discrimination.

New Privacy and Cybersecurity Obligations for Private Fund Sponsors and Managers (*Akin Client Alert*)

The Securities and Exchange Commission (SEC) imposed expanded privacy and cybersecurity obligations on fund managers and sponsors registered with the SEC as investment advisers. The amended regulation requires registered investment advisers to assess and mitigate incidents involving unauthorized access to customer information, notify affected individuals and to maintain compliance records.

Human Rights as a Basis for Climate Litigation (*ESG Investor*)

The European Court of Human Rights (ECHR) ruled in April 2024 that the Swiss government had violated its citizens' human rights due to its lack of action on climate change. The case – *Verein KlimaSeniorinnen Schweiz v. Switzerland* – was brought by four women concerned about the consequences of climate change on their living conditions, and ECHR determined Switzerland violated the right to respect for private and family life by failing to develop an adequate domestic regulatory framework with a carbon budget or national greenhouse gas emissions limitations.

Key Governance Developments

Developments in the UK Sustainability Disclosure Requirements Regime (*Akin Client Alert*)

Akin provides an overview of publications issued by the United Kingdom's Treasury (U.K. Treasury) and Financial Conduct Authority (FCA), which seek to expand the application of the U.K.'s labelling regime and sustainability disclosure requirements (SDR).

5 Key Roles Needed to Comply with SEC, EU and California Climate Disclosure Regulations (*GreenBiz*)

Sustainability executives are preparing for anticipated climate-related disclosure requirements by establishing new ESG-specific corporate roles, including an ESG controller, in-house sustainability counsel, a sustainability reporting director, an ESG data manager and a climate scientist.

Corporate Boards Have Never Been More Prepared to Face Down the Anti-ESG Backlash, New Research Finds (*Fortune*)

The NYU Stern Center for Sustainable Business published its latest 2023 corporate sustainability assessment in which it found 89 of Fortune 100 companies have sustainability committees, an increase from just 22 in 2018.

2024 U.S. Proxy Season Preview: Governance Back on Agenda While Sustainability Recedes (*Institutional Shareholder Services*)

ISS released its 2024 U.S. Proxy Season Preview outlining growing shareholder calls for more robust governance and board accountability. The report begins by highlighting (as an indicator of rising critical assessments of corporate governance) the landmark Delaware court ruling in March 2024, which vacated Elon Musk's 2018 compensation package for breaching its fiduciary duty and not providing complete information to shareholders.

Upcoming ESG Events

Responsible Business Europe 2024

Reuters
London, U.K.
June 11-12, 2024

Sustainability Week US

The Economist
New York, NY
June 12-13, 2024

GreenFin Sustainable Finance and Investing

GreenBiz
New York, NY
June 17-19, 2024

Climate Innovation Forum

Climate Action
London, U.K.
June 27, 2024

Risk and Reward: Complying with the SEC's Climate Rule

ESGDive
Virtual
July 11, 2024

Akin's ESG Practice

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Questions?

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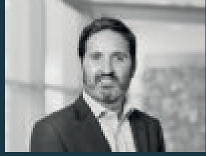
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