

Akin

Speaking Sustainability

Sustainability/ESG Policy and Regulatory Update



July 2024

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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 three primary European Union (EU) regulators recently announced an updated assessment of the Sustainable Finance Disclosure Regulation (SFDR). The European Supervisory Authorities (ESAs), comprising the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), have proposed several changes and updates to the SFDR, including introducing new “Sustainable” and “Transition” categories for financial products.

- The regulation currently classifies sustainability-focused investment funds with varying disclosure requirements, such as “Article 8” funds, which promote environmental or social characteristics, and “Article 9” funds, which have sustainable investment as their objective. The European Commission (EC) raised concerns that these classifications were being misused as sustainability quality labels, potentially leading to greenwashing.
- Key proposals in the ESAs' assessment include introducing a categorization system for financial products and an indicator to better understand their sustainability profiles. The suggested categories are:
 - Sustainable products: These invest in economic activities and assets that are already environmentally or socially sustainable, meeting minimum thresholds such as alignment with the EU Taxonomy for environmentally sustainable products.
 - Transition products: These invest in activities or assets that are not yet sustainable, but which aim to become sustainable over time, with a clear pathway compatible with EU and global environmental and social objectives.
- The Sierra Club has also filed suit alleging that the Final Rule does not go far enough and

that it was “overly weakened relative to the [SEC’s] initial proposal,” and will not provide investors with enough information about companies’ exposure to climate-related risks.

The Natural Resources Defense Council (NRDC) and Sierra Club have each moved to voluntarily dismiss their respective lawsuits brought against the Securities and Exchange Commission’s (SEC) final climate disclosure rules, which were set to occur in the U.S. Court of Appeals for the 8th Circuit (8th Circuit).

- According to the Sierra Club, while the SEC’s final climate disclosure rule is deficient and such “deficiencies remain, the Sierra Club petitioners now believe that focusing our resources on advocating for improved investor protections outside of the court, while also supporting efforts to defend the SEC’s fundamental authority to require disclosure of climate-based risks, is the most effective way to ensure investors have the information they need to properly evaluate companies’ exposure to such risks and thus effectively manage their asset portfolios.”
- The NRDC indicated it believes the SEC’s final rule is consistent with the SEC’s rulemaking authority and that its legal challenge focused on certain disclosures that were omitted from the final rule such as information regarding Scope 3 greenhouse gas or GHG emissions. In a similar vein to the Sierra Club, the NRDC stated it intends to “focus its resources on advocating for improvements to climate-related financial disclosures outside of this litigation.”

The EU published its Corporate Sustainability Due Diligence Directive (CSDDD). The final text of the CSDDD was adopted earlier this year and requires “in scope” companies to integrate responsible business practices into their due diligence processes and policies, affecting both EU companies and non-EU companies with significant operations in the EU. The CSDDD will further apply to companies that do not meet the specified thresholds but is the parent company of a group that, on a consolidated basis, reached those thresholds.

- The CSDDD is seen as complementing a handful of rulemaking initiatives adopted by EU Member States in recent years, including Germany’s Supply Chain Act and Norway’s Transparency Act, as well as other legislative initiatives covering deforestation and forced labor. The CSDDD will be implemented on a phased-in basis, with the first group of companies required to comply with its requirements beginning in 2027.
- Affected companies will need to integrate enhanced due diligence procedures into operations and policies; identify and evaluate potentially adverse impacts; develop and implement strategies that will prevent or mitigate such impacts; and develop mechanisms to receive and address stakeholder complaints. In-scope companies also will need to monitor the effectiveness of their CSDDD compliance measures and make public disclosures regarding their efforts.
- EU Member States are required to develop and implement penalties for companies that fail to comply with the CSDDD, which penalties may include monetary penalties of up to 5% of the non-compliant company’s net worldwide turnover (i.e., revenue). Civil penalties may also apply.

The U.S. Court of Appeals for the 5th Circuit ordered a federal district court in Texas to reconsider a rule issued by the U.S. Department of Labor (DOL) permitting fiduciaries under the Employee Retirement Income Security Act (ERISA) to consider ESG factors when making investment decisions (the DOL ESG Rule). Several states and energy companies challenged the DOL ESG Rule, arguing, among other things, that the DOL ESG Rule was inconsistent with a plain reading of ERISA and was “arbitrary and capricious” under the

Administrative Procedure Act. Last fall, the district court upheld the DOL ESG Rule last year, relying on the Chevron deference doctrine in its ruling. In its ruling, the 5th Circuit's three-judge panel cited the U.S. Supreme Court's recent *Loper Bright* decision overruling the Chevron doctrine as requiring the lower court to "reassess the merits" of the case.

- The question presented in the case is whether "ERISA allows retirement plan managers to consider factors that are not material to financial performance when making investment decisions affecting workers' retirement savings." According to the opinion, the 5th Circuit is not yet prepared to "venture an answer - at least not yet." Interestingly, the 5th Circuit noted that even before the *Loper Bright* decision, the DOL "presciently disclaimed reliance on Chevron in its briefing" before the appellate court meaning that the *Loper Bright* decision "had little effect on the parties' arguments before us." The appellate court's opinion may be found [here](#).
- The United States Court of Appeals for the Fifth Circuit heard oral arguments in an appeal seeking to overturn a district court ruling from September 2023, which upheld a Biden administration rule (the [ESG DOL Rule](#)) permitting retirement plan administrators and advisors to consider ESG factors when making investment decisions. According to media reports following the argument, the three-judge panel appeared to be skeptical of the arguments by Republican-led states and energy companies based in Texas seeking to have the earlier decision reversed. In addition, the states and energy companies also sought to have the case remanded with an order instructing the lower court to vacate the DOL ESG Rule on the basis that it violates.
- The DOL ESG Rule permits (but does not require) plan fiduciaries to consider ESG factors when making investment decisions. In addition, the DOL ESG Rule includes a "tiebreaker rule" pursuant to which ESG factors can "tip the scales on an ERISA plan manager's choice when there is a tie between equivalent investment options."

