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The Sustainable Finance Law Review

First Edition

Editor: Anna-Marie Slot, Global ESG Partner of Ashurst LLP

THE SUSTAINABLE FINANCE LAW REVIEW

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PREFACE

Sustainable finance is a relative youngster in the world of finance, but it is growing up fast. Public and private financing of sustainable/green projects, or those with provisions in line with borrowers' and issuers' environmental, social and governance (ESG) commitments, has exploded.

Since the signing of the Paris Agreement in 2015, more than 100 countries have committed to net zero emissions targets. Countries have also acted at a national level with ambitious target-setting and nationally determined contributions (NDC) pursuant to the Paris Agreement. They are not alone. By mid-2022, more than one-third of the world's largest publicly traded companies had net zero targets. Financial institutions have also engaged with various policies introduced to enshrine ESG commitments, in terms of both their own lending targets and the carbon emissions linked to those targets. Investors at both retail and institutional levels increasingly look to the financial markets as an important lever in achieving such targets.

For over three decades the United Nations has brought together almost every country on earth for the global climate summits – known as the Conference of the Parties (COP). At COP26 in 2021, private finance showed up in force to play its role in the transformation of the business ecosystem as we know it. Precisely what that role entails is a live debate and the discussions regarding the purpose of sustainable finance cover a wide spectrum of issues – from greenwashing, to the fundamental shift of credit including the risks and opportunities of ESG considerations. We saw that debate play out in real time during COP27.

Notwithstanding ongoing considerations about the purpose of sustainable finance, financial market participants have reacted by creating a wide variety of financial products marketed as sustainable, green or ESG-friendly. The rapid increase in both supply of and demand for sustainable investment products has, at times, resulted in a lack of consistency, transparency and reliability of disclosures and metrics. Governments and regulatory bodies are increasingly focused on imposing guidelines and frameworks to address these issues.

Although sustainable finance continues to elude strict definition at present, significant efforts are being made globally to ensure quality and transparency in the industry, to impose consistent frameworks such as the International Sustainability Standards Board (ISSB) and disclosure requirements such as those of the Task Force on Climate-related Financial Disclosures (TCFD) that support comparability and interoperability among firms and products, and to provide investors with sufficient information to monitor the impact of their investments.

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In this inaugural edition we aim to:

a provide a snapshot of the current state of sustainable finance and the status of regulatory efforts across multiple jurisdictions; and

b track the evolution of sustainable finance and outline key trends for the near future.

I thank all of the contributors for their expertise, hard work and dedication in producing this volume.

Anna-Marie Slot
Ashurst LLP
London
December 2022

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Chapter 1

BRAZIL

Tiago Araujo Dias Themudo Lessa, Rafael José Lopes Gaspar, Renata Gaspar Barbosa Corrêa and Victor Galembeck Ahern Miranda[1]

I INTRODUCTION

Increasing consideration for environmental, governance and social (ESG) aspects in investment decisions has become a global demand among investors, public authorities and companies. To attend to such requirements, companies, and the market in general, aim at fostering sustainable practices, increasingly solid governance and structuring transactions related to those sustainable standards.

The scenario is not different in Brazil: even though its sustainable finance framework is at an early stage in the development of specific rules on ESG-related factors, the Brazilian legal framework is provided with general rules that allow companies, managers and the securities market to analyse these factors in their investment decisions.

Companies are embracing sustainable local and external debt financing with enthusiasm and adjusting themselves to recently enacted legislation, regulation and self-regulation in order to align their corporate governance and disclosures with international standards. As part of this recent regulatory trend, the Brazilian Securities and Exchange Commission has modernised rules applicable to publicly held companies, setting forth parameters of ESG-related information to be disclosed by listed companies.

The Brazilian Association of Financial and Capital Markets Entities (ANBIMA), a self-regulatory entity and a spokesperson for the market, shows increasing concern about the topic, especially when applied to investment funds and their asset managers. ANBIMA published, in January 2020, the ESG Guide | Incorporation of ESG aspects in investment analysis, governing ESG concepts and national and global performance indicators, which also provides recommendations regarding requirements to be complied with in investment policies conducted by managers of investment funds. According to the 2nd Sustainability Research[2] conducted by ANBIMA in 2018, 85.4 per cent of asset and fund managers assess the potential impact of ESG-related risks in their relevant investment process, demonstrating the relevance of the matter to the capital markets industry.

1 Tiago A D Themudo Lessa and Rafael José Lopes Gaspar are partners and Renata Gaspar Barbosa Corrêa and Victor Galembeck Ahern Miranda are associates at Pinheiro Neto Advogados.

2 Publicly available at https://www.anbima.com.br/data/files/4C/92/36/CF/D6C17610167AA07678A80AC2/Relatorio-Sustentabilidade-2018.pdf.

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II YEAR IN REVIEW

During the past year, as indicated throughout this chapter, there have been certain developments of the Brazilian legal framework towards the ESG triad, such as an improvement of the duty of publicly held companies to disclose periodic information on ESG, as well as the refinement of the regulation regarding certified emission reductions. Nevertheless, there still is considerable work to be done.

Certain bills have been presented to the National Congress pending approval, including:

a Bill No. 725, of 2022, which provides for the insertion of hydrogen as an energy source in Brazil, as well as requirements for obtaining the incentives regarding sustainable hydrogen; and

b Bill No. 735, of 2022, which sets forth the green investment certificate, which aims at fostering sustainable practices within the Brazilian financial and capital markets.

III REGULATION AND POLICY

The Brazilian legal and regulatory framework regarding sustainable finance is still in its early stages and, even in 2022, there is no legal or regulatory definition of what is ESG or other criteria to define it. However, there are general rules that allow companies, managers and the securities market to analyse these factors in their investment decisions.

Such general rules are exemplified by Law 13,986, of 7 April 2020, as amended, commonly referred to as the Agro Law, which is an important tool to reduce unnecessary bureaucracy and promote economic development without losing sight of the environmental sustainability that is required under sustainable standards. Instruments set forth in the Agro Law allowed the issuance of the first green agribusiness receivables certificates – debt instruments issued in the context of a structured financing operation involving securitisation of agribusiness credit rights – according to the Agriculture Criteria Document, released in July 2020, by the Climate Bonds Initiative (CBI). These agribusiness receivables certificates were backed by financial rural product certificates (CPR-F), and the funds raised will be used for the regenerative organic production of grains, citrus and forestry and increased productivity through the expansion of irrigated areas.[3]

In addition to the agribusiness receivables certificates, the Agro Law has certainly enabled countless other sustainable and innovative structures from a legal, financial and environmental point of view. The financial rural product certificate is the debt instrument that has undergone the most positive changes. Traditionally, a financial rural product certificate must be issued by rural producers and in the context of an input produced by its issuer. One of the most innovative provisions of the Agro Law is the equivalence of the following products as rural products:

a products related to the conservation of native forests and the respective biomes;

b products related to the management of native forests within the scope of forest concession programme public funds; and

c products obtained from other forestry activities as defined by the government as environmentally sustainable.

3 As defined by the report prepared by the World Commission on Environment and Development, a member of the United Nations, sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their needs'.

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In other words, issuers of financial rural product certificates are thereby able to finance themselves or to create financing structures aimed at preserving native forests, and such possibility, until recently, was not widespread. The Agro Law also authorises natural or legal individuals, who are not rural producers but who explore native or planted forests, to also issue financial rural product certificates.

Such provision creates a path for individuals who are not rural producers and do not rely primarily on agricultural activities to act in the development and preservation of forests. The legal provisions introduced by the Agro Law clearly show that it is possible, through creative and innovative solutions, to generate an environment that combines economic interests with environmental preservation. The full effectiveness of the Agro Law, however, cannot be seen by disregarding a certain dependence on and linkage to the ability of companies in the agricultural sector to demonstrate that they hold and implement socio-environmental and governance policies. These were already trends or, in certain circumstances, even rules, bounding credits and financing or stimulating investment upon prior analysis or periodic monitoring of the socio-environmental standards of borrowers, or both.

In the current scenario, in which environmental, social and corporate governance standards are emerging in national and international markets, the development of companies that do not incorporate such standards is no longer assumed. Federal and state governments have seen attractive ways to promote environmental conservation and, as a consequence, encourage companies to adapt themselves to environmental standards and to reposition in the ESG market by using the environmental sphere as an example, sensitive to the current perspective and, in an intelligent way, combining the opportunity to make new business viable in the national and international spheres with the common objective of regularisation and environmental preservation. These public policies bring clear, general, broad and common benefits to the private sector, public authorities and civil society.

Additionally, on 19 May 2022, Decree No. 11.075 issued by the federal government established the procedures for the preparation of sectoral climate change mitigation plans and instituted the national system for the reduction of greenhouse gas emissions. Undeniably such rule, inspired by the Paris Agreement, is a move toward legislative improvements by focusing on:

a establishing the competence of the bodies that can propose climate change mitigation plans; and

b creating a national system whose purpose is to serve as a single centre for recording emissions, removals, reductions and offsets of greenhouse gases, and acts of trade, transfers, transactions and retirement of certified emission reduction credits.

Decree No. 11.075 also sets forth that deadlines and rules for updating sectoral climate change mitigation plans will be defined when they are prepared by the competent bodies (i.e., the Ministry of the Environment, the Ministry of Economy and related sectoral ministries, if any), and the commitments assumed by the country under the United Nations Framework Convention on Climate Change will be observed through nationally determined contributions. Even though such actions are still to be taken by the government and little is said about sustainable financing, it seems that the ESG agenda is here to stay.

However, since the ESG topic is in vogue and the legal framework regarding ESG is still under development, the governmental agencies that mostly work together with players of the capital markets (i.e., the Brazilian Securities Commission (CVM) and the Brazilian Central

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Bank), under pressure exerted by the market have issued a few rules regarding ESG matters and those are closely related to sustainable financing, since investors are more likely to be part of a structure that also concerns the environment.

It is important to highlight that both the Brazilian Central Bank and the CVM are independent bodies that also have sole discretion to apply penalties or to deny requests should they understand that an applicant or a party in a procedure has not complied with their rules. Thus, even though such bodies are not responsible for ESG matters, they play an important role in improving the sector and its regulations.

IV SUSTAINABLE FINANCE INSTRUMENTS

Green bonds and sustainability-linked loans serve as finance instruments for green and sustainable transactions in the Brazilian capital markets. Additionally, there are specific financial instruments existing under the Brazilian legislation, with the most used financial instruments being bonds, agribusiness receivables certificates, financial rural product certificates and certified emission reductions.

Overall, such transactions involve companies that have allocated funds to finance both environmental and social governance-focused sustainable projects in the most diverse sectors, including agribusiness and infrastructure (such as energy generation and sanitation), as well as in the wholesale, retail and food sectors. Depending on the structure of each case, it is possible to set forth obligations to ensure that the funds will be effectively allocated to those green and sustainable projects. In certain cases, it is common to establish green finance frameworks prepared by specialised firms and aligned with the Green Bond Principles published by the International Capital Markets Association in 2021 and the Green Loan Principles published by the Loan Market Association and the Loan Syndications and Trading Association, respectively, in 2021.

As reported by the Climate Bonds Initiative, between 2015 and 2020, the equivalent of US$7 billion of green bonds was issued by 32 issuers in 42 deals in Brazil. Most of the funds have been directed to clean energy projects, including the largest issuance by Brazilian Development Bank (BNDES) of US$1 billion in 2017, which focused on wind and solar energy.[4] Other projects relate to sustainable forest management, recycling and industrial ecoefficiency. In 2020, the government launched the first programme in Latin America to fund infrastructure projects with the sale of green bonds. Three planned freight railways, Fiol, Ferrogrão and Fico, which will have their operating licences auctioned, are expected to be certified as sustainable projects by CBI.[5] In 2020, around 3 per cent of all Brazilian bonds issued were green.[6] Brazil also has a high rate of verification for both its international and domestic issuances.

In the area of green loans, the Brazilian Bank Federation (Febraban) completed one of the world's first estimates of volume of lending provided for the green economy. At the end of 2015, 17 per cent of total corporate loans were allocated to the green economy, with

4 BNDES raises US$ 1 billion in green bonds on the international market (2017). BNDES. https://www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Institucional/Press/Noticias/2017/20170509_green_bonds.html.

5 'Brazil launches green bond program for railways' (2020). Reuters. https://www.reuters.com/article/brazil-infrastructure-green-bonds-idUKL1N2DN1IZ.

6 Green bond data from Climate Bonds Initiative; total Brazilian bond data from the BIS.

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sustainable transport as the largest category.[7] By 2020, this number was almost 22 per cent, slightly lower than in 2019.[8] As part of the 2017 Brazilian Green Finance Initiative, two funds (one by BNDES in 2017 and another by BrasilPrev in 2019) have been launched and 235 million reais issued for refinancing renewable energy portfolios.[9] A new green finance tool, developed by the Global Innovation Lab for Climate Finance in Brazil, is the green receivables fund, or the green FIDC, which seeks private capital to finance green economy projects. Once the project is operational, the vehicle will be refinanced in the Brazilian capital markets. The green FIDC is helpful in attracting pension funds and insurance companies to invest in the green economy. A spin-off from the green FIDC is the green CRI (certificate of real estate receivables); in 2021, US$50 million was raised by a Brazilian FI through these vehicles.[10]

In 2019, the Responsible Commodities Facility, a financial facility offering green bonds for sustainable soy production in Brazil, was launched on the London Stock Exchange with the aim of providing low-interest credit to Brazilian soy and corn farmers.[11] The carbon market simulation coordinated by the Fundação Getúlio Vargas Sustainability Study Centre, which began with 20 companies in 2013, started trading in 2020. Certified emission reductions and other environmental assets can be traded by private parties in different ways, notably through the BVRio environmental assets stock exchange.[12] According to the United Nations Framework Convention on Climate Change (UNFCCC), this initiative has resulted in a total stock or reduction of carbon derivative of BVRio's market mechanisms of 322 million tonnes of CO_2 equivalent.[13]

Finally, BNDES is also engaged in green finance activities. By 2018, its climate fund programme had leveraged more than 1 billion reais in financing to reduce greenhouse gas emissions. It is estimated that these investments should reduce the emission of greenhouse gases by about 4 million tonnes of CO_2 equivalent.[14]

7 UNEP. (2017). Roadmap for a Sustainable Financial System. World Bank. https://documents1.worldbank.org/curated/en/903601510548466486/pdf/121283-12-11-2017-15-33-33-RoadmapforaSustainableFinancialSystem.pdf.

8 More than 20% of the credit granted in 2020 was destined for the green economy, points out Febraban. (2021). Datagro. https://portal.datagro.com/en/agribusiness/12/331056/more-than-20-of-the-credit-granted-in-2020-was-destined-for-the-green-economy-points-out-febraban.

9 Ministry of Agriculture, Livestock and Food Supply. (2020b). Unlocking Brazil's Green Investment Potential for Agriculture. https://www.gov.br/agricultura/pt-br/assuntos/politica-agricola/financas-verdes/iniciativas-e-parcerias/arquivos/6-sustainable-agriculture-investment-roadmap-2020.pdf.

10 Buchner, B (2021). Brazil's first FIDC and CRI issued as climate bonds raise US$50 million. CPI. https://www.climatepolicyinitiative.org/press-release/lab-green-fidc-closes/.

11 UNEP. (2019). World's first green bonds scheme to finance responsible soy production in Brazil launched. https://www.unep.org/news-and-stories/press-release/worlds-first-green-bonds-scheme-finance-responsible-soy-production.

12 Baker McKenzie. (2017). Recommendations of the Task Force on Climate-related Financial Disclosures. Review of local relevance: BRAZIL. UN PRI. https://www.unpri.org/download?ac=1405.

13 BVRio – Environmental Exchange of Rio de Janeiro – Brazil. (n.d.). UNFCCC. Retrieved 7 July 2021, from https://unfccc.int/climate-action/momentum-for-change/activity-database/bvrio-environmental-exchange-of-rio-de-janeiro.

14 BNDES announces an additional R$ 2.2 bi to support investments in renewable energy. (September 2018). BNDES. https://www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Institucional/Press/Noticias/2018/20180927_bndes_renewable_energy.html.

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Secondary markets and other aspects of the financial systems are yet to be developed in respect of sustainable finance.

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

Recent regulations issued in Brazil set forth requirements regarding sustainable disclosure by financial institutions and publicly held companies.

At the end of 2021, the Brazilian Central Bank, in accordance with the recommendations of the Taskforce on Climate related Financial Disclosures and with the Basel Committee papers on the subject, issued several new ESG practice requirements for banks that are already in force or that are to be in force by the end of this year.

Such rules provide for, among other provisions, the risk management framework, the capital management framework and the information disclosure policy. From now on, social, environmental and climate risks must be integrated into the risk management process, requiring the development of new mechanisms that allow these activities to be carried out. Furthermore, banks shall:

a send information related to social, environmental and climate risks, with a high level of detail on the risk factors considered by the bank, including an assessment about customers, economic sectors and operations; and
b present reports on social, environmental and climate risks and opportunities, which should be disclosed to the market, presenting information on governance and processes related to the management of social, environmental and climate risks.

The CVM has also started working on issuing ESG rules, despite some criticism on how fast such rules are being issued. CVM Resolution No. 59, issued on 23 December 2021 and coming into force at the beginning of 2023, establishes that companies registered before the CVM will have one year to adapt to the new rules. Such Resolution changes important aspects of CVM Resolution No. 80, applicable to all companies that are registered before the agency – which is also a requirement for an initial public offering – and provides that companies present, in their reference form, their main indicators of ESG aspects, as well as their ESG risks. In addition, they must disclose whether they have an inventory of greenhouse gas emissions and provide information regarding the diversity of their body of administrators and employees.

It is noteworthy that, to date, there is no specific taxonomy (i.e., classification system) established in Brazil in respect of sustainable and green financing. In the emerging growing global sustainable finance environment, taxonomies that establish sustainable activities are becoming relevant to investors, financial intermediaries, regulators and supervisors. Taxonomies are instruments that:

a provide transparency, and therefore reduce the risk of greenwashing;
b prevent market fragmentation;
c set forth a foundation for additional policy action;
d emphasise the contribution of investments to sustainability;
e reduce transaction costs; and
f offer a tool to structure portfolios.

China and the EU have taken the lead internationally in the development of taxonomies. In view of Brazil's role in international capital and financial markets, these taxonomies

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will likely affect national market agents in the coming years. It is important to highlight that Brazil does not have a fully fledged, economy-wide environmental and sustainable taxonomy yet. However, every year since 2015, Febraban has collected data on the financial resources allocated by banks to the green economy, and to sectors with high potential for environmental degradation.[15]

In this sense, it is important to mention that voluntary initiatives exist in Brazil, such as the green economy methodology developed with the support of Fundação Getulio Vargas and the United Nations Environment Programme (UNEP) Inquiry, based on UNEP's green economy definition.[16] With the support of SITAWI, a public interest social organisation active in the development of innovative financial solutions for socio-environmental impact, Febraban is revising the methodology to develop a taxonomy that would help improve the identification of green activities, as well as sectors highly exposed to climate and environmental risks. The Brazilian Central Bank is also analysing how to adopt a classification system to identify the exposure of credit portfolios to environmental and social risks. In this regard, its latest financial stability report presents a version of this system, which is being improved. The under-review Febraban taxonomy and the list of high-risk sectors provided by the World Bank[17] are among the resources currently being considered.

An environmental and sustainable-focused taxonomy will provide investors with information and ensure transparency on sustainable investments. Participants in the market, given the non-existence of guidelines setting forth the requirements for an investment to be considered sustainable, can currently deal with products and services under the label of sustainability that do not fulfil the specific requirements. In view of this, a complete and clear taxonomy is likely to allow participants in the market to decide their relevant assets and mitigate the risks arising from greenwashing, and can incentivise the allocation of private and public capital from Brazilian and international participants for sustainable projects and investments.

VI ESG DATA AND REPORTING

Investors, companies and participants in the market are more and more concerned about the fulfilment of sustainable investments with regard to the relevant requirements. Under Brazilian regulation, there are certain aspects that aim at covering the disclosure of information on ESG aspects, as anticipated above, including information subject to disclosure by:

a publicly held companies under their periodic reference forms, as a result of the CVM's regulation; and

b financial institutions, as banks, in view of the regulations recently issued by the Brazilian Central Bank.

The Brazilian legal framework has yet to establish reporting requirements when it comes to sustainable investments, including coverage of the level of emissions by companies. However,

15 Febraban https://portal.febraban. org.br/pagina/3085/43/pt-br/estudos-sustentabilidade-2019. See the annual reports, Mensurando recursos financeiros na economia verde.

16 UNEP Green Economy: https:// www.unep.org/explore-topics/greeneconomy.

17 GIZ (2020). O mercado emergente de finanças verdes no Brasil. Available at: http://www. labinovacaofinanceira.com/wpcontent/uploads/2020/07/mercado_ f inancasverdes_brasil.pdf.

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the participants in the negotiation of the transaction documents usually set forth obligations therein in order to have evidence that the funds received in the offerings and transactions have been allocated by the companies to green and sustainable projects.

Additionally, the ESG data reporting regime has been challenging, mainly because: not all companies are required to disclose such information; and the Brazilian legal framework has yet to set forth all the requirements applicable to sustainable investments.

VII SUSTAINABLE FINANCE INCENTIVES

As mentioned above, there are no specific ESG government incentives; however, there are a few mechanisms that support investment in sustainable projects, even if only indirectly. Considering tax matters, it is important to highlight Law No. 12,431/11, which seeks to encourage the development of projects by reducing the applicable tax burden on the interest derived from debentures and investment funds whose fundraising was intended for investment projects.

In 2020, the government expanded the definition of investment projects set forth in Law. No. 12.431/11 by means of Decree No. 10.387/20. With the enactment of Decree 10,387/20, the investment and debentures encouraged by Law 12,431/11 encompass projects that provide relevant benefits to environmental or social matters. The main goal is that such measure can foster the development of the securities green market and fixed income securities whose resources are destined for carrying out projects or investing in assets that have positive climate or environmental impacts, and social securities. It is worth noting that Decree No. 10,387/20 also defines which projects cause 'relevant environmental or social impacts', moving towards defining something more specific to ESG-related matters. Among such projects, it is important to mention urban transport systems, including railways, and renewable solar energy generation.

It is also important to mention the incentives applicable to ESG operations, under which the issuer gains a few benefits by complying with some ESG criteria. In the green bonds structure, it has become more common to provide better rates to the issuer linked to the accomplishment of key performance indicators related to ESG, for example.

Furthermore, the CVM will soon begin to demand that listed companies disclose their ESG information, so it is very likely that the Brazilian stock exchange will also create some rules in this sense, as it did with the compliance requirements created within the context of the new market landmark, a few years ago, when compliance requirements increased all over the world.

VIII GREEN TECHNOLOGY

Emerging technologies, especially hydrogen and carbon, are likely to have an influence on sustainable finance investments, especially in cases where the relevant transaction documents establish any framework setting forth the green and sustainable projects to which the funds received in the transactions will be allocated. In this sense, such frameworks can focus on projects with alternative and sustainable resources.

Additionally, the federal government recently announced a series of decrees that will support the development of green investments and the reduction of greenhouse gas emissions. In this scenario, trading of emerging technologies, such as carbon and hydrogen, has been increasing in the past few years in Brazil, following the global trend and legislative

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innovations. In respect of carbon trading, Decree No. 11.075, among other matters, instituted the National System for the Reduction of Greenhouse Gas Emissions and created a national system whose purpose is to serve as a single centre for recording emissions, removals, reductions and offsets of greenhouse gases and acts of trade, transfers, transactions and retirement of certified emission reduction credits.

IX CLIMATE CHANGE IMPACT

Considering that the ESG agenda is constantly increasing, even more companies are seeking alternatives and adopting measures to benefit the environment (e.g., reducing the emission of polluting gases) or are committed to finding new ways to approach the matter within their daily activities.

However, since there are no specific rules in the Brazilian legal framework related to climate change, there are no litigation or enforcement actions related to such specific rules, although there are several lawsuits indirectly related to the matter, as there are lawsuits related to misconducts that are in discordance with environmental law or related rules.

The climate and transition risks are constantly debated in Brazil, considering the unique specifications of its nature. The advancement of some sectors of the economy has aggravated some issues already faced by the authorities, such as deforestation, irregular emission of gases in the atmosphere, and pollution of rivers and lakes.

On the other hand, the improvement of the environmental legislation, as mentioned above, has emerged as a promising way for discussing environmental issues and finding solutions, above all because it is clear that the authorities are increasingly attentive to these aspects and state that they are committed to making their best efforts to guarantee the improvement of the relationship between market participants and the environment.

X OUTLOOK AND CONCLUSIONS

Considering the above, and even though there still is a long way to go, it is possible to say that the improvement of the Brazilian legal framework concerning ESG matters is on the agenda of the government and its bodies. There are several laws near to enactment, and the Brazilian market has clearly embraced the cause, in accord with what is happening worldwide.

As a result of the recently enacted regulations, there has also been lots of interest in the carbon credits market and its financing alternatives, which is likely to result in potential new regulations being issued in the short term.

All in all, we shall see regulatory innovation in this regard in the coming years.

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Chapter 2

CANADA

Bill G Gilliland[1]

I INTRODUCTION

In Canada, sustainable finance has developed within the voluntary frameworks and best practices developed through the International Capital Market Association's (ICMA) Green Bond Principles, Sustainability-Linked Bond Principles, Social Bond Principles and the *Climate Transition Finance Handbook*. There is broad market acceptance of the various sustainable finance instruments contemplated within these frameworks.

Growing market understanding of the importance of environmental, social and governance (ESG) considerations to stakeholders has led more companies to adopt voluntary sustainability disclosure frameworks such as the Task Force on Climate-Related Disclosures (TCFD), but also others, as part of their regular disclosure, which, in turn, has facilitated the utilisation of sustainable financing instruments. More and more companies are adopting net-zero emissions targets in line with Canada's national commitments, including Canada's largest banks.

More regulation around ESG disclosure and sustainable finance is on the horizon, however. The federal government in Canada has recognised the potential for driving emissions reductions through climate-related regulatory requirements in the financial sector, and proposed regulations are out for consultation. In response to the adoption of various voluntary ESG disclosure frameworks and different approaches to making those disclosures, the Canadian Securities Administrators (CSA) have issued proposed climate-related disclosure rules for public companies in an effort to standardise the disclosure approach, based on some of the principles from the TCFD. Rules have been clarified on disclosures by ESG funds.

II YEAR IN REVIEW

There have been a number of significant developments in Canada over the past year relating to sustainable finance.

a In March 2022, the government of Canada issued a C$5 billion green bond in its first green bond offering.

b In July 2022, Ontario Power Generation Inc issued its second green bond with a use of proceeds including the development of nuclear power, demonstrating market acceptance of nuclear as 'green'.

1 Bill G Gilliland is a partner at Dentons Canada LLP. Bill gratefully acknowledges the assistance of Heather Bonnell, Carly Kist and Charles Lewis, associates at Dentons Canada LLP.

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c In February 2022, Tamarack Valley Energy Ltd issued a sustainability-linked bond, bringing that instrument into the high-yield space and demonstrating market acceptance of an oil and gas producer utilising the instrument with emissions intensity targets.

d In October 2021, the major Canadian banks signed on to the Net-Zero Banking Alliance (NZBA) and the disclosure and emissions reduction obligations as part of that grouping.[2]

e The Office of the Superintendent of Financial Institutions (OFSI) proposed a Draft Guideline B-15: Climate Risk Management (Guideline), which proposes a climate-sensitive prudential framework that would apply to all federally regulated financial institutions (FRFIs).[3]

f On 18 October 2021, the CSA published a proposed National Instrument 51-107 Disclosure of Climate-Related Matters and its proposed Companion Policy 51-107CP for comment.[4]

g On 19 January 2022, the CSA released Staff Notice 81-334 ESG-Related Investment Fund Disclosure to provide guidance on the disclosure practices of investment funds as they relate to ESG considerations.[5]

III REGULATION AND POLICY

i Governance regime

Canada is a party to the Paris Agreement[6] and so is required to prepare, communicate and maintain successive nationally determined contributions (NDCs),[7] being reports that communicate the actions a party will take to adhere to the Paris Agreement (e.g., reduce its greenhouse gas (GHG) emissions and build resilience to adapt to the impacts of rising temperatures).[8] NDCs are to be updated every five years, with each iteration to be more ambitious than the previous one.

Most recently, Canada submitted an updated NDC on 12 July 2021 (Updated NDC).[9] The most significant change in the Updated NDC is a commitment to reduce emissions by 40 to 45 per cent below 2005 levels by 2030. This is a substantial increase of ambition beyond Canada's original NDC, which had targeted a 30 per cent reduction below 2005 levels by 2030. The Updated NDC also outlines various climate-related action plans and investments that the Canadian government will take to adhere to the Paris Agreement.

2 See Section VII.

3 See Section VII.

4 See Section V.

5 See Section V.

6 Paris Agreement, Treaty Series, Vol. 3156 (4 November 2016) (https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf).

7 ibid. at Article 4, Section 2.

8 UNFCCC, The Paris Agreement (https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement).

9 Canada's 2021 Nationally Determined Contribution Under the Paris Agreement (https://unfccc.int/sites/default/files/NDC/2022-06/Canada%27s%20Enhanced%20NDC%20Submission1_FINAL%20EN.pdf); see also: UNFCCC, NDC Registry (https://unfccc.int/NDCREG).

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One of these items is the Canadian Net-Zero Emissions Accountability Act.[10] The Canadian Net-Zero Emissions Accountability Act is the legislation that enshrines Canada's commitment to net zero by 2050.[11] In particular, Section 6 states: 'The national greenhouse gas emissions target for 2050 is net-zero emissions.'[12]

The Net-Zero Emissions Accountability Act became law on 29 June 2021. Along with setting the 2050 target, the Net-Zero Emissions Accountability Act requires the Minister of the Environment to set national GHG emissions targets for each milestone year with a view to achieving net zero by 2050.[13] Each milestone target must be a progression from the previous one.[14] The Net-Zero Emissions Accountability Act provides that the 2030 GHG emissions target is Canada's NDC for that year under the Paris Agreement.[15] Therefore, the Net-Zero Emissions Accountability Act codifies Canada's NDC, which was updated in 2021, to set the target of reducing emissions by 40 to 45 per cent below 2005 levels by 2030.[16]

The Minister is also required to set plans for achieving each target and prepare at least one progress report relating to each milestone year no later than two years before the beginning of the relevant year.[17] The Net-Zero Advisory Body was also established pursuant to this Act. The role of the Advisory Body is to give advice on how Canada can achieve its goal of net-zero GHG emissions by 2050.[18]

Pursuant to the Net-Zero Emissions Accountability Act and other legislation, Canada's federal government has started to announce emissions reduction targets for various sectors, including oil and gas, transportation and agriculture, to align those sectors' emissions targets with those in Canada's Updated NDC. The exact application of these targets within industries is still being worked out, but those industries understand the direction of travel of government policy and, in turn, have been establishing their own net-zero targets.

Directly relevant to sustainable finance is the 2022 introduction of Bill S-243[19] (Bill), which would enact the Climate-Aligned Finance Act, for a first reading of the Senate on 24 March 2022.

Before the Bill can become law, it will be debated at the second reading of the Senate, studied by a parliamentary committee, debated at a third reading of the Senate and then voted on. If the Bill passes the vote at the third reading of the Senate, it will go through the same process in the House of Commons.[20] It is fair to say that the actual enactment of this

10 Canadian Net-Zero Emissions Accountability Act, SC 2021 c 22 (https://laws-lois.justice.gc.ca/eng/acts/C-19.3/page-1.html#right-panel).

11 Canadian Net-Zero Emissions Accountability Act, SC 2021, c.22 [CNZEAA].

12 ibid., Section 6.

13 ibid., Section 7(1).

14 ibid., Section 7(1.1).

15 ibid., Section 7(2).

16 'Canada's 2021 Nationally Determined Contribution Under the Paris Agreement' (2021) (https://unfccc.int/sites/default/files/NDC/2022-06/Canada%27s%20Enhanced%20NDC%20Submission1_FINAL%20EN.pdf).

17 CNZEAA, Note 1, Sections 9 and 14.

18 Net-Zero Advisory Body (nzab2050.ca).

19 Bill S-243, An Act to enact the Climate-Aligned Finance Act and to make related amendments to other Acts, 1st Sess, 44th Parl, 2022 (https://www.parl.ca/DocumentViewer/en/44-1/bill/S-243/first-reading).

20 Government of Canada, How new laws and regulations are created (https://www.justice.gc.ca/eng/laws-lois/index.html).

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Bill into law is somewhat uncertain in terms of both timing and eventual content, but it is indicative of the federal government's approach and of its understanding of using the levers available to it to drive certain behaviours in the financial sector.

The purpose of the Climate-Aligned Finance Act is to require certain financial and other federally regulated entities to mitigate and adapt to the impacts of climate change.[21] The Climate-Aligned Finance Act is structured to align with and support the climate commitments that Canada has made under, among other agreements and commitments, the Paris Agreement[22] and the Net-Zero Emissions Accountability Act.[23]

The Act would require, among other things:

a disclosures, for example:
- 'reporting entities' (defined below) must publicly report their plans and targets;[24] and
- a 'federal financial institution' (as defined below) must disclose how it 'financially facilities'[25] entities in a manner that either aligns or does not align with climate commitments;[26]

b creation of policy, for example:
- the Superintendent of Financial Institutions must establish guidelines to account for climate-related risks for banks and certain other entities regulated by the Bank Act;[27] and
- the creation of an action plan to incentivise financial products that support climate commitments and disincentivise those that are inconsistent with climate commitments;[28] and

c climate corporate governance, for example:
- certain enumerated entities must appoint board members with 'climate expertise';[29] and
- directors, officers or administrators of 'reporting entities' (as defined below) exercise their powers in a way that enables alignment with climate commitments.[30]

A 'reporting entity' includes 'federal financial institutions' (as defined below), along with (1) a corporation within the meaning of the Canada Business Corporations Act; (2) a work, undertaking or business within the legislative authority of Parliament that is described in any of Paragraphs (a) to (e) or (j) of the definition of 'federal work, undertaking or business' in Section 2 of the Canada Labour Code; and (3) an entity listed in Schedule III of the Financial Administration Act.[31]

21 Bill S-243, Table of Provisions, Part 1.
22 Paris Agreement, Treaty Series, Vol. 3156 (4 November 2016).
23 Canadian Net-Zero Emissions Accountability Act, SC 2021 c 22.
24 ibid. at Section 7.
25 'Financially facilitates' means providing assistance or services of any financial value (e.g., debt and equity financing, project or general corporate financing, loans, loan guarantees, insurance, the issuances of any security, and the provision of any advisory, consulting or management services: Bill S-243, Section 2.
26 Bill S-243, Sections 6(6) and 7(1).
27 ibid. at Section 9.
28 ibid. at Section 10.
29 ibid. at Section 12.
30 ibid. at Section 16.
31 ibid. at Section 2.

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A 'federal financial institution' includes, among other entities, (1) the Bank of Canada, (2) a bank within the meaning of the Bank Act, (3) the Canada Infrastructure Bank, (4) the Canada Deposit Insurance Corporation, (5) the Canada Mortgage and Housing Corporation, (6) Export Development Canada, (7) Farm Credit Canada, and (8) the Canada Pension Plan and the Canada Pension Plan Investment Board.

The Act would also provide the Superintendent of Financial Institutions to make any order they consider appropriate to certain federal financial institutions if, in their opinion, doing so is in alignment with climate commitments.[32]

More specific climate-related disclosure proposals that would apply to all FRFIs have been issued by OFSI.[33] Together with commitments banks have made within the NZBA, these disclosure requirements are expected, over time, to incent the use of sustainable finance instruments.[34]

The CSA have proposed climate-related disclosure rules that would apply to public companies in Canada.[35]

ii Regulators

At the time of writing, in Canada, sustainable finance frameworks are voluntary and market driven. Issuers and banks reference the frameworks established by the ICMA, including the Green Bond Principles, the Social Bond Principles, the Sustainability-Linked Bond Principles and the *Climate Transition Finance Handbook*.

Efforts are under way to develop a 'made in Canada' transition financing taxonomy, pursuant to recommendations of an expert panel on sustainable finance.[36] It is unclear when this work may result in any published taxonomy.

Any offering in Canada of securities labelled pursuant to one of the sustainable finance labels is regulated by generally applicable securities laws.

IV SUSTAINABLE FINANCE INSTRUMENTS

Generally, all types of sustainable finance are supported in Canada, including green, social, sustainability and sustainability-linked loans and bonds.

In the Canadian market, it is generally understood that green loans and bonds can be issued by issuers whose business involves fossil fuels, though the use of proceeds cannot be fossil fuel related (see, for example, Capital Power Corporation's green bond framework). Issuers in these types of industries can issue green bonds and use the proceeds to develop green and renewable power projects, for example, to transition their businesses towards renewable power. The government of Canada has issued a C$5 billion tranche of green bonds. The eligible use of proceeds are terrestrial and aquatic biodiversity conservation, sustainable water management, sustainable management of living natural resources, renewable energy, pollution prevention and control, energy efficiency, eco-efficient products, production technologies

32 ibid. at Section 17(1).
33 See Section VII.
34 See Section VII.
35 See Section V.
36 Final Report of the Expert Panel on Sustainable Finance – Mobilizing Finance for Sustainable Growth, Government of Canada, 2019.

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and processes, climate change adaptation and clean transportation (see also Ontario Power Generation Inc's green bond issuance where the proceeds have been used to refurbish nuclear power generation facilities).

Companies in traditional fossil fuel-related businesses have used sustainability-linked products with key performance indicators (KPIs) including emissions and emissions intensity (see, for example, Enbridge Inc's sustainability-linked bond framework and Tamarack Valley Energy Ltd's sustainability-linked bond framework). Enbridge Inc's sustainability-linked financing framework includes a target of reducing Scope 1 and 2 GHG intensity by 35 per cent by 2030 relative to 2018. Tamarack Valley's sustainability-linked financing framework includes the target of reducing Scope 1 and 2 emissions intensity by 39 per cent by 2025 over the 2020 baseline.

The Canadian market has seen the issuance of use of proceeds social bonds. For example, the City of Toronto has issued several tranches of social bonds where the use of proceeds is social and affordable housing, affordable basic infrastructure, access to essential services, and socioeconomic advancement and empowerment. Other social bond examples include issuance into Canada by the International Finance Corporation where the use of proceeds was for benefitting underserved communities in emerging markets, including women entrepreneurs and low-income people in need of access to healthcare and essential infrastructure.

Sustainability bonds have been issued in Canada with broad ESG use of proceeds objectives. These typically have been issued by banks with the use of proceeds dedicated to certain uses. The Toronto Dominion Bank issued a sustainability bond with use of proceeds being access to essential services; affordable basic infrastructure; affordable housing; clean transportation; employment generation, including through the potential effect of small and medium-sized enterprise (SME) financing and microfinance; energy efficiency; green buildings; pollution prevention and control; renewable energy; socioeconomic advancement and empowerment; sustainable management of living natural resources; and sustainable water management. ScotiaBank issued a sustainability bond with a use of proceeds being terrestrial and aquatic biodiversity conservation; sustainable water management; sustainable management of living natural resources; renewable energy; pollution prevention and control; green buildings; energy efficiency; employment generation, including through the potential effect of SME financing and microfinance; clean transportation; affordable housing; affordable basic infrastructure; and access to essential services. A portion of the proceeds of the ScotiaBank bond was dedicated to support the Scotiabank Women Initiative, which was intended to help promote businesses owned and led by women.

Companies have also established social and governance-based KPIs and targets for sustainability-linked bonds and loans. Enbridge Inc's sustainability-linked financing framework includes Enbridge's racial and ethnic diversity performance target to boost racial and ethnic diversity to 28 per cent by 2025 from the current 21 per cent level. The framework also includes a target related to achieving 40 per cent female board representation by 2025. Tamarack Valley Energy's sustainability-linked bond includes a target of increasing indigenous workforce participation to 6 per cent or greater by 2025.

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V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

At the time of writing, there are limited legally mandated sustainability disclosure requirements. The principle legal requirements relate to mandatory diversity disclosure by public companies. For example, since 2014, companies listed on the Toronto Stock Exchange (TSX) have been required to make diversity-related disclosures in their annual disclosure documents on a 'comply or explain' basis, including:[37]

a on their policies and targets regarding the representation of women on the board of directors and in executive positions;
b how representation of women is taken into account in selecting board and executive officer candidates;
c gender representation on the board and in executive officer positions; and
d term limits.

See also National Instrument 58-101 of the CSA Disclosure of Corporate Governance Practices.[38]

Public corporations governed by the Canada Business Corporations Act have been required to make diversity-related disclosure regarding women, indigenous peoples, persons with disabilities and members of visible minorities (designated groups) since 2020 on a comply or explain basis.[39] These requirements include disclosure of term limits or other board renewal mechanisms, a description of written diversity policies for the selection of individuals from the designated groups as board nominees, and a description of progress made in achieving the policy's objectives, whether the level of representation of designated groups on the board or in senior management is considered in appointing new candidates, whether targets have been established for representation of the designated groups on the board and in senior management, as well as progress towards those targets, and the number of members of each of the designated groups on the board and in senior management. New guidelines for making this disclosure were published by Corporations Canada in February 2022.[40]

Increasingly, governance ratings organisations and industry groups developing best practices are focusing on gender and other diversity measures as critical elements of measuring or rating corporate governance (see, for example, the Canadian Coalition for Good Governance and The Globe and Mail Board Games).

