

Akin

# Speaking Sustainability

Sustainability/ESG Policy and Regulatory Update



April 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

In the immediate days following the March 6 vote by the U.S. Securities and Exchange Commission (SEC) to adopt "[The Enhancement and Standardization of Climate-Related Disclosures for Investors](#)" (Final Rule), several lawsuits were filed across six appellate courts by state attorneys general, energy industry suppliers, the U.S. Chamber of Commerce and the Sierra Club.

Akin published a client alert covering the Final Rule in more detail (which may be found [here](#)).

- On March 21, the U.S. Judicial Panel on Multidistrict Litigation ordered the multiple lawsuits to be consolidated and proceed in the U.S. Court of Appeals for the 8th Circuit.
- The Final Rule was initially stayed by the 5th Circuit pursuant to a petition filed by Liberty Energy and Nomad Proppant seeking the stay pending judicial review of the Final Rule arguing that it aims to "inject the SEC into the world of climate politics," by compelling disclosure by public companies of "a breathtaking volume of information, much of it highly speculative." On March 22, the Circuit quietly lifted the stay after the suits were consolidated in the 8th Circuit. On April 4, the SEC voluntarily stayed implementation of the Final Rule while noting in its order that it intends to vigorously defend the Final Rule.
- 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 Biden administration announced final national motor vehicle emissions standards on March 20. The final rule, titled "[Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles](#)," which although are technology neutral, will accelerate deployment

## of electric or hybrid passenger cars, light trucks and medium-duty vehicles sold in the United States for model years 2027 through 2032.

- The U.S. Environmental Protection Agency (EPA) estimates the final standards are expected to avoid in excess of 7 billion tons of greenhouse gas (GHG) emissions and provide approximately \$100 billion of annual net benefits to society, in the form of improved air quality and an estimated \$62 billion of reduced annual fuel costs.
- EPA notes that these final standards have been issued in the context of sales of “clean vehicles” (including plug-in hybrids and fully electric vehicles) hitting record highs during 2023. Notably, these new standards were issued in the context of the U.S. Supreme Court reigning in the regulatory powers of federal agencies, including the court’s 2022 decision in *West Virginia v. EPA* that limited the EPA’s authority to regulate GHG emissions from power plants.
- Legal challenges to these final standards are widely expected, with congressional Republicans arguing that the new standards represent “another step toward an unrealistic transition to electric vehicles,” and criticizing the new standards as a “misguided electric vehicle mandate.”

## The European Council (EC) endorsed a final version of the Corporate Sustainability Due Diligence Directive (CSDDD) following significant compromises among several European Union (EU) members in relation to the new rules.

- The EC first adopted the CSDDD in late 2022 and tentatively reached an agreement with the European Parliament in December 2023 on a final draft to adopt; however, the vote was postponed after certain EU member states, including Germany and Italy, raised concerns regarding the bureaucratic and legal impact on companies.
- The version of the CSDDD endorsed by the EC on March 15, 2024 (which may be found [here](#)), has been significantly scaled back, covering fewer companies, fewer corporate activities and compliance will be phased on more gradually than originally contemplated.
- Under the terms of the CSDDD, among other things, companies will be required to incorporate risk-based due diligence procedures in their risk management systems and corporate policies. In addition, impacted companies will need to identify, assess and prioritize (when applicable) actual and potential adverse effects on the environment and human rights. The CSDDD also requires companies to cease and/or remediate activities that actually result in adverse impacts in these areas. Companies will be required to engage with stakeholders, including by establishing and maintaining procedures for such stakeholders to lodge complaints. Finally, impacted companies must adopt and implement climate transition plans that align with the climate targets set forth in the Paris Climate Accord.
- An EU company will be considered “in scope” for purposes of the CSDDD if it employs 1,000 or more employees (compared with 500 employees under the originally proposed rule) and (y) has €450 million in net worldwide turnover (i.e., total revenues) (compared with €150 million in the originally proposed rule). These new thresholds are expected to cover approximately 5,000 companies in the EU, as compared with approximately 13,000 companies under the originally proposed rule. Non-EU companies will now be “in-scope” only if they generate net turnover within the EU of €450 million (compared with the €150 million in the original proposal).

## **Securing Bankable Construction Delivery Terms for Energy Transition Projects (Akin)**

Akin covers the challenges in sustainable project finance delivery and subsequent solutions to support investment in the energy transition.

## **UK to Withdraw from Energy Charter Treaty (Akin)**

Akin discusses the implications of the United Kingdom announcing its withdrawal from the Energy Charter Treaty on the basis that it is incompatible with the energy transition.

## **South Korea Finance Sector Pledges \$313 Billion in Green Financing (BNN Bloomberg)**

Five financial institutions in South Korea pledged \$313 billion through the end of 2030 to fund projects targeted at achieving net-zero emissions within government operations and carbon-neutral status across the public sector.