Key Environmental Developments

Downstream GHG Emissions to be Taken into Account in Planning Decisions (Akin)

Akin discusses the recent *Finch v. Surrey County Council* ruling in which the U.K. Supreme Court determined a grant of planning permission for oil production was unlawful for failing to account for downstream emissions.

Treasury Issues Proposed Guidance on Technology-Neutral Clean Energy Tax Credits (Utility Dive)

The U.S. Department of Treasury and Internal Revenue Service (IRS) [issued](#) proposed guidance on the [Clean Electricity Production Credit and Clean Electricity Investment Credit](#), established by the Inflation Reduction Act.

ICVCM Approves its First "Core Carbon Principles"-Labelled Carbon Credits (ESG Today)

The Integrity Council for the Voluntary Carbon Market (ICVCM) announced the approval of the first carbon credits with ICVCM's Core Carbon Principles (CCP) label. Demand for carbon credits is likely to see a significant increase over the next few years as companies look to offset their emissions.

UK Financial Regulator Opens One Climate Investigation, Lawyer-led FOI Reveals (ClientEarth)

The Financial Conduct Authority (FCA) opened its first enforcement investigation into a business regarding a climate-related matter. FCA disclosed that the case opened in July 2023, but did not provide additional details on the type of company or its alleged misconduct.

China Releases ESG Reporting Standards for Businesses (China Briefing)

The ESG Reporting Standards aim to establish a mandatory International Sustainability Standards Board (ISSB)-aligned reporting system by 2030, with key sustainability and climate standards starting in 2027.

Key Social Developments

SEC Publishes Five C&DIs Covering Cybersecurity Incident Disclosures Pursuant to Item 1.05 of Form 8-K (Akin)

Akin discusses recently published guidance and Compliance and Disclosure Interpretations (C&DIs) in relation to cybersecurity incident disclosures under Form 8-K.

Protecting Americans' Data from Foreign Adversaries Act of 2024 (Akin)

Akin discusses the newly enacted "Protecting Americans' Data from Foreign Adversaries Act of 2024," which establishes new restrictions, as unfair or deceptive acts regulated by the Federal Trade Commission (FTC), on transfers of certain personally identifiable sensitive data to foreign adversary countries and entities controlled by a foreign adversary.

SEC Asks Organizations to Complete Diversity Self-Assessment (ESG Dive)

The SEC has started its biennial collection of [Diversity Self-Assessment Data](#), also releasing a [Diversity Self-Assessment Tool for Entities Regulated by the SEC](#), to help businesses review their diversity and inclusion policies.

US Appeals Court Blocks Grant Program for Black Women-Owned Businesses (Reuters)

The Atlanta-based 11th U.S. Circuit Court of Appeals ruled that venture capital fund Fearless Fund cannot continue providing grants to Black women-owned businesses, reversing a decision that would have allowed the program to continue as the case proceeds. The American Alliance for Equal Rights accused the Fearless Fund of violating Section 1981 of the 1866 Civil Rights Act that prohibits racial bias in private contracts.

Key Governance Developments

Fifth Circuit Vacates SEC Private Fund Advisers Rule (Akin)

Akin discusses the decision by the U.S. Court of Appeals for the 5th Circuit to vacate the SEC's Private Fund Advisers Rule, which would have required quarterly statements to investors in private funds, limitations on expenses that could be passed through to investors and restriction on preferential treatment, amongst other things.

Anti-ESG Laws Challenge Fiduciary Obligations, Add Significant Reporting Burden (ESG Dive)

A [new study](#) on the impact of anti-ESG laws from the UN-backed Principles for Responsible Investment discusses the unintended consequences that such measures could have on the business operations of financial institutions.

[Wall Street Backers See Breakthrough Moment for Carbon Offsets \(Energy Connects\)](#)

The Biden Administration and the Science Based Targets Initiative have each recently released guidance on the use of high-integrity carbon credits and offsets, potentially indicating a shift away from the uncertainty surrounding offsets and, instead, accepting it as a critical tool to meet climate targets.

Upcoming ESG Events

[ESG in Manufacturing Summit 2024](#)

LEAP ESG Conference Series
Denver, CO
July 29 - 31, 2024

[Climate Week NYC 2024](#)

Climate Group
New York, NY
September 21, 2024

[Sustainability USA 2024](#)

Reuters
New York, NY
October 7-8, 2024

[2024 ESG Summit](#)

The Conference Board
New York, NY
November 14, 2024

[Akin's ESG Practice](#)

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Questions?

If you have any questions, please contact Akin's ESG team:



Kerry E. Berchem
Partner
[Email](#)
+1 212.872.1095



Alex Harrison
Partner
[Email](#)
+44 77.7979.2862

Amy Kennedy
Partner

Stacey H. Mitchell
Partner



[Email](#)
+44 77.9699.3296

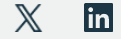


[Email](#)
+1 202.887.4338



Richard J. Rabin
Partner
[Email](#)
+1 212.872.1086

akingump.com



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