Through 2021, a series of reports and reviews were prepared by the Ontario Securities Commission, the CSA and Corporations Canada, focusing on board and senior management diversity data, term limits and targets, and looking at diversity based on gender, visible minorities, persons with disabilities and indigenous peoples, to provide the basis for consultation towards further regulatory changes. The CSA continue to consider whether the diversity disclosure model should move from comply or explain to mandatory quotas in order to accelerate increased diversity. Further proposals to change the current diversity disclosure framework will be coming.

On 18 October 2021, the CSA published a proposed National Instrument 51-107 Disclosure of Climate-Related Matters and its proposed Companion Policy 51-107CP

37 TSX Company Manual.
38 Canadian Securities Administrators, National Instrument 58-101 Disclosure of Corporate Governance Practices.
39 Canada Business Corporations Act RSC 1985, c. C-44, as amended, Section 172.1.
40 Diversity of board of directors and senior management guidelines, Corporations Canada, 7 February 2022.

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(Climate Disclosure Proposals) for comment.[41] The proposed instrument would apply to public companies in Canada, regardless of jurisdiction of incorporation. For TSX-listed corporations with 31 December year ends, the proposed rules would take effect for annual filings made in early 2024.

Canadian companies have started to make voluntary disclosure of climate-related matters following the various voluntary frameworks and standards. Companies have adopted different approaches to the location, style and content of their disclosure, and one of the stated aims of the CSA proposals is to bring some standardisation to the disclosure to allow greater comparability for investors.

The Climate Disclosure Proposals would require disclosure based on recommendations of the TCFD. The Climate Disclosure Proposals would require issuers to make disclosure in the following areas:

a governance: describing the board's oversight of climate-related risks and opportunities and management's role in assessing and managing climate-related risks and opportunities;

b strategy: describing any climate-related risks and opportunities identified over the short, medium and long term, and describing the impact of these risks and opportunities on its business, strategy and financial planning;

c risk management: describing its processes for identifying, assessing and managing climate-related risks and how these processes are integrated into overall risk management; and

d metrics and targets: describing its metrics used to assess climate-related risks and opportunities and targets used to manage these risks and opportunities.

The TCFD contemplates that issuers should disclose GHG emissions (Scope 1, 2 and 3). The Climate Disclosure Proposals would require issuers to make this disclosure or explain why they do not. The Climate Disclosure Proposals would not require issuers to disclose the resilience of their strategy with reference to various climate scenarios – a key element of the TCFD recommendations.

Subsequent to the release of the Canadian proposals, the US Securities and Exchange Commission (SEC) released its own proposal on the same disclosure area, and the International Sustainability Standards Board (ISSB) released two disclosure proposals on sustainability and climate change disclosure. Both the SEC's and the ISSB's proposals arguably go further than the CSA proposals in a number of areas. Since the Canadian capital markets are very integrated into the North American and global capital markets, it is generally expected that the CSA will seek to avoid creating a unique 'made in Canada' disclosure rule on climate-related matters and will finalise its proposal once there is clarity on the SEC and ISSB final requirements. The CSA is also likely to want to avoid being seen as a 'laggard' in this area by adopting less onerous disclosure requirements, except for some limited circumstances where the nature of Canada's capital markets clearly justifies that approach (e.g., to recognise the significant small public company venture start-up part of the Canadian capital markets). This anticipated approach means that the adoption and implementation schedules for the requirements are somewhat uncertain.

41 Canadian Securities Administrators Consultation Climate-Related Disclosure Update and CSA Notice and Request for Comment; Proposed National Instrument 51-107 Disclosure of Climate-Related Matters, 18 October 2021.

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On 19 January 2022, the CSA released Staff Notice 81-334 ESG-Related Investment Fund Disclosure (Notice) to provide guidance on the disclosure practices of investment funds as they relate to ESG considerations.[42] The issuance of the Notice follows a considerable increase in interest in ESG investing in Canada for both retail and institutional investors.

The CSA have emphasised that the guidance provided in the Notice is based on existing securities regulatory requirements and does not create any new legal requirements or modify existing ones. Rather, the Notice clarifies and explains how the current securities regulatory requirements apply to ESG-related investment fund disclosure, with the view of enhancing and bringing greater clarity to ESG-related disclosure and sales communications to enable investors to make more informed investment decisions.

i Key developments

An increase in ESG interest among investors, as well as the potential for 'greenwashing', whereby a fund's disclosure or marketing intentionally or inadvertently misleads investors about ESG-related aspects of the fund, are cited in the Notice as having led securities regulators and international organisations to directly address issues relating to ESG investing. Notably, the International Organization of Securities Commissions published a final report in November 2021, setting out recommendations for securities regulators and policymakers to improve sustainability-related practices, policies, procedures and disclosure in the asset management industry. In the same month, the CFA Institute published its Global ESG Disclosure Standards for Investment Products with the aim of providing greater transparency and comparability to investors by facilitating clear communication of ESG-related features of investment products from asset managers.

In Canada, the CSA have conducted continuous disclosure reviews of regulatory disclosure documents and sales communications of ESG-related funds. The findings of these reviews are summarised within the Notice. Although the CSA consider current disclosure requirements to be broad enough in scope to address ESG-related disclosure, in their view, additional guidance was needed to clarify how the current disclosure requirements apply to improve the quality of ESG-related disclosure and sales communications.

ii Guidance

The Notice sets out guidance on how existing securities regulatory requirements apply to investment funds as they relate to ESG considerations in the following areas.

Investment objectives and fund names

Under securities laws, an investment fund (in its prospectus) is required to disclose the fundamental investment objectives of the fund, as well as information that describes the fundamental distinguishing features of the fund. To prevent greenwashing, a fund's name and investment objectives should accurately reflect the extent to which the fund is focused on ESG and, where applicable, the particular ESG-related aspects the fund is focused on. To ensure consistency, where a fund's name references ESG, the fundamental investment objectives of the fund are required to reference the ESG-related aspect included in the name.

42 Canadian Securities Administrators CSA Staff Notice 81-334 'ESG-Related Investment Fund Disclosure' 19 January 2022. Description taken from Dentons Canada LLP article 'The Canadian Securities Administrators release ESG-related guidance for investment funds', 11 February 2022.

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Fund types

Non-exchange traded mutual funds are required to identify the type of mutual fund that the fund is best characterised as in its prospectus. In the CSA's view, where a fund does not include ESG considerations in its investment objectives, it should not characterise itself as a fund focused on ESG, and, conversely, where ESG considerations are so included, a fund may characterise itself as a fund focused on ESG.

Investment strategies disclosure

The Notice sets out guidance in relation to investment strategies disclosure applicable to all funds and specific guidance applicable only to funds that use any of the following: (1) proxy voting or shareholder engagement as an ESG strategy; (2) multiple ESG strategies; and (3) ESG ratings, scores, indices or benchmarks.

Guidance applicable to all funds

An investment fund is required to provide full, true and plain disclosure of all material facts in its prospectus. To enable investors to understand the ways in which a fund will meet its ESG-related investment objectives, where applicable, and make investments, full, true and plain ESG-related investment strategies disclosure must be made. ESG strategies, if used either principally or as part of its investment selection process, require disclosure of the ESG-related aspects of the fund's investment selection process and strategies. Description of these strategies must be written using plain language.

Further, the CSA take the view that investment strategies disclosure should identify the ESG factors used and explain their respective meanings, as well as how they are evaluated and monitored.

Guidance applicable to certain funds only

Funds that use proxy voting or shareholder engagement as a strategy to select investments are required to disclose how they are used by the fund. In the CSA's view, disclosure should include the criteria used by the strategy, the goal of the strategy and the extent of the monitoring process used to evaluate progress towards such goal.

If multiple ESG strategies are used, disclosure explaining how the different strategies are applied during the investment selection process is required. In addition, if the strategies are not applied simultaneously, disclosure must include the order in which they are applied.

In the CSA's view, where an ESG-related fund uses ESG ratings, scores, indices or benchmarks as part of its principal investment strategies or investment selection process, disclosure in relation to how these ratings, scores, indices or benchmarks are used should be provided.

Proxy voting and shareholder engagement policies and procedures

An investment fund that uses proxy voting as an ESG investment strategy must include a summary of the ESG aspects of the fund's proxy voting policies and procedures in the fund's prospectus or annual information form, as applicable. Such inclusion can provide clarity about how voting rights will be used to further the fund's ESG-related investment objectives.

Further, the CSA encourage investment funds that use shareholder engagement as an ESG strategy to make their shareholder engagement policies and procedures publicly available to achieve greater transparency for investors.

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Risk disclosure

In keeping with the requirement for a fund to disclose any material risks associated with an investment in the fund, the CSA encourage all investment funds to consider whether any material ESG-related risk factors are relevant to the fund and to disclose such risk factors, if applicable.

Suitability

As mentioned above, a fund's name and investment objectives should accurately reflect the extent to which the fund is focused on ESG. Similarly, the CSA highlight that brief statements of a fund's suitability for particular investors should also accurately reflect the extent of the fund's focus on ESG and any particular aspects of ESG that the fund is focused on.

Continuous disclosure

Funds that have ESG-related investment objectives can help prevent greenwashing by providing useful continuous disclosure that allows investors to monitor and evaluate the fund's ESG performance. ESG-related funds are required to disclose how the composition of the investment portfolio relates to the fund's ESG-related investment objectives or strategies, as applicable, in its management reports of fund performance. Further, the CSA encourage funds with a measurable ESG outcome to report whether the outcome is being achieved in the same reports. Investment fund managers are also encouraged to regularly assess, measure and monitor the ESG performance of the funds they manage, to ensure that useful disclosure is provided.

If a fund uses proxy voting as an ESG strategy to meet its ESG-related investment objectives, the fund is encouraged to include disclosure of all of the fund's annual proxy voting records on its websites, despite the current requirement that only the most recent annual proxy voting record be made available. The CSA take the view that such disclosure would provide greater transparency into how the fund has historically made use of proxy voting to meet its ESG considerations. For the same reason, funds that use shareholder engagement as an ESG strategy are also encouraged to provide disclosure of past shareholder engagement activities.

Sales communications

Sales communications containing ESG considerations must not be misleading or untrue and should be consistent with a fund's regulatory offering documents so as to not intentionally or inadvertently mislead investors about ESG-related aspects of the fund.

Sales communications indicating that a fund is focused on ESG

The extent to which a fund is focused on ESG should be accurately reflected in any sales communication pertaining to an investment fund. Further, the CSA believe that a fund should not indicate that it is focused on ESG in its sales communications unless ESG is referenced in its investment objectives.

Sales communications referencing a fund's ESG performance

A fund must not include misleading statements about ESG performance of the fund in its sales communications.

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Sales communications including ESG ratings, scores or rankings

Similarly, sales communications that include fund-level ESG ratings, scores or rankings must not be misleading. In the Notice, the CSA provide specific guidance on how to avoid issues such as: (1) conflicts of interest involving the provider of the ESG rating, score or ranking; (2) cherry-picking ESG ratings, scores or rankings; (3) selecting ESG ratings, scores or rankings that are not representative of the ESG characteristics or performance of the fund; and (4) omission of necessary or appropriate explanations, qualifications or limitations.

ESG-related changes to existing funds

To the extent that any references to ESG are added or removed from the fundamental investment objectives of a fund, that fund will be subject to the requirement that approval of its security holders be obtained prior to the making of any change to the fund's fundamental investment objectives. If an investment fund changes its name to add or remove a reference to ESG, as mentioned above, similar consideration should be given to changing the fund's fundamental investment objectives.

ESG-related terminology

A fund's prospectus should provide a clear explanation of any ESG-related terms that are not commonly understood.

Investment fund manager-level commitments to ESG-related initiatives

If investment fund managers are signatories to certain international or regional ESG-related initiatives and publicly disclose this information, the CSA highlight the importance of clarifying that commitments to these initiatives are at the entity level, rather than at the fund level.

VI ESG DATA AND REPORTING

At the time of writing, mandatory reporting relating to sustainable investments is limited to diversity matters.[43] Broadly applicable industry-specific regulation can require reporting of various metrics to applicable regulators, and some of this reporting includes information relevant to sustainability topics. Some of this reporting is public and some is confidential. Since this type of reporting is not tied to sustainable investments, it is not dealt with further in this chapter. Its existence is relevant to note, however, since the argument for more sustainability disclosure is often based on the fact that disclosure is being made to regulators in any event.

Reporting relating to sustainable investments is being made by numerous companies on a voluntary basis. This disclosure is being made under voluntary frameworks and standards like the TCFD, or in the context of specific issuances in accordance with the relevant ICMA

43 See Section V.

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principles.[44] This has led to an environment where disclosure varies across companies in terms of location, content and style (and in some cases not at all), which, in turn, has led investors to push for mandatory disclosure requirements.[45]

Various proposals are being considered at the time of writing that would impose mandatory data and reporting requirements.[46]

VII SUSTAINABLE FINANCE INCENTIVES

At the time of writing, there are no direct government incentives to use sustainable finance instruments. There are, however, indirect longer-term, market-based incentives developing to push companies towards adopting sustainable finance instruments. Major providers of capital in Canada will become subject to climate-related disclosure obligations that will incent those institutions to prefer to lend pursuant to sustainability-type financing instruments so that they are comfortable that their lending portfolios will, over time, represent lower GHG emissions. The most immediate disclosure obligations on the horizon are those in the climate risk management proposal from OSFI and commitments made by financial institutions that have signed on to the NZBA.

OSFI has, for example, proposed a Draft Guideline B-15: Climate Risk Management (Guideline), which proposes a climate-sensitive prudential framework that would apply to all FRFIs.[47] OSFI has announced that it will communicate any subsequent changes to the Guideline's planned publication, although a 2023 release is anticipated, with application potentially for fiscal periods ending on or after 1 October 2023.[48]

On 26 May 2022, OSFI issued a draft version of the Guideline, advancing a climate-sensitive prudential framework that establishes a mandatory climate-related financial disclosure regime.[49] According to OSFI, such 'disclosures incentivize improvements in the quality of the FRFI's governance and risk management practices over time and contribute to public confidence in the Canadian financial system'.[50]

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44 See, for example, International Capital Market Association, Green Bond Principles and Sustainability-Linked Bond Principles.

45 Canadian Securities Administrators Consultation Climate-Related Disclosure update and CSA Notice and Request for Comment; Proposed National Instrument 51-107 Disclosure of Climate-Related matters, 18 October 2021.

46 See Section V.

47 Canada, Office of the Superintendent of Financial Institutions, Draft Guideline B-15: Climate Risk Management (Ottawa: Office of the Superintendent of Financial Institutions, 2022) at Annex 2.1 [Draft Guideline B-15].

48 ibid. at Paragraph 25.

49 Office of the Superintendent of Financial Institutions, News Release, 'OSFI consults on expectations to advance climate risk management' (26 May 2022), online: OSFI Public Affairs (www.osfi-bsif.gc.ca/Eng/osfi-bsif/med/Pages/b15-dft_nr.aspx).

50 ibid. at Paragraph 25.

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Chapter 2 of the Guideline requires all FRFIs, except for subsidiaries of FRFIs that report consolidated results to OSFI, to make climate-related financial disclosures.[51] As such, all Canadian banks fall within the scope of the Guideline.[52] Importantly, the required disclosures include Scope 1, 2 and 3 emissions.

OSFI's climate-risk related financial disclosure expectations for FRFIs are as follows.[53]

Expectations	Disclosures
Expectations based on the Financial Stability Board's Task Force on Climate-Related Disclosures Framework and the International Sustainability Standards Board's (ISSB) Exposure Draft on Climate-Related Disclosures.	• Governance; • strategy; • risk management; • metrics and targets; • greenhouse gas emissions (Scope 1, 2 and 3); • ISSB cross-industry metrics; and • ISSB industry-specific metrics for banks and insurers.
Other expectations	• Climate transition plan; and • net-zero commitment(s), if the federally regulated financial institution has made one or more, whether through the Net-Zero Banking Alliance or otherwise.

At the time of writing, eight Canadian institutions have joined the NZBA. The first Canadian member was Vancity, which became a founding signatory on 21 April 2021.[54] On 21 October 2021, the Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, National Bank of Canada, Royal Bank of Canada and Toronto Dominion Bank became NZBA signatories.[55] In the months that have followed, Coast Capital Savings, a credit union operating wholly in British Columbia, is the only other Canadian institution to join.

The NZBA was convened by the United Nations Environment Programme Finance Initiative. It represents a group of banks committed to aligning their lending and investment portfolios with net-zero emissions by 2050.[56] Two structures drive the NZBA's goal towards net-zero emissions. First, it establishes a platform for members to demonstrate leadership, consistency and credibility of action.[57] To this end, the NZBA provides a common standard for '1.5 degrees trajectory', which, in turn, enhances accountability to the commitment. Second, it provides a structured forum to support member transitions by showcasing potential implementation approaches, sharing experiences to accelerate progress, and facilitating the transfer of resources, methodologies and leading practices.[58]

51 Canada, Office of the Superintendent of Financial Institutions, Draft Guideline B-15: Climate Risk Management (Ottawa: Office of the Superintendent of Financial Institutions, 2022) at Annex 2.1 [Draft Guideline B-15].

52 Office of the Superintendent of Financial Institutions, 'Who we Regulate,' online: OSFI (www.osfi-bsif.gc.ca/Eng/wt-ow/Pages/wwr-er.aspx?sc=1&gc=1#WWRLink11/>).

53 ibid. at Annex 2.1.

54 Net-Zero Banking Alliance, Note 16.

55 ibid.

56 UN Environment Programme Finance Initiative, 'Net-Zero Banking Alliance,' online: UNEP-FI (www.unepfi.org/net-zero-banking) [Net-Zero Banking Alliance].

57 Net-Zero Banking Alliance, 'Frequently Asked Questions' (2 August 2022), online (pdf): UNEP-FI (www.unepfi.org/wordpress/wp-content/uploads/2022/06/FAQ-General-3.pdf) [Frequently Asked Questions].

58 ibid.

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To join the NZBA, each bank must have its chief executive officer sign a commitment statement that describes the target setting and reporting process said to be the primary catalyst for achieving the net-zero transition.[59] All signatories must commit to the following:

a to transition the operational and attributable GHG emissions from their lending and investment portfolios to align with pathways to net zero by 2050 or sooner;

b within 18 months of joining, to set 2030 targets (or sooner) and a 2050 target, with intermediary targets to be set every five years from 2030 onwards;

c banks' first 2030 targets will focus on priority sectors where the bank can have the most significant impact (i.e., the most GHG-intensive sectors within their portfolios), with further sector targets to be set within 36 months;

d to publish absolute emissions and emissions intensity annually in line with best practice, and within a year of setting targets disclose progress against a board-level reviewed transition strategy setting out proposed actions and climate-related sectoral policies; and

e to take a robust approach to the role of offsets in transition plans.[60]

VIII GREEN TECHNOLOGY

Sustainable finance in Canada is being shaped by the significance of resource extraction, transportation and processing industries in the economy and the transition these industries are making to a lower carbon world.[61] The transition means, of course, that there are investments that fall squarely in the typical use of proceeds for green bonds. These include renewable power generation and green buildings.

However, many companies whose business involves fossil fuels see sustainability and sustainability-linked instruments as more aligned with their capital spending programmes that may include carbon capture utilisation and storage, efficiency projects or grey hydrogen, for example. Some of these companies that may not yet be perceived as strong sustainability actors have stayed away from issuing green bonds to avoid any risk of greenwashing allegations, even when they do have typical green spending plans.

IX CLIMATE CHANGE IMPACT

The regulatory framework around sustainable finance in Canada is in the developmental phase and, at this point, the real impact of sustainable finance on climate change is an awareness that there is the potential for sustainable finance to have an impact on reducing GHG emissions and the achievement of other ESG targets.

X OUTLOOK AND CONCLUSIONS

Over the coming year, it is anticipated that many of the regulatory proposals around ESG disclosures and sustainable finance will have solidified or been adopted, in most cases contemplating prospective application. The regulatory road map around these issues

59 Frequently Asked Questions, Note 17.

60 Net-Zero Banking Alliance, Note 16.

61 Final Report of the Expert Panel on Sustainable Finance – Mobilizing Finance for Sustainable Growth, Government of Canada, 2019.

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will become clearer, though the direction of travel of regulation is understood to be well articulated in the proposals, which seems unlikely to change. This should facilitate the continuing development of sustainable finance in Canada as capital markets participants prepare for compliance timelines.

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Chapter xx

COP27

Anna-Marie Slot and Eileen Kelly[1]

I INTRODUCTION

The 27th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP27) took place in Sharm el-Sheikh, Egypt, from 6 to 18 November 2022 under the Egyptian presidency. COP27 marked the 30th anniversary of the adoption of the United Nations Framework Convention on Climate Change (UNFCCC).

Against a backdrop of economic and geopolitical issues, including those caused or exacerbated by the war in Ukraine, many feared that COP27 would backtrack on the commitments made at COP26. Indeed, few countries followed through on their commitments to reset their nationally determined contributions (NDCs), with Australia and the European Union being rare exceptions among developed regions.

Despite a significant amount of engagement and interest in net zero commitments, energy transition and sustainable finance worldwide, the continued lack of clarity on government action, along with the intended pathways to achieve them, limits the ability of financial market participants to distribute capital efficiently.

Private finance was a significant area of focus, as the billions committed thus far to fighting climate change remain far below the levels of investment required to implement the Paris Agreement. Efforts to increase investment include proposals to reform public lenders, such as the World Bank, to allow them to take on more risk and lend more money, with the hope that this encourages increased participation by private investors.

Although the final COP27 deal contemplated the phasing down of unabated sectors like coal power and the phasing out of inefficient fossil fuel subsidies, it fell far short of expectations by failing to take significant steps to rein in climate-damaging emissions, either by setting more ambitious national targets or by scaling back the use of fossil fuels. Commitment to more aggressive action to reduce reliance on fossil fuels remains weak amid the energy crisis following the war in Ukraine, and groups launched at COP26 in Glasgow that are dedicated to phasing out fossil fuels have this year struggled to recruit additional members.

Other long-standing discussions did progress, most notably with respect to the establishment of a loss and damage fund. However, COP27 nevertheless saw a more subdued outcome than many had hoped for, and continued efforts will be needed at COP28 to achieve the sort of climate action required to deliver on the 1.5°c commitment.

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II THE NEED FOR CLIMATE FINANCE

Each COP presents its own unique challenges and opportunities.

At COP26 in Glasgow, Scotland, the private sector played a key role, and finance was at the heart of the discussions and resolutions arising from the conference. Important announcements were made by Mark Carney and Rishi Sunak regarding financial services businesses, including climate transition plans being mandated by the UK government, signalling real progress towards putting climate at the heart of companies' efforts.

However, adoption of similar plans globally remains inconsistent. COP27 was focused on implementation and the increased voice of the Global South. The focus on the role of finance in delivering on climate change solutions that was evident at COP26 continued, and indeed COP27 acknowledged formally the finance sector's role in the fight against climate change.

In its Sharm el-Sheikh Implementation Plan published on 20 November 2022, the UNFCCC emphasised the importance of the role finance plays in delivering the 1.5°c commitment. According to the International Energy Agency's World Energy Outlook 2022, approximately US$4 trillion per year needs to be invested in renewable energy until 2030 in order to reach net zero emissions by 2050, and a global transition to a low-carbon economy is expected to require investment of at least US$4 to US$6 trillion per year.

Implicit in these funding requirements is the increasing gap between the needs of developing countries, particularly those needs that result from the increasing impacts of climate change, referred to as adaptation finance, and related increases in indebtedness, and the active support for their efforts to implement their NDCs. Current estimates place those needs at approximately US$5.9 trillion for the period to 2030.

Although developed countries have previously committed to the goal of providing US$100 billion per year in support to developing countries by 2020, to address the impact of climate change and support the low carbon transition in the developing world, this goal has not yet been met, and falls well short of the financial support needed. According to the UNFCCC, global finance flows in 2019 to 2020, estimated to be US$803 billion, represented only 31 to 32 per cent of the annual investment needed to keep the global temperature rise well below 2°c or at 1.5°c above pre-industrial levels, and is also below what would be expected in the light of identified investment opportunities and the cost of failure to meet climate stabilisation targets.

Additionally, of the US$100 billion already committed in support for developing countries, only about US$20 billion was earmarked to fund adaptation measures to help countries become more resilient against the impacts of climate change. At COP26 in Glasgow, countries agreed to double that proportion and, after some negotiation, that promise was affirmed at COP27.

Climate finance has been pivotal to UNFCCC discussions and, in particular, the use of blended finance (the mix of public and philanthropy-backed finance and private capital) is key to mobilise new sources of capital for sustainability development goals. The Central Banks and Supervisors Network for Greening the Financial System launched a blended finance initiative at COP27 to help its members overcome potential regulatory and implementation barriers by developing a 'Blended Finance Handbook'. This financing method will encourage monetary and supervisory capital allocation for the net zero transition.

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III LOSS AND DAMAGE

As an initial step in addressing the shortfall in funding required by the developing world to mitigate the impacts of climate change, COP27 concluded with a decision to establish and make operational a loss and damage fund. Loss and damage refers to the increasing gravity, scope and frequency of loss and damage associated with the adverse effects of climate change, resulting in devastating economic and non-economic losses, including forced displacement and impacts on cultural heritage, human mobility and the lives and livelihoods of local communities. Although loss and damage impacts all regions of the world, it comes with significant financial cost in the developing world, where it increases the debt burden and limits the realisation of the United Nations sustainable development goals. The new loss and damage fund will aim to compensate vulnerable nations for loss and damage from climate-induced disasters. However, there is no agreement yet on how the financing for the fund should be provided and by whom, and it is likely to take several years to negotiate these details. Funding adaptations in response to climate change are also key to prevent future loss and damage requirements from spiralling and, although the call from COP26 to double adaptation financing was repeated at COP27, overall progress on this point was insignificant.

IV SUSTAINABILITY FRAMEWORK FOR TRADE TRANSACTIONS

Following a roadmap announced in Glasgow at COP26, the International Chamber of Commerce (ICC) published a pilot version of the first-ever industry framework to assess the sustainability performance of trade transactions. This Wave 1 framework sets out an agreed industry definition of sustainable trade and embeds an approach that covers the entire life-cycle of an international trade transaction across five different dimensions, from the buyer and supplier to the nature and purpose of the goods or services sold. At COP27, the ICC Secretary General announced that more than 20 banks and corporates, including BNP Paribas, Commerzbank, Lloyds Bank, Commonwealth Bank of Australia, DNB, Santander, Société Générale, Wells Fargo and Yes Bank, have pledged to pilot the application of the Wave 1 framework for transactions in the textiles sector. The ICC will publish the findings from these pilots and set out how it will use the findings to enhance the framework by mid-2023.

V CONCLUSION

Against the background of the outcomes of COP27, there remains a significant role for private finance to play in funding the transition to a low-carbon economy. This role is two-fold: financing the solutions required to decarbonise the economy, and engaging in stewardship activities to encourage companies to engage in net zero or low-carbon transitions.

It is clear from COP27 that one of the key takeaways involves collaboration between both the public and private sector – forming climate philanthropy partnerships across geographies to better footprint sustainable financial investments. Multilateral development banks and the private sector need to work together to de-risk investments via innovative structures to be able to scale change.

The private sector also has a pivotal role to play in reallocating capital to new partnerships and ventures that are genuinely climate change driven – clean 'tech-celeration'. This will enable companies to measure the credibility and progress of their net zero targets and scale up

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to accelerate their net zero transition. As governments and public bodies continue to clarify their goals and the paths towards achieving them, the financial markets will respond and the risks and opportunities of sustainable finance will grow.

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Anna-Marie Slot is Ashurst's first global ESG/sustainability partner, appointed in 2019 and global head of high-yield debt. She leads the firm's ESG strategy both internally and for clients. She has delivered a number of significant initiatives including establishing the firm's sustainability goals, co-creating Ashurst's first digital product, ESGReady and launching Ashurst's first podcast channel, ESG Matters@Ashurst, and its first series, '30 for Net Zero 30'. Together with Tara Waters, she co-leads the Fintech Legal Labs powered by Ashurst. Anna-Marie was also named the 'Most Innovative Sustainable Lawyer' at the Financial Times Innovative Lawyers Europe Awards 2021.

Anna-Marie has over two decades of finance experience acting for investment banks and companies in a wide range of corporate finance and securities transactions, including high yield debt offerings, sustainable finance, liability management including consents and tender offers, refinancings and numerous securities transactions, such as Rule 144A and Regulation S debt offerings, as well as mezzanine debt investments and senior credit facilities.

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Eileen Kelly is a senior associate in our finance practice. Eileen's practice focuses on banking and capital markets transactions. She has advised public and private companies, sponsors, lenders and financial institutions on a variety of debt, equity and financing transactions, including sustainable finance transactions, in the United States and Europe.

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Chapter 3

HONG KONG

Mark Uhrynuk, Susanne J Harris, Francis K W Chen, Dion K Y Yu, Wei Na Sim and Angie N K Chan[1]

I INTRODUCTION

The sustainable finance framework in Hong Kong is currently voluntary. While there are no specific regulatory or legal requirements for sustainable finance, several financial regulators in Hong Kong, such as the Hong Kong Monetary Authority (HKMA), the Securities and Futures Commission (SFC) and The Stock Exchange of Hong Kong Limited (HKEX), have issued sustainable finance-related guidance on topics such as ESG disclosure requirements and climate-related risk management.

On a broader scale, in the Asia-Pacific region, the Asia Pacific Loan Market Association (APLMA), jointly with the Loan Market Association (LMA) and the Loan Syndications and Trading Association (LSTA), have issued principles and guidance on three types of sustainable loans: green loans,[2] sustainability-linked loans[3] and social loans.[4] These serve as the industry standard for sustainable lending within the region.

Sustainable finance has experienced growing popularity within Hong Kong and the Asia-Pacific region. This can be credited to support and interest from key stakeholders across the industry, including companies, financial institutions, regulators and the government.

With Hong Kong's goal of developing into a green financial hub in the region, the government has taken a lead role in sustainable finance with the issuance of green bonds through the Government Green Bond Programme (GGBP) since 2019. The GGBP expanded its borrowing ceiling from HK$100 billion to HK$200 billion to raise funds for a variety of public and private green projects.[5] The GGBP demonstrates the government's support for sustainable finance and also sets a benchmark for the issuance of green bonds in the market. The issuance of bonds under the GGBP was oversubscribed by five times on the five and 10-year tenor and seven times on the 30-year tenor, reflecting the market's substantial appetite for sustainable finance.[6]

1 Mark Uhrynuk, Susanne J Harris, Francis K W Chen and Dion K Y Yu are partners, Wei Na Sim is a counsel and Angie N K Chan is a senior associate at Mayer Brown.
2 APLMA/LMA/LSTA Green Loan Principles and Guidance on Green Loan Principles.
3 APLMA/LMA/LSTA Sustainability-Linked Loan Principles and Guidance on Sustainability-Linked Loan Principles.
4 APLMA/LMA/LSTA Social Loan Principles and Guidance on Social Loans.
5 The Government Green Bond Programme.
6 Christophe Cretot (Credit Agricole), Hong Kong Prices Second Green Bond, Becoming a Key Sustainable Finance Issuer in Asia (news) (January 2021).

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Further, various regulators have published strategic frameworks and created working groups to encourage the development of a sustainable finance ecosystem in Hong Kong. The relevant frameworks and initiatives will be described below.

Well-known Hong Kong companies recognise the importance of sustainable finance and have developed publicly available internal sustainable finance frameworks. Further, Hong Kong companies have been involved in sizable sustainable finance deals. For example, in November 2021, a Hong Kong property developer signed the largest sustainability-linked loan in Hong Kong at the time for HK$8.65 billion.[7]

Financial institutions encourage the development of sustainable finance as well. For example, HSBC has set aside US$5 billion for sustainable finance to fund projects within the Greater Bay Area region that aim to reduce carbon emissions and stated that it would provide up to US$1 trillion for transition financing and investment by 2030 to reduce financed emissions in its portfolio.[8]

With the active involvement of key players in the sustainable finance market, the Hong Kong green finance market has encouraged Mainland Chinese firms to access offshore sustainable financing. In the past year, Hong Kong accounted for nearly 40 per cent of the US$6.7 billion sustainability-linked loans taken out by Mainland Chinese firms.[9]

The above actions of key stakeholders reflect the prevailing positive attitude in the market towards sustainable finance.

II YEAR IN REVIEW

Over the past year, the Hong Kong sustainable finance market has grown significantly. The volume of green and sustainable debt issued in the past 12 months reached US$57 billion, four times greater than the previous year.[10]

In April 2022, the government launched its first retail green bond programme with a target issuance of up to HK$20 billion. The issuance was oversubscribed by 1.2 times and, at the time, was the largest global retail green bond issuance.[11]

Environmental and sustainable lending has also been on the rise. From January to May 2022, private sector builders have signed US$3.7 billion worth of sustainability-linked loans. The public sector has also been involved in sustainability-linked loans with one of the most recent deals being a HK$4 billion loan to a statutory body overseeing the development of a cultural district.[12] Additionally, in 2022, the market has evolved with the emergence of social-based sustainable finance, which will be further expanded upon in Section IV.

7 Sun Hung Kai Properties, 'SHKP signs first sustainability-linked loan of HK$8,650 million, the largest of its kind in real estate sector in Hong Kong' (press release) (November 2021).

8 Martin Choi, 'HSBC sets aside US$5 billion in sustainable financing to fund projects in the Greater Bay Area to reduce carbon emissions', *South China Morning Post* (May 2022).

9 Loretta Chen, 'Hong Kong Emerges as a Hub for Chinese Firms Seeking ESG Loans', *Bloomberg News* (May 2022).

10 Paul Chan (Financial Secretary of Hong Kong), Country backs HK's green finance (speech delivered on 16 June 2022).

11 Enoch Yiu, 'Hong Kong's first Retail Green Bond sells out with US$4.2 billion in orders, auguring well for city's role as funding hub for climate-friendly projects', *South China Morning Post* (May 2022).

12 West Kowloon Cultural District Authority, 'WKCDA Announces the Signing of a $4 billion Sustainability-linked loan' (press release) (April 2022).

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At the same time, concerns about greenwashing have become more prevalent in the sustainable finance market. Please refer to Section IX for details.

Another challenge is the limited access of small and medium-sized enterprises (SME(s)) to the sustainable finance market. Over the past five years, most ESG fundraisings have been undertaken by large and well-developed businesses. To address this, the government has introduced several incentives and schemes, which are discussed in Section VI.

III REGULATION AND POLICY

i Governance regime

The People's Republic of China (PRC) ratified the Paris Agreement in 2016 and, in accordance with the Basic Law of Hong Kong, declared that the Paris Agreement applies to Hong Kong. In September 2020, President Xi Jinping stated that the PRC will aim for peak carbon emissions prior to 2030 and carbon neutrality prior to 2060, which is otherwise known as the '30.60' decarbonisation goal.[13] Hong Kong has a role to help fulfil the PRC's obligations under the Paris Agreement. Hong Kong aims to reduce total carbon emissions by 50 per cent before 2035 using 2005 level as a base, and to reach carbon neutrality prior to 2050.

The government's commitment is demonstrated by its plan to deploy HK$240 billion over the next 15 to 20 years (from 2021) to combat climate change.[14] The acceleration of sustainable finance and the development of Hong Kong into a green financial hub in the region form part of the strategies and opportunities identified in the government's Climate Action Plan 2050. As previously mentioned, Hong Kong does not have specific laws governing sustainable finance by public and private institutions.

Green and Sustainable Finance Cross-Agency Steering Group

In May 2020, Hong Kong established the Green and Sustainable Finance Cross-Agency Steering Group (Cross-Agency Steering Group),[15] a multi-regulatory steering group co-led by the HKMA and the SFC. The Cross-Agency Steering Group aims to coordinate the management of climate and environmental risks to the financial sector, accelerate the growth of green and sustainable finance in Hong Kong and support the government's climate strategies.

The Cross-Agency Steering Group has launched a number of initiatives including the Centre for Green and Sustainable Finance (GSF Centre). The GSF Centre is a cross-sector platform designed to coordinate the efforts of financial regulators, government agencies, industry stakeholders and academia in capacity building and policy development. It serves as a repository for resources, data and analytics and supports the development of a sustainable finance ecosystem, such as with its GSF Data Source Repository. As of June 2022, the Cross-Agency Steering Group is working with the government to pilot a Green and Sustainability Capacity Building Support Scheme, which aims to subsidise training for and the acquisition of relevant professional qualifications by existing and prospective practitioners.

13 Carbon Neutral @ HK, Hong Kong's Climate Action Plan 2050 (October 2021).

14 ibid.

15 Other members of the Cross-Agency Steering Group include the Environment Bureau, Financial Services and the Treasury Bureau, HKEX, the Insurance Authority and the Mandatory Provident Funds Schemes Authority.

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The Cross-Agency Steering Group has published its Strategic Plan to Strengthen Hong Kong's Financial Ecosystem to Support a Greener and More Sustainable Future (Strategic Plan). The Strategic Plan sets out six key focus areas to strengthen Hong Kong's sustainable financial ecosystem.

ii Regulators

The main regulators involved in regulating, enforcing and promoting sustainable finance frameworks in Hong Kong are the SFC, HKMA, HKEX and the Hong Kong Mandatory Provident Fund Schemes Authority (MPFA). The guidelines and papers issued by these regulators are not directly applicable to sustainable finance, but form part of the regulatory ecosystem that financial institutions operate in.

SFC

The SFC is an independent statutory body charged with regulating the securities and futures markets in Hong Kong.

In 2018, the SFC published the Strategic Framework for Green Finance. The SFC listed five main focus areas, namely:

a improving HKEX-listed companies' climate-related disclosure obligations;
b engaging with relevant stakeholders to formulate disclosure obligations for the asset management industry;
c facilitating the development of a wider range of green investment products;
d supporting investor awareness of and capacity building in green finance and investment-related matters; and
e promoting Hong Kong as an international green finance centre by participating in international green initiatives.[16]

The strategic framework has led to action by various regulators in Hong Kong such as the SFC's amendments to the Fund Manager Code of Conduct (FMCC), with effect from August 2022, to introduce climate-related disclosures and the HKEX ESG-related disclosure requirements. Both are discussed in Section V.

The SFC further published its Agenda for Green and Sustainable Finance in August 2022 to lay out its continued strategy in supporting green and sustainable finance. The Agenda has outlined three main focuses: corporate disclosure; expectations on fund managers; and identifying an appropriate regulatory framework for the carbon market.[17]

HKMA

The HKMA is Hong Kong's central banking institution, which is the governmental authority responsible for maintaining monetary and banking stability in Hong Kong.

In June 2020, the HKMA published a white paper on green and sustainable banking,[18] which outlines the HKMA's supervisory approach to climate-related issues. The HKMA's

16 SFC, Strategic Framework for Green Finance (September 2018).
17 SFC, Agenda for Green and Sustainable Finance (August 2022).
18 HKMA, White Paper on Green and Sustainable Banking (June 2020).

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sustainable finance framework targets sustainable banking practices in Hong Kong. The HKMA issued a set of climate change risk management guidelines for banks in December 2021. See Section IX for details.

HKEX

The HKEX is the stock exchange based in Hong Kong. In December 2020, the HKEX launched the Sustainable and Green Exchange (STAGE). It provides access to a comprehensive database of sustainable and green investment options available in Hong Kong's securities markets as well as a sustainable finance education and advocacy platform. One of its most valuable features is a product repository, which is a reliable and accessible platform for information on a variety of green investment products.

MPFA

The MPFA is in charge of supervising the provision of Mandatory Provident Fund (MPF) retirement schemes. In November 2021, the MPFA introduced Principles for Adopting Sustainable Investing in Investment and Risk Management Processes of MPF Funds (MPFA Principles).[19] The MPFA Principles outline a high-level integration of ESG considerations for trustees of the MPF, a compulsory retirement savings scheme for Hong Kong residents. The MPFA Principles have four key focuses: governance, strategy, risk management and disclosure.

Hong Kong Quality Assurance Agency

Although not a regulator, the Hong Kong Quality Assurance Agency (HKQAA) is a key player in promoting green and sustainable finance in Hong Kong.

The HKQAA is a non-profit public organisation established by the government in 1989 to introduce international management standards and promote good management practices and sustainability in the Greater China region. One of its most significant contributions is the Green and Sustainable Finance Certification Scheme. Under this scheme, the HKQAA provides third-party compliance assessments for sustainable requirements of finance instruments. The HKQAA had certified over US$35 billion worth of green and sustainable finance instruments as at the end of 2021.[20]

IV SUSTAINABLE FINANCE INSTRUMENTS

Green bonds and sustainability-linked and green loans are the most popular types of sustainable finance debt instruments. Climate Bonds[21] has noted that in 2021, green debt instruments that aligned with Climate Bonds' Green Bond Database accounted for 75 per

19 MPFA, Principles for Adopting Sustainable Investing in the Investment and Risk Management Processes of MPF Funds (November 2021).