## **“Greenhushing” Is on the Rise as Companies Go Silent on Climate Pledges (Inside Climate News)**

Following backlash from both conservative and liberal stakeholders, companies are beginning to intentionally keep private and not publicize climate-related actions or commitments.

## **High-Integrity Offsets Key to Restoring Confidence in Voluntary Carbon Market (Reuters)**

Recent regulatory developments surrounding the voluntary carbon markets in California and the EU could enhance confidence in the carbon market and stimulate market growth to exceed an annual value of \$1.1 billion by 2050.

## **SEC Climate Rule Offers Escape Hatch to Corporations, Critics Say (E&E News)**

The SEC’s final climate-related financial disclosure rule drew a wide range of criticism, including some who argue the final rule gives too much discretion over what information companies can provide and may ultimately lead to incomplete reporting.

## **DOE Sides with Industry on Hydrogen Tax Rules (E&E News)**

The Department of Energy (DOE) is reportedly asking the Department of the Treasury to impose less stringent guidance on the 45V hydrogen production tax credit, following concerns the tax credit will complicate DOE’s own hydrogen initiatives, including the regional hydrogen production hubs.

## **US Treasury Drops Plan to Collect Insurer Data on Climate Risks (BNN Bloomberg)**

The Department of the Treasury will collaborate with state insurance regulators to collect data on home insurance prices and availability at the zip code level at a time when premiums and climate risks are intensifying.

# Key Social Developments

## **Supreme Court Passes on Another Affirmative Action Case (Inside HigherEd)**

The U.S. Supreme Court declined to intervene in an affirmative action case originating from Virginia where the 4th Circuit Court of Appeals issued a split decision that a racial diversity

policy did not constitute discrimination against white and Asian American students.

### **Bonuses Padded by Cryptic ESG Claims Draw Activist Scrutiny (BNN Bloomberg)**

Companies worldwide that link ESG performance to executive pay remuneration policies will see increased pressure from shareholders to produce more transparent metrics in order to demonstrate material and meaningful ESG progress.

### **Federal Appeals Court Blocks Florida's "Stop WOKE Act" Rules for Businesses (The Hill)**

The 11th Circuit blocked enforcement of provisions in Florida's "Stop WOKE Act," which would have restricted mandatory diversity, equity and inclusion (DEI) trainings, based on First Amendment concerns.

### **Job Cuts, Fleeing Investors: How Anti-DEI Lawsuits Take a Toll on Targets (BNN Bloomberg)**

This article discusses the impact the conservative activist group, America First Legal, is having on minority-owned businesses.

## **Key Governance Developments**

### **Delaware Chancery's *Moelis II* Decision Provides Cautionary Tale for Board and Activists (Akin)**

Akin discusses the recent decision in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, in which Vice Chancellor Laster held that several provisions in a stockholder agreement between a company and its founder were facially invalid as they unlawfully constrained the board's discretion in violation of DGCL § 141(a).

### **The Road Ahead for Private Equity: Reflections and Predictions (Akin)**

Akin discusses opportunities and challenges confronted by private equity funds during 2023 and expectations for 2024.

### **Increase in Regulatory Reporting Across Jurisdictions Drives Demand for ESG Controller Role (Reuters)**

Companies are gradually incorporating a new professional role within their management structures to oversee ESG data collection and ensure integrity in the ESG and climate-related reporting process.

### **A Roadmap for Corporate ESG Reporting: eBay Chief Sustainability Officer (ESG Dive)**

The Chief Sustainability Officer at eBay writes about trends to expect in 2024 around ESG disclosure, ESG investing and stakeholder expectations.

### **Corporates Inch Towards Gender Equity on Boards (ESG Investor)**

Recent reports issued by Moody's Ratings and MSCI highlight the slow increase seen globally in the number of women on corporate boards, and also project gender parity on boards won't be reached until 2040 if the pace remains the same.

### **US Environmental and Social Proposals Hit New Heights (ESG Investor)**

The 2024 Global Outlook Report projected U.S. environmental and social proposals may reach or exceed the previous year's proposal numbers, noting the number of such proposals

submitted in 2023 were the highest on record for a third consecutive year. This increase in proposals comes at the same time as a two-year decline in shareholder support for ESG-related proposals.

## Upcoming ESG Events

### 2024 ESG Conference

University of Texas at Arlington  
Arlington, TX  
April 22, 2024

### Earthx2024 Congress of Conferences

EarthX  
Dallas, TX  
April 22-26, 2024

### Accelerating the Circular Economy

GreenBiz  
Chicago, IL  
May 22-24, 2024

### Sustainability Week US

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

### Akin's ESG Practice

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### Questions?

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