20 The Hong Kong Quality Assurance Agency, 'HKQAA Symposium Sustainable Finance and Climate Resilience 2021', *Taiwan News* (December 2021).

21 Climate Bonds is an international organisation working on mobilising global capital for climate action.

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cent of the total of the US$14 billion in green, social, sustainability and transition bonds and sustainability-linked debt instruments issued by Hong Kong issuers.[22] Within the PRC and Hong Kong, there was US$1.7 billion of green loans in January and February of 2022.[23]

Apart from the above debt instruments, sustainable deposits and green retail certificates of deposit have also been introduced by large banking institutions into the market.[24]

Traditionally, in Hong Kong, the sustainable finance market has focused on environmental finance. However, more recently, the market has been venturing into social-based sustainable finance.

In June 2022, a listed real estate property developer issued the first US dollar-denominated social and green dual tranche bond issuance in the public bonds market.[25] More recently, the Hong Kong Mortgage Corporation Limited issued its first social bond. The net proceeds of the issuance are to be mostly used to finance or refinance the Special 100% Loan Guarantee under the SME Financing Guarantee Scheme, which was launched in April 2020 to alleviate cash flow pressure of SMEs in Hong Kong during the covid-19 pandemic.[26]

In September 2022, the first Hong Kong property developer concluded its bilateral social loan of HK$100 million. The HKQAA served as the independent and external certification body.[27] Further, Mayer Brown acted for a syndicate of banks including Sumitomo Mitsui Banking Corporation (as social loan adviser) in a HK$2 billion and US$241 million social loan facility with China Gas Capital Management Limited (a wholly owned subsidiary of China Gas Holdings Limited, a leading natural gas operator in China) as the borrower, which is the first syndicated social loan in the Greater China region.[28]

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

A mix of mandatory and comply or explain disclosure requirements exists in Hong Kong.

The HKEX's ESG reporting guide (within the listing rules) contains two disclosure obligations for both listed companies on the Main Board and on the Growth Enterprise Market. First, there are mandatory board governance disclosure requirements, such as disclosure of the board's oversight of ESG issues, the board's ESG management approach and how progress is made against ESG-related goals with an explanation of how they relate to the issuer's business. Secondly, the comply or explain requirements relate to key performance indicators across 12 areas of environmental and social issues ranging from emissions to supply chain management.[29]

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22 Note that this statistic does not include any sustainability-linked loans. Climate Bond Initiative, Green and Sustainable Debt Market Briefing 2021 (Hong Kong) (report) (July 2022).

23 Loretta Chen, 'China, Hong Kong ESG Loan Deals Soar in Face of Global Slump', *Bloomberg News* (July 2022).

24 See footnote 18, paragraph 2.4.3.

25 New World Development Company Limited, 'New World Development Offers World's First USD Social and Green Dual Tranche Bond in Public Markets Totaling USD700M' (press release) (June 2022).

26 HKMA, 'HKMC's Inaugural Social Bond Issuance' (press release) (October 2022).

27 Henderson Land Development Company Limited, 'Henderson Land Concludes an Industry-first HK$100 Million Bilateral Social Loan with China Construction Bank (Asia)' (press release) (September 2022).

28 China Gas Holdings Limited, 'China Gas Signs Three-Year US$500 Million Syndicated Loan Marks First Social Syndicated Loan in Greater China Region' (press release) (June 2022).

29 HKEX, Appendix 27 Environmental, Social and Governance Reporting Guide, Main Board Listing Rules.

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The SFC's FMCC was amended in 2022 to require fund managers of collective investment schemes to take climate-related risks into consideration in their investment and risk management processes and make the appropriate disclosures such as ensuring board and management-level oversight of climate-related issues; identifying climate-related risks relevant to their investment strategies; considering climate-related risks in risk management procedures; and publicly disclosing how they manage climate-related risks. At a minimum, annual disclosures should be made regarding climate-related governance, risk management and investment management.[30]

The HKMA's Supervisory Policy Manual GS-1 on Climate Risk Management requires financial institutions to incorporate climate risk considerations into their strategic frameworks. The manual requires banks to make climate-related disclosures aligned with the TCFD recommendations as soon as reasonably practicable and no later than mid-2023.[31]

With regard to investment products, the SFC issued guidance on 29 June 2021 on the disclosure standards of ESG funds through a circular to management companies of SFC-authorised unit trusts and mutual funds involving ESG factors. It requires a fund's offering documents to provide information necessary for investors to make an informed judgment about the investment. This includes the fund's ESG focus, ESG investment strategy, expected proportion of ESG investment (in terms of net asset value), any reference benchmark and related risks.[32] The guidelines require ESG fund managers to conduct periodic assessments of the attainment of their ESG focus and to disclose the results through effective means such as annual reports.

With regards to the MPFA, the MPFA Principles require MPF trustees to disclose ESG integration strategies and report implementation progress regularly and disclose metrics; describe how ESG factors are factored into the relevant investment strategies; and disclose metrics and targets adopted by investment managers where possible.

Hong Kong has committed to align itself with TCFD recommendations by 2025.[33] The Cross-Agency Steering Group has announced plans for mandatory TCFD-aligned climate-related disclosures by 2025.

The SFC, HKEX and HKMA regularly refer to TCFD recommendations in their guidance materials. In November 2021, the HKEX published the Reporting on TCFD Recommendations: Guidance on Climate Disclosures. This guidance provides practical advice to assist listed companies in complying with TCFD-aligned reporting requirements.[34]

Hong Kong regulators may soon require companies to follow the global baseline for sustainability reporting, expected to be finalised by the International Sustainability Standards Board (ISSB) by early 2023. The SFC and the HKEX are evaluating the implementation of

30 SFC, Circular to licensed corporations management and disclosure of climate-related risks by fund managers (August 2021).

31 HKMA, Supervisory Policy Manual GS-1 Climate Risk Management (December 2021).

32 SFC, Circular to management companies of SFC-authorized unit trusts and mutual funds – ESG funds (June 2021).

33 HKMA, 'Cross-Agency Steering Group Launches its Strategic Plan to Strengthen Hong Kong's Financial Ecosystem to Support a Greener and More Sustainable Future' (press release) (December 2020).

34 HKEX, 'Exchange Publishes Corporate Governance and ESG (Climate Disclosures) Guidance' (regulatory announcement) (November 2021).

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the ISSB standards for Hong Kong listed companies. An SFC–HKEX joint working group is further looking into the challenges faced by listed companies and their readiness to report under the ISSB's proposed disclosure requirements.[35]

Hong Kong does not have a local green finance taxonomy. Local issuers and underwriters mostly rely on international standards and taxonomies. Following the publication of the updated Common Ground Taxonomy (CGT) report by the International Platform on Sustainable Finance, the Cross-Agency Steering Group will work towards proposing the structure and core elements of the local green classification framework for consultation.[36]

VI ESG DATA AND REPORTING

Please refer to Section V for a discussion on reporting requirements.

There are two main challenges in the ESG data reporting regime.

First, there are challenges surrounding data availability. At present, reporting is only required for a narrow range of entities in Hong Kong such as listed companies, fund managers and companies that issue ESG funds. Outside of Hong Kong, mandatory reporting of ESG data is also limited.

Secondly, even where data is available, it may not be sufficiently granular to fully evaluate a particular ESG metric. HKEX has previously emphasised that there is no one-size-fits-all approach for ESG reporting frameworks.[37] While this is true, difficulties may arise regarding which reporting standards to adopt and the breadth and depth of the reporting done by each company, which can lead to difficulties when comparing the disclosed data between industries and markets.

The HKEX's ESG reporting guide encourages (but does not oblige) listed companies to disclose according to scope classifications.

Regarding fund managers of collective investment schemes, large fund managers[38] must make efforts to collect and disclose Scope 1 and Scope 2 greenhouse gas emissions data, whereas smaller fund managers are not required to comply with this requirement.

VII SUSTAINABLE FINANCE INCENTIVES

One of the most notable incentives that the government supports is the Green and Sustainable Finance Grant Scheme (GSFG Scheme).[39] The GSFG Scheme consists of two tracks.

Track I covers general bond issuance costs (such as arrangement, legal, audit and listing fees) for eligible first-time green and sustainable bond issuers. Track II covers external review costs (such as pre-issuance external review, post-issuance external review or reporting) for eligible green and sustainable bond issuers and loan borrowers.

35 The Government of the Hong Kong Special Administrative Region, Cross Agency Steering Group announces launch of information and data repositories and other progress in advancing Hong Kong's green and sustainable development (press release) (June 2022).

36 HKMA, Cross-Agency Steering Group announces progress and way forward to advance Hong Kong's green and sustainable finance development (press release) (December 2021).

37 See footnote 30.

38 Fund managers with over US$8 billion of assets under management for any three months in the previous reporting year constitute large fund managers.

39 HKMA, Guideline on the Green and Sustainable Finance Grant Scheme (May 2021).

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The GSFG Scheme supports issuers in Hong Kong to access sustainable financing, which can help accelerate the climate transition. As of late May 2022 (a year after the Scheme was launched), close to 100 applications were approved resulting in an aggregate amount of approximately HK$100 million provided as grants to private institutions.[40]

In addition, the government has set out four decarbonisation strategies in the Climate Action Plan. These involve net-zero electricity generation, energy saving and green buildings, green transport and waste reduction.[41] Public and private companies embarking on such projects will likely require sustainable financing.

In December 2021, the HKMA issued a circular on sound practices supporting the transition to carbon neutrality as a transition framework for the banking industry.[42] With banks prioritising carbon neutrality, this will further encourage a healthy, sustainable finance ecosystem.

Given Hong Kong's reputation as an international finance centre and the important roles that HKMA, SFC, HKEX and the MPFA have played in upholding this status, their individual transition frameworks and guidelines to transform Hong Kong into a sustainable economy will serve as important benchmarks for companies seeking to remain compliant and competitive, and to develop and maintain a good reputation in the market.

VIII GREEN TECHNOLOGY

i Carbon trading

In March 2022, the Cross-Agency Steering Group published its preliminary assessment report following a carbon market work stream that supports Hong Kong's development into a global, high-quality voluntary carbon market that could potentially become a Greater Bay Area unified carbon market.[43]

On 28 October 2022, the HKEX launched Core Climate, an international carbon marketplace for the trading of voluntary carbon credits and instruments. The Core Climate platform enables parties to source, hold, trade, settle and retire voluntary carbon credits. Projects listed on the platform will be verified against international standards such as the Verified Carbon Standard.

ii Research and development

Hong Kong's start-up community is actively involved in the development of green technology as one of the Hong Kong Science Park's five core technology clusters. The government has provided funding support to environmental technology-related research and development (R&D) projects under the Innovation and Technology Fund, with total funding exceeding HK$499 million.[44]

40 See footnote 10.
41 See footnote 13.
42 HKMA, Sound practices supporting the transition to carbon neutrality (circular) (December 2021).
43 SFC, Preliminary Carbon Feasibility Assessment (March 2022).
44 HKTDC Research, Green Technology & Environmental Services Industry in Hong Kong (October 2022).

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IX CLIMATE CHANGE IMPACT

Hong Kong's initiatives have yielded positive results in its aim to reach carbon neutrality before 2050. Hong Kong's carbon emissions in 2020 were 20 per cent below the base 2005 level, reflecting an almost 30 per cent drop from the peak per capita carbon emission level in 2014.[45] However, climate change is increasingly evident in our living and working environments. Accordingly, a more cohesive and global approach is required to effectively combat climate change.

In December 2021, the HKMA published the results of a climate risk stress test on banks. The test indicated that the Hong Kong banking sector should remain resilient to climate-related shocks given the banks' strong capital buffers. However, it noted that the use of simplified assumptions and historical data could mean that the potential impact may be more serious than predicted.[46]

In response to such risks, the HKMA published the Supervisory Policy Manual GS-1 (see the discussion on its disclosure requirements in Section V),[47] and issued a circular in June 2022 to lay out its two-year plan to integrate climate risk management into its supervisory processes and agenda.[48]

Hong Kong has a history of environmental public interest litigation, including environmental-related cases with mixed success.[49] It is not uncommon for Hong Kong courts to hear judicial review cases brought by parties who seek to challenge the Town Planning Board's planning permissions on environmental grounds.[50]

Since mandatory climate-related regulations are new and relatively limited, there has not been any noteworthy climate-related litigation or enforcement action in Hong Kong. Nonetheless, regulatory checks on compliance with the new ESG disclosure and reporting requirements are expected and may lead to the first such enforcement action in the coming years. In addition, the global trend of increased shareholder and non-governmental organisation activism as a result of greenwashing concerns is likely to apply in Hong Kong as well. An example is the Airport Authority's US$4 billion green bond package, which was the subject of media reports following concerns raised by Reclaim Finance, a Paris-based climate campaigner. Reclaim Finance alleged that the environmental benefits of the project would be more than offset by greater carbon emissions from more flights and biodiversity risks from building the new runway.[51]

45 See footnote 10.

46 HKMA, Pilot Banking Sector Climate Risk Stress Test (December 2021), page 5.

47 See footnote 32.

48 HKMA, Embedding climate risk in banking supervision (circular) (June 2022).

49 Cases include the Harbour Reclamation (2004), Hong Kong-Zhuhai-Macau Bridge (2011), Municipal Wastes Incinerator at Shek Kwu Chau (2014), Artificial Beach in Lung Mei (2014), and the Airport Third Runway (2015).

50 An example is *Tam Hoi Pong v. Town Planning Board* [2022] HKCA 462.

51 Eric Ng, 'Sustainable finance: 'greenwashing' concerns raised as Hong Kong airport floats US$4 billion bonds package to fund growth decarbonisation', *South China Morning Post* (January 2022).

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X OUTLOOK AND CONCLUSIONS

In the 2022–23 Budget Speech, the Financial Secretary of Hong Kong noted that green and sustainable finance development in Hong Kong will continue to be a key initiative to support Hong Kong's net zero agenda as well as the PRC's 30.60 decarbonisation goal in relation to carbon emission peak and carbon neutrality.

Issuances of government green bonds are expected to continue. The government's proactive approach signifies Hong Kong's commitment to a low-carbon economy, which can lead to a lower cost of capital for the sustainable finance market. This is likely to stimulate increased funding of sustainable projects in the region and to anchor Hong Kong as an attractive location for PRC companies to issue offshore sustainable debt.

Further, based on the trend in 2022, we predict that social finance will gain traction in Hong Kong in the coming year.

With the strategic framework published by the HKMA and the SFC and consultations published by the HKEX, we anticipate increasing ESG-related regulations and mandatory disclosures to be expected of financial institutions and companies in Hong Kong, which are likely to become increasingly aligned with the TCFD.

At the same time, significant market challenges remain.

First, there is a lack of harmonised sustainability definitions and classification systems in the market, which may affect the credibility of sustainable finance products. Due to the lack of a common taxonomy, the standards in a green finance transaction are often agreed between private parties. The lack of consistency in the market can lead to greenwashing concerns, which affect the integrity of the sustainable finance market as a whole. To help close this gap and address the issue of greenwashing, Hong Kong's short-term goal is to develop a local taxonomy aligned with the CGT.

A second key challenge is the shortage of talent to meet demand in the sustainable finance market in Hong Kong. To address this issue, the government is seeking to attract ESG professionals from abroad and to build capacity locally. Experienced financial professionals in ESG have been added to the Talent List of Hong Kong, which lists the professions that are most needed in the immediate to medium term for Hong Kong's economic growth. Professionals on the list are entitled to receive preferential residency treatment.

Overall, we believe that Hong Kong's sustainable finance ecosystem will grow from strength to strength over the coming years. The steady increase of sustainable finance locally within Hong Kong and regionally within the Greater Bay Area and the PRC, the increasing global demand for sustainable finance products and Hong Kong's commitment to fulfil its climate goals by 2050 collectively reflect Hong Kong's potential as an international sustainable finance hub.

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Chapter 4

INDIA

Rahul Gulati, Saara Ahmed and Dwiti Goyal[1]

I INTRODUCTION

At the United Nations Climate Change Conference in Glasgow in November 2022 (COP26), India committed to achieve net zero emissions by 2070. Following the COP26, India updated its nationally determined contributions (NDCs). It is estimated that to achieve its NDCs, India requires capital flow of approximately US$2.5 trillion from 2015 to 2030, or roughly US$170 billion per year in clean energy, clean transport and energy efficiency.[2]

Indian regulators and government organisations have over the past few years constituted several committees and published reports, which include a comparative study of practices in sustainable finance of various global regulators and banks and have provided recommendations to develop a similar sustainable finance regulatory framework in India.

The Indian regulatory framework for sustainable finance is at an early stage of development. The existing framework is primarily focused on sustainable finance for energy, but work is underway on disclosure standards and other aspects, and Indian regulators have introduced rules and guidelines on incorporation of environmental, social and governance (ESG) standards in the operation of corporate entities and certain other specific aspects of sustainable financing. To date, the Indian regulatory framework on sustainable finance does not expressly address just the transition of the Indian economy to net zero emissions.

II YEAR IN REVIEW

There is an increased focus by the government and Indian regulatory authorities on environmental, social and governance (ESG) matters generally, and on sustainable finance in particular. In the past year:

The government has announced that it will issue sovereign green bonds for mobilising resources towards green infrastructure[3] and has introduced incentives for the manufacture of

1 Rahul Gulati is a partner, Saara Ahmed is a senior associate and Dwiti Goyal is an associate at Talwar Thakore & Associates.

2 Climate Policy Initiative - Landscape of Green Finance in India, August 2022, available at: https://www.climatepolicyinitiative.org/publication/landscape-of-green-finance-in-india-2022/#:~:text=Green%20finance%20flows%20must%20increase,Net%2DZero%20emissions%20by%202070.

3 Issuance Calendar for Marketable Dated Securities for October 2022 - March 2023, Ministry of Finance available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1863434.

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high-efficiency modules.[4] The government has also announced plans to promote thematic funds for blended finance for encouraging the development of important sunrise sectors including climate action, which will have a certain amount of government ownership and will be managed by private fund managers.[5]

The Bureau of Energy Efficiency (BEE), a statutory body under the Ministry of Power, has released a draft blueprint on the National Carbon Market for consultation.[6] The Indian Parliament has also passed the Energy Conservation (Amendment) Bill, 2022 (ECA Amendment Bill) to, inter alia, establish a framework for a carbon credit trading scheme, in India.[7]

The Securities and Exchange Board of India (SEBI), the Indian securities regulator, has:

a released a framework for the establishment of social stock exchange (SEBI SSE framework);[8]

b issued a consultation paper on green and blue bonds as a mode of sustainable finance (SEBI sustainable bonds consultation paper);[9]

c issued a consultation paper on regulation of ESG rating providers (ERPS) (SEBI ERPs consultation paper);[10] and

d constituted a committee for advising on ESG matters in the securities market.[11]

The Reserve Bank of India (RBI), the Indian central bank, has released a report setting out the results of a survey conducted in relation to the climate risk and sustainable finance policies of several commercial banks in India (RBI survey), which is intended to help in shaping RBI's regulatory and supervisory approach to climate risk and sustainable finance.[12] Following the

4 Budget2022 is a step towards innovative & sustainable development in New India to strengthen our Energy Transition journey and fight climate change: Power Minister, Ministry of New and Renewable Energy, available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1794473.

5 Blended Finance, Speech of Nirmala Sitharaman, Minister of Finance, Budget 2022-2023, p. 19, available at: https://www.indiabudget.gov.in/doc/budget_speech.pdf.

6 National Carbon Market, draft blueprint for stakeholder consultation, Ministry of Power, Government of India, available at: https://beeindia.gov.in/sites/default/files/NCM%20Final.pdf.

7 The Energy Conservation (Amendment) Bill, 2022, Bill No. 177 of 2022, available at: http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/177_2022_LS_Eng.pdf.

8 SEBI Circular on Framework on social stock exchange, 19 September 2022, available at: https://www.sebi.gov.in/legal/circulars/sep-2022/framework-on-social-stock-exchange_63053.html.

9 SEBI Consultation Paper on Green and Blue Bonds as a Mode of Sustainable Finance, 4 August 2022, available at: https://www.sebi.gov.in/reports-and-statistics/reports/aug-2022/consultation-paper-on-green-and-blue-bonds-as-a-mode-of-sustainable-finance_61636.html.

10 SEBI Consultation Paper on Environmental, Social and Governance (ESG) Rating Providers for Securities Markets, 24 January 2022, available at: https://www.sebi.gov.in/reports-and-statistics/reports/jan-2022/consultation-paper-on-environmental-social-and-governance-esg-rating-providers-for-securities-markets_55516.html.

11 SEBI constitutes advisory committee on Environmental, Social and Governance (ESG) matters, SEBI press release, 6 May 2022, available at: https://www.sebi.gov.in/media/press-releases/may-2022/sebi-constitutes-advisory-committee-on-environmental-social-and-governance-esg-matters_58794.html.

12 Report of the Survey on Climate Risk and Sustainable Finance, RBI Sustainable Finance Group, Department of Regulation, July 2022, available at: https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1215.

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RBI survey and recognising the need for a governance framework to address transition risks associated with climate change in the financial system,[13] RBI has released a discussion paper on climate risk and sustainable finance (RBI discussion paper).[14]

The International Financial Services Centres Authority (IFSCA), which is the unified authority for development and regulation of financial products, financial services and financial institutions for the International Financial Services Centre (IFSC) in India,[15] has released a committee report (IFSCA committee report) to formulate a plan for development of IFSC as international hub for sustainable finance and recommend a short, medium and long-term roadmap on sustainable finance.[16]

III REGULATION AND POLICY

i Governance regime

At the COP26, India presented the five elements of India's climate action plan:

a raising the non-fossil fuel based energy capacity of India to 500GW by 2030;
b meeting 50 per cent of India's energy requirements by 2030 by using renewable energy sources;
c reducing the total projected carbon emissions by 1 billion tonnes between 2021 and 2030;
d reducing the carbon intensity of the economy to less than 45 per cent by 2030; and
e achieving carbon neutrality and net zero emissions by the year 2070.[17]

These targets and NDCs have not been directly incorporated in any legal framework but the following key laws and policies have been formulated on certain aspects of sustainable finance.

Key laws and regulations in relation to sustainable finance

(Indian) Companies Act, 2013 (CA2013)

The Ministry of Corporate Affairs (MCA), which monitors and administers all companies and limited liability partnerships incorporated in India, introduced the concept of corporate social responsibility (CSR) in the (Indian) Companies Act, 2013 (CA2013). The CA2013 requires that companies with a certain specified net worth must constitute a CSR committee and formulate a CSR policy, and ensure that they spend at least 2 per cent of their average

13 Statement on Developmental and Regulatory Policies, RBI press release, 28 April 2022, available at: https://rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=53536.
14 RBI discussion paper on Climate Risk and Sustainable Finance, Department of Regulation, 27 July 2022, available at: https://www.rbi.org.in/Scripts/PublicationsView.aspx?id=21071.
15 About International Financial Services Centres Authority, available at: https://www.ifsca.gov.in/Pages/Contents/AboutIFSCA.
16 Report of the Expert Committee on Sustainable Finance, International Financial Services Centres Authority, 3 October 2022, available at: https://ifsca.gov.in/Viewer/ReportandPublication/33.
17 National Statement by Prime Minister Shri Narendra Modi at COP26 Summit in Glasgow, Ministry of External Affairs, Government of India, available at: https://www.mea.gov.in/Speeches-Statements.htm?dtl/34466/National+Statement+by+Prime+Minister+Shri+Narendra+Modi+at+COP26+Summit+in+Glasgow.

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net profits made during the three immediately preceding financial years on CSR activities as per their CSR policy.[18]

SEBI regulations

SEBI has mandated that the top 1,000 equity listed entities by market capitalisation must issue a business responsibility and sustainability report (BRSR), which must include disclosure of ESG-related information, aimed at helping market participants to assess sustainability-related risks and opportunities;[19] and certain granular and quantifiable metrics seeking disclosures[20] on listed entities' performance, against the nine principles of the National Guidelines on Responsible Business Conduct (as published by MCA).[21]

SEBI in 2017 prescribed a framework for issuance of green debt securities and has specified disclosure and reporting requirements and responsibilities of issuers of such green debt securities. This framework is under review, and SEBI is also consulting on the introduction of a framework for blue bonds in India and has sought views on solutions against greenwashing in the SEBI sustainable bonds consultation paper.[22]

SEBI has also recently introduced a framework for SSE, which is intended to provide not-for-profit organisations and social enterprises an alternate platform to raise funds from institutional and retail investors and attract CSR funding with transparency.[23]

RBI regulations

RBI in 2007 issued a note[24] aimed at creating awareness among banks of their role in relation to CSR, sustainable development and non-financial reporting. RBI also mandates financial institutions to allocate a certain percentage of their adjusted net bank credit to certain priority sectors, which include social infrastructure and renewable energy.[25]

Other regulations

IFSCA has notified regulations on issuance and listing of ESG debt securities including green bonds, social bonds, sustainable bonds and sustainability-linked bonds with the intent of attracting international capital towards sustainable sectors.[26]

18 Section 135, (Indian) Companies Act, 2013, available at: https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/acts.html?act=NTk2MQ==#Corporate_Social_Responsibility.

19 SEBI Circular on business responsibility and sustainability reporting by listed entities, 10 May 2021, available at: https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html.

20 Economic Survey 2021-22, Finance for sustainable development, Ministry of Finance, page 256, available at: https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf.

21 National Guidelines on Responsible Business Conduct, Ministry of Corporate Affairs, available at: https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf.

22 See footnote 9 (SEBI sustainable bonds consultation paper).

23 See footnote 8 (SEBI SSE framework).

24 RBI Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting – Role of Banks, 20 December 2007, available at: https://rbidocs.rbi.org.in/rdocs/notification/PDFs/82186.pdf.

25 Reserve Bank (Priority Sector Lending – Targets and Classification) Directions, 2020, updated as on 20 October 2022, available at: https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=11959.

26 Chapter X: Environment, Social and Governance (ESG) Debt Securities, International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations, 2021, available at: https://ifsca.gov.in/Viewer/Index/202.

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Recent government policies

In September 2022, the government announced that it will issue sovereign green bonds for an aggregate amount of 160 billion rupees to mobilise resources towards green infrastructure, the proceeds of which will be deployed in public sector projects that help in reducing the carbon intensity of the economy.[27] Further, an additional allocation of 195 billion rupees for production-linked incentives for the manufacture of high efficiency modules has also been announced.[28] The government is also finalising the national policy on blue economy for India.

Partnerships with international organisations

India is a member of the International Platform on Sustainable Finance,[29] which has encouraged India to introduce laws to increase accountability and increase transparency in the area of sustainable finance.

The Green Growth Equity Fund, a joint India-United Kingdom fund,[30] has also been established and aims to make equity investments in green infrastructure projects in India.

Pursuant to the EU-India Connectivity Partnership,[31] the European Investment Bank (EIB) and the State Bank of India (SBI) have agreed to back an initiative of €100 million for new high-impact climate action and sustainability business financing.[32] EIB had also invested in the construction of metro lines in some Indian cities for green and affordable transport.[33] In December 2021, the Asian Infrastructure Investment Bank approved the Chennai City Partnership: Sustainable Urban Services Programme aimed at strengthening institutions and improving the quality and financial sustainability of selected urban services in the city of Chennai.[34]

27 See footnote 3.

28 See footnote 4.

29 International Platform on Sustainable Finance, European Commission, available at: https://finance.ec.europa.eu/sustainable-finance/international-platform-sustainable-finance_en.

30 India and the UK announce joint UK-India Fund, namely a Green Growth Equity Fund; Aims to leverage private sector investment from the City of London to invest in Green Infrastructure Projects in India, Press Information Bureau, Government of India (Ministry of Finance), available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=160487.

31 Principles, Partnerships, Prosperity: EU and India launch collaboration on sustainable connectivity, press release, European Commission, 8 May 2021 available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2327.

32 India: New €100 million EIB and State Bank of India private sector climate action initiative launched at EU-India Leaders Meeting, European Investment Bank, 7 May 2021, available at: https://www.eib.org/en/press/all/2021-154-new-eur100-million-eib-and-state-bank-of-india-private-sector-climate-action-initiative-launched-at-eu-india-leaders-meeting.

33 Government of India & European Investment Bank sign finance contract for first tranche loan of Euro 250 million for Agra Metro Rail project, press release, Ministry of Finance, available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1784619 , also see India: Green, safe and affordable public transport for Kanpur as EIB invests €650 million into city metro rail, European Investment Bank, 31 August 2020, available at: https://www.eib.org/en/press/all/2020-230-green-safe-and-affordable-public-transport-for-kanpur-as-eib-invests-eur650-million-into-city-metro-rail.

34 India: Chennai City Partnership: Sustainable Urban Services Program, Asian Infrastructure Investment Bank, available at: https://www.aiib.org/en/projects/details/2021/approved/Chennai-City-Partnership-Sustainable-Urban-Services-Program.html.

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Public and private institutions in India

The government has established organisations such as the Indian Renewable Energy Development Agency Limited (IREDA).[35] Rural Electrification Corporation (REC)[36] and National Bank for Agricultural and Rural Development (NABARD)[37] for providing finance for the renewable energy sector and for the promotion of sustainable and equitable agriculture. The Small Industries Development Bank of India (SIDBI) has introduced a range of financing instruments to support investments for environmentally and socially positive purposes.[38]

Other private financial institutions also offer various financial services in relation to renewable energy in India.

Most of these public and private organisations in India have sustainable finance schemes that offer concessional rates of lending if certain specified sustainability linked criteria are established. Such lending is generally enabled through bilateral lines of concessional credit from international agencies and funds.[39]

A number of large financial institutions in India follow the International Finance Corporation's Environmental and Social Performance Standards and certain global sustainability reporting frameworks like the Global Reporting Initiative and the CDP reporting framework.[40] However, the RBI survey notes that climate and sustainability-related risks and opportunities are still not being discussed at the board level of most financial institutions, and that a majority of the surveyed banks have not yet quantified their portfolio in relation to climate-related risks.[41]

Alternative funding avenues like the National Clean Energy and Environment Fund[42] and the National Adaptation Fund for Climate Change[43] to fund innovative projects in clean energy technologies and build climate change resilience, respectively, have also been set up by the government.

35 IREDA Background, available at: https://www.ireda.in/background.

36 REC Business profile, available at: https://recindia.nic.in/business-profile.

37 NABARD Genesis and Vision, available at: https://www.nabard.org/content.aspx?id=2.

38 Financing Clean Energy for Sustainable Development, SIDBI, Annual Report 2018-2019, available at: https://www.sidbi.in/AnnualReport201819/sustainable_development.php.

39 The rise of sustainable finance in India – case studies of 'best practice' in front running financial institutions, UK Pact, February 2022, available at: https://cdn.odi.org/media/documents/Rise_of_sustainable_finance_in_India_-_ODI_auctusESG_and_CBI24.pdf.

40 HDFC Integrated report 2020-21, available at: https://www.hdfc.com/sites/default/files/2021-08/final-hdfc-integrated-report-20-21.pdf, also see Kotak, Annual integrated report 2020-21, available at: https://www.kotak.com/content/dam/Kotak/about-us/integrated-report-fy2021.pdf, and see footnote 38.

41 See footnote 12 (RBI survey).

42 Creation of National Clean Energy Fund, Press Information Bureau, Government of India, available at: https://pib.gov.in/newsite/PrintRelease.aspx?relid=71517.

43 National Adaptation Fund for Climate Change (NAFCC), Ministry of Environment, Forest and Climate Change, press release, 3 February 2022, available at: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1795075.

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ii Regulators

RBI

In order to learn from and contribute to environmentally sustainable development, RBI has joined the Central Banks and Supervisors Network for Greening the Financial System (NGFS).[44] RBI has also set up a sustainable finance group (SFG) within its department of revenue to lead efforts and regulatory initiatives in the area of climate risk and sustainable finance.[45] RBI expects that the SFG will play a key role in suggesting strategies and evolving a regulatory framework, including appropriate disclosures, which could be prescribed for banks and other regulated entities in relation to sustainable practices and mitigation of climate-related risks in India.[46]

From a social perspective, RBI has notified regulations and guidelines to deepen financial inclusion in India (including the setting up of small finance banks and payments banks),[47] with the aim of enabling sustainable development[48] by improving the quality of lives of poor and marginalised sections of Indian society.

SEBI

As highlighted above, SEBI has introduced guidelines for issuance and listing of green bonds in India, as well as disclosure requirements such as ESG disclosures in the form of BRSR reporting.

MCA

MCA has published the National Guidelines on Responsible Business Conduct (NGRBC)[49] to meet its commitment to the United Nations Guiding Principles on Business and Human Rights and align with the United Nations sustainable development goals (SDGs). Recognising the significance of non-financial reporting, along with the formulation of the NGRBC, MCA has also constituted a committee on business responsibility reporting to frame business responsibility reporting formats that, inter alia, reflect SDGs for both listed and unlisted companies.[50]

44 Reserve Bank of India Commits to Support Greening India's Financial System- NGFS, RBI press release, 3 November 2021, available at: https://www.rbi.org.in/scripts/FS_PressRelease.aspx?prid=52508&fn=2.

45 Perspectives, RBI Publications, 28 December 2021, available at: https://m.rbi.org.in/scripts/PublicationsView.aspx?id=20941.

46 See footnote 12 (RBI survey).

47 National Strategy for Financial Inclusion 2019-2024, RBI, 10 January 2020, available at: https://rbidocs.rbi.org.in/rdocs/content/pdfs/NSFIREPORT100119.pdf.

48 Financial inclusion and the SDGs, UNCDF and the SDGs, available at: https://www.uncdf.org/financial-inclusion-and-the-sdgs.

49 MCA releases national guidelines on responsible business conduct, Ministry of Corporate Affairs, 13 March 2019, available at: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1568750; also see National Guidelines on Responsible Business Conduct, Ministry of Corporate Affairs, available at: https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf.

50 Report of the Committee on Business Responsibility Reporting, Ministry of Corporate Affairs, available at: https://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf.

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IFSCA

IFSCA has notified regulations on the issuance and listing of ESG debt securities including green bonds, social bonds, sustainable bonds and sustainability-linked bonds.[51] These regulations require the appointment of an independent external reviewer to ascertain that such instruments are aligned with IFSCA Recognised Frameworks (as defined below), and also prescribe specific additional disclosures in the offer documents and post-listing continuous disclosures in relation to utilisation of proceeds and impact reports.

Other key government agencies

IREDA

The government established IREDA under the administrative control of the Ministry of New and Renewable Energy (MNRE). IREDA is engaged in promoting, developing and extending financial assistance for setting up projects relating to new and renewable sources of energy, energy efficiency and conservation.[52] IREDA receives its funding from multilateral agencies (in many cases with guarantees by the government) and provides a range of financial products from project conceptualisation to post-commissioning in the renewable energy sector.[53]

SIDBI

SIDBI is an accredited agency of the Green Climate Fund, a fund established within the framework of the United Nations Framework Convention on Climate Change,[54] and promotes sustainable development through a series of schemes that seek to provide adequate and affordable energy efficiency and green finance as well as enhance awareness of benefits of climate control among small and medium-sized enterprises.[55] SIDBI has launched a number of schemes to promote sustainable finance (such as the green finance scheme and the end-to-end efficiency scheme) and provides financial support to energy service companies.[56]

IV SUSTAINABLE FINANCE INSTRUMENTS

i Types of sustainable finance instruments

As a general matter, Indian regulations as well as voluntary guidelines by various governmental authorities primarily deal with environment-focused sustainable finance instruments.

Indian laws do not regulate any specific aspect of sustainable financing through equity instruments. However, the general framework on equity investments applies to sustainable

51 See footnote 26.

52 IREDA Profile, available at: https://www.ireda.in/home.

53 Indian Renewable Energy Development Agency Limited, Care Ratings, press release, 16 September 2021, available at: https://www.ireda.in/images/HTMLfiles/CARE(3).pdf.

54 Green Climate Fund, United National Environment Programme, available at: https://www.unep.org/about-un-environment/funding-and-partnerships/green-climate-fund.

55 Financing End to End Energy Efficiency Investments in MSMEs (4E Financing Schemes) Financing Schemes for Sustainable Development, SIDBI, available at: https://sidbi.in/files/product/3.%20Financing%20Schemes%20for%20Sustainable%20Development.pdf.

56 Financing Clean Energy for Sustainable Development, SIDBI Annual Report 2018-19, available at: https://www.sidbi.in/AnnualReport201819/sustainable_development.php.

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financing by way of equity as well. Foreign investors or persons resident outside India are also permitted to invest in up to 100 per cent equity of Indian companies operating in the renewable energy sector, without any prior government approval.

The following mechanisms for sustainable financing, through debt, have been specifically prescribed in the Indian legal framework:

Green debt securities

Issuance and listing of green debt securities is governed by SEBI through the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 (NCS Regulations),[57] and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.[58] NCS Regulations define a green debt security as a debt security issued for raising funds that are to be utilised for projects or assets, or both, falling under any of the following categories, subject to the conditions as may be specified by SEBI from time to time:

a renewable and sustainable energy including wind, solar, bioenergy and other sources of energy that use clean technology;
b clean transportation including mass and public transportation;
c sustainable water management including clean and drinking water, and water recycling;
d climate change adaptation;
e energy efficiency including efficient and green buildings;
f sustainable waste management including recycling, waste to energy and efficient disposal of wastage;
g sustainable land use including sustainable forestry and agriculture, and afforestation;
h biodiversity conservation; and
i a category as may be specified by SEBI from time to time.

At present, green debt securities are the only expressly recognised and regulated instruments for sustainable financing in the Indian domestic market (excluding IFSCs).

Priority sector lending

RBI has issued priority sector lending (PSL) guidelines[59] to channel lending for the achievement of SDGs and social and inclusive development. Under the PSL guidelines, RBI has identified eight priority sectors, which include renewable energy, education, housing and social infrastructure. RBI has set out different mandatory targets of lending in each priority sector for different categories of banks in India.

57 Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021, available at: https://www.sebi.gov.in/legal/regulations/apr-2022/securities-and-exchange-board-of-india-issue-and-listing-of-non-convertible-securities-regulations-2021-last-amended-on-april-11-2022-_58126.html.

58 SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021 w.e.f. 5.5.2021, available at: https://www.sebi.gov.in/legal/regulations/may-2021/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-second-amendment-regulations-2021_50100.html.

59 See footnote 25.

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Sustainable finance instruments recognised in IFSC

IFSCA regulations permit the issuance of green, social, sustainable or sustainability-linked debt securities. Such debt securities are defined as those securities that are intended to be utilised for financing projects aligned with the international frameworks, like the International Capital Market Association Principles and Guidelines, the Climate Bonds Standard, ASEAN Standards, European Union Standards and Taxonomy, any framework or methodology specified by a competent authority in India, or other international standards, as considered on a case-by-case basis by recognised stock exchanges or IFSCA (IFSCA Recognised Frameworks).[60]

IFSCA had appointed a committee on sustainable finance.[61] Among other things, the committee has recommended the issuance of sovereign green bonds in IFSC by the government and the introduction of sustainable finance mechanisms and products such as transition bonds, blended finance vehicles, weather derivatives and labelled bonds such as catastrophe bonds and green municipal bonds.

Impact bonds

There have been a few issuances of social impact bonds and development impact bonds in India.[62] However, there is no specific legal framework that regulates the issuance of such bonds.

Other sustainable finance instruments

Other than the regulated instruments discussed above, there are various types of sustainable finance mechanisms and instruments voluntarily offered by financial institutions in India. The RBI survey notes that:

a a few banks have introduced the concept of green deposits (where the deposits are invested to finance green businesses) for their customers;

b approximately 20 per cent of the surveyed banks offer sustainability-linked loans (where the interest rate on the loan is linked to the achievement of certain sustainability goals by the borrower)[63] while 32 per cent of the surveyed banks intend to offer such loans in the next 12 months; and

c a majority of the surveyed banks offer loans for specific green products such as solar panels, electric vehicles and charging infrastructure.[64]

RBI in the RBI discussion paper[65] has also highlighted the overall urgency of incorporating ideas of sustainability in business strategies and has encouraged banks to incorporate environmental and social assessments into financial decision-making and structuring products using the environmental and social lens.

60 See footnote 26.

61 See footnote 16.

62 India's First Skill Impact Bond with a Gender Lens, National Investment Promotion & Facilitation Agency, 1 November 2021, available at: https://www.investindia.gov.in/siru/indias-first-skill-impact-bond-gender-lens; Also see Educate Girls Development Impact Bond Final Evaluation Report, ID Insight, 10 June 2018, available at: https://www.educategirls.ngo/pdf/Educate-Girls-DIB-Final-Evaluation-Report_2018-06-10.pdf.

63 See footnote 12 (RBI survey).

64 See footnote 12 (RBI survey).

65 See footnote 14 (RBI discussion paper).

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The National Voluntary Guidelines for Responsible Financing, released by the Indian Banks' Association, set out eight principles through which ESG factors should be integrated into business operations of banks.[66] These principles encourage financial institutions to collaborate with government, investors and development finance institutions and offer diverse instruments to mobilise capital for green projects,[67] and also encourage banks to support inclusive and social development by offering affordable and quality products for increasing access to finance.[68]

ii Consideration of just transition

The Indian legal framework on sustainable finance does not expressly address the ideas of transition to net zero and a socially inclusive resilient economy.[69] However, the RBI survey does suggest that public and private sector banks could adopt a gradual and non-disruptive approach to transition away from high carbon-emitting or polluting businesses, keeping in mind the development imperatives of a growing economy such as India.[70]

iii Other aspects of the financial system

In an attempt to make fundraising for green projects attractive, India International Exchange has entered into a memorandum of understanding with the Luxembourg Stock Exchange to provide issuers the opportunity of dual listing.[71] Further, an international sustainability platform has also been launched at GIFT-IFSC, India's first IFSC.[72] The major stock exchanges in India have also set up benchmark indices that assess the carbon performance of stocks[73] and ESG risk score[74] based on certain quantitative parameters.

Further, SEBI has introduced a framework for operation of SSE in India to enable not-for-profit organisations and social enterprises to raise capital (by way of equity, debt or units).[75]

India does not at present have any specific framework for derivatives and aftermarket trading in relation to sustainable finance.

66 Indian Banks' Association, National Voluntary Guidelines for Responsible Financing, 27 November 2011, available at: https://www.iba.org.in/reports/national-voluntary-guidelines-for-responsible-financing_290.html.

67 Principle 4, ibid.

68 Principle 5, ibid.

69 Towards a Just Transition Finance Roadmap for India, Insight, CDC Investment Works, June 2021, available at: https://assets.cdcgroup.com/wp-content/uploads/2021/07/09130404/Towards-a-just-transition-finance-roadmap-for-India_July-2021.pdf?id=1.

70 See footnote 12 (RBI survey).

71 Green Social and Sustainable Bonds, Criteria for listing on GSM Green, India INX, available at: https://www.indiainx.com/static/gsmgreen.aspx.

72 NSE IFSC announces launch of international sustainability platform at GIFT City, NSE, 17 June 2022, available at: https://www.nseindia.com/resources/nse-ifsc-launch-international-sustainability-platform.

73 BSE and Sustainability, BSE, available at: https://www.bseindia.com/static/about/sustainability.html.

74 NIFTY Indexogram, NIFTY 100 ESG, available at: https://www1.nseindia.com/content/indices/Factsheet_NIFTY100_ESG_Index.pdf.

75 See footnote 8 (SEBI SSE framework).

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V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

i MCA

MCA released the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business in 2011.[76] These guidelines were revised and named the National Guidelines on Responsible Business Conduct.[77]

MCA also constituted a committee on business responsibility reporting (BRR Committee) to frame business responsibility reporting formats for listed and unlisted companies.[78] This committee recommended two reporting frameworks, a comprehensive business responsibility and sustainability report consisting of three sections: general disclosures, management and process and principle-wise performance. The second reporting framework is a 'lite' version of a former format for smaller companies looking to start non-financial reporting.[79] Currently, such business responsibility reporting is voluntary, but MCA has stated that it will make these mandatorily applicable to all companies in a staggered manner. MCA has also proposed that these formats will be used to develop a Business Responsibility-Sustainability Index, which will enable organisations, including the central and state governments, to give preference in their procurement processes to businesses that demonstrate responsible business conduct.

The CA2013 also prescribes certain mandatory disclosure requirements to be fulfilled by listed and unlisted companies, for responsible business conduct. For instance, the relevant companies are required to make mandatory disclosures in relation to the CSR actions undertaken by them.[80] Further, companies are required to include a report by their board of directors on conservation of energy, along with annual financial statement.[81]

ii SEBI

In 2021, in line with the BRR Committee report, SEBI revised the ESG reporting structure in BRSR with the intent of collecting quantitative and standardised information on ESG parameters for comparative functionality of the data.[82] BRSR does not recognise any specific international reporting framework but allows equity listed entities that submit reports to offshore investors in an internationally accepted framework to submit the same reports in India after cross-referencing the disclosures against requirements of BRSR.[83] BRSR has been made mandatory for the top 1,000 equity listed companies based on market capitalisation

76 Ministry of Corporate Affairs, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities, of Business, available at: https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

77 See footnotes 21 and 49.

78 ibid.

79 See footnote 50.

80 See footnote 18.

81 Section 134, (Indian) Companies Act, 2013 and Rule 8(3)(A) of the Companies (Accounts) Rules, 2014, available at: https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/rules.html.

82 SEBI Circular on Business responsibility and sustainability reporting by listed entities, 10 May 2021, available at: https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html.

83 ibid.

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from 2022 to 2023.[84] Equity listed entities are also mandated to include disclosures on opportunities, threats, risks and concerns as part of their annual reports.[85] To date, these disclosure requirements do not require companies to provide details about the process adopted to identify such opportunities or risks, or chart progress over time.

As highlighted under Section III.i, 'Regulation and policy', SEBI has prescribed additional disclosures in offer documents for issuance of green debt securities (including environmental objectives of the issuance and details of the project where proceeds are to be deployed), as well as post-listing continuous disclosures in relation to the utilisation of the proceeds, details of unallocated proceeds and performance of the project. SEBI has proposed[86] aligning these disclosure requirements to the International Capital Market Association's Green Bond Principles (ICMA Principles).[87] SEBI has also proposed to introduce disclosure norms for domestic ESG mutual fund schemes.[88]

iii RBI

The RBI survey notes that a majority of the surveyed banks have not aligned their climate-related financial disclosures with the Task Force on Climate-related Financial Disclosures framework (TCFD).[89] RBI has also emphasised the importance of disclosure of climate-related information by entities regulated by RBI in identifying and adapting to climate-related risks and has encouraged adoption of the TCFD by such entities.[90]

iv Sustainable finance taxonomy

The current Indian framework has limited definitions for sustainable finance taxonomy. In this regard, the SEBI sustainable bonds consultation paper proposes to expand and amplify the definition of green debt securities to include pollution prevention and control and circular economy-adapted products as green debt securities.[91] SEBI also proposes to sub-categorise green bonds as per the ICMA Principles and introduce the concept of blue bonds in India.[92]

Further, there is no definition of other sustainable finance instruments such as green equity or other kinds of ESG-linked bonds, which has resulted in a plurality of definitions of

84 SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021 w.e.f. 5.5.2021, available at: https://www.sebi.gov.in/legal/regulations/may-2021/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-second-amendment-regulations-2021_50100.html.

85 Regulation 34(3), SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 available at: https://www.sebi.gov.in/legal/regulations/jul-2022/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-july-25-2022-_61405.html.

86 See footnote 9 (SEBI sustainable bonds consultation paper).

87 The Green Bond principles, ICMA, available at: https://www.icmagroup.org/assets/documents/Sustainable-finance/2022-updates/Green-Bond-Principles_June-2022-280622.pdf.

88 SEBI Consultation paper on introducing disclosure norms for ESG Mutual Fund schemes, 26 October 2021, available at: https://www.sebi.gov.in/reports-and-statistics/reports/oct-2021/consultation-paper-on-introducing-disclosure-norms-for-esg-mutual-fund-schemes_53500.html.

89 See footnote 12 (RBI survey).

90 See footnote 14 (RBI discussion paper).

91 See footnote 9 (SEBI sustainable bonds consultation paper).

92 ibid.

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green finance and sustainable finance.[93] The India-UK Sustainable Finance Working Group has recommended that the Indian taxonomy for sustainable finance should consider just transition, resilience and social objectives.[94]

VI ESG DATA AND REPORTING

Other than the disclosures covered in Section V, no other reporting requirements are required in relation to ESG matters. BRSR has made it mandatory for prescribed Indian companies to provide details of each of the Scope 1, Scope 2 and Scope 3 levels of emission intensity per rupee of turnover of the entity.[95]

It has been noted that an ESG reporting mechanism will improve information management in India, which may further help in reducing maturity mismatches and borrowing costs, and improve efficiency in resource allocation in sustainable finance.[96] Currently, a majority of Indian companies do not have a mandatory obligation to integrate ESG standards or report or disclose their performance in that aspect. However, as per the BRR Committee, in the near future, the BRSR report may be required to be mandatorily published by all companies.

VII SUSTAINABLE FINANCE INCENTIVES

The government has introduced several schemes and production-linked incentives to promote investments in generation of renewable energy in India.[97] The MNRE has introduced the 'Preference to Make in India' programme in the green energy sector, under which the government and government entities mandatorily prefer domestically manufactured goods and services for their renewable energy sector requirements.[98] This preference for domestically manufactured goods and services along with other government incentives such as production-linked incentives for manufacturing of high efficiency modules in the

93 Accelerating Green Finance in India: Definitions and Beyond, CPI Discussion Brief, Climate Policy Initiative, June 2020, available at: https://www.climatepolicyinitiative.org/publication/accelerating-green-finance-in-india-definitions-and-beyond/.

94 Practical actions to finance India's sustainable recovery, Report by India-UK Sustainable finance working group, January 2021, available at: https://ficci.in/spdocument/23424/Sustainable-Recovery_IUKSFWG_Report.pdf.

95 Annexure II, see footnote 19.

96 Green Finance in India: Progress and Challenges, RBI Bulletin January 2021, 21 January 2021, available at: https://rbi.org.in/Scripts/BS_ViewBulletin.aspx?Id=20022.

97 Details of the solar schemes offered by the MNRE can be accessed at: https://mnre.gov.in/solar/schemes/; Details of the wind energy schemes offered by the MNRE can be accessed at: https://mnre.gov.in/wind/schemes; Details of the small hydro schemes offered by the MNRE can be accessed at: https://mnre.gov.in/small-hydro/schemes; Details of the bio-energy schemes offered by the MNRE can be accessed at: https://mnre.gov.in/bio-energy/schemes; also see https://www.pib.gov.in/PressReleasePage.aspx?PRID=1808349 for a list of recent government incentives introduced for promotion of investments in the green energy sector.

98 Public Procurement (Preference to Make in India) to provide for Purchase Preference (linked with local content) in respect of Renewable Energy (RE) Sector, Order dated 23 September 2020, available at: https://dpiit.gov.in/sites/default/files/MNRE%20Order%20dated%20230920.pdf;

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renewable energy sector,[99] and fiscal and infrastructure support for research and development in the green energy sector, [100] is expected to boost investor confidence in sustainable finance in India.

Some other incentives for green finance include a subsidy offered to institutional, residential and social sectors on the installation costs of the rooftop solar panels,[101] and schemes to encourage electric and hybrid vehicle purchase by providing financial support.[102]

The government also provides financial support in infrastructure viability gap funding (VGF) for projects that are economically justified but commercially unviable due to large capital investment requirements, long gestation periods and the inability to increase user charges to commercial levels.[103] The VGF scheme (as renewed until 2024/2025) also includes social sectors such as the waste-water treatment, water supply, solid waste management, health and education sectors.

The Parliamentary Standing Committee on Energy has in its 21st report recommended that, among other things, the government should introduce innovative green financing mechanisms such as a green bank system and improve the borrowing flexibility of IREDA from RBI to enable it to support more sustainable investments.[104]

VIII GREEN TECHNOLOGY

i Emerging green technologies, policies and funding

Carbon trading

For enhancing energy efficiency in certain designated energy-intensive industries, the Indian regulatory framework currently has a market-based mechanism of perform achieve and trade (PAT). Under the PAT scheme, the designated energy-intensive industries are mandated

99 Production Linked Incentive Scheme under 'National programme on High Efficiency Solar PV Modules', MNRE, 30 September 2022, available at: https://mnre.gov.in/img/documents/uploads/file_f-1664601098820.pdf; also see Production Linked Incentive (PLI) scheme, 'National Programme on Advanced Chemistry Cell (Acc) Battery Storage', Ministry of Heavy Industry and Public Enterprises, 9 June 2021, available at: https://heavyindustries.gov.in/writereaddata/UploadFile/ACC%20Scheme%20Notification%209June21.pdf; Scheme for Faster Adoption and Manufacturing of Electric Vehicles in India Phase II, notification dated 25 June 2021, S.O. 2526(E)., and Notification of Extension dated 8 March 2019, available at: https://fame2.heavyindustries.gov.in/content/english/11_1_PolicyDocument.aspx.

100 Administrative Approval for continuation of the Renewable Energy Research and Technology Development (RE-RTD) Programme for the period from FY 2021-2022 to FY 2025-26, MNRE, 9 December 2022, available at: https://mnre.gov.in/img/documents/uploads/file_f-1639111951695.pdf; also see Government incentivises local development and manufacturing of renewable energy technologies, MNRE, 22 March 2022, available at: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1808349.

101 'What is the solar rooftop subsidy scheme/yojana?', *Times of India*, 20 July 2022, available at: https://timesofindia.indiatimes.com/business/faqs/miscellaneous/what-is-the-solar-rooftop-subsidy-scheme/yojana/articleshow/93010587.cms.

102 See footnote 99.

103 Cabinet approves Continuation and Revamping of the Scheme for Financial Support to Public Private Partnerships in Infrastructure Viability Gap Funding, 11 November 2020, available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1671914.

104 Financial Constraints in Renewable Energy Sector, Twenty First Report, Standing Committee on Energy (2021-2022), Ministry of New and Renewable Energy, available at: https://eparlib.nic.in/bitstream/123456789/835464/1/17_Energy_21.pdf.

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to reduce their specific energy consumption.[105] These energy savings are then converted to energy saving certificates that are permitted to be traded on Indian energy exchanges, the Indian Energy Exchange and the Power Exchange India Limited.[106]

The Parliament has also recently passed the ECA Amendment Bill, which establishes the framework for creation of the carbon credit market.[107] This will enable domestic companies to trade carbon credits efficiently and help in meeting India's energy transition goals (as per the updated NDCs) by encouraging private sector participation in combating climate change. Further, the BEE has also released a blueprint for the establishment of the Indian national carbon markets in a phased manner.[108]

Emerging green technologies

The ECA Amendment Bill makes it mandatory for energy-intensive industries to use a share of non-fossil sources for energy and feedstock such as green hydrogen, green ammonia, biomass and ethanol.[109]

In 2021, the government launched the National Hydrogen Mission,[110] which has set a target of indigenously producing 5 million tonnes of green hydrogen by 2030.[111] It is estimated that an investment of US$100 billion per year will be required to meet this target.[112] Further, the MNRE provides infrastructural and fiscal support for development of green technology (including biogas and hydrogen),[113] and has granted financial aid to a start-up for development of indigenous hydrogen sensing and analysis technology.[114] Following such policy considerations, a number of Indian companies have announced significant investment plans for green and blue hydrogen and ammonia.

Development of the corresponding regulatory frameworks for emerging green technologies (such as hydrogen, ammonia and carbon trading) is at a nascent stage in India.

105 PAT, Bureau of Energy Efficiency, available at: https://beeindia.gov.in/content/pat-cycle#:~:text=PAT%20scheme%20is%20a%20regulatory,saving%20which%20can%20be%20traded.

106 ESCerts Trading, Bureau of Energy Efficiency, available at: https://beeindia.gov.in/content/escerts-trading; also see Perform, Achieve and Trade (PAT) Scheme, brief note, Bureau of Energy Efficiency, available at: https://beeindia.gov.in/sites/default/files/press_releases/Brief%20Note%20on%20PAT%20Scheme.pdf.

107 See footnote 7.

108 See footnote 6.

109 See footnote 7.

110 National Hydrogen Mission, Ministry of New and Renewable Energy, Press Information Bureau, 17 February 2022, available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1799067.

111 National Hydrogen Mission, Ministry of New and Renewable Energy, Press Information Bureau, 17 February 2022, available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1799067.

112 Need for Accelerated Investments for Green Hydrogen India, Invest India Outlook Editorial, 30 September 2022, available at: https://www.investindia.gov.in/team-india-blogs/need-accelerated-investments-green-hydrogen-india.

113 Administrative Approval for continuation of the Renewable Energy Research and Technology Development (RE-RTD) Programme for the period from FY 2021-2022 to FY 2025-26, MNRE, 9 December 2022, available at: https://mnre.gov.in/img/documents/uploads/file_f-1639111951695.pdf.

114 Financial aid was announced for a hydrogen start-up for indigenous development of Hydrogen Sensing and Analysis Technology, Ministry of Science and Technology, Press Information Bureau, 19 August 2022, available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1853145.

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IX CLIMATE CHANGE IMPACT

i Climate-related risks

While India has not yet seen climate litigation against corporations, the principle of polluter pays has evolved significantly through various cases. In *Indian Council for Environment-Legal Action v. Union of India*,[115] the defendant was ordered to pay compensation to the people affected by environmental deterioration following the absolute liability rule for the damage caused to the environment.

Following orders from the National Green Tribunal,[116] the Central Pollution Control Board has released a report[117] that lays down the methodology to assess and recover compensation for environmental damage through the polluter pays principle.

ii Risk management

In one of its bulletins, RBI has identified fiscal policy tools (tax incentives, carbon pricing) and monetary policy instruments (subsidised liquidity support to banks, allocation of minimum credit to climate-friendly sectors) focused on green finance as significant mitigators of climate change risks.[118]

From a regulatory perspective, climate risk management in India is at a nascent stage.

X OUTLOOK AND CONCLUSIONS

The government has committed to achieving net zero emissions by 2070, and has highlighted five elements of its climate action plan and also updated its NDCs. Various government departments and institutions have announced schemes and plans towards achieving SDGs and India's NDCs, and Indian companies have announced ambitious investment plans in renewable energy as well as in green ammonia and hydrogen. Indian regulators are increasing their focus on various aspects of sustainable finance, including the amplification of the current sustainable finance taxonomies and introduction of new and innovative market products to promote energy-efficient technologies. Specialised groups and committees have also been constituted to advise Indian regulators on various ESG-related matters and best practices for the development of sustainable finance.

A combination of clear and comprehensive sustainable finance taxonomy, mandatory ESG disclosures, government incentives, innovative financing instruments, deepening of the domestic debt securities market and a sustained policy focus will be required, and will together enable India to achieve SDGs and its NDCs. It is expected that the next few years will see significant developments in the regulatory framework for sustainable finance in India.

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115 Indian Council For Enviro-Legal Action *v.* Union Of India, (1987) 1 SCC 395.

116 Paryavaran Suraksha Samiti *v.* Union of India, WP (CIVIL) No. 375/2012.

117 Central Pollution Control Board, Report of the CPCB In-house Committee on Methodology for Assessing Environmental Compensation and Action Plan to Utilize the Fund, July 2019 available at: https://cpcb.nic.in/uploads/report-15.07.2019.pdf.

118 Reserve Bank of India Bulletin, April 2020, Vol LXXIV, 4 available at: https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/0BULLETINAPRIL2020F350561C95624AB29FFA13D79062E08A.PDF.

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Chapter 5

JAPAN

Hiromi Hattori, Yuichi Miyashita and Takuma Kaneko[1]

I INTRODUCTION

The Japanese sustainable finance market is not an exception in the context of the rapid growth observed in the global sustainability finance market.

Since 2014, when the first green bonds were issued by a Japanese company,[2] the number of issuances of green bonds deals has increased steadily and reached 99 per year in 2021.[3] The total value of green bonds issued in 2021 was recorded to be approximately ¥1,865 billion. Similarly, it was in 2015 when the first sustainability bonds were issued by a Japanese company, and the number of issuances of sustainability bonds deals increased steadily, reaching 39 per year in 2021 (the total value of sustainability bonds issued in 2021 was approximately ¥1,000 billion).[4]

Sustainability-linked bonds are rather new in the Japanese market, and it was only in 2020 when the first sustainability-linked bonds were issued in Japan. However, both the number of deals and the issuance values have grown rapidly, and as at 26 September 2022, both the number of deals and issuance value for sustainability-linked bonds in 2022 had already exceeded the corresponding statistics of 2021. In particular, the issuance value in 2022 has more than doubled from that in 2021.[5]

The first green loan was introduced in the Japanese market in 2017. Although the green loan market is rather small compared to the green bond market, both in terms of the number of deals and the value, the market has steadily expanded. As of 26 September 2022, 96 green loan deals with a total value in excess of approximately ¥311 billion have been announced in 2022.[6]

It was in 2019 when the first sustainability-linked loans were introduced in the Japanese market. In 2021, the number of deals involving sustainability-linked loans reached 56, and the total value of such loans exceeded approximately ¥357 billion. As of 26 September 2022, the number of deals of such loans announced in 2022 reached 105, more than double that in 2021.[7]

1 Hiromi Hattori and Yuichi Miyashita are partners and Takuma Kaneko is an associate at Nagashima Ohno & Tsunematsu.
2 These green bonds were issued by the Development Bank of Japan Inc.
3 http://greenfinanceportal.env.go.jp/en/bond/issuance_data/market_status.html.
4 http://greenfinanceportal.env.go.jp/en/bond/issuance_data/market_status.html.
5 http://greenfinanceportal.env.go.jp/en/bond/slb_issuance_data/slb_market_status.html.
6 http://greenfinanceportal.env.go.jp/en/loan/issuance_data/market_status.html.
7 http://greenfinanceportal.env.go.jp/en/loan/sll_issuance_data/sll_market_status.html.

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As for social finance, the number of deals involving social bonds was announced to be 53 in 2021, and the total value of such social bonds issued in 2021 was approximately ¥1,162 billion.[8] No statistical data about social loans is available.

The above trends are backed by the global movement towards a carbon-neutral society. Further, the covid-19 outbreak since early 2020 has affected the social finance market. As compared to 2019, both the number and value of social bonds in 2020 have more than doubled.

At the same time, the framework of sustainable finance is rapidly developing in Japan. While there is no specific legislation that sustainable finance market players are required to comply with, these players have been voluntarily complying with the guidelines issued by governmental bodies, such as the Ministry of Environment (MOE), the Financial Services Agency (FSA) and the Ministry of Economy, Trade and Industry (METI). The Japanese guidelines are designed to follow the internationally recognised sustainability finance principles released by the International Capital Market Association (ICMA) and the Loan Market Association (LMA), and they have been updated periodically – that is to say, whenever the principles that the Japanese guidelines are based on have been updated. In this regard, the guidelines do not have penalty provisions that are applicable to a case where, for example, an issuer issues certain bonds without complying with the relevant guidelines. The guidelines do not work as hard law, but rather as soft law, and they are respected by the sustainable finance market players.

II YEAR IN REVIEW

During the period from 2021 to 2022, there have been various developments in connection with sustainable finance in Japan, both in terms of the voluntary guidelines applicable to sustainable finance instruments and the disclosures of sustainability information of listed companies.

i Voluntary guidelines of sustainable finance instruments

The Green Bond Guidelines and Green Loan and Sustainability-Linked Loan Guidelines issued by MOE in 2020 were revised to reflect the contents of the latest version of the Green Bond Principles (ICMA; June 2021), the Green Loan Principles (LMA; February 2021) and the Sustainability-Linked Loan Principles (LMA; March 2022), and the new version was released in July 2022. In addition, MOE newly developed the Sustainability-Linked Bond Guidelines based on the Sustainability-Linked Bond Principles (ICMA; June 2020) and subsumed it into the new version of the Green Bond Guidelines and Green Loan and Sustainability-Linked Loan Guidelines. Furthermore, the FSA issued the first guidelines for social finance, the Social Bond Guidelines, in October 2021 based on the Social Bond Principles (ICMA; June 2021). For details of these guidelines, refer to Section IV.

ii Disclosure of sustainability information

The working group on corporate disclosure of the Financial System Council of the FSA (disclosure working group) issued a report on the enhancement of disclosure of non-financial information in June 2022. Based on the report, the FSA announced in November 2022

8 https://www.jsda.or.jp/sdgs/hakkou.html.

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a draft of amendments to the relevant regulations to require listed companies to disclose sustainability information in their annual securities reports under the Financial Instruments and Exchange Act (FIEA). For details of this development, see Section V.

In addition, various voluntary guidelines relating to the disclosure of sustainability information are being developed. Among others, in August 2022, a study group on the visualisation of non-financial information established by the Cabinet Secretariat released the Guidelines for Visualisation of Human Capital Information, which outline the basic approach towards an effective disclosure of human capital information of companies.

III REGULATION AND POLICY

i Governance regime

Japan had promoted various initiatives on carbon neutrality even before the Paris Agreement came into effect. For instance, in July 2015, Japan submitted to the United Nations Framework Convention on Climate Change Secretariat its nationally determined contribution target to reduce greenhouse gas emissions in 2030 by 26 per cent from 2013 levels. To further accelerate these efforts after the entry into force of the Paris Agreement, then Prime Minister Yoshihide Suga declared in his policy speech in October 2020 that Japan will aim for carbon neutrality by 2050. Under the Suga administration, domestic efforts to decarbonise have made rapid progress, with the announcement of an ambitious goal of a 46 per cent reduction in greenhouse gas emissions in 2030 (compared to 2013 levels), which is consistent with the goal of carbon neutrality in 2050.

Under the current Kishida administration, decarbonisation continues to be an important policy issue for Japan. In Prime Minister Fumio Kishida's policy speech in December 2021, he stated: 'We will forge our clean energy strategy by grasping both the supply and the demand sides in an integrated manner, including innovations and capital investments not only in energy supply but also on the demand side.'

In terms of the sustainable development goals (SDGs), generally speaking, after the adoption of the SDGs by the UN Sustainable Development Summit held in September 2015, the Japanese government established the SDGs Promotion Headquarters in May 2016, which is headed by the Prime Minister, to effectively achieve the SDGs. In December 2016, the SDGs Implementation Guiding Principles were established. The Principles, revised in December 2019, are part of a mid-to-long-term national strategy for achieving the SDGs in Japan and internationally by 2030.

ii Regulators

Sustainable finance policies in Japan involve a variety of organisations, including ministries, government agencies and private sectors. Here, we introduce some of the most important organisations and list the main frameworks in relation to sustainable finance that they have developed.

Organisation	Framework/principle/document/policy
FSA	· Stewardship Code (2014, revised in 2017, 2020) · Corporate Governance Code (2015, revised in 2018 and 2021) · Social Bond Guidelines (2021) · Basic Guidelines on Climate Transition Finance (2021, jointly with METI and MOE)

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Organisation	Framework/principle/document/policy
MOE	· Green Bond and Sustainability-Linked Bond Guidelines (2017, revised in 2020, 2022) · Green Loan and Sustainability-Linked Loan Guidelines (2020, revised in 2022) · Basic Concept of Impact Finance (2020) · Green Impact Assessment Guide (2021)
METI	· Guidance for Integrated Corporate Disclosure and Company-Investor Dialogues for Collaborative Value Creation (2017, revised in 2022) · The Guide for SDG Business Management (2019) · Climate Innovation Finance Strategy (2020) · Roadmaps of transition finance for each industrial sector
The Tokyo Stock Exchange	· Corporate Governance Code (2015, revised in 2018 and 2021) · Practical Handbook for ESG Disclosure (2020)

Other than the above, the Ministry of Land, Infrastructure, Transport and Tourism has outlined roadmaps on transition finance focusing on the transportation industrial field. In addition, various industrial associations, such as the Japan Securities Dealers Association and Japanese Bankers Association, have compiled various proposals and reports in relation to bonds and loans, respectively.

IV SUSTAINABLE FINANCE INSTRUMENTS

i Types of sustainable finance instruments

In Japan, instruments of sustainable finance have been constantly developed in accordance with the study and practice of other markets. There are several types of environment-related financing instruments, as follows. Green finance is used to finance green projects (projects related to renewable energy, energy conservation, clean transportation, etc.); sustainability finance, funds of which are used for both green projects and social projects, is used to finance sustainability projects; and sustainability-linked finance, which encourages the realisation of ambitious sustainability performance targets (SPTs) in light of the fact that financial or structural characteristics, or both, can vary depending on whether the issuer achieves the SPTs. In addition to these, a new category called transition finance has emerged in recent years to promote financing for steady low carbon initiatives, such as energy conservation in sectors where greenhouse gas emissions are difficult to reduce, and for transition initiatives, such as long-term research and development of decarbonisation. There is also growing interest in blue finance, which uses funds for a specific purpose that involves the aquatic environment, such as preventing marine pollution and protecting marine resources. From a social-related perspective, social finance is used to finance social projects (projects related to infrastructure development, childcare and nursing care support, employment and the health of employees, etc.).

These types of financing mainly take two forms: one is to raise funds from capital markets by issuing bonds, and the other is to raise funds through loans from financial institutions (mainly banks). In addition to bonds, there can also be equity finance in the form of stocks and other securities.

However, these types may overlap, which makes them difficult to categorise. Therefore, in Japan, as described in the next section, principles and guidelines have been developed based on international principles and guidelines, and the requirements for each type of financing and its relationship with the other types of financing have been organised. Taking the

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relatively new transition finance as an example, the Basic Guidelines on Climate Transition Finance labels three categories of financial instruments as transition finance:

a financial instruments (bonds or loans) that meet the four elements[9] of disclosure recommended in the Climate Transition Finance Handbook by ICMA and the proceeds of which shall be used for specific purposes (when the proceeds are not used for green projects but the process follows the existing principles and guidelines);

b financial instruments (bonds or loans) that meet the four elements, set targets in line with the transition strategy and change their financial or structural characteristics, or both, depending on the achievement of predefined targets, and the proceeds of which can be used for general corporate purposes; and

c financial instruments that meet the four elements and follow the existing Green Bond Principles and the Green Bond Guidelines (when the proceeds are used for green projects).

The guidelines also noted that regardless of (a) through (c) above, financial instruments that fulfil the four elements of transition finance may be recognised as transition finance.

ii Principles and guidelines

There is no legislation in Japan that defines the criteria and requirements for specific types of green finance, social finance, sustainability finance, sustainability-linked finance or transition finance. However, the following principles and guidelines have been developed by relevant Japanese ministries in accordance with international ones for reference in arranging such financing.

Contrast chart in respect of bonds

Type of bond	ICMA	Japan
Green bond	Green Bond Principles	Green Bond Guidelines
Social bond	Social Bond Principles	Social Bond Guidelines
Sustainability bond	Sustainability Bond Guidelines	Green Bond Guidelines[10] and Social Bond Guidelines[11]
Sustainability-linked bond	Sustainability-Linked Bond Principles	Sustainability-Linked Bond Guidelines
Transition bond	Climate Transition Finance Handbook	Basic Guidelines on Climate Transition Finance

Contrast chart in respect of loans

Type of loan	LMA and others	Japan
Green loan	Green Loan Principles	Green Loan Guidelines
Social loan	Social Loan Principles	–

9 The Climate Transition Finance Handbook by ICMA provides four elements (Element 1: issuer's climate transition strategy and governance; Element 2: business model environmental materiality; Element 3: climate transition strategy to be 'science-based' including targets and pathways; and Element 4: implementation transparency).

10 The Green Bond Guidelines apply to sustainability bonds to the extent that the proceeds of the sustainability bonds are allocated to green projects.

11 The Social Bond Guidelines apply to sustainability bonds to the extent that the proceeds of the sustainability bonds are allocated to social projects.

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Type of loan	LMA and others	Japan
Sustainability loan	–	–
Sustainability-linked loan	Sustainability-Linked Loan Principles	Sustainability-Linked Loan Guidelines
Transition loan	–	Basic Guidelines on Climate Transition Finance[12]

Each of the principles and guidelines provide four or five core components. The core components that the principles and guidelines for green social, and sustainability finance have in common are 'use of proceeds', 'process for project evaluation and selection', 'management of proceeds' and 'reporting'. The reporting component is also a core component of sustainability-linked finance; however, as proceeds of sustainability-linked finance can be used for general purposes, use of proceeds is not one of its core components. Rather, as sustainability-linked finance is a financial instrument for which the financial or structural characteristics, or both, can vary depending on whether the issuer achieves predefined sustainability targets, 'selection of key performance indicators', 'calibration of sustainability performance targets', 'bond/loan characteristics' and 'verification' are provided as key components in the principles and guidelines.

It is noteworthy that the latest Green Bond Guidelines and Green Loan Guidelines provide viewpoints that can be referred to by bond issuers or borrowers in judging whether a certain project has a clear improving effect on the environment, which are not seen in the Green Bond Principles and the Green Loan Principles.

These principles and guidelines are not legal norms; therefore, no legal penalties will be imposed if, for instance, financing labelled as a green bond does not meet some of the elements of the Green Bond Principles by ICMA and the Green Bond Guidelines by MOE. However, the main purpose of these principles and guidelines is to ensure the market's confidence in these types of financing by acting as a check against bonds and loans that may be traded as 'greenwash', which are bonds and loans that may be perceived as being green despite having no environmental benefits. Since the goal is to ensure confidence in financing and to attract sufficient funds from the market, market players voluntarily originate bonds and loans in compliance with these principles and guidelines, and it has become common practice to do so in Japan.

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

i Disclosure by companies

In Japan, under the FIEA, listed companies and certain other companies generally must file annual securities reports with the local finance bureau within three months of the end of each fiscal year. In June 2022, the disclosure working group published a report proposing to amend the disclosure requirements for annual securities reports under the FIEA to introduce a new section for the disclosure of sustainability information. Based on the report, the FSA announced in November 2022 a draft of amendments to the disclosure rules under the FIEA. The new section will be comprised of four elements: governance, strategies, metrics and targets, and risk management, which are based on the framework of the TCFD and the

12 While these guidelines are written based on cases for bonds, the relevant concepts can also be applied to loans.

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exposure drafts of the sustainability disclosure standards of the International Sustainability Standards Board (ISSB). The FSA's draft provides that the disclosure of strategies and metrics and targets should be only required if the relevant reporting company has determined that they are material, while governance and risk management should be disclosed by all reporting companies. Among various sustainability issues, the discussion by the disclosure working group focused on climate change, human capital and diversity. For climate change, the FSA's draft provides no specific disclosure standard, but the Sustainability Standards Board of Japan is expected to participate in the development of the ISSB disclosure standards for international comparability of climate change disclosures. For human capital and diversity, the FSA's draft provides that human resource development policies, policies on improving the workplace environment, gender pay gap, ratio of women in managerial positions and ratio of male workers taking childcare leave will be added to disclosure items. The amendments to the disclosure rules based on the FSA's draft are expected to be enacted during 2022, and the initial mandatory disclosures on these matters will be required to be made via annual securities reports for the fiscal year ending March 2023.

In addition, the Tokyo Stock Exchange revised the Corporate Governance Code in June 2021. The Code adopts a principle-based approach, under which each listed company is to substantively interpret and apply the Code according to its own circumstances without being limited by the text of the Code itself. The revised Code provides that companies should appropriately disclose their initiatives on sustainability when disclosing their management strategies. In particular, the Code provides that companies listed on the Prime Market should collect and analyse the necessary data on the impact of climate change-related risks and earning opportunities on their business activities and profits, and enhance the quality and quantity of disclosure based on the TCFD recommendations or an equivalent framework that is expected to include the ISSB disclosure standards.

ii Disclosure by investors

In contrast to these corporate level disclosures, legal requirements for the disclosure of sustainability information by asset managers or asset owners, or on an investment product basis, have not been introduced yet in Japan; however, the following initiatives are being developed.

In terms of disclosure by investors, in March 2020, the Stewardship Code of Japan was revised to address sustainability considerations, including that institutional investors should clearly specify how they take the issues of sustainability into consideration in their stewardship policy, corresponding to their investment management strategies. Further, in July 2022, the Expert Panel on Sustainable Finance of the FSA published the second report on the direction of policy measures for sustainable finance. The report emphasises that it is important for institutional investors, especially asset owners, to deepen their knowledge about how sustainability initiatives should be considered in their basic policies on investment from the perspective of increasing the growth and sustainability of assets under their management and expanding the benefits for the ultimate beneficiaries over the long term.

For ESG mutual trusts, the second report provides that asset managers that engage in ESG investment are expected to (1) formulate their own clear ESG policies and continuously work to enhance their investment processes, (2) establish an organisational structure necessary for implementing appropriate ESG investment, and (3) actively provide

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appropriate information and disclosure, in a manner consistent with the actual investment process. In relation to this, in May 2022, the FSA published its supervisory expectations for asset managers that provide ESG mutual trusts.

VI ESG DATA AND REPORTING

i Reporting by companies

As discussed in Section V, the FSA's draft of the amendments to the disclosure rules provides that strategies and metrics and targets with respect to sustainability are only required to be disclosed in annual securities reports if the relevant reporting company has determined that they are material. In terms of greenhouse gas emissions, there is no legal requirement to disclose information on greenhouse gas emissions in annual securities reports; however, the FSA expects that reporting companies will proactively disclose information on Scope 1 and 2 greenhouse gas emissions, considering the materiality of the information based on the relevant companies' business models and business environment. While such expectation on the part of the FSA does not include Scope 3 greenhouse gas emissions, there was discussion by the members of the disclosure working group to the effect that information on Scope 3 greenhouse gas emissions is useful.

The Act on Promotion of Global Warming Countermeasures requires certain business operators that produce considerably high greenhouse gas emissions to report to the government information on Scope 1 and 2 greenhouse gas emissions, and the government publishes the information annually. This measure is not for the purpose of disclosure to investors but is a regulatory purpose for global warming countermeasures.

ii ESG evaluation and data providers

Recently, the role of ESG evaluation and data providers has been increasingly important based on the expansion of sustainable finance. The providers' evaluations and data are used for, among other things, decisions on investment in securities by institutional investors, creation of ESG indices and engagement with companies. In July 2022, the FSA published a draft Code of Conduct for ESG Evaluation and Data Providers. The Code addresses issues regarding ESG evaluation and data providers, such as transparency of evaluations and potential conflicts of interest. The Code does not constitute laws or regulations that uniformly require all ESG evaluation and data providers to comply with the Code, but rather is designed to be a voluntary code on a principle basis, where the FSA calls for providers to express their support for the Code, and the providers that support the Code will either comply with the Code or explain the reasons for their non-compliance with a particular item. The Code sets forth principles, guidelines and concepts with respect to various matters, such as securing the quality of the service of ESG evaluation and data provision; managing independence and conflicts of interest; and ensuring transparency of methodologies and processes for the evaluation.

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VII SUSTAINABLE FINANCE INCENTIVES

The government offers various kinds of incentives to promote sustainable finance.

i Financial incentives for costs for second-party opinions of sustainable finance issuers

MOE and METI, through their outside executive body, provide subsidies to rating agencies that provide second-party opinions to sustainability finance issuers, or to consulting firms that provide various consulting services for green finance. By the government's provision of the aforementioned subsidies, companies that intend to raise funds through sustainable finance are relieved of the burden of costs for the second-party opinions required under the relevant principles and guidelines. These financial incentives are intended to make it easier for the companies to utilise sustainable finance instruments.

ii Transition finance interest subsidy

METI has offered an interest subsidy project for transition loan borrowers since 2021. The borrowers are required to:

a obtain certification by an outside rating agency that the transition loan satisfies both the Basic Guidelines on Climate Transition Finance and the Sustainability-Linked Loan Guidelines; and

b apply for and obtain certification of their plan from the certified government ministry.

METI will offer the interest subsidy in relation to approximately ¥1 trillion in loans in total, for a period of three years.

iii Sustainable finance model project certification

MOE sponsors the Green Finance Model Project and solicits cases that conform to the Sustainability-Linked Bond (Loan) Guidelines and should be regarded as models of green finance. METI sponsors the Transition Finance Model Project and solicits cases that conform to the Basic Guidelines on Climate Transition Finance and should be regarded as models of climate transition finance. In certifying the cases selected as model projects, the government bears the costs for the assessment of the conformity of those cases to the relevant guidelines and publicises information about those model cases on its website.

iv Development of roadmaps for promoting transition finance

METI developed a roadmap to provide a concrete direction for the transition toward achieving carbon neutrality in 2050 for greenhouse gas-intensive industries. METI has released roadmaps for seven industrial sectors. In other industrial sectors, such as the international shipping, domestic marine transport and aviation sectors, there are roadmaps and other documents, issued by the Ministry of Land, Infrastructure, Transport and Tourism, which indicate technologies and directions toward carbon neutrality that can be used or followed for transition finance.

It is assumed that companies will refer to the roadmap when considering climate change measures using transition finance. The roadmap is expected to assist financial institutions in determining whether a company's strategies and initiatives toward carbon neutrality qualify for transition finance when the company raises funds.

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VIII GREEN TECHNOLOGY

i Green innovation fund

Toward the goal of achieving carbon neutrality by 2050, it is necessary to make structural changes in the energy and industrial sectors and to invest in green innovation. In 2021, METI established the green innovation fund, a ¥2 trillion fund, as part of the New Energy and Industrial Technology Development Organisation. The green innovation fund supports, for 10 years, companies and other organisations that will implement projects that are aimed at realising ambitious 2030 targets (performance, amount of installation, price, CO_2 reduction rate, etc) in the priority fields for the government's green growth strategies. The priority fields include offshore wind power, solar power, geothermal power, hydrogen and fuel ammonia. The eligible project must include innovative and fundamental R&D elements that are worthy of being commissioned by the government.

The green innovation fund requires persons in management at companies and other organisations seeking support to show their commitment to tackling the 2030 targets as management issues. To secure this, the green innovation fund may terminate support and require a partial refund of commission fees if the relevant companies or other organisations are not sufficiently committed to such efforts; and the fund introduces incentive measures, such as contingent fees depending on goal achievement levels and other criteria.

ii Digitally tracked green bonds

In June 2022, JPX Market Innovation & Research, Inc, an affiliate of Japan Exchange Group, Inc, issued digitally tracked green bonds through a security token offering. The bonds utilise blockchain technology to improve transparency of data and efficiency of data collection, thereby addressing issues that have been raised by both issuers and investors of green bonds around the transparency of data and complexity of the data collection process needed for green investments. The mechanism automatically measures the amount of power generated by renewable power generation facilities, converts it into an amount of CO_2 reduced, and records on a security token platform the amount of generated power and reduced CO_2. The investors can access the data recorded, and thereby the transparency and efficiency of green projects are expected to improve.

IX CLIMATE CHANGE IMPACT

i Progress in reduction of greenhouse gas emissions

As discussed in Section III, in 2021 the government announced its ambitious goal of a 46 per cent reduction in greenhouse gas emissions in 2030 (compared to 2013 levels). According to the progress report issued by Global Warming Prevention Headquarters in August 2022, the total volume of greenhouse gas emissions in FY2020 was reduced to 1.1 billion t-CO_2, which is 78 per cent of the total volume of greenhouse gas emissions in FY2013 (i.e., a 22 per cent reduction has been achieved).

ii Climate change-related litigations

Unlike in the US or in Europe, there has been no noteworthy litigation directly requesting the government or Japanese companies to take certain actions for climate change (e.g., litigation alleging that the government policy in relation to climate change is not sufficient, litigation

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requesting a company to take certain effective actions to reduce its volume of greenhouse gas emissions). There are, however, several cases pending in Japan requesting an injunction against the operation or construction of coal-fired power plants.

iii Climate and transition risk management frameworks

At the time of writing, there is no legislation or any guidelines in Japan prescribing rules for climate and transition risk management frameworks with which companies in general are required to comply. In July 2022, the FSA published Supervisory Guidance on Climate-related Risk Management and Client Engagement, which provides viewpoints in supervisory dialogues with financial institutions regarding their climate-related risk management and their engagement with clients to support the responses of clients to climate-related opportunities and risks. This guidance is non-binding and serves as a baseline for supervisory dialogues between the FSA and financial institutions.

See Section V for the disclosure requirements regarding risk management in the context of disclosure of sustainability information by reporting companies.

X OUTLOOK AND CONCLUSIONS

To achieve the goal of carbon neutrality by 2050, the government is formulating various measures to vitalise the sustainable finance market. In addition, as it is key for listed companies to provide investors and other stakeholders with sufficient sustainability information to improve their corporate value, the formulation of the rules and guidelines relating to the disclosure of sustainability information is progressing rapidly.

It will be important for sustainable finance market players, including their advisers, to pay close attention to movements relating to sustainable finance and sustainability information disclosures.

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Chapter 6

LUXEMBOURG

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I INTRODUCTION

In less than 15 years, Luxembourg has become a well-known and highly regarded hub for environmental, social and governance (ESG) sustainable finance instruments.

This success story began in 2017 with the issuance of the first green bond by the European Investment Bank, called a climate awareness bond. As for other ESG products, the rise of Luxembourg sustainable finance instruments is the result of a combination of factors: a clear and flexible national legal regime, notably in the issuance of debt instruments; the combination of European and national regimes with respect to listing venues; and the strong commitment and cooperation of Luxembourg political parties, regulators and market players to greening the financial system. To date, the Luxembourg Green Exchange created by the Luxembourg Stock Exchange lists approximately 1,489 sustainable instruments split across green, social, sustainability and sustainability-linked bonds. Their aggregate issuance is approximately €750 billion.[2]

As of February 2021, 50 per cent of green bonds worldwide were listed on the Luxembourg Stock Exchange.[3] The country's green trajectory is fully supported by government initiatives, so much so that in 2020, Luxembourg became the first European and triple A-rated state to issue a sustainable bond.[4]

Luxembourg's financial sector generally derives its ground rules from European legislation, and sustainable finance is no exception to this.

The most important text laying the foundations for the new sustainable finance framework and setting the scene for sustainable engagement in the European financial world is the Action Plan on Sustainable Finance, published by the European Commission in March 2018 (Action Plan). The Action Plan set sustainability targets and initiated the main subsequent directives and regulations, targeting all financial market participants and cutting across every aspect of financial services provision (and beyond).

The regulatory offspring of the Action Plan have been plentiful:

a Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR);

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2 https://www.bourse.lu/security/US298785JT41/363919 and https://www.bourse.lu/lgx-displayed-international-bonds?bonds=green.

3 Luxembourg sustainable finance strategy, Luxembourg sustainable finance initiative, February 2022.

4 For an amount of €1.5 billion: https://www.bourse.lu/security/LU2228213398/311986.

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b Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (EU Taxonomy);
c the revision of the framework of both Directive (EU) 2011/61 (AIFMD) and Directive (EU) 2009/65 (UCITS Directive);
d the update of the delegated acts to the CRR,[5] MiFID II,[6] Solvency II Directive[7] and IDD[8] frameworks;
e Regulation (EU) 2019/2089 amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks;
f the proposal for a Corporate Sustainability Reporting Directive (CSRD) amending the existing Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups (NFRD); and
g the proposal for a Corporate Sustainability Due Diligence Directive (CSDDD).

These texts have been supplemented by guidance, reports, opinions and discussion papers published by the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), as well as by the local implementing rules and regulations adopted under national law or issued by Luxembourg supervisory authorities.

Ever since, market practice in Luxembourg has gradually become clearer: those who do not wish to be part of the sustainability transition must be fully transparent about this fact (and, as a result, few financial market players have opted for that position). The asset management world was the first to undergo a significant shift towards more sustainability, initially on the retail side and then in the private universe. Other fields of finance later followed suit.

The CSSF, Luxembourg's supervisory authority for the financial sector, was quick to set clear expectations while maintaining constant dialogue with the industry. Luxembourg's supervisory authority for the insurance sector, the CAA, has issued valuable guidance as well.

Luxembourg has also set ambitious long-term goals for sustainability generally:
a Luxembourg is committed to the Paris Agreement on global warming and to the 17 sustainable development objectives set by the United Nations in the 2030 Agenda.
b Following the objectives set in the Paris Agreement, Luxembourg aims to reduce its own greenhouse gas emissions for the sectors outside the emissions trading scheme by 55 per cent by 2030 compared to 2005. For this purpose, Luxembourg adopted the law of 15 December 2020 on the climate, amending the amended law of 31 May 1999 establishing an environmental protection fund. This law imposes gas emissions reductions on the following sectors: energy and manufacturing industries, construction, transport, residential and tertiary buildings, agriculture and forestry as well as waste and wastewater treatment.

5 Amended Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (CRR).
6 Amended Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II).
7 Amended Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II Directive).
8 Amended Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (IDD).

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c Luxembourg has implemented the 10 priority fields of action defined by the National Plan for Sustainable Development and the National Integrated Energy and Climate Plan.

d Luxembourg is very ambitious regarding its energy sovereignty, and aims to increase its share of renewable energy from 11 to 25 per cent by 2030.

e The Luxembourg Ministry for Foreign and European Affairs, together with the Luxembourg Union of Enterprises and the National Institute for Sustainable Development and Corporate Social Responsibility (INDR), recently launched a new instalment of the National Business and Human Rights Pact,[9] a voluntary initiative for Luxembourg enterprises willing to commit to aligning with the United Nations Guiding Principles on Business and Human Rights.

National institutions are also active in this area and have applied a range of sustainability principles internally. For example, the Chamber of Commerce is implementing the principles described in its publication Luxembourg Sustainable Business Principles – Our common 2030 goal.[10]

II YEAR IN REVIEW

i General financial sector developments

In Luxembourg, and throughout the European Union, the past year has been occupied with clarifying the various requirements of the SFDR, the EU Taxonomy and other legislation, and proposing practical solutions for meeting them.

The CSSF has been proactive in offering practical means of implementing the EU's regulatory framework for sustainable finance. In particular, it has created an accelerated examination process in view of the entry into force of the SFDR Level II on 1 January 2022: in July 2022, the CSSF issued a communication informing financial market participants that, although it would require updated, compliant documents by 31 October 2022 for financial products under its supervision, these documents could be fast-tracked for examination and approval under certain conditions.

This was just one of many efforts to manage the major implementation challenge faced by the country due to the size of its financial industry. Another was the CSSF's rapid response to the publication on 25 March 2022 of the final draft of Commission Delegated Regulation (EU) 2022/1288, the regulatory technical standards relating to the SFDR (SFDR RTS). Anticipating a capacity issue, the CSSF wasted no time, already communicating on 1 April that: 'In line with the ESAs' Updated Supervisory Statement, the CSSF encourages financial market participants and financial advisers to use the draft RTS as a reference for the purposes of applying the provisions of Articles 2a, 4, 8, 9, 10 and 11 of the SFDR and Articles 5 and 6 of the [EU Taxonomy] in the interim period until [SFDR] RTS are adopted by the European Commission.'

The CSSF has also continually raised awareness on ESG-related legislative developments. One example of this is its communication of 15 June 2022 drawing the local market's

9 Available at https://maee.gouvernement.lu/fr/directions-du-ministere/affaires-politiques/droits-de-l-homme/entreprises-droits-de-l-homme1/pacte-national-edh.html.

10 Available at https://www.cc.lu/toute-linformation/publications/detail/luxembourg-sustainable-business-principles-notre-cap-2030-commun.

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attention to two European Commission Q&As (of July 2021 and May 2022), the ESMA Supervisory Briefing of 31 May 2022 and the European Supervisory Authorities' clarification statement on the SFDR RTS of 2 June 2022.

In its 2021 annual report, the CSSF repeatedly highlighted the role and importance of sustainable finance, and issued many educational videos on the back of this report.

ii Banking and insurance-specific developments

2020, 2021 and 2022 have been years of breathtaking change for banks and insurance undertakings when it comes to ESG requirements.

Key milestones at the national level include the following:

a In 2020 and 2021, the CSSF amended and adopted key circular letters to integrate ESG risk exposures into banks' overall business strategies, risk management frameworks and internal governance arrangements.[11]

b In February 2022, Luxembourg adopted the law of 25 February 2022 implementing a range of sustainability legislation, including the SFDR and the EU Taxonomy (Implementing 2022 Law). In particular, the Implementing 2022 Law designates the Luxembourg authorities responsible for supervising the proper implementation of the SFDR and the EU Taxonomy in the banking and insurance sectors.

c In July 2022, Luxembourg adopted the Grand Ducal Regulation of 27 July 2022 amending the amended Grand Ducal Regulation of 20 May 2018 on the protection of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (GDR 2022). The GDR 2022 served to implement the product governance requirements imposed under the Commission Delegated Directive 2021/1269 amending the Commission Delegated Directive (EU) 2017/593 as regards the integration of sustainability factors into product governance obligations.

d In August 2022, the CSSF issued a series of press releases, in particular to call attention to the application deadlines for the new sustainability-related requirements pertaining to the integration of sustainability preferences into suitability assessments.[12]

e In the same month, the CAA published an information notice emphasising the regulatory challenges linked to sustainable finance.[13]

f In September 2022, the CSSF published the results of a public survey that assessed the knowledge and perception of sustainable finance among Luxembourg households. According to the survey, the public generally agreed that the financial sector can have a positive impact on the development of renewable energy, local communities, climate and the environment, but it lacked detailed knowledge of what constitutes sustainable finance. The survey further emphasised the importance of educational action and the key role of the banker in this regard.[14]

11 Amended CSSF Circular Letter 12/552 on Central Administration, Internal Governance and Risk Management; CSSF Circular Letter 21/773 on the Management of Climate-related and Environmental Risks.

12 CSSF press release 22/18, published on 1 August 2022.

13 CAA Information Notice 22/9 regarding the regulatory challenges linked to sustainable finance.

14 CSSF press release 22/24, published on 21 September 2022.

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The last milestone in particular illustrates a principal near-term challenge for the banking and insurance sectors: to remediate the sustainability knowledge gaps of their clientele. To achieve this, market players must ensure that relevant staff and key function holders are adequately trained to understand the new concepts and rules as they emerge, and that their businesses can implement and adjust to the ever-evolving regulatory requirements around sustainable finance.

III REGULATION AND POLICY

i Governance regime

Governance is, as a matter of principle, a subject to which Luxembourg regulators pay meticulous attention, with frequent on-site inspections of financial sector players performed to verify the adequacy of their governance mechanisms.

In today's regulatory environment, sustainability considerations impact these mechanisms directly. Boards in particular have a pivotal role to play in this respect.

From a Luxembourg law perspective, the board of directors is the body ultimately responsible for the sound and prudent management of undertakings and their compliance with applicable laws, regulations and administrative guidelines.[15]

To date, there is no general obligation under Luxembourg corporate law for boards to take action in the direct interest of their company's external stakeholders. Board members are obliged to act in the best interest of the company, and it is to the company that their fiduciary duty is due.

However, companies listing their shares on the Luxembourg Stock Exchange are subject to the 'X Principles of Corporate Governance of the Luxembourg Stock Exchange' (X Principles).[16] The X Principles include three sets of rules: the actual mandatory Principles, which are complementary to Luxembourg legislation and cannot deviate from or contradict its provisions; the related Recommendations, which are issued on a comply or explain basis; and the Guidelines, which are indicative and not binding.

With respect to fiduciary duties, Principle 2 of the X Principles provides that the board, as a collective body, must act in the corporate interest, and must serve all the shareholders by ensuring the company's long-term success. However, board members must also consider corporate social responsibility (CSR) aspects and take into account the interests of all stakeholders in their deliberations. Recommendation 2.3 further provides that the board must consider all CSR aspects of the business when defining the company's values. Furthermore, Principle 9 requires companies listed on the Luxembourg Stock Exchange to define a CSR policy that includes social and environmental responsibilities. In the creation of long-term value for the company, directors are recommended to integrate CSR aspects (Recommendation 9.2) and to consider the company's non-financial risks, including social and environmental risks (Recommendation 9.3), as well as to establish a specialised CSR committee as part of sound corporate governance (Guideline 2 on Recommendation 9.3).

While the X Principles are mandatory only for listed companies, their recognised prestige in the market makes them a clear point of reference for private companies as well. More generally, the shifting regulatory landscape and the foreseeable disruptions that climate

15 See, for example, Article 38-1 of the amended law of 5 April 1993 on the financial sector and Article 70 of the amended law of 7 December 2015 on the insurance sector.

16 See https://www.bourse.lu/corporate-governance.

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change will continue to bring about make it necessary to revise the traditional interpretation of the fiduciary duties of company directors. In the current environment, the sustainability of business and governance models has ceased to be a corollary of CSR and has become a tool for risk mitigation and management. While for private companies the hard law requirements are still pinned to the traditional principle of shareholder primacy, sound corporate governance principles, the risk of exclusion from supply chains and pressure from activist shareholders and stakeholders are pushing Luxembourg boards to commit to sustainability, establish sustainability policies and take part in voluntary initiatives.

Among such initiatives, the ESR label issued by the Luxembourg INDR[17] is noteworthy: under this label, a company that satisfies certain sustainability parameters may qualify as a socially responsible enterprise. The ESR label is granted following a self-evaluation by the company, paired with an assessment by the INDR and subsequent monitoring focused on shortcomings and the implementation of CSR commitments (also subject to independent audit).

Whether a company's goal is to conspicuously excel at voluntary initiatives or merely to reduce external pressure, the application of sound corporate management rules and prudent governance principles will invariably call for an expansive interpretation of its directors' fiduciary duties (which must now go far beyond the duty to maximise short-term profits for shareholders).

Today's boards are tasked with ensuring that all relevant ESG requirements are properly implemented across corporate governance levels and functions. This means that board members must acquire or keep ready access to the range of ESG knowledge, experience and expertise needed to understand the extent and implications of those requirements. In addition, boards must ensure that key staff are properly trained in ESG matters.

Beyond their impact on requisite professional competences, ESG requirements also influence the personal qualities expected of board members, particularly in terms of diversity.

From a Luxembourg law perspective, diversity in the board room is generally considered a key component of good governance for regulated entities. For example, the amended CSSF Circular Letter 12/552 on central administration, internal governance and risk management (Circular 12/552) requires banks to include 'aspects of diversity' in the procedures that govern the composition of their management bodies. Here the concept of diversity refers to 'the characteristics of the members of the management body, including their age, gender, geographical origin and educational and professional background'. Circular 12/552 further specifies that 'the promotion of diversity shall be based on the principle of non-discrimination and on measures ensuring equal opportunities'.[18]

The recent CAA Circular Letter 22/15 on the board of directors of insurance and reinsurance undertakings[19] also explicitly refers to the 'principle of diversity of qualities and competences'.

17 See https://esr.lu/.

18 Point 11 of Circular 12/552; in particular, this Circular implements the rules laid down in the Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU, 2 July 2021 (ESMA35-36-2319 EBA/GL/2021/06).

19 Point 23 of CAA Circular Letter 22/15 of 26 July 2022 on the board of directors of insurance and reinsurance undertakings; in particular, this Circular Letter implements the rules laid down in the EIOPA Guidelines on System of Governance, 1 January 2014 (EIOPA_BoS_14/253 EN).

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Accordingly, boards must ensure when recruiting that they accumulate a broad set of qualities and competences among their members in order to foster constructive criticism and discussion based on different points of view.

While good governance in general is an eligibility criterion for classification as a sustainable investment, board gender diversity in investee companies is now among the mandatory social principal adverse impact (PAI) indicators imposed under the SFDR.[20]

For listed companies, Recommendation 4.1 of the X Principles specifies that, when appointing board members, companies must include diversity criteria in their considerations, including criteria relating to professional experience, geographical origin and the appropriate representation of genders, beyond general skill-based criteria.

ii Regulators

General considerations

The Luxembourg Sustainable Finance Initiative is a not-for-profit association that designs and implements the Luxembourg Sustainable Finance Strategy.[21]

It is charged with raising awareness, promoting and developing sustainable finance initiatives in Luxembourg, and helping regulators and financial market participants improve their practices.

Asset managers

The CSSF is the Luxembourg authority competent to supervise the financial sector. It reports to the Ministry of Finance, and its functioning and powers are governed by the amended law of 23 December 1998 establishing a financial sector supervisory commission.

The Implementing 2022 Law explicitly confirms that the CSSF is the competent authority in Luxembourg tasked with supervising the proper implementation of the SFDR and the EU Taxonomy in the financial sector.

The CSSF has been very active in regulating, enforcing and promoting the sustainable finance framework.

In its September 2022 newsletter, the CSSF highlighted that: 'sustainable finance is a rather complex subject, and its objectives can only be fully reached if investors sufficiently understand the different concepts. It is essential to ensure a high level of trust in the regulatory framework which is being implemented. [. . .] Consequently, sustainable finance will continue to require not only educational efforts and financial education efforts from all stakeholders, but also an interest and questioning from investors.'[22]

The CSSF actively participates in financial education efforts, particularly via Letzfin,[23] a website devoted to making the workings of the financial world accessible to the broader public with simple explanations of technical terms, practical advice and interactive tools.

Many industry associations also support the regulator in this area.

The Association of the Luxembourg Fund Industry (ALFI) has regular meetings with the CSSF to discuss technical matters in the pursuit of better large-scale financial education. The

20 ESMA Final Report on draft Regulatory Technical Standards with regard to the content, methodologies and presentation of disclosures pursuant to Article 2a(3), Article 4(6) and (7), Article 8(3), Article 9(5), Article 10(2) and Article 11(4) of SFDR, 2 February 2021 (JC 2021 03).

21 See https://lsfi.lu/.

22 CSSF Newsletter No. 260, September 2022.

23 See www.letzfin.lu.

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association has also prepared many informative publications accessible either to its members or to the general public, including the SFDR Guidelines for Luxembourg, ALFI Guidelines on sustainability-related pre-contractual disclosures, ALFI guidance on sustainability-related disclosures and reduced subscription tax for EU Taxonomy-compliant investment funds.

The CSSF is also in close dialogue with the Luxembourg Bankers Association (ABBL), which has made various efforts to promote ESG, for example by adding a chapter on responsible banking into its Code of Conduct, and by participating in the CSSF survey on Luxembourg household knowledge of sustainable finance referred to in Section II.

The roles and responsibilities of the CSSF are mirrored in the insurance sector by the CAA (also under the authority of the Ministry of Finance), whose functioning and powers are governed by the amended law of 7 December 2015 on the insurance sector and that is in charge of supervising compliance with any rules and regulations applicable to insurance undertakings, including those pertaining to sustainability.

As for the CSSF, the Implementing 2022 Law explicitly confirms that the CAA is the Luxembourg authority competent to supervise the proper implementation of the SFDR and the EU Taxonomy in the insurance sector.

In an Information Notice published in August 2022,[24] the CAA emphasised the challenges entailed by the regulatory requirements pertaining to sustainable finance, and specified that its own control measures would be gradually adapted to integrate the verification of compliance with the evolving regulatory landscape.

VII SUSTAINABLE FINANCE INCENTIVES

The Luxembourg legislation governing sustainable bond issuance allows bonds to be issued in a variety of forms by various forms of companies. Bonds may take a registered, bearer or dematerialised form and, in accordance with Luxembourg private international law, a Luxembourg-based company may issue them subject to Luxembourg law or a foreign law.

Three bond listing platforms are available in Luxembourg:

a the Securities Official List, a listing venue that does not permit trading but that does give issuers some visibility;

b the EuroMTF, a multilateral trading facility offering both listing and trading opportunities; and

c the regulated market, for which bonds require a prospectus compliant with Regulation (EU) 2017/1129.

There is currently no specific legal regime governing sustainable bonds, and all eyes are on the 2021 Commission proposal for a European green bond standard. This proposal is still undergoing intense negotiations, as indicated by the rapporteur's report published in May 2022, which suggests that the framework created by the European green bond standard will be relatively binding.

While they await further developments, Luxembourg market players adhere to the set of principles published by the International Capital Markets Association (ICMA) while taking into consideration the EU Taxonomy and the draft rules on the European green bond standard.

24 CAA Information Notice 22/9 regarding the regulatory challenges linked to sustainable finance.

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Currently, bonds can also benefit from the green bond label issued by LuxFLAG, an independent non-profit Luxembourg association created in July 2006 by ALFI, the ABBL, the European Investment Bank, LuxembourgForFinance, the ADA and the Luxembourg government.

To access the Luxembourg Green Exchange, the Luxembourg Stock Exchange requires issuers to provide an external review of the bond issue performed by a third party and commit to post-issuance reporting. Such reports, which are publicly accessible, give a precise insight into the types of projects funded with the issuance proceeds.

For the Luxembourg sustainability bond, these reports indicate that, of a total of €1.1 billion, 53 per cent went to fund social projects, with the remaining 47 per cent allocated to green projects – notably the construction of the Luxembourg tramway, used free of charge by nearly 15 million passengers, resulting in the avoidance of 194,490 tonnes of CO_2 emissions.[25]

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

Luxembourg's sustainable disclosure requirements derive from the NFRD, the SFDR, the EU Taxonomy and additional sector-specific regulations.

i The NFRD and the law of 19 December 2002

The NFRD, which became applicable in 2017, applies to public interest entities (which include banks and insurance undertakings) that meet certain size criteria in terms of employee volume as well as balance sheet and net turnover.

The management reports of entities in-scope of the NFRD must include a non-financial statement that assesses how their business is affected by sustainability issues and how, conversely, it impacts the external environment (pursuant to the amended Article 19a of Directive 2013/34 as implemented into Luxembourg law by the amended Article 68 bis of the law of 19 December 2002 on the trade and companies register and the accounting and annual accounts of companies).

The NFRD is slated for future changes as a result of the proposal for a CSRD, which will expand the scope of the NFRD and further detail and harmonise the disclosure requirements it imposes.

ii The SFDR

The SFDR, which came into force on 10 March 2021, applies to financial market participants and financial advisers; in Luxembourg, these include asset managers, credit institutions that provide portfolio management or investment advice within the meaning of MiFID II and insurance undertakings that make available, or advise on, insurance-based investment products within the meaning of the IDD.

The SFDR was issued after it had been observed that the absence of harmonised requirements for sustainability-related disclosures had led to the provision of insufficiently detailed disclosures to end investors.

25 Luxembourg sustainability bond report, post-issuance use of proceeds report published on the website of the Luxembourg Stock Exchange, 7 September 2022.

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In this context, the SFDR now requires institutions to make pre-contractual and ongoing disclosures to end investors in an effort to reduce the asymmetry of information on the integration of sustainability risks, the consideration of adverse sustainability impacts, the promotion of environmental or social characteristics, and the sustainable status of investments.

Level I of the SFDR provided for principles-based transparency rules, but was incomplete. This led to many challenges in its implementation as market participants awaited the regulatory and technical standards meant to provide further guidance. These were finally published on 6 April 2022 and adopted a few months later as the SFDR RTS.

The SFDR provides for transparency rules at entity level (asset managers, insurance product manufacturers, etc.) and at product level (investments funds, pension products, etc.).

Under the entity rules, institutions' websites must contain information about their policies governing the integration of sustainability risks in their investment decision-making process, as well as information on whether they consider principal adverse impacts (if so: how; if not: why not). Their remuneration policies must contain information on how they are consistent with the integration of sustainability risks. These requirements have applied since 10 March 2021.

As for product rules, the SFDR establishes a distinction between three types of products, subject to different levels of disclosure requirements:

a financial products without any particular ESG characteristic or sustainable investment objective (standard products);

b financial products that promote environmental or social characteristics or a combination of those characteristics (provided that the companies in which the investment is made follow good governance practices) (SFDR Article 8 products); and

c financial products having sustainable investment as their objective, meaning an investment in an economic activity that contributes to an environmental or social objective, provided that such investment does not significantly harm any of the other objectives and the investee company follows good governance practices (SFDR Article 9 products).

The pre-contractual documents of all products, including standard products, must at least disclose how sustainability risks are integrated into the investment decisions of a financial market participant, or the investment (or insurance) advice of a financial adviser. The SFDR further requires disclosure of the results of an assessment of the likely impacts of sustainability risks on the returns of the financial products that financial market participants make available or that financial advisers provide advice on. Moreover, the pre-contractual documents for each financial product must include information on the integration of adverse impacts on sustainability factors.

SFDR Article 8 products and SFDR Article 9 products have even more detailed disclosure requirements for their pre-contractual documents, websites and annual reports.

The SFDR RTS list key principles and specific guidance in interpreting SFDR obligations for SFDR Article 8 products and SFDR Article 9 products, as well as new rules on website disclosures for such products, indicators of principal adverse impacts and related disclosure obligations. They also contain templates for pre-contractual disclosures and periodic reporting. After several delays, the SFDR RTS will finally enter into force on 1 January 2023.

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In the Luxembourg investment fund sector, the CSSF has been very attentive to feedback from financial market participants and has sought to take the lack of available data on the European and global markets into account.

iii The EU Taxonomy

The EU Taxonomy applies to institutions qualifying as financial market participants under the SFDR, and to institutions in-scope of the NFRD.

The EU Taxonomy is a classification tool to help investors and companies make informed investment decisions on environmentally friendly economic activities. Contrary to popular belief, however, it is not a mandatory list to invest in, nor a list of standards or exclusions.

When assessing whether an economic activity can be considered as environmentally sustainable under the EU Taxonomy, the first step is to check whether the EU Taxonomy covers the activity at all.

If the activity is eligible under the EU Taxonomy criteria, the next step is to assess whether it is being performed in a manner that meets the EU Taxonomy's technical screening criteria, which take the form of scientific and technical thresholds. If the economic activity does not meet relevant thresholds or the data needed to establish this cannot be obtained, the activity cannot be considered EU Taxonomy-aligned.

If these first two steps are successful, the next step is to verify that, when making a substantial contribution to one of the EU Taxonomy objectives, the economic activity does not significantly harm any of the other objectives. Here again, the EU Taxonomy provides technical criteria against which the performance of the activity must be checked.

Finally, it must additionally be ensured that the company itself respects minimum social and governance safeguards; for instance, by complying with, inter alia, international agreements on human rights and International Labor Organization labour conditions.

Financial products subject to the SFDR must therefore add specific EU Taxonomy-related disclosures to their pre-contractual information:

a SFDR standard products must add a specific disclaimer stating that they are not aligned with the EU Taxonomy;

b SFDR Article 9 products that invest in a sector contributing to environmental objectives are required to disclose which environmental objectives they contribute to, and how and to what extent their investments qualify as environmentally sustainable (including the percentage of their investments that are aligned with the EU Taxonomy); and

c although SFDR Article 8 products are covered by the EU Taxonomy, the exact disclosure requirements for them are still rather unclear.

The transparency rules for entities subject to the SFDR begin to apply in two stages: 1 January 2022 for disclosing information in relation to the first two EU Taxonomy objectives, and 1 January 2023 for the remaining four objectives. At the same time, while non-financial undertakings in-scope of the EU Taxonomy must begin disclosing on their EU-Taxonomy alignment in 2023, financial undertakings need only begin in 2024. In 2022, therefore, financial market participants were likely not in a position to accurately estimate the EU Taxonomy alignment of their funds, notably because the supporting data will not be reported by underlying companies before 2023 – and even then, data will not be available for all companies due to the misaligned reporting deadlines between the disclosure obligations at fund and product level and the corresponding reporting obligations at undertaking level.

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In addition, the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or adaptation have yet to be approved, and are thus not yet in force. The rules for calculating alignment with the EU Taxonomy at portfolio or fund level are also awaiting finalisation, and have received heavy criticism from the industry.

Still, the SFDR RTS have helped to diminish these challenges by providing pre-contractual templates to guide the disclosure of EU Taxonomy-related information for financial products. While this clarifies what is expected of such disclosures in terms of content, the lack of data from underlying assets remains a serious impediment to reporting institutions.

Moreover, once the arrival of the CSRD extends the scope of the disclosure rules, the EU Taxonomy will also concern players other than financial market participants and financial advisers, impacting large (non-regulated and unlisted) industrial companies as well.

iv Sector-specific regulations

In addition to the three more general texts discussed above, sector-specific regulations like the CRR and the Solvency II Directive now also include sustainability-related disclosure obligations for banks and insurance undertakings.

The CRR requires large credit institutions[26] whose shares are admitted to trading on a regulated market to disclose prudential information on ESG risks, including transition risks and physical risks, in their Pillar 3 disclosures.

These disclosure requirements were detailed further in draft implementing technical standards (ITS)[27] published by the EBA on 24 January 2022. The ITS set out templates for comparable quantitative disclosures on climate change-related transition and physical risks, including information on exposures towards carbon-related assets and assets subject to chronic and acute climate change events as well as institutions' mitigating actions to support their counterparties in transitioning to a carbon-neutral economy and adapting to climate change; and key performance indicators on institutions' asset financing activities that are environmentally sustainable according to the EU Taxonomy. The ITS also include tables for providing qualitative information on how institutions are embedding ESG considerations in their governance, business model, strategy and risk management framework.

In the insurance sector, ESG risks have not yet been included in the Pillar 3 disclosures imposed under the Solvency II Directive. EIOPA has, however, indicated that further consideration should be given to mandatory requirements for public disclosures on sustainability risks on both sides of the balance sheet.[28]

26 Large institutions are defined as institutions that meet any of the following conditions:
- *a* they qualify as a 'global systemically important institution 'within the meaning of the CRR;
- *b* they have been identified as an 'other systemically important institution' within the meaning of the CRR;
- *c* they are, in their Member State of establishment, one of the three largest institutions in terms of the total value of their assets; or
- *d* the total value of their assets on an individual basis or, where applicable, based on their consolidated situation is equal to or greater than €30 billion.

27 EBA draft implementing technical standards on prudential disclosures on ESG risks in accordance with Article 449a CRR (EBA/ITS/2022/01) of 24 January 2022.

28 EIOPA Opinion on Sustainability within Solvency II Directive (EIOPA-BoS-19/241) of 30 September 2019.

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In addition, Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing the Solvency II Directive has now been updated to require insurance undertakings of any size to disclose, in their remuneration policies, information on how they consider integrating sustainability risks in their risk management system.

Banks and insurance undertakings now face a deluge of disclosure requirements with diverging scopes and timelines for application.

The first challenge that undertakings must tackle, therefore, is to determine whether, and when, the various requirements may be applicable to them, before embarking on the herculean task of adapting their internal policies and procedures, updating their pre-contractual documentation and periodic reporting as well as reviewing and expanding the content of their websites.

VI ESG DATA AND REPORTING

The sustainable finance reporting requirements applicable in Luxembourg mainly stem from the EU-level rules in this area; Luxembourg does not have its own specific regime governing ESG data reporting.

Central to the EU rules on ESG reporting are obligations on relevant institutions to add SFDR and EU Taxonomy-related information to their annual reports.

These reporting obligations primarily require institutions to report on how they attained the ESG characteristics or sustainable investment objectives advertised (whatever they may be) over the past reference period.

In addition, institutions are asked to calculate and disclose their level of alignment with the EU Taxonomy.

It may also be necessary to report on certain specific ESG indicators listed in Annex I of the SFDR RTS (PAI indicators).

This ESG reporting may be done using the templates provided in the Annexes to the SFDR RTS.

Luxembourg has also seen a significant uptake in the FinDatEx European ESG Template (EET) initiative.

Many financial market participants in Luxembourg are planning to use the EET to streamline their processing and analysis of investment funds' ESG credentials, notably in order to match them with the ESG preferences expressed by investors in MiFID suitability assessments on sustainability. This is leading many investment fund managers to prepare their ESG reporting as EET Excel spreadsheets.

Beyond the general EU-level rules, the law of 19 December 2002 mentioned above imposes an obligation on certain large companies to publish an annual management report with information on ESG topics (e.g., diversity, environment, social questions, respect for human rights and the fight against corruption). In addition, two further factors are leading Luxembourg enterprises to already begin collecting ESG-related data and setting up disclosure procedures. One is the impending application of the CSRD, which will impact many large Luxembourg entities given that Luxembourg is (rather famously) a popular choice of headquarters for large holding companies. The other factor, of interest for small and medium-sized enterprises as well, is the domino effect that the disclosure obligations on financial market players have on underlying investments: companies' ability to report on their externalities and potential adverse impacts can influence the likelihood of their being granted access to debt or equity financing, or both.

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As for companies with shares listed on the Luxembourg Stock Exchange, under Recommendation 9.2 of the Exchange's X Principles, these companies must disclose CSR information either in a separate report or in their management report, in a specific section or in an appendix relating to sustainable development. They must analyse the sustainability of their activities and provide clear and transparent non-financial information to support this analysis. In doing so, companies are advised to rely on well-established international standards and show, in the form of a scoreboard, the CSR performance indicators applicable to their business activities; for example, gender balance, subcontracting and relations with suppliers, energy consumption, water consumption, waste treatment, CO_2 emissions, adaptation to the consequences of climate change and measures taken to preserve or develop biodiversity.

IV SUSTAINABLE FINANCE INSTRUMENTS

i Incentives for investment funds

In Luxembourg, investment funds are subject to subscription tax on their total net assets (assets under management) valued on the last day of each quarter.

This subscription tax is reduced for more sustainable funds.

Since 2021, funds that invest in assets related to economic activities qualifying as environmentally sustainable (as defined by the EU Taxonomy – Taxonomy compliant assets) have been eligible for reduced subscription tax, currently levied at 0.05 per cent of net asset value (a right conferred by the Luxembourg law of 19 December 2020 on the state revenue and expenditure budget for 2021, amending the law of 17 December 2010 on undertakings for collective investment, implementing Directive (EU) 2014/91 (UCITS V Directive) into Luxembourg law).

This reduction depends on the percentage of investment in Taxonomy compliant assets:

a for a fund investing more than 5 per cent of its net assets in Taxonomy-compliant assets, subscription tax is reduced to 4 basis points on that portion;

b for a fund investing more than 20 per cent of its net assets in Taxonomy-compliant assets, subscription tax is reduced to 3 basis points on that portion;

c for a fund investing more than 35 per cent of its net assets in Taxonomy-compliant assets, subscription tax is reduced to 2 basis points on that portion; and

d for a fund investing more than 50 per cent of its net assets in Taxonomy-compliant assets, subscription tax is reduced to 1 basis point on that portion.

ii Incentives for corporates

Luxembourg also provides substantial support for sustainable business incentives in the form of financial aid.

The government adopted the amended law of 15 December 2017 on an aid scheme for environmental protection, implementing Regulation (EU) No. 651/2014,[29] which came into force on 25 December 2017.[30] This aid targets all undertakings and natural persons holding

29 Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of state aid compatible with the internal market, in application of Articles 107 and 108 of the Treaty of the Functioning of the European Union (TFEU).

30 Amended law of 15 December 2017 on an aid scheme for environmental protection and amending the law of 17 May 2017 on the promotion of research, development and innovation as well as the law of 20 July 2017 on the establishment of a regional investment aid scheme.

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establishment permits in order to encourage them as they pursue sustainability transition. The law covers different types of aid with different objectives: investment aid to enable companies to exceed EU environmental protection standards or improve environmental protection in areas that lack standards, to fund early adjustment to future EU standards, to increase energy efficiency in buildings or fund other energy efficiency measures, to enable high-efficiency cogeneration and promote energy from renewable sources, to remediate contaminated sites, as well as to fund efficient heating and cooling networks, waste recycling and reuse, energy infrastructure and environmental studies.

On 10 May 2022, the government also launched the 'Klimabonus' programme, which helps provide reformed and strengthened financial measures to support the ecological, energy and social transition.

Finally, as mentioned in Section IV, the Luxembourg Green Exchange makes industry best practices for green, social and sustainable securities a mandatory requirement.

The Luxembourg Green Exchange is also the only exchange that requires post-issuance commitments from issuers, including certain reports once the security has been issued and listed.

According to the Review of the implementation of EU environmental policy, Luxembourg is Europe's best performer in terms of resource productivity, meaning the efficiency with which the economy uses material resources to produce wealth.

VIII GREEN TECHNOLOGY

As in many other European jurisdictions, the carbon markets have enjoyed much interest from investment fund managers since early 2022. This has led to the creation of investment vehicles structured with the objective of investing in carbon offsets (verified emissions reductions). This in turn has impacted the whole fund industry value chain; for example, in compelling depositaries and fund administrators in Luxembourg to update their procedures and operational processes to account for the particular features of this new type of asset.

In parallel, financial market participants are looking for ways to gain exposure to carbon markets in traditional UCITS strategies. To achieve this, some are starting to look at the potential UCITS-eligibility of EU emissions allowances (carbon emissions allowances exchangeable under the European Union Emissions Trading Scheme).

At the end of 2021, Luxembourg market players created the first-ever pledge on emissions allowances at the EU level: an exchange-traded commodity backed with carbon allowances that also benefits from the advantages of the Luxembourg law on collateral arrangements.

IX CLIMATE CHANGE IMPACT

As mentioned in Section II, key regulatory initiatives linked to climate change mitigation in Luxembourg's banking sector include the adoption of specific regulatory requirements to integrate ESG risks, and especially climate change risks, into banks' overall business strategies, risk management frameworks and governance requirements.

CSSF Circular Letter 21/773 on the management of climate-related and environmental risks requires institutions to integrate ESG risks into their business strategies, risk management frameworks and governance arrangements. It applies to all credit institutions deemed less significant institutions under the Single Supervisory Mechanism, and to all branches of non-EU credit institutions, and is consistent with the European Central Bank's

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Guide on climate-related and environmental risks and the Guide for Supervisors: integrating climate-related and environmental risks into prudential supervision published by the Network of Central Banks and Supervisors for Greening the Financial System.

These requirements are mirrored in Circular 12/552, which also specifies that a bank's business model, internal governance arrangements and risk management framework should take into account all risks and relevant risk factors, including ESG risks.

In the insurance sector, climate change risks were recently addressed in the application guidance on running climate change materiality assessments and using climate change scenarios in the own risk and solvency assessment (ORSA)[31] published by EIOPA in August 2022.[32]

This guidance is expressly referred to in CAA Information Notice 22/9 on the regulatory challenges linked to sustainable finance, in which the CAA specifies that it intends to publish a separate information notice in the near future containing its analysis of the progress supervised undertakings have made in integrating sustainability elements into their ORSA reports.

According to CAA Information Notice 22/9, the main challenges for concerned undertakings will consist in analysing the impacts of climate change on their activity and conducting specific stress tests as part of their forward-looking ORSA assessments, which may require actuarial projection models (and therefore special technical expertise).

By and large, the applicable regulatory frameworks for ESG risk management are fairly recent creations, making it difficult to assess how 'successful' they are at this stage. Monitoring such success will be one of the key tasks of the competent supervisory authorities.

X OUTLOOK AND CONCLUSIONS

Beyond the broader future developments that the SFDR, the NFRD, the CSRD, the EU Taxonomy and the draft CSDDD have set in motion, there are several major hurdles that Luxembourg banking and insurance market actors will have to surmount sooner rather than later.

Banks will first have to comply with the detailed product governance requirements imposed under the GDR 2022, which became applicable on 22 November 2022.

Banks will further have to consider the rules included in ESMA's Final Report – Guidelines on certain aspects of the MiFID II suitability requirements published on 23 September 2022 (ESMA Suitability Guidelines).[33] The ESMA Suitability Guidelines integrate sustainability factors, risks and preferences into certain organisational requirements and operating conditions imposed under MiFID II. Once they have been published in all official EU languages, a two-month period will begin to run during which the CSSF will have to notify ESMA as to whether it already complies with them, or intends to.

Finally, major future developments could potentially derive from the outcome of a discussion paper on the role of environmental risks in the prudential framework[34] launched by ESMA in May 2022, in which it explores whether and how environmental risks are to be

31 In addition to the specific climate change requirements in the proposal for a directive amending the Solvency II Directive published by the Commission in September 2021 (COM/2021/581).

32 EIOPA-BoS.22/329, published on 2 August 2022.

33 ESMA35-43-3172.

34 EBA/DP/2022/02.

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incorporated into the Pillar 1 prudential framework imposed under the CRR. In the paper, ESMA discusses targeted enhancements and clarifications within the existing framework that would be needed to address environmental risks, and the potential incorporation of forward-looking methodologies as an alternative to introducing specific risk-weighted adjustment factors.

On the insurance side, EIOPA states in its guidance on the integration of sustainability preferences in suitability assessments under the IDD published in July 2022 (EIOPA suitability guidance) that, unlike ESMA, it has paused its work on issuing formal guidelines in this area. For the time being, therefore, concerned insurance undertakings will have to make do with the practical recommendations contained in the EIOPA suitability guidance.

With respect to potential developments in the prudential framework, European institutions are currently discussing the proposal for a directive amending the Solvency II Directive published by the Commission in September 2021,[35] which mandates EIOPA to explore, by 2023, a specific prudential treatment of exposures related to assets or activities associated substantially with environmental and/or social objectives, and to regularly review the scope and calibration of the standard formula pertaining to natural disaster risks. The outcome of such a proposal may thus have major impacts on the insurance industry.

In this environment, even Luxembourg's non-financial industry players must continue to adapt their business models to more sound and transparent governance, if they are to maintain access to external financing, mitigate the mid and long-term risks of unsustainability and limit the transitional risks caused by the fluctuating EU legislative backdrop (especially the new rules set forth in the CSRD and the draft CSDDD, and the broad-based disruptions these will bring to unregulated enterprises).

To conclude, the key market challenges that Luxembourg financial actors are currently facing in relation to sustainability are those of implementing the existing requirements, whose compliance is currently being integrated into the regulators' supervisory processes and practices, and of remaining agile enough to adapt to the additional sustainability-related legislative changes that are expected to come into force in the future.

35 COM/2021/581.

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Chapter 7

NIGERIA

Seyi Bella, Boluwatife Anjola, Bukola Alada and Ayomide Agbaje[1]

I INTRODUCTION

The history of sustainable finance regulation in Nigeria is traceable to the circular issued by the Central Bank of Nigeria (CBN) in 2012, the Implementation of Sustainable Banking Principles by Banks, Discount Houses and Development Finance Institutions in Nigeria (the CBN SBP Circular). Through the CBN SBP Circular, the CBN adopted the Nigerian Sustainable Banking Principles (NSBPs)[2] and mandated that banks, discount houses and development finance institutions (DFIs) integrate the NSBPs into their operational, governance and risk management frameworks. Since the adoption of the NSBPs, the CBN and other financial sector regulators and participants have issued several rules, guidelines and policies aimed at the development of a sustainable finance ecosystem in Nigeria. Although some of these rules are mandatory, others are voluntary and guideline-type prescriptions.

The Nigerian Exchange Group (NGX) (or the Exchange) prescribes mandatory sustainability disclosure guidelines for publicly listed companies on the Exchange (the issuers)[3] through its Sustainability Disclosure Guidelines (NGX SD Guidelines). The NGX SD Guidelines outline key sustainability principles, elements and reporting requirements and recommend approaches for integrating sustainability into organisations. The standards prescribed by the CBN SBP Circular, SEC SFP Guidelines and NGX SD Guidelines help to ensure that:

a there is a standard for engaging in and reporting best practices, thus preventing greenwashing; and[4]

b organisations in the same sector can be evaluated and compared on the basis of standard metrics, thus helping investors, clients, customers and the public to make informed decisions in respect of these organisations.

1 Seyi Bella is a partner and Boluwatife Anjola, Bukola Alada and Ayomide Agbaje are associates at Banwo & Ighodalo.

2 A set of nine principles that jointly serve as a compass for ingraining sustainability in the Nigerian banking industry.

3 Section 4.2(a) of the NGX Sustainability Disclosure Guidelines.

4 The practice of passing off as a sustainable organisation without being truly sustainable.

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Other mandatory rules include the Securities and Exchange Commission (SEC) Green Bond Issuance Rules (the SEC Green Bond Rules) and the SEC Social Bond Issuance Rules (the SEC Social Bond Rules). The SEC Green Bond and Social Bond Rules each provide the framework for issuances of green bonds and social bonds in the Nigerian capital market.[5]

An example of guideline-type prescriptions is the SEC Guidelines on Sustainable Financial Principles for the Nigerian Capital Market (the SEC SFP Guidelines). The SEC SFP Guidelines and approach are principles-based and therefore do not prescribe specific implementation requirements. These principles are to be applied by each regulated entity in a manner that fits its mandate, core values and enterprise risk management framework.[6] Another key non-mandatory guideline is the Federal Ministry of Environment's (FME) Nigeria Green Bond Guidelines (the Green Bond Guidelines).

Beyond the local regulations, market participants in Nigeria have voluntarily adopted relevant international guidelines in their sustainable finance projects. The Principles of Responsible Investing[7] and the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD)[8] are among the guidelines being adopted and promoted by industry players in Nigeria's sustainable finance ecosystem.

i Recent trends

Driven by a mix of education and regulation, market participants in Nigeria are now generally more aware of sustainable finance instruments. Environmental, social and governance (ESG) and sustainable finance themes now frequently feature in the conferences and webinars of market participants[9] and enablers (such as accountants and lawyers).

Another growing trend is the integration of sustainability principles and practices in the credit risk assessments of banks.[10] Many Nigerian banks have adopted the International Financial Corporation (IFC) Performance Standards on Environment and Social Sustainability.[11] The market has also seen an increase in the issuance of sustainability reports by financial and non-financial institutions.[12]

5 These rules provide potential issuers of sustainable financial instruments with the regulatory structure within which they can access the market, and also provide potential investors with clarity on what constitutes a green or social bond. These rules are discussed further in Section III of this chapter. However, a private company undertaking a private placement is not required to comply with the SEC Rules.

6 Capital market operators, trade groups, self-regulated organisations and capital trade points.

7 https://www.chapelhilldenham.com/chapel-hill-denham-now-a-signatory-un-supported-principles-of-responsible-investment.

8 https://businessday.ng/news/article/ngx-regulation-urges-public-private-sector-to-implement-initiatives-against-climate-change/.

9 Two of Nigeria's leading exchanges – the NGX and the FMDQ Exchange – are heavily invested in educating the ecosystem and regularly organise different forms of sustainable finance-themed programmes.

10 https://lbssustainabilitycentre.edu.ng/wp-content/uploads/2021/11/Full-Report-Business-and-Sustainability-Development-in-Nigeria-The-Banking-Industry-optimized.pdf; page 29.

11 https://lbssustainabilitycentre.edu.ng/wp-content/uploads/2021/11/Full-Report-Business-and-Sustainability-Development-in-Nigeria-The-Banking-Industry-optimized.pdf; page 29.

12 FBN Holdings Plc, Sterling Bank Plc and Access Bank Plc are some of the financial institutions that have issued sustainability reports for the 2021 financial year (either as stand-alone publications or as part of the company's annual report). https://www.lbs.edu.ng/wp-content/uploads/2020/09/LBS-Full-Report-Business-and-Sustainability-Development-in-Nigeria-The-Banking-Industry.pdf; https://www.firstbanknigeria.com/fbn-sustainability-report-2021.pdf.

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Also, there appears to be increasing integration of ESG metrics in debt and equity financings in our market. In July 2022, the US International Development Finance Corporation announced its commitment of a US$280 million sustainable loan facility to Access Bank Plc.[13] Relatedly, many private equity funds that are themselves recipients of IFC (or other DFI) funding usually require undertakings from their investee companies to operate in line with certain ESG considerations and also report their ESG operations data. Essentially, we are witnessing a growth of sustainable finance in the private sectors as lenders and investors operating in our market access funding from DFIs that have sustainability mandates and, in turn, require their borrowers or investee companies to apply the same mandate to their activities.

ii Prevailing market mood

The 55 market participants surveyed for the Nigeria Sustainable Finance Roadmap in 2018 all expressed optimism about the potential of sustainable finance in Nigeria.[14] Four years later, there is still palpable excitement around sustainable finance. Among many market participants there is the hope that sustainable finance tools and instruments will help deepen Nigeria's financial markets while tackling some of the nation's most pressing social and environmental challenges. On the other hand, there are also concerns in certain quarters that sustainable finance is a fad. Some, especially those who equate the concept with climate finance, believe that sustainable finance is an international concept with no nexus to the country's local realities. Their concerns often find expression in questions such as 'In a country where two out of every five people live below the poverty line, why care about the ozone layer?'.

II YEAR IN REVIEW

Some of the significant developments in Nigeria's sustainable finance ecosystem over the past year are discussed below.

i The SEC Social Bond Rules[15]

These Rules prescribe (1) eligible projects in respect of which social bonds may be issued, (2) conditions for approval of a social bond, (3) guidelines for the utilisation and management of proceeds of social bonds, (4) guidelines for the reporting of social bonds and (5) external review requirements in respect of social bonds.

13 https://www.dfc.gov/media/press-releases/dfc-commits-280-million-financing-access-bank-boosting-small-businesses. Notably, Banwo & Ighodalo is advising.

14 https://www.sbfnetwork.org/wp-content/assets/policy library/1590_Nigeria_Sustainable_Finance_Roadmap_2018.pdf.

15 On 29 October 2021, the SEC issued its Social Bond Rules, which set out the framework for social bond issuances in Nigeria.

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ii Launch of the FMDQ Green Exchange

On 8 November 2021, FMDQ Holdings Plc (FMDQ) launched the FMDQ Green Exchange, an information hub for highlighting securities issuances that comply with ESG principles. The Exchange is intended to drive accountability and transparency within Nigeria's sustainable finance ecosystem.

iii The Climate Change Act[16]

The Climate Change Act (CCA) seeks to provide a framework for achieving low greenhouse gas (GHG) emissions, inclusive green growth and sustainable economic development in Nigeria. The CCA prescribes the formulation of a National Climate Change Action Plan (the Action Plan) by the secretariat of the National Council on Climate Change (NCCC) in consultation with the federal ministries responsible for environment, budget and national planning.

iv Augusto & Co's approved verifier status from the Climate Bonds Initiative

A key concern for potential investors has been how to verify sustainability-related claims of issuers of sustainable finance instruments. Thus, verification and certification mechanisms, similar to credit rating mechanisms, are being developed to provide comfort and clarity to investors.

In February 2022, the Climate Bonds Initiative[17] approved Augusto & Co[18] as a verifier under its Climate Bonds Standard and Certification Scheme. This approval is expected to stimulate growth in the market as investors may now find the necessary comfort from ratings and verifications undertaken by a reputable rating agency familiar with the Nigerian market.

v Significant market developments

In addition to new regulations, there have also been significant market developments in the past year. For example, in September 2021, a memorandum of understanding (MOU) was signed by the Lagos state government, FMDQ Group and Financial Sector Deepening (FSD) Africa for a proposed 25 billion naira green bond issuance.[19] Prior to this, in August 2021, Onewatt Solar successfully raised 3 billion naira under its 10 billion naira Green Bond Issuance Programme.[20] In November 2021, the Development Bank of Nigeria, the Financial Centre for Sustainability (FC4S) Lagos and the Nigeria Climate Innovation Centre also signed an MOU to fund green projects in Nigeria. In May 2022, Access Bank Plc issued a US$50 million green note in the international capital market via private placement.[21]

In the loan market, Airtel Africa announced its first sustainability-linked US$125 million facility from Citibank in August 2022.[22] In the same month, the Bank of

16 On 18 November 2021, the President of Nigeria signed into law the Climate Change Act.

17 The international organisation behind the leading Climate Bonds Standard and Certification Scheme.

18 A leading Pan-African credit rating agency.

19 https://www.fc4slagos.com/lagos-state-blaze-the-trail-as-the-foremost-state-on-green-bond-issuance-in-nigeria/. The Bond has not been issued at the time of writing.

20 https://www.thisdaylive.com/index.php/2021/07/05/onewatt-solar-raises-n3bn-green-bond-for-renewable-energy/. This issuance comprised a 2 billion naira seven-year Green Bond Issue (Tranche 1) and a 1 billion naira seven-year Green Sukuk Issue (Tranche 2).

21 https://www.vanguardngr.com/2022/05/standard-chartered-acts-as-sole-arranger-of-us50-million-step-up-for-access-bank-plc/.

22 https://businessday.ng/news/article/airtel-signs-125m-sustainability-linked-facility-with-citi/.

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Industry secured a €100 million line of credit from the Green Climate Fund (under the Fund's Transforming Financial Systems for Climate Programme) to finance climate mitigation and adaptation projects in Nigeria.[23]

In line with global trends, significant capacity development initiatives were undertaken in the past year. In February 2022, a coalition of organisations, including FC4S Lagos, launched the Green Tagging Banking Review, which highlighted the challenges of financing green projects in Nigeria and offered a framework for the reporting of green loans.[24] In March 2022, the NGX and the IFC trained issuers and market operators on the issuance of sustainable financial instruments.[25] In April 2022, the NGX, in collaboration with the UN Sustainable Stock Exchanges Initiative, IFC and Carbon Disclosure Project, hosted two climate disclosure training courses.

III REGULATION AND POLICY

i Governance regime

The key regulations governing different aspects of sustainable finance in Nigeria are as follows.

The NSBPs

As mentioned earlier, the NSBPs were adopted pursuant to the CBN SBP Circular and outline nine principles for banks, discount houses and DFIs to comply with. These include integrating environmental and social considerations into their decision-making processes; avoiding, minimising or offsetting the negative impacts of their business operations and, where possible, promoting positive impact; respecting human rights in their business operations; promoting women's economic empowerment and providing products and services designed specifically for women; and regularly reviewing and reporting on their compliance with the NSBPs' principles, among other things.[26]

The SEC SFP Guidelines

The SEC SFP Guidelines seek to achieve a balance between the pursuit of economic prosperity and environmental protection and social development. The Guidelines contain five Nigerian sustainable finance principles.[27] In implementing these principles, the SEC expects regulated entities to:

a embed ESG considerations into their operations and decision-making processes to avoid, minimise or offset negative impacts;

23 https://www.boi.ng/boi-and-afd-join-forces-to-fight-climate-change-in-nigeria/.

24 https://www.fc4slagos.com/green-banking-unlocking-climate-finance-in-nigeria/.

25 https://ngxgroup.com/ngx-ifc-partner-to-build-capacity-on-green-bonds-issuance/.

26 The Nigeria Sustainable Banking Principles in the Circular are accompanied by the Nigeria Sustainable Banking Principles Guidance Notes, the Nigeria Sustainable Banking Principles Power Sector Guidelines, the Nigeria Sustainable Banking Principles Agriculture Sector Guidelines and the Nigeria Sustainable Banking Principles Oil & Gas Sector Guidelines.

27 (1) Environmental, Social and Governance considerations; (b) Collaborative Partnership and Capacity Building; (c) Financing of priority sectors of the economy; (d) Human rights, women's economic empowerment, job creation and financial inclusion; and (e) Reporting and Disclosures.

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b collaborate with stakeholders to raise awareness on ESG issues, build capacity, manage risks, develop innovative solutions and promote widespread action across the Nigerian financial system;

c promote the financing of priority sectors of the economy while ensuring balance with ESG considerations;

d respect human rights, promote women's economic empowerment, support job creation and enhance financial inclusion; and

e report their progress in implementing ESG principles and require organisations they supervise or finance to make appropriate disclosures on their ESG compliance.

The SEC Green Bond Rules

The SEC Green Bond Rules provide the framework for the issuance of green bonds in the Nigerian capital market. The rules focus on (1) the qualifications for green projects, (2) the conditions for the approval of a green bond by the SEC, (3) the manner in which proceeds of a green bond issuance should be utilised and managed, and (4) reporting in respect of green bond issuances.

The Green Bond Guidelines

The Green Bond Guidelines broadly mirror the International Capital Markets Association's Green Bond Principles. Pursuant to the Green Bond Guidelines, green bond documentation should describe the use of proceeds of the green bond. The net proceeds of the green bond issuance must be deposited in an account or sub-account for that purpose and monitored such that the proceeds are not utilised in a manner contrary to the specified use of proceeds. Issuers are expected to report on the use of proceeds and the impact of the utilisation, as well as to engage the climate change department of the FME in preparing for the issuance.[28]

The SEC Social Bond Rules

The SEC Social Bond Rules provide the framework for the issuance of social bonds in Nigeria. The Rules outline projects that qualify as social projects for the purpose of the use of proceeds of social bonds. They also prescribe the conditions for approval of a social bond by the SEC and compel issuers of social bonds to make reports to SEC at least annually on the projects or assets financed by the bond proceeds and the impact of such projects or assets in qualitative and quantitative terms.[29]

The NGX SD Guidelines

The NGX SD Guidelines generally prescribe the form and standard for sustainability reporting of companies listed on the NGX. To encourage compliance with the NGX SD Guidelines, the NGX will publish annually the names of issuers that submit their sustainability reports in accordance with the NGX SD Guidelines.[30]

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28 The Green Bond Guidelines also outline eligible green project categories and require a green bond issuer to justify its project's fit within any of the specified categories.

29 https://sec.gov.ng/wp-content/uploads/2021/11/Social-Bond-Rule-New-October-29-2021.pdf.

30 Section 4.2(b) NGX Sustainability Disclosure Guidelines; the NGX SD Guidelines are further discussed in Section V of this chapter.

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The Nigerian Code of Corporate Governance

The Nigerian Code of Corporate Governance (NCCG) sets minimum governance standards for companies regulated thereby[31] and requires that Nigerian companies pay adequate attention to sustainability issues.[32] The NCCG also recommends some practices for companies, including the establishment of policies and practices around ESG.

From a policy perspective, the strong drivers of sustainable finance in Nigeria are the climate change treaties and agreements that Nigeria is a party to and the legislation and policies enacted to implement the said treaties. The most impactful treaties include the UN's Agenda 2030[33] and the Paris Agreement of 2015.[34] Policies include the Climate Change and Gender Action Plan, Nigeria NDC Sectoral Action Plan and National Climate Change Policy for Nigeria (NCCP) 2021.

ii Regulators

The bodies regulating sustainable finance in Nigeria include:

a the CBN;
b the SEC;
c the NGX;
d the FMDQ Exchange; and
e the FME.

These regulators are committed to ensuring best practices and transparency in their sectors and help to avoid greenwashing or exploitation of investors who generally approach the market with the goal of 'doing good while doing well'.[35]

IV SUSTAINABLE FINANCE INSTRUMENTS

In line with the growing interest in sustainability in our jurisdiction, different types of sustainable finance instruments are being utilised to raise capital. However, specific frameworks have been created only for green bonds, social bonds, and climate or sustainability bonds. In 2017, the Federal Government of Nigeria issued its first sovereign green bond – making Nigeria the first African country and the fourth country globally to issue a sovereign green bond. The first series of the Nigerian sovereign green bond issuance was for over 10.69 billion naira (US$26 million) across a five-year tenure. Subsequently, Nigeria issued a second series of green bonds for 17.93 billion naira (approximately US$44 million).[36] The

31 By the provisions of Paragraph 1(1) of the Regulation on Adoption and Compliance with Nigerian Code of Corporate Governance 2018, the following entities are obligated to comply with the NCCG: (1) all public companies (whether listed or not), (2) all private companies that are holding companies of public companies or other regulated entities, (3) all companies that are subject of concessions or privatisation programmes of the Nigerian government, and (4) all private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and Corporate Affairs Commission.

32 NCCG Principle 26; https://nambnigeria.org/Nig_Code_of_Corp._Governance_2018.pdf.

33 Which includes the Sustainable Development Goals.

34 These are discussed in more detail under Section IX of this chapter.

35 These regulators also receive support from international organisations like the World Bank Group and the United Nations Environment Programme.

36 It is noteworthy that each series of the bond was oversubscribed.

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Nigerian sovereign green bond is also the first sovereign bond certified by the Climate Bond Initiative.[37] In 2018, the Green Bond Market Development Programme[38] was launched to develop a corporate bond programme for the Nigerian market. That same year, the SEC issued the SEC Green Bond Rules, which further entrenched the support of green bonds in the country. The Nigerian market has since witnessed green bonds from Access Bank Plc[39] and NSP-SPV PowerCorp Plc, a subsidiary of North South Power Company, in 2019 and 2021, respectively,[40] and recently Access Bank Plc again in April 2022.[41]

Although green bonds have been the most prominent instruments, social bonds have also been supported. In 2021, following the issuance of the SEC Social Bond Rules, the SEC reported an 800 per cent increase in the volume of social bonds compared with the year before.[42] As at 2020, the volume of social bonds issued was estimated at about 85 billion naira.[43] In 2020, the Lagos state government issued a 100 billion naira Series III bond under its 500 billion naira bond programme. The proceeds of the bond issuance were targeted at financing social and infrastructure projects in the state.[44]

Apart from the primary markets, some sustainable finance instruments in Nigeria, such as the green bonds and social bonds, are also being traded in the secondary markets through the FMDQ and the NGX.[45]

The use of proceeds from these instruments cuts across renewable energy, energy efficiency, agriculture and water management, etc. Similar to the principles codified in Nigeria's Energy Transition Plan (ETP)[46] and the NCCP, the proceeds of the green bonds have been targeted at projects that aid renewable energy generation and reduce GHG emissions. For example, the proceeds from the Nigeria sovereign green bond were used to finance three government renewable energy projects: the renewable energy micro-utilities programme, the re-energising education programme and the afforestation programme.[47] Similarly, some

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37 https://www.climatebonds.net/certification/federal-government-nigeria.

38 The Green Bond Market Development Programme was launched by FMDQ Group Plc, Climate Bonds Initiative and Financial Sector Deepening Africa.

39 Access Bank Plc issued a 15 billion naira (US$36 million) green bond, making it the first corporate organisation to issue a green bond in Nigeria. The issuance is also the first corporate green bond in Africa certified by the Climate Bonds Initiative.

40 North South Power Company Group listed an 8.5 billion naira (US$21 million) green infrastructure bond on the NGX. Notably, Banwo & Ighodalo advised on some of these groundbreaking transactions, such as the green bonds issued by the North South Power Group.

41 https://www.nipc.gov.ng/2022/04/28/access-bank-sells-50m-5-year-green-bond-for-sustainable-projects/. Notably, Banwo & Ighodalo also advised on this transaction.

42 https://www.vanguardngr.com/2021/06/sec-targets-85bn-global-social-bonds-market/.

43 ibid.

44 https://www.chapelhilldenham.com/lagos-state-government-issues-n100-billion-series-iii-bond-under-the-n500-billion-debt-issuance-programme.

45 For example, the FMDQ Exchange Limited lists the green bond issued by North South Power Company Limited as part of its secondary market products.

46 The ETP highlights some of the ways by which emissions may be reduced towards meeting Nigeria's net-zero pledge and was approved in February 2022 by the Federal Executive Council of Nigeria.

47 https://climatechange.gov.ng/2020/09/21/brief-on-green-bonds/.

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social bonds have been targeted at projects in healthcare and the environment[48] seeking to improve people's quality of life.

In Nigeria, it appears that the focus of sustainable finance has been on the environment, with a growing interest in the social elements of sustainable finance.[49]

As part of the measures for a just transition, there are initiatives aimed at ensuring that workers and stakeholders in relevant industries are not left behind as the economy shifts in response to climate change policies. For example, in 2021, together with other stakeholders, Nigeria launched the Just Transition and Green Jobs Project, which is expected to run until December 2024.[50] The project is aimed at strengthening institutional capacity and laying foundations for just transition policies, including skill development and social security for workers in impacted sectors.[51]

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

i Sustainable disclosure requirements

One of the ways to ingrain sustainability in companies is by requiring that companies make disclosures. In Nigeria, sustainable disclosure requirements (SDRs) are prescribed in the following regulations.

The NGX SD Guidelines

As mentioned above, the NGX SD Guidelines prescribe SDRs for issuers[52] in Nigeria. However, in recognition of the budding nature of the concept of sustainability and the varying levels of readiness among issuers, the requirements therein are quite general, albeit that they encourage issuers to disclose additional ESG issues applicable to their businesses. The general disclosure requirements are divided across four categories, namely: (1) overall structure and profile of how economic, environmental and social risks are managed; (2) the scope and boundaries of the report, whether on the basis of physical location or entities within the same organisation; (3) material sustainability matters and how they are identified and managed; and (4) stakeholder identification and the manner of responding to the reasonable expectations

48 For example, the proceeds of the Lagos state government 137 million naira Series IV bond are to be used for financing infrastructure projects in road, healthcare and the environment. https://nairametrics.com/2021/12/21/lagos-raises-n137-328-billion-bond-from-capital-market-for-key-infrastructural-projects/.

49 Although the topic of sustainability usually covers environmental and social risks, the development of sustainable finance in Nigeria started with green finance. For instance, in terms of regulation, there are more rules on environment-focused sustainable finance, whereas the SEC Social Bond Issuance Rules are a relatively new development.

50 The project is funded by the French government and implemented by the International Labour Organization.

51 https://www.ilo.org/africa/countries-covered/nigeria/WCMS_846927/lang--en/index.htm.

52 As defined under Section I of this chapter.

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and interests of the stakeholders.[53] The NGX is empowered to introduce sustainability ratings and indices to assess and track the performance of listed companies that make sustainability disclosures; however, the NGX is yet to introduce such ratings and indices.[54]

The SEC SFP Guidelines

The earlier-referenced SEC SFP Guidelines[55] broadly require regulated entities to adopt a set of procedures that detail ESG considerations and how such considerations will be managed. Furthermore, regulated entities are mandated to ensure that appropriate reports are prepared detailing their progress on the ESG metrics. In respect of financing, regulated entities are encouraged to identify business plans in priority sectors such as green finance and to disclose products and services designed to facilitate the financing of these sectors. They are also expected to report the monetary value of actual investments undertaken and the total monetary value of assistance received from governments (e.g., tax reliefs and tax credits subsidies and royalty holidays, etc.) in financing products and services in priority sectors of the economy.[56]

The NSBPs[57]

Banks in Nigeria also have mandatory sustainability reporting obligations under the NSBPs. In a similar manner to the NGX SD Guidelines and the SEC SFP Guidelines, the NSBPs establish broad measures in relation to sustainability reporting for banks, such as setting clear targets and ensuring that necessary systems are in place to collect data, etc., in making their reports. In 2013, the CBN released a reporting template that requires banks to provide details of the number of transactions undertaken under the nine principles of the NSBPs.[58]

ii The TCFD

Nigeria has not yet adopted the TCFD framework; however, the NGX Regulation Limited, a subsidiary of the NGX, in June 2022, announced its plans to issue dedicated guidelines for listed companies on climate-related disclosures in line with the TCFD framework.[59]

Pursuant to Section 24 of the CCA, private entities with up to 50 employees are required to put in place measures to achieve the annual carbon emission reduction targets as well as to designate a climate change officer or an environmental sustainability officer who shall submit annual reports on the entity's efforts at meeting its carbon emission reduction

53 Section 4.1, NGX Guidelines; the sustainability disclosures may form a part of an issuer's annual report or be in a separate sustainability report filed within the same period as its annual accounts (Section 4.3, NGX Guidelines).

54 Section 4.2(c), NGX Sustainability Disclosure Guidelines; performance indicators listed include diversity in the workplace, occupational health and safety, impact on society and local communities, environmental impact of products and services, and efficient use and consumption of energy, etc.

55 These Guidelines apply to participants in the Nigerian capital markets, including capital market operators, trade groups, self-regulated organisations and capital trade points – broadly regarded as regulated entities.

56 Principle 3, SEC Guidelines.

57 The Nigerian Sustainable Banking Principles.

58 See Section III of this chapter.

59 https://thenationonlineng.net/ngx-mulls-guidelines-on-corporate-compliance-on-climate-sustainability/.

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target.[60] The NGX SD Guidelines, the SEC SFP Guidelines and the NSBPs also encourage the consideration of ESG issues in the operations of companies, including placing effective governance structures to consider the impact of their operations on the environment.[61]

VI ESG DATA AND REPORTING

As mentioned earlier as a recent trend, ESG data and reporting in Nigeria have also extended to contractual relationships following the increased practice of lenders and private equity firms requiring ESG integration by their borrowers and investee companies as conditions precedent or subsequent to completion of deals.

Although there is no specific requirement to cover Scope 1, 2 and 3-level emissions, there are various regulations extending sustainability obligations to organisations in a company's value chain. For example, the NSBPs require banks to assess the potential environmental and social impacts of the operations of their customers, and to ensure that the customers can demonstrate the right level of commitment and capacity to manage environmental and social risks.[62] The SEC SD Guidelines also encourage companies to articulate in their policies ESG procurement standards for their suppliers, contractors and other third-party providers.[63] These are in line with coverage of Scope 3 emissions, which applies to emissions that an organisation is indirectly responsible for.

The biggest challenge in the ESG data reporting regime in Nigeria is the self-regulatory or voluntary approach of such requirements. The main objectives of the current reporting regime appear geared towards ensuring, on a basic level, that companies recognise the importance of ESG and integrate ESG considerations into their operations; thus, the approach appears to grant flexibility to companies. Although various regulatory authorities and the extant rules on reporting encourage and, in some cases, mandate companies to monitor and make necessary disclosures on ESG-related issues, the reporting requirements are typically broad and prescribe only preferred rather than hardline benchmarks. For example, financial institutions and publicly listed companies are mandated[64] to report on their ESG-related issues; however, the nature and content of such reports are subjective. Also, the rules do not always stipulate specific means of implementation, and there are minimal provisions on sanctions for non-compliance. Also, it is noteworthy that not all companies are mandated to monitor ESG-related issues, as the existing framework for monitoring and reporting ESG data does not apply to all companies.[65]

60 Section 24(3) of the CCA provides that where a private entity fails to meet its target, it shall be liable to a fine to be determined by the Council, relying on a system of environmental-economic accounting, with attention on the health impacts, impact on climate variation and total damage to ecosystem services.

61 Principle 1, SEC Guidelines.

62 Principle 1, NSBPs.

63 Principle 1, SEC Guidelines.

64 Pursuant to the SEC Guidelines and the NSBPs (as discussed in Section V of this chapter).

65 Specifically, the NGX Guidelines apply to public listed companies; the SEC Guidelines apply to capital market regulated entities; and the NSBPs apply to financial institutions. The obligations in the CCA are not applicable to enterprises that employ fewer than 50 people and may be bypassed by larger enterprises through restructuring.

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VII SUSTAINABLE FINANCE INCENTIVES

As part of the government's efforts to mobilise long-term capital towards sustainable projects pursuant to its sustainability goals, it offers a number of fiscal and financial incentives to private institutions to invest in such projects. These incentives are highlighted below.

i Renewable energy investment incentives

To attract investment in renewable energy sources and energy-efficient technology, the government offers incentives in the form of (1) tax credits, (2) soft and special interest loans, (3) tax holidays,[66] (4) feed-in tariffs and (5) duty waivers under its National Renewable Energy and Energy Efficiency Policy 2015.

Also, concessional loans are offered to private entities providing off-grid renewable energy solutions to communities in unserved areas in Nigeria under the Rural Electrification Fund.[67] Key players in the solar value chain may also take advantage of long-term low-interest credit facilities provided under the Solar Connection Facility (the Solar Power Naija Program).[68]

ii Natural gas infrastructure investment incentives

Notwithstanding the country's renewable energy objectives, given the continued relevance of its oil and gas industry and the fact that the energy industry constitutes the country's second largest source of GHG emissions – with venting and flaring of gas constituting 80 per cent of the industry's GHG emissions[69] – the government has channelled significant efforts towards incentivising investment into infrastructure that would help eliminate gas-flaring.[70]

Investors in large-scale gas utilisation infrastructure in the midstream[71] and downstream petroleum sectors may benefit from the fiscal incentives under Section 39 of the Company Income Tax Act, including (1) a tax holiday, (2) capital allowances and (3) tax-free dividends. Also, the Petroleum Industry Act 2021 establishes the Midstream and Downstream Gas Infrastructure Fund, which is empowered to make equity investments in infrastructure relating to the midstream and downstream gas sectors and would consequently stimulate private sector investments in such operations through participation and risk-sharing.[72] Apart from addressing gas-flaring, these investments should increase

66 Note that a near-identical tax holiday incentive is available to investors in renewable energy under the Pioneer Status Incentive. A claim for one is to the exclusion of the other.

67 The incentive provided under the Rural Electrification Fund was established pursuant to the government's Rural Electrification Initiative. It goes not only towards the country's climate change goals but also towards its SDGs, particularly SDG7 to ensure universal access to affordable and reliable energy.

68 The Solar Power Naija Program seeks to establish 5 million new solar-based connections to off-grid communities pursuant to the Economic Sustainability Plan of 2020.

69 Per Paragraph 4.5 of NCCP. Agriculture, forestry and other land uses is the largest source per Paragraph 4.2 of the NCCP.

70 The government's plans to incentivise private sector investment in the natural gas infrastructure have been documented in several national policies and plans, including the 2008 Gas Master Plan, the Nigerian Gas Flare Commercialisation Programme 2016, the Nigeria National Gas Policy 2017, the Economic Recovery and Growth Plan and its successor the Medium-Term National Development Plan 2021–2025, the Decade of Gas Initiative and, most recently, the ETP.

71 Added by virtue of Section 302(6) of the Petroleum Industry Act 2021.

72 https://www.thisdaylive.com/index.php/2021/10/03/chijioke-mama-pias-midstream-and-downstream-gas-infrastructure-fund-is-a-game-changer/.

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the domestic supply and utilisation of liquefied petroleum gas and thus reduce reliance on fuelwood. Indeed, effective investment in the natural gas infrastructure will go a long way towards putting Nigeria on a low-carbon emission, high socio-economic growth and climate-resilient trajectory.

Overall, incentives such as those outlined above will accelerate the sourcing and injection of the capital required for medium to long-term capital-intensive, sustainability-linked projects.

iii The CCA and the future of sustainable incentives

Further sustainable finance incentives should become available to private sector actors in accordance with various government policies and plans, and particularly following the promulgation of the CCA. The CCA empowers the NCCC to make regulations that provide fiscal incentives to promote the reduction of GHG emissions and encourage private sector participation in climate actions.[73] The earlier-mentioned Action Plan to be released by the NCCC[74] is expected to propose incentives for private and public entities that achieve GHG emission reduction. The CCA further establishes a Climate Change Fund (CCF); funds from the CCF shall, inter alia, be used towards incentivising private and public entities towards transitioning to clean energy and sustaining a reduction in GHG emissions.[75]

The Medium-Term National Development Plan 2021–2025, the NCCP of 2021 and the 2050 Long-Term Vision for Nigeria are some examples of the many domestic plans and policy frameworks that broadly outline measures to be taken by the Nigerian government in respect of the economy in general, and specific sectors of the economy, to foster their transition to clean energy in line with the country's climate change goals. The earlier-referenced ETP outlines the finance required to deliver net zero by 2060 and specifically sets out a timeline and framework for emission reductions across five key sectors: power, cooking, oil and gas, transport and industry.[76] Significantly, the ETP calls for the scaling up of the country's solar capacity and addresses the future of the oil and gas industry. It promotes the commercialisation of gas as a pathway to fair and equitable transition and considers the use of carbon capture utilisation and storage technology as a means of offsetting oil and gas emissions. Although the ETP is comparatively vague by global standards, the plan should promote sustainable investment in Nigeria as it signifies a commitment from the highest level of government, highlights investment opportunities and makes available investment-grade data through the Nigerian Integrated Energy Planning Tool.[77]

The signing into law of the CCA marks a significant milestone for the country's clean energy transition efforts. The CCA is expected to mainstream environmental sustainability considerations into the activities and investments of government ministries, departments and agencies, as well as private and public entities, which must all adhere to the carbon emission reduction targets in addition to the various other obligations to be set by the NCCC in its Action Plan and in the future regulations that it is empowered to make.

73 Section 32(d) of the CCA.
74 An Action Plan is to be released every five years,
75 Section 15(2)(j) of the CCA.
76 https://www.energytransition.gov.ng/.
77 https://nigeria-iep.sdg7energyplanning.org/#.

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VIII GREEN TECHNOLOGY

i Carbon trading

Nigeria recently commenced activities towards the establishment of its Emissions Trading Scheme (ETS), pursuant to the CCA.[78] The establishment of the ETS should compel affected public and private entities and government ministries, departments and agencies to invest in sustainable practices. Further, fines and charges collected by the NCCC from private and public entities flouting their climate change obligations are to be applied towards the CCF, which, inter alia, are to be used to incentivise private and public entities for their investments in sustainable practices.

ii Financial technology and sustainable finance

Nigeria has a burgeoning financial technology ('fintech') industry with numerous fintech platforms intentionally seeking to improve access to finance for the underserved community. Indeed, improving access to finance and credit supports the achievement of the SDGs.[79] There are fintech platforms that seek to foster sustainable financing in Nigeria and more widely in Africa. One such platform is Igugu Global, which offers climate data for financial actors and has recently launched its Green Finance Marketplace, a platform that streamlines climate-related information to help financial managers address the challenges of searching for and benchmarking climate risk and climate-related investment opportunities across Africa.[80]

IX CLIMATE CHANGE IMPACT

In line with the requirement under Article 4 of the Paris Agreement, Nigeria has set its nationally determined contribution. Nigeria has committed to an unconditional contribution of 20 per cent below business as usual (BAU) by 2030, and recently increased its conditional contribution (dependent on international support) from 45 per cent to 47 per cent below BAU by 2030.[81] The country has further committed to end gas-flaring by 2030, cut its emissions by 50 per cent by 2050[82] and achieve net-zero emissions by 2060.[83] Nigeria appears on track to meet its unconditional contribution as its projected GHG emissions for 2030 are almost half of what were expected in 2015.[84] Its performance, however, has been more a product of slower than expected economic growth than a product of its mitigation measures.[85] Still, to achieve its conditional contribution and its long-term objectives, it will need significant international public finance. According to the Vice President of Nigeria, the country needs

78 Sections 19 and 4(i) and (ii) of the CCA.
79 https://www.uncdf.org/financial-inclusion-and-the-sdgs.
80 https://igugu.global/ and https://leadership.ng/igugu-global-launches-africas-green-finance-marketplace-with-angel-investment/.
81 NDC Registry: https://unfccc.int/NDCREG.
82 Nigeria's NDC Report 2021: https://climatechange.gov.ng/wp-content/uploads/2021/08/NDC_File-Amended-_11222.pdf.
83 https://climateactiontracker.org/climate-target-update-tracker/nigeria/.
84 Nigeria's NDC Report 2021.
85 ibid.

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over US$410 billion to deliver its net-zero target by 2060.[86] Nigeria must make the necessary regulatory changes and legislative and policy harmonisation to support sustainable investing, and this includes improving data transparency by implementing robust SDRs.

Climate change litigation in Nigeria

Litigation has the potential to play an impactful role in ensuring that Nigeria meets its climate change targets, particularly in light of the CCA's obligations for key actors and the landmark decision in *Center for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (referred to hereinafter as *COPW v. NNP*).[87,88] Prior to *COPW v. NNPC*, for a climate change litigant to possess *locus standi*, it had to prove that its private right was affected, or that it had suffered a direct injury as a result of the defendant's non-compliance with relevant environmental laws.[87] Where litigants were able to surmount the *locus standi* obstacle, they still faced judicial bias towards the economic interests of the oil and gas industry, as demonstrated in *Gbemre v. Shell Petroleum Development Company Nigeria Ltd and NNPC and Ors*.[88] However, the Supreme Court in *COPW v. NNPC* effectively widened the restrictive rule on *locus standi* and signified a positive shift in judicial attitudes towards climate change. In the action over an oil spillage, the Court dismissed the defendant's challenge of the appellant's standing and held that public-spirited individuals and organisations may bring action against relevant public authorities and private entities to force compliance with the relevant laws.[89]

Nigeria is particularly vulnerable to environmental and socio-economic risks associated with climate change, especially due to its high population, poor infrastructure and low resilience to economic shocks. Risks include food insecurity and population displacement due to increasingly unpredictable rainfall patterns; consequential resource conflicts; water- and vector-borne diseases, especially in high-density urban areas, due to increased flooding; and economic shocks due to the vulnerability of the agricultural sector, the largest employer of labour in the country. Furthermore, as a major producer and exporter of petroleum,[90] Nigeria faces a loss of economic opportunities and investments as global investors seek to decarbonise their portfolios and global demand for fossil fuel declines in response to climate change.

The government has developed a number of policies to mitigate the challenges associated with climate change, including plans for economic diversification and efficient agricultural practices.[91] In June 2020, the government published the National Adaptation Plan (NAP)

86 https://statehouse.gov.ng/news/osinbajo-travels-to-united-states-nigerias-energy-transition-plan-on-the-agenda/.

87 *AG Federation v. AG Abia State* (2001) 11 NWLR (Pt. 725), 689, and *Oronto Douglas v. Shell Petroleum Development Company Nigeria Limited and Ors* [Unreported Suit No: FHC/L/CS/573/96, 17 February 1997].

88 Suit No. FHC/CS/B/153/2005 (Unreported).

89 In coming to its conclusion, the Supreme Court explicitly cited the increasing concern for the environment and instructive judgments from other Commonwealth jurisdictions.

90 The oil and gas sector constitutes 14 per cent of Nigeria's GDP and 95 per cent of its foreign exchange earnings and contributes up to 65 per cent of the federal budget per the NCCP (per Nigeria's NDC report, p. 22)

91 The Economic Recovery and Growth Plan, Medium-Term National Development Plan 2021–2025, NCCP, National Adaptation Strategy and Plan of Action on Climate Change in Nigeria, Nigeria Climate Change Response Programme, National Agricultural Resilience Framework, National Livestock Transformation Plan and Nigeria's National Security Strategy on Climate Change are all important policy documents that identify ways in which the country can address climate change-associated risks.

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Framework, which sets out a broad framework for the various sectors of the economy to address the country's climate change-associated risks. Crucially, the NAP Framework seeks to clarify the country's adaptation objectives, guiding principles and roles of the relevant stakeholders; align all existing policies on adaptation; and focus on themes that are relevant to Nigeria's context.

X OUTLOOK AND CONCLUSIONS

As expected, the global preparation for COP27 spurred on critical conversations around the growing prominence of sustainable finance and what this means for the development of Nigeria's critical oil and gas assets that directly impact on the country's external revenue, foreign exchange reserve and economic performance.[92] Market participants continue to follow keenly the significant shifts in the definitions underpinning the global sustainable finance framework, such as the recharacterisation of gas as a transition fuel by the European Commission.[93]

Market challenges

The key challenges in Nigeria's sustainable finance ecosystem are (1) the lack of a clear definition of what is sustainable or sustainable finance; (2) insufficient data, disclosure and reporting;[94] (3) insufficient tools and mechanisms for verification of sustainability claims;[95] (4) greenwashing; and (5) the concern that advocating for sustainable finance will have a counterproductive effect, given the country's heavy reliance on oil and gas as a source of energy and revenue.

Notwithstanding these challenges, and as evidenced by the policies, regulations and market developments discussed in this chapter, Nigeria's sustainable finance ecosystem is on a healthy growth path and is poised to become mainstream with the right support from market participants, intermediaries, development institutions and policymakers.

92 https://www.devex.com/news/nigerian-minister-decries-defunding-of-gas-projects-as-inequitable-100216.

93 https://www.reuters.com/business/sustainable-business/eu-parliament-vote-green-gas-nuclear-rules-2022-07-06/.

94 This affects the market's ability to make comparisons and decisions that underpin the flow of sustainable finance.

95 These tools and mechanisms are being developed but are not yet at a scale sufficient to meet market needs.

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Chapter 8

SINGAPORE

Timothy Goh and David Good[1]

I INTRODUCTION

The government is developing a vibrant sustainable finance ecosystem, and accelerating the sustainable finance lending market through policy and regulatory initiatives, deepening sustainability research and capabilities and harnessing the power of green technologies. The prevailing policy and regulatory environment reflects the government's recognition that environmental sustainability is intrinsically linked to financial sustainability. The Monetary Authority of Singapore (MAS), Singapore's central bank and financial regulator, has proactively instituted environmental risk management practices for financial institutions and introduced incentives to promote the growth of sustainable finance solutions in Singapore. Further, by enhancing comparability and reliability of sustainability-related disclosures, Singapore's regulators seek to promote accountability of financial institutions, corporations and asset managers, thereby increasing investor confidence in, and further stimulating, the sustainable finance market. As outlined further below, applicable taxonomies, disclosure requirements and technological developments initiated by both the public and private sectors, which complement regulatory initiatives, help foster such investor confidence.

II YEAR IN REVIEW

2022 saw a further strengthening of the government's efforts to create a trusted and active sustainable finance market, backed by its own enhanced commitment announced in February 2022 to achieve net zero emissions by or around the middle of the century. Key regulatory, market and policy developments include:

a MAS and the Singapore Exchange (SGX) jointly launching ESGenome, a digital disclosure portal for companies to report ESG data in a structured and efficient manner, and for investors to access such data in a consistent and comparable format;

b the government issuing its S$2.4 billion inaugural sovereign green bond, priced at 3.04 per cent;

c MAS and Google Cloud jointly launching the Point Carbon Zero Programme to drive the innovation, incubation and scaling of climate fintech solutions in Asia;

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d commencement of the requirement for all SGX-listed entities to provide climate reporting on a 'comply or explain' basis, whereby entities must either comply with the relevant guidelines or explain why they have not complied (which will become mandatory in a phased approach – see Section V);
e MAS issuing disclosure and reporting guidelines for retail ESG funds;
f Climate Impact X and Nasdaq announcing a strategic technology partnership that will bring exchange-grade trading functionalities to the voluntary carbon market; and
g the second public consultation on a Singapore green and transition taxonomy by the Green Finance Industry Taskforce (GFIT), convened by MAS, setting out detailed thresholds and criteria for economic activities in the energy, transport and real estate sectors.

III REGULATION AND POLICY

i Policy

Singapore is an early and committed contributor to global climate action, having ratified the United Nations Framework Convention on Climate Change (UNFCCC) in 1997, acceded to the Kyoto Protocol in 2006 and, more recently, ratified the Paris Agreement in September 2016. In alignment with the Glasgow Climate Pact signed at COP-26, the government announced that it will raise its climate ambition to achieve net zero emissions by or around the middle of the century.[2]

Singapore's central regulatory authorities play a highly active and engaged role in the government's push to be a leading centre for green and sustainable finance in Asia and globally. MAS and SGX are the key authorities taking the lead in regulating, enforcing and promoting sustainable finance policies, regulations and frameworks. MAS in particular has a leadership role both locally and in international committees[3] to shape best practices, regulatory and supervisory approaches to sustainability issues, while SGX aims to become a leading sustainable finance and trading hub.

The Green Finance Action Plan (GFAP) is MAS' sustainable finance strategy, which consists of four key elements:

a strengthening the financial sector's resilience to environmental risks;
b developing green and transition finance solutions and markets for a sustainable economy;
c harnessing technology to enable trusted and efficient sustainable finance flows; and
d building knowledge and capabilities in sustainable finance.

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2 Singapore announced in its 2022 budget that it would review its 2030 nationally determined contribution, which currently pledges to peak emissions at 65 MtCO2e around 2030. See also Singapore's Green Plan 2030, which sets a framework of targets to strengthen Singapore's commitments under the Paris Agreement and the UN's 2030 Sustainable Development Agenda.

3 For example:
a MAS managing director Ravi Menon was appointed as the chair of the Network for Greening the Financial System (NGFS) for a two-year term starting in January 2022.
b MAS is also the chair of the Climate Risk Steering Group (CRSG) established by the International Association of Insurance Supervisors (IAIS), a global standard-setting body responsible for developing and assisting in the implementation of principles, standards and other supporting material for the supervision of the insurance sector.
c MAS co-leads a supervision workstream within the Task Force on Climate-Related Financial Risks established by the Basel Committee on Banking Supervision.

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In addition, MAS convened the GFIT[4] to accelerate the development of sustainable finance through four key initiatives: developing a taxonomy; improving disclosures; fostering green finance solutions; and enhancing environmental risk management practices of financial institutions.

To promote the growth of sustainable finance solutions in Singapore, MAS has introduced a number of sustainable finance instruments and incentives including the Green and Sustainability-Linked Loan Grant Scheme (GSLS) and Sustainable Bond Grant Scheme (SBGS) (see Section VII), Project Greenprint (see Section VI) and the voluntary carbon markets (see Section VIII).[5]

ii Regulation

MAS has progressively integrated environmental risk into its supervisory framework and processes at the individual firm and system-wide levels, with a particular focus on three categories of financial institution: banks, asset managers and insurers. MAS' risk identification and management frameworks are informed by its collaborations with internationally acclaimed industry expert groups. For instance, its risk management guidelines for banks are informed in part by its leadership role in the Network for Greening the Financial System and its participation in the task force on climate-related financial risks within the Basel Committee on Banking Supervision. Similarly, its risk management guidelines for insurers are guided by its leadership role in the Climate Risk Steering Group within the International Association of Insurance Supervisors, and its founding status in the Sustainable Insurance Forum.

MAS has identified two broad categories of environmental risk – financial risk and reputational risk. Financial risk covers the negative financial impact of changes in the environment, and regulations targeted at transitioning towards a low-carbon economy. MAS further specifies three key financial risk areas for banks and insurers: market risk, liquidity risk and operational risk. A shift in investor preferences away from carbon-intensive investments may negatively impact the valuation of investments in carbon-intensive sectors and pose a market risk to these institutions. Additionally, the increased threat of natural disasters can lead to higher claims, a surge in withdrawal of funds and increased demand for emergency loans, thus exacerbating liquidity risk. Finally, operational risk is posed by extreme weather events that can disrupt business continuity. MAS also identifies credit risk as a concern for banks. Based on MAS' guidelines, the threat of extreme weather events that reduce the value of assets that are held by banks poses significant credit risk. Furthermore, the transition to a low-carbon economy can impact the profitability and operation rights of carbon-intensive

4 Comprising representatives from banks, asset managers, insurers, sustainability service providers, academia and NGOs.

5 One of the key strategies outlined in Singapore's Financial Services Industry Transformation Map 2025 is to catalyse Asia's net-zero transition. According to the Map, MAS will work with the industry to develop innovative solutions to scale up sustainable and transition financing through the following: providing greater clarity on transition activities including through the development of an industry-led taxonomy for eight priority sectors; facilitate the decarbonisation of real economy sectors through appropriate financing solutions for corporates; enhance sustainability disclosures and build data utilities, such as Project GreenPrint, to facilitate companies' sustainability disclosures and investors' access to companies' ESG data; and provide S$100 million grant funding from 2021 to 2025 for capability building, green FinTech, climate risk and reinsurance, and solutions for sustainable and transition finance.

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sectors, thus impacting borrowers' ability to pay back their debts. Similarly, MAS identifies insurance risks posed by the heightened threat of frequent natural disasters leading to higher claims and underwriting losses as concerns for insurers.

MAS' guidelines represent a top-down approach to risk management where companies' board and senior management are responsible for developing a framework for environmental risk management, incorporating environmental considerations into business strategies, and overseeing environmental risk management policies and practices. MAS recommends that financial institutions use a 'three lines of defence' model, wherein the business line acts in accordance with the organisation's environmental risk management framework, its actions are overseen by the risk management function, and the internal audit function independently examines the robustness of the institution's risk management framework.[6] The guidelines also encourage these institutions to oversee the environmental risks in their own portfolios as well as their clients' engagements, and to encourage clients to pursue greener practices.[7] Finally, the guidelines encourage institutions to develop tools and metrics to assess environmental risk exposures, engage in regular scenario analysis and stress testing, and employ capacity building measures to enhance their risk management frameworks.

Regulations 13(B) and 54A of the Securities and Futures (Licensing And Conduct Of Business) Regulations require all funds and mandates to put in place a risk management framework, and this includes environmental risk considerations. MAS has further broken down risk management considerations by asset class and outlined environmental risk management strategies in equity, fixed income and real estate investments. Similarly, MAS has provided guidelines for insurance underwriters to assess environmental risk. Like asset managers, insurers are legally required to have risk management frameworks, which also include management of environmental risks.

MAS aims to align sustainable-related disclosure requirements in Singapore with the international Task Force on Climate-related Financial Disclosures (TCFD) and upcoming International Sustainability Standards Board (ISSB) standards. In connection therewith, SGX requires all SGX-listed entities to provide climate reporting on a comply or explain basis for financial years starting on or after 1 January 2022. Issuers in industries identified by the TCFD as most affected by climate change will be progressively subject to mandatory climate reporting from financial year 2023. In addition, MAS introduced disclosure and reporting guidelines for retail ESG funds to mitigate greenwashing risks.[8] From 1 January 2023, retail ESG funds will be required to provide clear disclosures on their ESG investment objectives and approach, relevant ESG criteria and metrics, as well as regular updates on how their ESG objectives have been met, or have not been met.

6 MAS Guidelines for Environmental Risk Management (Banks), p. 6; MAS Guidelines for Environmental Risk Management (Insurers), p. 6; MAS Guidelines for Environmental Risk Management (Asset Managers), p. 5.

7 MAS Guidelines for Environmental Risk Management (Banks), pp. 6–7; MAS Guidelines for Environmental Risk Management (Insurers), p. 6; MAS Guidelines for Environmental Risk Management (Asset Managers), pp. 7–8.

8 MAS has issued Circular No. CFC 02/2022 on disclosure and reporting guidelines for all retail ESG funds. See https://www.mas.gov.sg/regulation/circulars/cfc-02-2022---disclosure-and-reporting-guidelines-for-retail-esg-funds.

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IV SUSTAINABLE FINANCE INSTRUMENTS

The demand for sustainable finance instruments is driven by multiple factors including an increase in retail demand, regulations designed to promote sustainable finance and growth of the green economy, portfolio decarbonisation commitments and a growing awareness of climate risk exposure. Singapore is now ASEAN's largest green finance market, accounting for close to 50 per cent of cumulative ASEAN green bond and loan issuances by volume in 2020, and it supports a wide variety of sustainable financing instruments.[9] SGX also maintains an online database of green fixed income securities, social fixed income securities, sustainability fixed income securities and sustainability-linked bonds (SLBs), which tracks the number of issuances on a yearly basis.

i Green bonds

Green bonds are debt securities where the proceeds are used exclusively for new or existing projects with climate and environmental benefits based on specified issuance principles or guidelines. There are several frameworks that issuers can adopt in order to qualify their issuance as a green bond, such as the International Capital Market Association (ICMA) Green Bond Principles 2021 and the Climate Bonds Standard. Notable Singapore issuers include major banks such as DBS Group and OCBC Bank, who have also developed their own frameworks – the DBS Green Bond Framework and OCBC Sustainability Bond Framework, respectively.

The government's Ministry of Finance published a national Green Bond Framework, which lays the foundation for the issuance of green bonds by the government under the Significant Infrastructure Government Loan Act 2021. The Framework is aligned with international principles and market practices and was developed and structured in alignment with the core components and key recommendations of the ICMA Green Bond Principles 2021 and the ASEAN Capital Markets Forum ASEAN Green Bond Standards 2018. It lists eight categories of green projects that may be financed by Singapore sovereign green bonds.[10] A central component of the Framework is that the issuer of the green bond must use its proceeds for eligible green expenditures that contribute to one or more of the environmental objectives set out in the ICMA Green Bond Principles and the ASEAN Green Bond Standards. In 2022, the government issued its S$2.4 billion inaugural sovereign green bond, which was priced at a 3.04 per cent coupon.

ii Sustainability fixed income securities and SLBs

Sustainability bonds are debt securities where the proceeds are used exclusively for a combination of both green and social projects based on specified issuance principles or guidelines. Sustainability bonds may voluntarily comply with the Sustainability Bond Guidelines issued by the ICMA or other sustainability bonds standards established by the relevant issuer.

Sustainability-linked bonds (SLBs) are forward-looking performance-based instruments and, depending on whether pre-defined sustainability performance targets are achieved, certain characteristics may vary (e.g., a variable coupon rate linked to achievement

9 https://www.pwc.com/sg/en/financial-services/assets/sustainable-finance-developments-in-singapore.pdf.

10 These are: renewable energy; energy efficiency; green buildings; clean transportation; sustainable water and wastewater management; pollution prevention, control and circular economy; climate change adaptation; and biodiversity conservation and sustainable management of natural resources and land use.

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of defined targets). Issuers may use proceeds from SLBs for general corporate purposes. The Sustainability-Linked Bond Principles issued by the ICMA provide guidelines that recommend structuring features, disclosure and reporting.

iii Transition finance

Transition bonds are debt securities where the proceeds are used to fund the transition towards a reduced environmental impact or to reduce its carbon emissions. MAS is focused on developing transition finance, although there is currently limited uptake among investors, who cite concerns about a lack of clear standards, and that such instruments may allow issuers to carry on 'business as usual'.

iv Social and governance-focused sustainable finance

Singapore's sustainable finance market is still predominantly focused on the environmental 'E' in 'ESG', and while social and governance-related instruments are feasible there is less uptake compared to environmental instruments.

SGX broadly defines social bonds as debt securities where the proceeds are used exclusively for new or existing projects aimed at improving social outcomes based on specified issuance principles or guidelines. Issuers of social bonds may voluntarily adhere to the Social Bond Principles issued by the ICMA, which aim to provide transparent social credentials alongside an investment opportunity, or other customised frameworks created by issuers, such as the Social Finance Framework established by First REIT in connection with its S$100 million healthcare social bond issuance. Other examples of activity in recent years beyond environmental and into social and governance-focused sustainable finance include a €500 million bond issuance for Korea Housing Finance Corporation and the Women's Livelihood Bond.

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

i Banks, insurers and asset managers

The MAS Guidelines for Environmental Risk Management (Guidelines) outline the disclosure requirements for banks, asset managers and insurers. Such entities are required by the Guidelines to annually disclose their approach to managing environmental risk and the impact of material environmental risks, and their disclosures must be in accordance with well-regarded international reporting frameworks.

ii SGX-listed entities

SGX requires entities listed on the Singapore Exchange to release an annual sustainability report on a comply or explain basis. Currently, SGX recommends that issuers give priority to globally-recognised reporting frameworks for their sustainability-related disclosures. To further standardise sustainability reporting, MAS intends to consult on introducing mandatory sustainability-related disclosure requirements for financial institutions as soon as a global baseline sustainability reporting standard is established by the ISSB at the end of 2022.

The annual sustainability report requires listed entities to submit a climate-related disclosure, which is prepared in accordance with the TCFD framework. Although these disclosures are currently required on a comply or explain basis, SGX is mandating reporting

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by sector in phases over the next two years at the time of writing. From 2023 onwards, listed companies in the financial, agriculture and energy industries will be required to provide a climate-related disclosure. Likewise, after 2024, listed entities in the materials and building industry and transportation industry will be required to disclose their climate-related information. Although these disclosures are currently accepted in the TCFD framework, SGX has indicated that, upon the release of the ISSB's final draft on climate-related disclosures, it may integrate the two frameworks, resulting in new disclosure requirements.

iii Singapore-incorporated companies

There is currently no overarching sustainability reporting requirement for Singapore-incorporated companies, although the Accounting and Corporate Regulatory Authority and Singapore Exchange Regulation (SGX RegCo) have established a Sustainability Reporting Advisory Committee to advise on a sustainability reporting roadmap for Singapore-incorporated companies.

iv Taxonomy

Singapore is in the consultation phase of establishing a taxonomy (Singapore Taxonomy). Two working drafts of the Singapore Taxonomy have been released by MAS for public consultation. Phase 1 of the Singapore Taxonomy covered five core sectors that account for 90 per cent of ASEAN's greenhouse gas emissions – agriculture and forestry/land use, real estate, transportation, energy and industrial – and three enabling sectors whose products and services contribute to climate change mitigation – information and communications technology, waste/circular economy, and carbon capture and sequestration. Phase 2 of the Singapore Taxonomy laid out a guiding framework for green and transition activities and the technical screening criteria in three core sectors – energy, buildings and construction, and transportation and fuels. Similar guiding frameworks and technical screening criteria for the remaining five sectors are expected in the subsequent phases of the Singapore Taxonomy.

The Singapore Taxonomy aims to provide a common and consistent framework that classifies economic activity and promotes sustainable investments, and it was drafted to be compatible with other taxonomies in order to ensure interoperability, particularly the EU Taxonomy and the ASEAN Taxonomy (defined below). The Singapore Taxonomy introduces a traffic light model of classifying economic activity:

a red constitutes harmful activities that are not compatible with the net zero trajectory;
b amber signals that a sector is moving towards more sustainable practices and facilitating a significant reduction in emissions over time; and
c green signals that the sector is contributing towards climate change mitigation.

In addition to the Singapore Taxonomy, the ASEAN Taxonomy applies to Singapore as an ASEAN Member State (ASEAN Taxonomy), and the Singapore Taxonomy is stated to be consistent and compatible with the ASEAN Taxonomy. The ASEAN Taxonomy comprises two tiers: the first tier is a principles-based 'foundation framework', which provides baseline guidance to determine if an activity contributes to the ASEAN Taxonomy's environmental objectives and if it qualifies as being sustainable; the second tier consists of the 'plus standard', which provides additional detailed technical screening criteria with metrics and data-backed activity-level thresholds to further classify transition and economic activities in the six focus sectors – agriculture, forestry and fishing; electricity, gas steam and air conditioning supply; manufacturing; transportation and storage; water supply, sewerage and waste management;

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and construction and real estate. The plus standard will also identify 'enabling sectors' (information and communication; professional, scientific and technical; carbon capture, utilisation and storage) that have a significant ability to enable other sectors to contribute to the environmental objectives.

The ASEAN Taxonomy is not legally binding and is intended to provide a framework that is interoperable with other national, regional and international taxonomies. Nonetheless, this principles-based approach is a necessary staging-post to educating the market and creating common alignment on sustainability metrics and disclosure standards across ASEAN, and can form the foundation of future regulatory initiatives.

VI ESG DATA AND REPORTING

i Mandatory TCFD-aligned disclosures

As discussed in Section V, SGX has confirmed implementation of a roadmap for mandatory disclosure aligned to the TCFD recommendations. Starting in 2022, all issuers are required to adopt TCFD-aligned reporting on a comply or explain basis. Disclosure will then become mandatory in 2023 for companies in key industries including finance and transportation, and in most other industries in 2024. MAS estimates that by 2025, mandatory climate reporting will cover 60 per cent of SGX-listed entities by number, and 78 per cent by total market capitalisation.

ii ESG metrics reporting

SGX also recommends a list of 27 core ESG metrics for issuers to use as a starting point for sustainability reporting. These core ESG metrics are intended as a common and standardised set of ESG metrics, which will help better align users and reporters of ESG information. SGX may review and revise the core ESG metrics periodically, in line with the evolution of international reporting standards. The environmental metrics include measurements of greenhouse gas emissions (GHG), energy consumption, water consumption and waste generation.

SGX recommends the measurement of GHG to be in both absolute metrics and intensities. The absolute metric is metric tons of carbon dioxide equivalent (tCO2e) of relevant GHG emissions, with the data to be reported comprising the total Scope 1 and Scope 2 GHG emissions and, if appropriate, Scope 3 GHG emissions. The emission intensity ratios are to be measured in GHG emissions (tCO2e) per unit of a specific metric (e.g., revenue, units of production, floor space, number of employees, number of passengers). This figure is calculated from the absolute emissions reported, and denominators should be clearly defined and disclosed. The recommended social metrics include gender diversity and age diversity, while the governance metrics include board composition and management diversity.

iii Project Greenprint

MAS and SGX jointly launched ESGenome as part of Project Greenprint, a digital disclosure portal for SGX-listed companies to report ESG data in a structured and efficient manner, and for investors to access such data in a consistent and comparable format. ESGenome helps SGX-listed companies simplify the disclosure process by using a core set of metrics that is mapped across global standards and frameworks. The ESG data submitted by SGX-listed companies will be automatically mapped across their selected standards and frameworks to

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cater to different investor requirements. A sustainability report can then be automatically generated from the inputs, which allows for meaningful peer benchmarking and tracking of sustainability commitments.

MAS intends to draw on the lessons from ESGenome to address the reporting needs of the broader universe of Singapore corporates, notably small and medium-sized enterprises (SMEs), and supply chain partners and suppliers, as part of its ongoing work on Project Greenprint.

MAS also launched ESGpedia in partnership with Project Greenprint, a blockchain-based registry platform that provides ESG data of companies across various sectors in a single location. The registry uses distributed ledger technology to record and maintain the provenance of green certifications issued by various competent bodies, allowing banks to access these for their green and sustainable financing decisions.

VII SUSTAINABLE FINANCE INCENTIVES

MAS' Green Finance Steering Committee is the key decision-making body for all green finance and sustainability initiatives. Key sustainable finance incentives supported by the government include the GSLS and the SBGS, implemented by MAS.

The GSLS is presented in two tracks: the first focuses on facilitating corporates' access to green and sustainability-linked loans, and the second is intended to encourage banks to develop green and sustainability-linked loan frameworks for SMEs and individuals. The GSLS incentivises banks and corporates to invest in more sustainable projects by defraying their costs of hiring independent assessment and advisory services that develop frameworks and report on the proceeds of sustainable and sustainability-linked loans. Similarly, the SBGS offsets additional expenses for external reviews of eligible green, social, sustainability and SLBs and promotes the adoption of internationally accepted standards.

MAS has also earmarked S$50 million out of S$250 million from the Finance Sector Technology and Innovation Scheme to support green fintech solutions and projects. This MAS-administered scheme provides support for the creation of a vibrant ecosystem for innovation in the finance sector.

VIII GREEN TECHNOLOGY

i Overview

The government recognises that technology and sustainability are two fundamental forces shaping the future of financial services. One of MAS' key strategies, therefore, is to harness Singapore's strength in fintech to address challenges in the green finance space. In addition, the government continues to invest in green technology. For example, Temasek (a state-owned holding company) committed an initial amount of S$5 billion to establish GenZero, an investment platform company that aims to accelerate decarbonisation for future generations towards a net zero world. GenZero will invest globally across three focus areas: technology-based solutions, nature-based solutions and carbon ecosystem enablers.

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ii Climate fintech

One prominent form of technology driving sustainable finance adoption is climate-related fintech. For example, MAS and Google Cloud jointly launched the Point Carbon Zero Programme to drive the innovation, incubation and scaling of climate fintech solutions in Asia. The Programme is a collaboration under MAS' Project Greenprint (see Section VI) and seeks to use climate financial solutions to bolster financial sector access to accurate and granular climate-related data, for more efficient deployment of capital towards green and sustainable projects. To support the Programme, Google Cloud will launch the world's first open-source cloud platform dedicated to climate finance, which will facilitate the deployment of climate fintech solutions and their adoption by the financial sector.[11]

MAS also announced in June 2022 the first use case of NovA! to help financial institutions assess the sustainability performance of Singapore's real estate sector. NovA!, part of the National Artificial Intelligence (AI) Programme, is aimed at helping financial institutions harness AI to generate insights on financial risk. In the initial phase, the Programme will focus on enhancing financial institutions' ability to assess companies' environmental impacts and identify emerging environmental risks.

iii Voluntary carbon exchange

One of the government's primary methods to achieve Singapore's net-zero goal is through raising carbon taxes.[12] There is thus a need to source credible and high-quality carbon credits and develop well-functioning and regulated carbon markets.

Climate Impact X (CIX) is a Singapore-based global carbon exchange and marketplace that aims to scale the voluntary carbon market. CIX connects an ecosystem of partners, leveraging satellite monitoring, machine learning and blockchain to enhance transparency, integrity and quality of carbon credits. CIX aims to launch the Carbon Exchange in early 2023, and has launched Project Marketplace.

The Carbon Exchange will be a digital platform that enables buyers and suppliers to spot trade large volumes of high-quality credits. The exchange caters primarily to large-scale buyers, including multinational corporations and institutional investors, and will provide the market with price transparency. These contracts will be defined by a set of terms and quality definitions against which carbon credits can be delivered.

Project Marketplace is a digital platform for businesses and carbon project suppliers to list, discover, compare, buy and retire quality carbon credits. It aims to accelerate the corporate sector's ability to take climate action through the provision of verified carbon projects.

In June 2022, CIX and Nasdaq announced a strategic technology partnership that will bring exchange-grade trading functionalities to the voluntary carbon market for the first time, helping to unlock price transparency and liquidity.

11 https://www.mas.gov.sg/news/media-releases/2022/mas-and-google-cloud-launch-point-carbon-zero-programme--to-catalyse-climate-fintech-solutions.

12 The carbon tax will be raised to S$25/tCO2e in 2024 and 2025, and S$45/tCO2e in 2026 and 2027, with a view to reaching S$50-80/tCO2e by 2030.

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iv ESG impact hub

MAS has launched an ESG impact hub (Hub) focused on applying technology to enhance the ESG data ecosystem. The Hub will run a number of ESG accelerators aimed at spurring sustainability-focused innovation and encouraging the development of solutions to plug ESG data gaps. The Hub will host green fintech players and provide a platform for collaboration and experimentation, to help them scale and integrate their solutions with use cases in the financial sector and real economy.

IX CLIMATE CHANGE IMPACT

i Climate change litigation and enforcement actions

There are no reported cases of climate change litigation in the Singapore courts at the date of this edition. A possible reason for this lack of litigation is that (unlike its neighbours in Hong Kong, Malaysia and Australia) Singapore lacks a formal environmental impact assessment (EIA) law requiring development projects to prioritise environmental considerations.[13] At present, individual ministries decide, based on their internal guidelines, whether an EIA is necessary for certain projects.[14] There are also no statutory requirements that such EIAs are published for public review. Without an EIA law in place, there are no formal avenues for the public to commence climate change litigation in the Singapore courts.

Another potential reason for the lack of climate change litigation is procedural. Given that most climate change issues affect the public at large, a climate change action would usually have to be brought via representative proceedings under Order 15 Rule 12 of the Singapore Rules of Court. Such proceedings, however, are rare, as they subject the litigant to many procedural hurdles[15] before an action can be commenced.

While there are currently few publicly disclosed climate change disputes in Singapore, there are nonetheless other avenues to facilitate and enforce Singapore's carbon emissions targets, including through the implementation of various laws and regulations that carry penalties for non-compliance.

The evolving legal and regulatory environment in Singapore might also be a source of potential climate change disputes.

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13 Nidhi Mehra and Lin-Heng Lye, *Environmental Impact Assessment Laws of Malaysia and Hong Kong: Lessons for Singapore in Sustainability Matters*, pages 163–203 (2015). See also https://www.todayonline.com/singapore/govt-agencies-will-consider-posting-future-environmental-impact-studies-online and https://www.lexology.com/library/detail.aspx?g=1eb08f82-1bf4-48a3-9868-9590269af222.

14 See, for instance, Section 36(1)(a) of the Environmental Protection and Management Act, which gives the Director-General of Environmental Protection the discretion to 'require any person intending to carry out any activity that, in the opinion of the Director-General, is likely to cause substantial pollution of the environment . . . to carry out a study on environmental pollution control and related matter'.

15 For instance, the representative claimant will have to ensure that all of the members of the class of claimants is identified and that they have the consent of each member. Whether the action is allowed to proceed is also subject to the Singapore court's discretion. The court must be persuaded that it is appropriate for the case to proceed, having regard to certain factors such as whether the defendant would be disadvantaged by having to defend against a collective action and cost considerations.

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Carbon tax

Under the carbon tax policy, businesses producing annual carbon emissions of at least 25,000 tCO2e[16] are required to register their business as a taxable facility and to fulfil the annual reporting requirements via an emissions data monitoring and analysis system. Any failure to meet these carbon tax obligations may result in fines and even imprisonment, depending on the severity of the violation.[17] The increase in the carbon tax may lead to more carbon trading to offset carbon emissions, which could, in turn, lead to contractual disputes over issues such as, inter alia, commodity non-delivery, and breaches of covenants and warranties.

Climate reporting and disclosure requirements

As discussed in Sections V and VI, MAS has issued various environmental risk management guidelines across banking, insurance and asset management. Both MAS and SGX also set out roadmaps for mandatory and 'legally binding' climate-related financial disclosures by financial institutions and listed entities under a phased approach in consultation with the industry. The implementation of mandatory climate reporting may potentially lead to more climate litigation in relation to inadequate disclosures and breaches of directors' duties.

Hydrofluorocarbon mitigation measures

Hydrofluorocarbons (HFCs) are greenhouse gases commonly used as refrigerants in commercial and residential refrigeration and air-conditioning applications. In 2019, Singapore's National Environment Agency introduced measures to reduce such emissions by implementing licensing controls on HFCs aimed at establishing a better national consumption baseline level. Recent amendments to the Environmental Protection and Management Act, passed in 2022, will also provide additional regulatory enforcement powers to existing initiatives to control the release of HFCs.

ii Arbitrating climate disputes

As the number of renewable investments grows in Southeast Asia, more international commercial disputes will likely arise out of such investments. Parties in the region routinely include contractual clauses requiring arbitration of disputes in Singapore. Renewable investments in the region made through Singapore-incorporated companies could also lead to more investor-state arbitrations being commenced in the island-state in response to changes in governmental environmental regulations (whether to further climate goals or to scale down climate-related regulations under pressure from interest groups), which, in turn, might lead to issues such as expropriation without compensation and unfair and inequitable treatment.[18]

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16 This threshold effectively covers approximately 80 per cent of Singapore's carbon emissions. See https://unfccc.int/sites/default/files/resource/Singapore%20Country%20Report%20final.pdf.

17 See, generally, Part 8 of the CPA. See further https://unfccc.int/sites/default/files/resource/Singapore%20Country%20Report%20final.pdf.

18 Mark Mangan and Lukas Lim (Dechert LLP), 'Protecting Investments in Carbon Credits through Investment Treaties', *Oil, Gas & Energy Law Intelligence* Volume 20, Issue 4 (June 2022).

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X OUTLOOK AND CONCLUSIONS

The general trend on sustainable finance regulation appears to be a gradual shift from voluntary measures to greater regulatory intervention and stronger enforcement action by regulators.

As Singapore aspires to be a leading centre for green and sustainable finance both in Asia and globally, the government and its regulators will likely continue to develop policies and regulations reflecting that ambition. The government will implement the Singapore Taxonomy, which will be complemented by more developed regulations, frameworks and standards that aim, among other things, to prevent greenwashing and improve investor confidence in the sustainable finance market. MAS and SGX will also continue to enhance environmental and climate-related disclosure standards to promote market transparency.

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Chapter 9

SPAIN

Jesús Sedano Lorenzo and Luis Villar González[1]

I INTRODUCTION

The fight against climate change entails a number of important challenges for both society and the economy. Reaching the targets set out by international, European and national instruments requires the economy to become carbon neutral. To this end, the financial system is crucial to reorient capital flows towards more sustainable economic activities and in developing sustainable financing instruments to transform the economy. Sustainable finance aims at incorporating environmental, social and governance elements into business management and investment decision-making.

The framework for climate action in Spain follows both the commitments assumed under the Paris Agreement (ratified by Spain on 22 April 2016) and the European Union's energy and climate policy. Thus, Spain is committed to limit global warming to well below 2°C, and is following the path of the European Union and its European Green Deal, which aims to make Europe the first climate-neutral continent by 2050. The greenhouse gas emissions reduction target at a European level has been recently revised to 55 per cent by 2030, compared to 1990 levels. The European Commission has presented the Fit for 55 package, which is a set of proposals to revise and update EU legislation on climate and energy with the aim of ensuring the climate goals.

In this context, Parliament passed Law No. 7/2021 of 20 May, on Climate Change and Energy Transition (Climate Change Act), which aims, among other objectives, to ensure Spain's compliance with the objectives of the Paris Agreement, and has introduced relevant sustainable disclosure requirements. Even though Spain has been promoting conditions to encourage sustainable economic development at least since Law 2/2011, of 4 March, on Sustainable Economy, sustainable finance has gained more momentum in recent years, as a clear trend to reallocate resources towards sustainable investments can be identified in the market. In parallel, a reverse trend is underway aimed at cutting the financing of projects that are not sustainable. Therefore, a legal framework is being developed (at an international, European and domestic level) that is accompanying this tendency, which ultimately aims to secure the transition to a carbon neutral economy by 2050.

To allocate resources to genuinely sustainable projects, it is necessary to standardise criteria and provide transparency. Environmental taxonomy has thus become a crucial factor that enables a classification system and the unification of criteria on activities, assets or revenue segments that deliver on environmental objectives.

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II YEAR IN REVIEW

In recent years, and following the launch of the European Commission's sustainable finance action plan (SFAP) in 2018, the European Union has issued a number of regulations on sustainable finances (which are identified in the following section) that are directly applicable to operators of the Spanish market. To implement such EU regulations properly, in June 2021, the national supervisory body, the Spanish National Securities Market Commission, issued a guidance document, providing criteria on the application of EU sustainability regulations to financial products in Spain.

At a national level, the Climate Change Act has established a general framework to promote sustainable investments, which includes some reporting obligations for financial operators. Its provisions will be further developed in the coming years. As a preliminary step, the Ministry of Economic Affairs and Digital Transformation is currently preparing a national plan for sustainable finances. The strategic objectives of this plan are:

a to ensure the transformation of the public and private financial sector towards a model aligned with climate neutrality, while preserving its viability and financial stability;
b to improve the competitiveness of the Spanish financial sector; and
c to redirect capital flows towards a low carbon and more sustainable investment economy.

This plan is expected to include actions such as the regulatory development on sustainable finance provisions of the Climate Change Act.

A relevant milestone of the past year has been the implementation of the green bond programme of Spain, which led to the issuance of a 21-year, €5 billion green bond by the Treasury in September 2021. Following this issuance, the government is promoting the issuance of green bonds by private institutions.

III REGULATION AND POLICY

i Governance regime

Spain is a party to all relevant international treaties, such as the UNFCCC, the Kyoto Protocol and the Paris Agreement. Spain is also an EU Member State. Therefore, the Spanish internal regulations are highly influenced by international and European regulations and objectives.

The SFAP's main aim is to reorient capital flows towards more sustainable economic activities, promoting the transformation of the productive sector into a more environmentally sustainable one. The SFAP is being implemented through a series of EU regulations on sustainable finance on:

a taxonomy;[2]
b sustainability benchmarks;[3] and

2 Regulation (EU) No. 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment.
3 Regulation (EU) No. 2019/2089 of 27 November 2019 amending Regulation (EU) No. 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and Sustainability-related Disclosures for Benchmarks.

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c disclosure obligations for financial market participants and advisers,[4] and financial entities, listed and unlisted companies and large unlisted companies,[5] as regards corporate sustainability reporting

Since the ratification by Spain of the Paris Agreement on 22 April 2016, a number of regulatory initiatives have been developed to integrate environmental, social and governance considerations into investment decision-making, with the ultimate goal of transitioning to a low-carbon, circular and sustainable economy. The main regulations containing provisions on sustainable finances are:

a Law No. 7/2021, of 20 May, on Climate Change and Energy Transition. This Law plays a pivotal role in the Spanish legal system with respect to the fight against climate change. From a cross-cutting approach, it provides the regulatory framework to ensure compliance with the aim of decarbonisation of the Spanish economy by 2050.

b Law No. 11/2018, of 28 December, amending the Commercial Code, the Consolidated Text of the Law on Corporations, and Law on Audit of Accounts, with regard to non-financial information and diversity.[6]

c Law No. 2/2011, of 4 March, on Sustainable Economy (as amended, in particular, by Royal Decree-Law No. 36/2020, of 30 December).

i Regulators

The Spanish finance market is subject to supervision by different international regulators. Some of the most active fora are the Network for Greening the Financial System (which comprises 100 members) and the Basel Committee on Banking Supervision. At an EU level, the main regulators are the European Commission and the European Central Bank.

Besides international regulators, the main national supervisors are the Ministry of Economic Affairs and Digital Transformation, the Spanish National Securities Market Commission, the Bank of Spain, the Directorate General of Insurance and Pension Funds and the Climate Change Office. All these institutions collaborate and have competences in the field of sustainable finance.

IV SUSTAINABLE FINANCE INSTRUMENTS

Spain is committed under the Paris Agreement to bring 'finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development' (Article 2.1.(c)). To this end, the country is designing the legal framework to promote sustainable investment, enabling capital flows to be reallocated towards sustainable and inclusive growth. The Climate Change Act lays the foundations to do so.

4 Regulation (EU) No. 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

5 Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No. 537/2014.

6 Which transposes Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

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In particular, the government is working on a national sustainable finance plan (see Section II). Among other actions, the draft of the plan foresees the creation of a mixed investment fund (public and private) for the financing of sustainable projects, or the adaptation of the financial system to the use of the taxonomy of sustainable finance.

While such provisions are being developed, as previously mentioned, in September 2021, the Treasury issued a 21-year, €5 billion green bond, the first sovereign green bond of Spain. This issuance proved very successful with investors, and is aimed at financing sustainable positions in the national budget. Alongside it, the national government recognises that it will not be able to mobilise the levels of investment required to decarbonise the economy on its own, and is encouraging private sector participation in the issuance of green bonds.

Apart from green bonds, additional financing instruments are already in place.

In 2009, the carbon fund for sustainable economy (FES-CO2) was created as a climate finance instrument. Among other actions, it acquires carbon credits, preferentially on energy efficiency, renewable energy and waste management projects. Its specific rules are regulated in Royal Decree No. 1494/2011, of 24 October, which regulates the carbon fund for a sustainable economy.

Similarly, the ecological restoration and resilience fund was created in 2020. This fund aims to support, mainly through the award of public subsidies, actions in the areas of water, coasts, climate change and pollution prevention as part of the recovery, transformation and resilience plan (implementation in Spain of the NextGenerationEU recovery plan). The fund was created through Royal Decree-Law No. 6/2020 of 30 December, approving urgent measures for the modernisation of the public administration and for the implementation of the recovery, transformation and resilience plan.

The Spanish National Promotional Bank (ICO) provides direct financing to sustainable projects. The ICO has been accredited by the European Commission to manage funds from the Invest EU programme for the period 2021–2027 (which plans to allocate €26.2 billion in guarantees in all Member States).

On the other hand, in order to comply with Spain's international climate finance commitments, the Climate Change Act also requires the national government to:

a develop a plan for the entire Spanish public sector to divest holdings or financial instruments in companies or entities whose business activity includes the extraction, refining or processing of fossil energy products; and

b establish an international climate finance strategy (to date, not yet implemented).

Within the framework of green financing, social and governance aspects are also taken into consideration in order to achieve a just transition. One of the major objectives of the Climate Change Act is, indeed, to promote adaptation to the impacts of climate change and the implementation of a sustainable development model that generates decent employment and contributes to the reduction of inequalities.

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

i Sustainability-related disclosures in financial services

Being part of the European Union, and with the ultimate aim of mobilising capital in the financial sector towards more sustainable entities, EU No. Regulation 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related

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disclosures in the financial services sector applies to financial market participants and advisers in Spain. It provides harmonised transparency rules in investment and advisory decision-making processes.

Financial market participants must communicate to investors how they have considered sustainability objectives (in environmental and social terms) in their investment decision-making. Emphasis should be placed on a pre-contractual duty of disclosure, which includes a description of how sustainability risks are integrated into investment decisions and the results of the assessment of the potential impact of sustainability risks on the profitability of the financial products they offer. In addition, a clear and reasoned explanation of how the financial product has considered the main adverse impacts on sustainability factors should also be provided.

ii EU taxonomy for sustainable activities

The proper allocation of funds towards sustainable projects demands the development of a classification system, establishing a list of environmentally sustainable economic activities. To this end, Action 7 of the European Commission's SFAP on financing sustainable growth (March 2018) identified a need to clarify the obligations of institutional investors and asset managers in relation to sustainability factors.

This requirement resulted in the Taxonomy Regulation,[7] which governs taxonomy for environmentally sustainable economic activities, as it provides for a common language and a clear definition of what 'sustainable' is. Taxonomy is a classification system that provides economic operators with unified standards and criteria to consider certain economic activities and investments as environmentally sustainable.

In addition, this EU Regulation obliges financial market participants (asset managers, institutional investors, entities offering certain financial products, among others) to publish how they consider sustainability factors and risks in their strategies and investment decisions.

VI ESG DATA AND REPORTING

i Disclosure of environmental matters on the non-financial statement of the annual accounts

The Spanish legal system does not contain specific regulations on the environmental matters related with their activity that companies must disclose. Certain companies are obliged to disclose information on environmental matters to be included in their annual accounts.

In particular, companies obligated to prepare a non-financial statement (NFS) as part of the management report of the annual accounts must include significant information on environmental issues. A company shall prepare the NFS (either consolidated at a group level, or individual):

a if the number of employees exceeds 250; and

b the company is classified as a public interest entity in accordance with THE Law on Audit of Accounts, or for two consecutive financial years the company's total assets are greater than €20 million or the net annual turnover exceeds €40 million.

7 Regulation (EU) No. 2020/852.

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According to Article 49.6.I of the Commercial Code (approved by Royal Decree of 22 August 1885), such information shall be:

a the current and foreseeable effects of the company's activities on the environment and, where appropriate, on health and safety;
b the environmental assessment or certification procedures;
c the resources assigned to the prevention of environmental risks;
d the application of the precautionary principle; and
e the amount of provisions and guarantees covering environmental risks.

In addition, specific information concerning the following areas must also be provided:

a Emissions: measures taken to prevent, reduce or remediate carbon emissions that have a significant impact on the environment; any kind of atmospheric pollution from an activity must be considered.
b Circular economy and waste prevention and management: waste prevention, recycling and reuse measures adopted, and other forms of waste recovery and disposal implemented.
c Sustainable use of resources: water usage and water supply in accordance with local constraints; consumption of raw materials and measures taken to improve the efficiency of their use; direct and indirect energy consumption, measures taken to improve energy efficiency and the use of renewable energies.
d Climate change: the significant factors of greenhouse gas emissions generated as a result of the company's activities, including the use of the goods and services it produces; the measures taken to adapt to the consequences of climate change; the reduction targets voluntarily set in the medium and long term to reduce greenhouse gas emissions and the measures implemented to this end.
e Biodiversity protection: measures taken to preserve or restore biodiversity; impact caused by activities or operations in protected areas.

ii Report on the financial impact assessment of the risks associated with climate change for the company

Article 32 of Law No. 7/2021 of 20 May, on Climate Change and Energy Efficiency has introduced an obligation for certain companies to submit, as part of their non-financial reporting obligations, an annual report assessing the financial impact on the company of the risks associated with climate change caused by the exposure of its activity to climate change, including the risks of the transition to a sustainable economy and the measures adopted to address these financial risks.

The following companies must report on the financial impact of the risks associated with climate change on the company:

a Companies issuing securities admitted to trading on regulated markets that prepare consolidated annual accounts, as well as those that are not part of a consolidable group and have the obligation to include either a consolidated or an individual NFS in the management report.
b Consolidated groups of credit institutions and credit institutions not included in one of these consolidated groups subject to the supervisory regime of the Banco de España and the European Central Bank, in accordance with the provisions of Regulation (EU) No. 1024/2013.

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c Consolidated groups of insurance and reinsurance companies, and insurance and reinsurance companies that are not part of one of these groups, are subject to the supervisory regime of the Directorate General of Insurance and Pension Funds.

d Companies preparing consolidated accounts, and companies that do not form part of a consolidable group (other than those referred to in the previous sections) that have the obligation to include either a consolidated or an individual NFS in the management report.

Companies must provide, at least, the following information in the annual report:

a The governance structure of the company, including the role of its different bodies, in relation to the identification, assessment and management of risks and opportunities related to climate change.

b The strategic approach, in terms of both adaptation and mitigation, of the entities to manage the financial risks associated with climate change, taking into account the risks already existing at the time of writing the report, and those that may arise in the future, identifying the actions required at that time to mitigate such risks.

c The actual and potential impacts of climate change risks and opportunities on the company's activities and strategy, as well as on its financial planning.

d The processes for identifying, assessing, monitoring and managing climate-related risks and how these are integrated into its overall business risk analysis and their integration into the company's overall risk management.

e The metrics, scenarios and targets used to assess and manage the relevant risks and opportunities related to climate change and, if calculated, the scope 1, 2 and 3 of its carbon footprint and how its reduction is addressed.

iii Integration of climate change risk into the financial and energy system

Finally, the Climate Change Act also establishes obligations for supervisors regarding the correlation between climate risk management, long-term value creation and market performance. According to Article 33, the Bank of Spain, the Spanish National Securities Market Commission and the Directorate General for Insurance and Pension Funds, within the scope of their respective areas of competence, shall jointly prepare, every two years, a report on the assessment of the risk to the Spanish financial system arising from climate change and the policies to fight it.

VII SUSTAINABLE FINANCE INCENTIVES

On a general basis, the Climate Change Act establishes, among other things, a general regime for the allocation of public resources to the fight against climate change. By virtue thereof, a percentage of the general state budget, equivalent at least to that agreed in the multiannual financial framework of the European Union, must support the objectives regarding climate change and energy transition. This percentage will be revised upwards by the government before 2025.

The Climate Change Act also includes a series of incentives in relation to public procurement, including the inclusion in the specific administrative clauses of award criteria linked to the fight against climate change and of specific technical conditions setting out the necessary reduction of emissions and carbon footprint.

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Finally, the Climate Change Act foresees a tax reform that will assess green taxation. However, due to the rise of energy prices, the government has decided to postpone such reform.

In addition to the foregoing, Spain is part of the EU trade scheme under EU Directive 2003/87/EC implemented in Spain by means of Law 1/2005, of 9 March, governing the greenhouse gas emissions trading scheme. According to this law, obliged parties must obtain a greenhouse gas emission authorisation, which is granted by the autonomous regions, and deliver on an annual basis greenhouse gas emission allowances per each equivalent tonne of carbon dioxide emitted. The current trading period (phase IV) started in January 2021 and will expire on 31 December 2030.

According to the Climate Change Act, revenues from the auctioning of greenhouse gas emission allowances will be used to meet climate change and energy transition goals. The general state budget will allocate at least €450 million each year to finance the costs of the electricity system provided for in the Electricity Sector Act, regarding promotion of renewable energies. Up to 30 per cent of the total revenue may be allocated to measures with social impact to alleviate situations caused by the transition to a decarbonised economy or related to vulnerability to the impacts of climate change.

In 2020, in response to the covid-19 pandemic, the European Council agreed on the exceptional recovery instrument known as NextGenerationEU to address the economic and social consequences of the pandemic. This economic support will be used to promote a green, digital and resilient recovery of the economy, as the pandemic is an extraordinary opportunity to promote ecological transition and the fight against climate change.

The aforementioned regime is completed by several national strategies and plans supporting the fight against climate change and the ecological transition. The most relevant strategies are the just transition strategy, the national climate change adaptation plan 2021–2030, the national integrated energy and climate plan 2021–2030 and the long-term decarbonisation strategy, which sets out a pathway to achieve climate neutrality by 2050.

VIII GREEN TECHNOLOGY

As part of the Spanish recovery, transformation and resilience plan's objective of transforming the Spanish economy, several strategic projects (PERTE) have been approved, among them, a PERTE for renewable energy, renewable hydrogen and storage. In addition, the Ministry for Ecological Transition and the Demographic Challenge is focusing on boosting green hydrogen projects in different regions of the country, and has approved an incentive programme for pioneering and unique renewable hydrogen projects (H2 PIONEERS programme).

The Ministry for Ecological Transition and the Demographic Challenge is also supporting investments in other sustainable technologies, such as green methanol production plants.

IX CLIMATE CHANGE IMPACT

As already mentioned, the Climate Change Act has been recently approved. This law sets the following legally binding targets for 2030:

a reducing greenhouse gas emissions by 23 per cent compared to 1990 levels;
b 42 per cent of final energy consumption coming from renewable energy sources;
c achieve an electricity system with at least 74 per cent of generation from renewable energy sources; and

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d improve energy efficiency by reducing primary energy consumption by at least 39.5 per cent compared to the baseline in accordance with EU legislation.

It is still too early to assess the success in meeting these objectives.

To comply with the information objectives assumed under the Paris Agreement and other international and EU regulations, in accordance with the Climate Change Act, the Ministry for Ecological Transition and the Demographic Challenge, in collaboration with other ministerial departments and the autonomous regions, shall prepare and publish reports, at least every five years, on the evolution of the impacts and risks derived from climate change and on the policies and measures aimed at increasing resilience and reducing vulnerability to climate change in Spain.

X OUTLOOK AND CONCLUSIONS

Spain has made the fight against climate change one of its core priorities and is committed to financing more sustainable activities and projects. As already mentioned, the Climate Change Act has recently been passed. While this law has laid the foundations for the regulation of sustainable finance and contains some directly applicable obligations, its provisions on sustainable finance are awaiting further regulatory implementation in the coming years. Therefore, standards on sustainable finance are mainly provided by EU law at the moment, although there have been specific internal developments in the area of non-financial reporting.

The authorities and the Spanish market are taking steps to implement a comprehensive legal regime, which encourages and reorients investments towards sustainable projects, with the ultimate aim of ensuring the transition to a carbon-neutral society and economy.

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Chapter 10

UNITED KINGDOM

Anna-Marie Slot and Eileen Kelly[1]

I INTRODUCTION

The United Kingdom (UK) has been an early leader in its commitment to transitioning to a low-carbon economy. In 2019, the UK became the first major economy to commit in law to net zero greenhouse gas emissions by 2050. The government took this commitment further in 2021, setting into law the world's most ambitious climate change target of cutting emissions by 78 per cent compared with 1990 levels by 2035.[2] Achieving these targets will require a transformation of the entire economy, with a significant shift in investment towards sustainable projects and green technology. Demand for such investment is high, with 70 per cent of the UK public wanting their money to go towards making a positive difference to people's lives or the planet.[3]

Although the UK financial markets are beginning to respond to the demand for sustainable investment, raising more than £100 billion in green finance from 2017 to 2021 across bond, equity and loan markets, the levels of investment fell well short of what is required to meet the UK's net zero commitment by 2050.[4] According to the UK Climate Change Committee, approximately £190 billion of green investment annually will be required to meet the UK's net zero goal, or an increase of approximately 450 per cent on green investment levels seen in 2021.[5]

The government has implemented a number of initiatives to highlight the importance of the financial markets supporting the transition to a low-carbon economy and to encourage increased investment towards net zero. In 2019, it published the Green Finance Strategy, which sets out two key lines of effort aimed at aligning UK financial flows with a low-carbon world: 'greening finance', or supporting the financial services sector to align with the UK's net-zero commitment and wider environmental goals; and 'financing green', or mobilising private finance at scale to support clean and resilient growth. The government is now seeking to build on these foundations with a three-phase approach to delivering on the green finance strategy, with an initial focus on addressing the information gap for market participants and ensuring that investors are provided with consistent, meaningful and comparative data

1 Anna-Marie Slot is a partner and Eileen Kelly is a senior associate at Ashurst LLP.
2 HM government, 'Greening Finance: A Roadmap to Sustainable Investing', October 2021, p. 6.
3 HM government, 'Investing in a Better World: Understanding the UK public's demand for opportunities to invest in the Sustainable Development Goals', p. 7.
4 Christopher Breen, 'A Reality Check on Green Finance in the UK: Analysis of the Size, Growth & Penetration of Green Finance in Capital Markets in the UK', July 2022, p. 5.
5 id.

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regarding environmental sustainability. Implementing sustainability disclosure requirements (SDRs) across the economy and developing a UK Green Taxonomy to ensure consistency across sustainability reporting will be central to these efforts.

II YEAR IN REVIEW

2021 has been the most active year on record for sustainable finance across a number of indicators, with the market responding to the growing climate emergency. The value of green finance raised in the UK financial markets has increased significantly over the past five years to £44 billion in 2021, which represents an increase of more than 500 per cent since 2017.[6] Approximately half of green finance activity comprises issuances of labelled green bonds (that is, bonds with a green use of proceeds, also referred to as use of proceeds bonds). Despite the significant increase in activity, green finance still represents only a small proportion of financial markets activity in the UK, estimated to be just 9 per cent of financial markets activity across bond, equity and loan markets in 2021.[7]

Debt markets, primarily green bonds, account for the vast majority of the market in green finance in the UK. Debt markets accounted for approximately 98 per cent of all green finance in the UK in 2021, comprising roughly 75 per cent green bonds and 25 per cent green loans. In 2021, issuances of labelled green bonds raised approximately £32 billion in the UK, representing a nearly 700 per cent increase on the previous year. A significant portion (more than two-thirds) of the increase is accounted for by the government's debut £19 billion green gilt issuance. Over the past five years, the penetration of green finance has been highest in the bond market, where it represents 12 per cent of all bond issuances in the UK, compared with 7 per cent in the loan market and only 2 per cent in the equity market.[8]

The UK lags behind the European Union (EU) in green finance. Despite representing over 20 per cent of all financial markets activity in Europe over the past five years, UK issuers account for only 14 per cent of all green finance in European financial markets over the same period. Green finance accounted for approximately 5 per cent of all financial markets activity in the UK over the past five years, roughly half of the amount in the EU.[9]

The levels of investment in sustainable finance in 2021 fell well short of the amount required for the government, corporates and financial institutions to meet their net zero targets. The estimated annual investment required to support the UK's net zero commitment is approximately £190 billion, almost twice the amount that has been raised over the past five years.[10] Key elements in scaling up the rate of investment in green finance will include more transparency and clarity about definitions of green finance, use of proceeds and companies' adoption of transition plans, each of which forms part of the initial phase of the government's Greening Finance Strategy.

6 Breen, p. 3. This figure excludes other categories of ESG financial products such as sustainability, sustainability-linked or social loans and bonds.

7 id.

8 Breen, p. 7.

9 Breen, p. 3.

10 Breen, p. 5.

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III REGULATION AND POLICY

Although the UK is committed in law to achieving net zero by 2050, current frameworks in relation to sustainable finance and ESG reporting are primarily voluntary. The government's Green Finance Strategy, published in 2019, seeks to build a regulatory framework and establish mandatory guidelines for green labelling, sustainability reporting and taxonomies in order to provide investors with more clarity regarding green finance. The Green Finance Strategy will be delivered in three phases:

a phase 1: focused on addressing the information gap for investors and consumers;

b phase 2: focused on creating requirements for sustainability information to be incorporated into business and financial decisions; and

c phase 3: focused on aligning financial flows across the economy with the UK's net zero commitment.

The government is currently focusing on delivering phase 1, with a number of initiatives having been proposed or implemented to address the availability, quality and consistency of information about sustainability for investors. These initiatives include, among others, implementing SDRs across the economy incrementally, and delivering a UK Green Taxonomy that is fit for purpose and useful as a marketing tool.

IV SUSTAINABLE FINANCE INSTRUMENTS

The term sustainable finance is generally used to refer to a range of financial products connected to ESG-related aims, which include green, social, sustainable and sustainability-linked financial products, as set out below.

Types of sustainable finance instruments

Green	Financial instruments whose proceeds are used exclusively to finance or refinance green projects or projects with clear environmental benefits. Also referred to as 'labelled green' products or 'use of proceeds' products.
Social	Financial instruments whose proceeds are used exclusively to finance or refinance eligible social projects, as defined by the relevant international standards.
Sustainable	Financial instruments whose proceeds are used exclusively to finance or refinance any combination of eligible green and social projects, as defined by the relevant international standards.
Sustainability-linked	Forward-looking performance-based financial instruments in which the issuer commits to future improvements in sustainability outcomes within a predefined timeline, in accordance with relevant international standards. These instruments typically include a financial penalty, such as an interest rate step-up, if the issuer fails to meet the sustainability target within the predefined timeline.

Green finance remains the largest area of sustainable finance globally, with green bonds constituting approximately 41 per cent of all sustainability-related bond issuances in 2020, followed by social bonds at 30 per cent and sustainability bonds at 24 per cent. The value of green finance in the UK financial markets rose significantly from 2017 levels to a total value of £44 billion in 2021. A large portion of that activity, approximately £31 billion, comprised labelled green bond issuances, in large part driven by the £19 billion green gilt issuance by the government in 2021. Although the green gilt issuance pushed up the proportion of green finance issued by government entities in 2021, over the past five years corporate issuers have accounted for the majority of green finance, representing an average of 61 per cent of all issuances and reaching a peak of 90 per cent in 2019. Although the share of the market being driven by government and financial sector issuers is increasing, corporate

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activity remains the most constant driver of growth in the UK's green finance market.[11] During the same period, £40 billion of sustainability-linked loans were issued in the UK, of which approximately £6 billion could also be considered green finance based on the use of proceeds.[12] The sustainable finance market is continually evolving as new products are developed, including products such as green derivatives and green trade finance.

Green bonds remain the primary instrument for raising green finance in the UK, accounting for nearly £49 billion in issuances over the past five years. Green bond issuances increased by nearly 700 per cent in the UK in 2021, accounting for almost the entirety of the increase in green finance in the UK overall and again driven primarily by the government's green gilt issuance. In January 2021, the London Stock Exchange's Sustainable Bond Market (a sustainable finance platform launched in 2019 and designed to enhance disclosure and increase visibility and access for investors in green, social and sustainability-linked bonds) was home to over 250 bonds.[13] The green loan market raised approximately £11 billion in 2021, a decrease of almost 10 per cent compared with 2020. Prior to 2021, green loan issuance had been the primary capital raising method in the green finance market, yet in 2021 green loans' share of the market fell from nearly three-quarters to only one-quarter. Green equity issuances, which remain a very small proportion of the market, represented approximately £1 billion in issuances in 2021.[14]

Green finance is not solely composed of financing with an explicitly green use of proceeds but also includes any financing raised by companies whose primary activity is addressing climate change or supporting the transition to clean energy and net zero, such as renewable energy firms. Over the past five years, these companies are estimated to have raised an additional £35 billion (adjusted so as not to double-count issuances of labelled green bonds or loans with green use of proceeds), representing approximately 33 per cent of all green finance. Trailing behind these financings are loans with green use of proceeds, which represent approximately 21 per cent of the green financing market over the past five years, or approximately £22 billion. Green venture capital, or investment in smaller companies that are focused on developing clean energy or other activities to address climate change, is the smallest component of the green finance market, representing approximately 1 per cent of green finance over the past five years.[15]

Despite the strong and increasing activity in the green finance market in the UK, green finance still represents a relatively small share of all UK financial markets activity. Green capital raising rose to 9 per cent of all financial markets activity in the UK in 2021, more than doubling the penetration of 4 per cent in 2020. Penetration remains highest in the bond market, where labelled green bonds make up approximately 9 per cent of all corporate bond issuances. Green loans make up approximately 7 per cent of the overall loan market, and green financing in the equity and venture capital markets accounts for only 2 per cent and 1 per cent, respectively.[16] Although penetration of green financing in the overall financial markets

11 Breen, p. 12.

12 Breen, p. 14.

13 London Stock Exchange Sustainable Bond Market Factsheet, 19 February 2021. The Sustainable Bond Market is not a distinct primary market but a label applied across various segments of the London Stock Exchange's existing primary markets in order to promote visibility of sustainable debt finance instruments.

14 Breen, p. 7.

15 Breen, p. 8.

16 Breen, p. 9.

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is increasing, it remains low, signifying that much remains to be done to match companies' stated ambitions to support the transition to a low-carbon economy and to enable the UK to achieve its net zero commitment.

Another way to look at the penetration of green finance in the UK financial markets is to analyse the proportion of capital raised by 'good' and 'bad' companies. In the report 'A Reality Check on Green Finance in the UK: Analysis of the Size, Growth & Penetration of Green Finance in Capital Markets in the UK', Christopher Breen of New Financial LLP demonstrates that the £36 billion raised by good companies (defined as companies whose primary activity is to help address climate change and accelerate the transition to clean energy and net zero) in the UK financial markets over the past five years is dwarfed by the £302 billion raised by bad companies (defined as companies whose main activity plays a significant role in causing the problems of climate change or delaying the transition to clean energy and net zero (including companies in the oil and gas and mining sectors, companies in the Climate Action 100+ list of the largest polluters in the world and companies whose business description includes references to bad activities from a climate perspective).[17] For much of the past five years, every pound raised by a good company was offset by nearly 10 pounds raised by a bad company, although this ratio decreased to 6:1 in 2021. Overall, green finance represents only 4 per cent of the overall funding of bad companies over the past five years. When considering the types of finance raised by good and bad companies, the differences remain stark: good companies account for over half (55 per cent) of all green financing by UK corporates over the past five years, with bad companies driving only 17 per cent of green financing over the same period. Green finance accounted for only 5 per cent of all financial markets activity by bad companies in 2021.[18] These figures illustrate that significant progress must be made to encourage the most carbon-intensive businesses to reduce their impact on the climate.

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

i SDRs

Various government and regulatory bodies have already taken steps towards formalising disclosure requirements and guidelines regarding green finance. In November 2020, the Chancellor of the Exchequer announced that the UK intends to make disclosures aligned with the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) mandatory across the UK economy by 2025. In December 2021, the Financial Conduct Authority (FCA) finalised its TCFD-aligned disclosure rules for UK premium-listed companies, and in June 2021 began consulting on proposals to extend those disclosure rules to standard-listed issuers and to require UK-authorised asset managers, life insurers and pension providers to publish client-focused TCFD-aligned disclosures. In his Mansion House speech in July 2021, the Chancellor of the Exchequer announced new SDRs that will build on the UK's TCFD implementation and will cover three types of disclosure:

a Corporate disclosure: new requirements will be put in place for companies, including those in the financial sector, to make sustainability disclosures. Subject to consultation, these requirements will comprise reporting under proposed international standards

17 Breen, p. 10.

18 Breen, p. 11.

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currently being developed by the International Sustainability Standards Board (ISSB) and reporting of environmental impact using the UK Green Taxonomy (discussed in more detail below).

b Asset manager and asset owner disclosure: SDRs will also apply to asset managers and asset owners that manage or administer assets on behalf of clients and consumers, including occupational pension schemes, and will require them to disclose how they take sustainability into account. This disclosure will assist consumers in determining whether their assets are managed in accordance with their sustainability preferences.

c Investment product disclosure: SDRs will require the creators of investment products to report on the products' sustainability impact and relevant financial risks and opportunities. This information will form the basis of a new sustainability labelling regime that seeks to simplify classification of investment products for consumers.[19]

The ISSB is currently consulting on a draft climate-related international disclosure standard, which will eventually expand to include broader environmental and sustainability factors. The government expects that the ISSB standards will form a core component of the SDR framework and, to this end, intends to create a mechanism to adopt and endorse ISSB-issued standards for use in the UK. The current expectation is that the standards issued by the ISSB, and therefore integrated into the SDRs, will build on the four pillars of climate-related financial disclosure as developed by the TCFD: governance, strategy, risk management, and metrics and targets. The SDRs will also go further in requiring disclosure against the UK's Green Taxonomy. In particular, asset managers and owners and developers of investment products will be required to substantiate their ESG claims in a way that is accessible to clients and consumers and that allows them to compare one product with another. They will also be required to disclose whether and how they take ESG-related matters into account in their governance arrangements, investment policies and strategies. Additionally, the SDRs will require disclosure against minimum safeguards relating to good business practice.

TCFD-aligned disclosures are required for financial years beginning on or after 1 January 2021 for premium-listed issuers, on or after 1 January 2022 for standard-listed issuers and larger firms (i.e., those with more than £50 billion in assets under management for asset managers, or £25 billion in assets under administration for asset owners) and on or after 1 January 2023 for firms with assets that are under management or administration and that are greater than £5 billion. The UK has committed to make disclosures aligned with TCFD disclosures mandatory across the economy by 2025, with most requirements in place by 2023. In the lead up to mandatory reporting, the government recommends that organisations seeking to report on forward-looking financial risks and opportunities arising from climate change should consider reporting in line with the TCFD recommendations on a voluntary basis. The FCA has a huge focus on transparency and has placed TCFD recommendations at the heart of its work on climate-related disclosures.

19 Greening Finance, p. 11.

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The framework of the UK SDRs

	Corporates	Asset managers/owners	Investment products
Governance	Governance in relation to sustainability-related risks, opportunities and impacts	Governance in relation to sustainability-related risks, opportunities and impacts, and the implications for investment policies, strategies and outcomes	Governance in relation to sustainability-related risks, opportunities and impacts, and the implications for investment products
Strategy	Actual and potential implications of sustainability-related risks, opportunities and impacts for the organisation's businesses, strategy and financial planning	Actual and potential implications of sustainability-related risks, opportunities and impacts for the organisation's investment policies, strategies and outcomes	Actual and potential implications of sustainability-related risks, opportunities and impacts for investment outcomes
Risk management	Processes used to identify, assess and manage sustainability-related risks, opportunities and impacts	Processes used to identify, assess and manage sustainability-related risks, opportunities and impacts, and the implications for the organisation's investment policies, strategies and outcomes	Processes used to identify, assess and manage sustainability-related risks, opportunities and impacts at product level
Metrics and targets	Metrics and targets used to assess and manage relevant sustainability-related risks, opportunities and impacts Performance against targets Taxonomy alignment and relevant supporting information	Metrics and targets used to assess and manage relevant sustainability-related risks, opportunities and impacts, and implications for the organisation's investment policies, strategies and outcomes Performance against targets (where relevant) Taxonomy alignment and relevant supporting information based on underlying investments	Product-level metrics and performance indicators on sustainability-related risks, opportunities and impacts Performance against targets (where relevant) Product-level Taxonomy alignment and relevant supporting information based on underlying investments

Source: Greening Finance, p. 14.

ii Transition plans

SDRs will also include disclosures on any published transition plan outlining the actions and targets in a firm's transition to a low-carbon economy. Initially, certain firms in the UK will be required to either publish transition plans that align with the government's net zero commitment or explain why they have not done so. Although no standard template regarding transition plans has yet been adopted, certain guidelines are emerging, such as those provided by the TCFD and groups such as Climate Action 100+ and the Institutional Investors Group on Climate Change, as well as best practice guidance for financial sector transition strategies being developed by the Glasgow Financial Alliance for Net Zero (GFANZ). As additional standards emerge and coalesce, the government and regulators will look to incorporate these standards into UK regulation and strengthen disclosure requirements as appropriate, with a view to encouraging consistency and comparability and supporting more widespread adoption.

iii UK Green Taxonomy

To combat greenwashing and provide more consistent and comparative information to support investor decisions, the government is implementing a UK Green Taxonomy (Taxonomy), which will clearly set out the criteria that specific economic activities must meet to be considered environmentally sustainable and therefore Taxonomy-aligned. Reporting against the Taxonomy will form part of the SDRs. Certain companies will be required to

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disclose what proportion of their activities is Taxonomy-aligned, and providers of investment funds and products will have to do the same for the assets they invest in. The goals of the Taxonomy are to:

- *a* create clarity and consistency for investors: investors will be able to easily compare the environmental performance and impact of companies and investment funds to inform their financial decisions;
- *b* improve understanding of companies' environmental impact: Taxonomy disclosures will facilitate an understanding of a companys' contribution to environmental sustainability; and
- *c* provide a reference point for companies. The Taxonomy will provide companies with an informative performance target. For example, companies can also, on a voluntary basis, use the Taxonomy to develop and communicate their net zero transition and capital investment plans.

The Taxonomy has six environmental objectives:

- *a* climate change mitigation;
- *b* climate change adaptation;
- *c* sustainable use and protection of water and marine resources;
- *d* transition to a circular economy;
- *e* pollution prevention and control; and
- *f* protection and restoration of biodiversity and ecosystems.

Each of these objectives will be underpinned by a detailed set of standards known as technical screening criteria (TSC). Each economic activity included in the Taxonomy will have an individual TSC that identifies how that activity can make a substantial contribution to the environmental objective. To be considered Taxonomy-aligned, an activity must meet three tests:

- *a* it makes a substantial contribution to one of the six environmental objectives;
- *b* it does no significant harm to the other objectives; and
- *c* it meets a set of minimum safeguards.

Taxonomy alignment will be based on reported data, rather than projections, in order to provide a clear picture of the areas in which a company is currently making a substantial contribution to environmental objectives. The Taxonomy also allows for recognition of companies that, while not currently conducting their business in a way that is aligned with net zero ambitions due to technological constraints, are engaged in transitional activities (such as aligning with best-in-sector emissions levels), or are investing capital expenditure in activities that are Taxonomy-aligned, or both. The Taxonomy will also recognise enabling activities, which support contributions to environmental objectives but are not yet sustainable themselves (such as the manufacture of components for wind turbines).

VI ESG DATA AND REPORTING

Despite movement across the UK regulatory structure to implement a suite of reporting requirements regarding ESG, standards in relation to raising green finance remain primarily voluntary. Labelled green bonds and loans are often aligned with the ICMA Green Bond Principles or the Loan Market Association (LMA) Green Loan Principles, as relevant, which

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are voluntary standards built upon four pillars: use of proceeds, process for evaluation and selection of eligible projects, management of proceeds and reporting. Similar standards exist for sustainability-linked social and sustainable loans and bonds. Although issuers of green finance often choose to report against these principles, such reporting is not currently mandatory, and investors generally have no recourse against issuers that do not use proceeds as anticipated, fail to achieve sustainability targets or fail to provide a particular level of ongoing disclosure. Many sustainable finance issuers also rely on second party opinions, which are obtained from third-party ESG ratings organisations to confirm the alignment of the issuer's relevant sustainable financing principles with the ICMA or LMA standards, or to confirm the alignment of the particular issuance with the issuer's sustainable financing principles, or both. Currently, these ESG ratings organisations are not regulated, and there are no standard guidelines on the level of diligence required to deliver such opinions. In its Greening Finance sustainability roadmap, the government indicated that it is considering bringing ESG ratings providers within the scope of FCA authorisation and regulation, a proposal that is supported by the FCA. Further detail is expected by the end of 2022.

VII SUSTAINABLE FINANCE INCENTIVES

The FCA is considering regulatory incentives for sustainable finance instruments or for the financing of activities aligned with the Paris Agreement and the UN Sustainable Development Goals.

A market-led transition will require that listed companies and regulated firms have the right incentives, tools and organisational arrangements in place to set and pursue effective ESG strategies, including transition plans aligned with the government's net zero targets. A number of market-led initiatives have developed in the UK to support companies and financial institutions in their independent efforts towards sustainability and to coordinate these efforts across the economy. For instance, the Green Finance Institute (GFI) was established in 2019 as a public and private sector coalition of global financial industry experts that is focused on designing, developing and launching portfolios of scalable financial solutions that accelerate sector-specific transitions to a low-carbon economy. GFANZ was launched in April 2021 to unite net zero financial sector-specific alliances from around the world in one industry-wide strategic alliance and provides a forum for leading financial institutions to accelerate the transition to a net zero global economy. GFANZ currently has more than 450 member firms from across the global financial sector, representing more than US$130 trillion in assets under management and advice. GFANZ focuses on three core areas: net zero transition planning for financial institutions, mobilising capital towards emerging markets and developing economies and net zero public policy.

VIII GREEN TECHNOLOGY

Data and artificial intelligence have the potential to provide solutions to ESG concerns, from combating greenwashing to expanding access to a wider range of financial products. To this end, the FCA and the City of London Corporation have collaborated to develop the Digital Sandbox, a platform that provides innovators with access to data in the quantity and quality needed to develop algorithms, and it acts as a crossroads bringing together various elements of the financial services ecosystem. The second phase of the Digital Sandbox ran from November 2021 to March 2022 and focused on tech solutions in the area of ESG data

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and disclosures, particularly with regard to transparency of sustainability reporting on supply chains, automating and validating ESG data and improving consumers' understanding of a product's ESG characteristics. The UK's efforts to leverage technology to support the growth of the green finance industry is in line with broader G20 efforts through its Sustainable Finance Study Group to explore opportunities to better leverage digital technologies for financing sustainable development.

IX CLIMATE CHANGE IMPACT

The expansion of ESG regulatory frameworks together with regulators' increasing focus on policing disclosures is likely to result in an increase in the number of firms being pursued for greenwashing claims. The government's Greening Finance roadmap defines greenwashing as 'when misleading or unsubstantiated claims about environmental performance are made by businesses or investment funds about their products or activities'. Greenwashing can make it very difficult for investors to determine the actual impact of their investments, undermining trust in the green finance market and leading to misallocation of capital intended for sustainable investment. According to Schroders Institutional Investor Study 2021, greenwashing was the most frequently cited concern among respondents, with 59 per cent of investors raising it as the biggest challenge to investing sustainably.[20] In July 2021, the FCA published a 'dear chair' letter addressed to authorised fund managers following a number of applications for authorisation of ESG-focused investment funds that the FCA described as 'poor quality' and '[falling] below our expectations'.[21] The dear chair letter provided a number of guiding principles to support the existing regulatory framework in the FCA Handbook (e.g., that communications are clean, fair and not misleading), including the overarching principle that a 'fund's focus on ESG/sustainability should be reflected consistently in its name, stated objectives, its documented investment policy and strategy, and its holdings'.[22] Following the publication of this letter, in December 2021 the FCA published a policy statement (PS21/24) containing final rules and guidance for a climate-related disclosure regime for FCA-authorised asset managers and owners.[23]

The introduction of SDRs and the UK Green Taxonomy are intended in part to address the perception of greenwashing in the green finance market and to reduce the risk arising from misleading statements, and regulatory bodies across the UK have indicated their intention to enforce these and other guidelines. For instance, in the FCA's policy statement published in December 2021, it noted that: '[s]upervision will act reactively where needed and start carrying out work to assess firms' implementation of the rules once the first disclosures are published in 2023. Enforcement could consider taking action if firms failed to make disclosures or if these were misleading/constituted serious misconduct.'[24] Increased regulatory action in other markets provides an indication of what might be expected in the UK once stricter disclosure regimes come into force. For example, in January 2020 Italian

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20 Schroders Institutional Investor Study 2021, available at https://www.schroders.com/en/uk/pensions/insights/institutional-investor-study-2021/sustainability/.

21 https://www.fca.org.uk/news/news-stories/guiding-principles-on-design-delivery-disclosure-esg-sustainable-investment-funds.

22 id.

23 https://www.fca.org.uk/publication/policy/ps21-24.pdf.

24 id.

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energy company ENI was fined €5 million by Italian regulatory authorities for false claims related to its 'green' diesel, and in the United States the Securities and Exchange Commission has formed the SEC Climate and ESG Task Force to 'develop initiatives to proactively identify ESG-related misconduct' and to 'identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules'.[25]

In the UK, ClientEarth (a Shell plc shareholder) is in the process of bringing a claim in the English courts against Shell's board for its perceived failure to 'adopt and implement a climate strategy that truly aligns with the Paris Agreement'.[26] The claim is understood to be proceeding as a derivative action. Firms may also find themselves at risk of securities claims under Sections 90 or 90A of the Financial Services and Markets Act 2000 arising from false or misleading ESG-related statements and disclosures. Such claims may become more likely if regulators begin to levy fines against firms with insufficient or misleading ESG disclosures, or if publicity around such enforcement impacts public companies' share prices and investors are able to demonstrate that they relied on the statements in question and that such statements caused identifiable losses. Other trends in the UK litigation market, such as the rise in collective (or class) actions and the growing availability of third-party litigation funding, may also contribute to a rise in ESG-related litigation.

X OUTLOOK AND CONCLUSIONS

The timeline below sets out key milestones in the UK's sustainable finance legislation and regulation.

Date	Action
2022	Government is to publish information about potentially bringing ESG data and ratings providers within the scope of FCA authorisation and regulation
2022	Prudential Regulation Authority (PRA) will switch its supervisory approach on its climate-related supervisory expectations from one of assessing implementation to actively supervising entities' ongoing progress against such expectations
2022	PRA and Bank of England will begin undertaking work on enhancements to regulatory capital frameworks to support efforts to address climate change
2022	FCA is to: *a* engage with stakeholders on transition plans, focusing on governance and the content and disclosure of transition plans *b* focus on and challenge fund managers' responses to its dear chair letter and its guiding principles for the design, delivery and disclosure of ESG investment products *c* engage with stakeholders on whether its regulatory regime sets the right expectations and incentives across the ESG spectrum *d* engage with stakeholders on developing its policy approach to ESG governance, remuneration, incentives and training in regulated firms
2022	Government to consult on climate change mitigation and climate change adaptation criteria under the UK Green Taxonomy
Q3/Q4 2022	FCA intends to consult on introducing ESG disclosures for MiFID investment firms as part of the Investment Firms Prudential Regime
Autumn 2022	FCA intends to publish a feedback statement and consultation paper following its discussion paper on the SDRs and product labels
Q4 2022	PRA intends to publish a report on the use of capital and climate change

25 https://www.sec.gov/news/press-release/2021-42.

26 https://www.clientearth.org/latest/press-office/press/clientearth-starts-legal-action-against-shell-s-board-over-mismanagement-of-climate-risk/.

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Date	Action
End 2022	Government intends to legislate on climate change mitigation and climate change adaptation criteria under the UK Green Taxonomy
End 2022	Transition Plan Taskforce to publish a consultation on transition plans, with a view to finalisation in early 2023
End 2022	Updated Green Finance Strategy expected to be published
2023	Government expects firms to start publishing transition plans
Q1 2023	Government to consult on expanding climate criteria and the remaining four environmental objectives under the UK Green Taxonomy
30 June 2023	Deadline for making first public disclosures under FCA's climate-related disclosure regime
End 2023	Government to assess the progress made by the UK's pensions and investment sectors towards stronger stewardship

The key market challenges in the UK include:

a Small overall market share: green finance represents a very small proportion of overall UK financial markets activity.

b Funds not being used to transition: companies in industries such as fossil fuels are not using raised funds to invest in transition.

c Slow transition in the equity markets: the debt markets are becoming greener but the equity markets have been much slower to transition.

d Greenwashing: marketing spin that highlights a company's sustainability credentials in a potentially misleading way.

e Expectations versus reality: no amount of green financing will solve the problem unless companies, the government and financial institutions are clear about what exactly they are doing to meet their public commitments to reduce their impact and reach net zero.

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Chapter 11

UNITED STATES

J Paul Forrester and Jennifer Kratochvil[1]

I INTRODUCTION

In the United States, at the current time a company's decision to engage in sustainable finance is voluntary. Companies consider the reputational and financial benefits for doing a sustainable finance transaction when deciding whether to enter or participate in the market. There are industry guidelines for green, social and sustainable bonds and loans and sustainability-linked bonds (SLBs) and loans, as published by the International Capital Markets Association (ICMA) and the Loan Syndications and Trading Association (LSTA). While these are just that – guidelines – they are increasingly being viewed in the US sustainable finance market as standards or expectations. In addition to market practices and guidelines, the federal government has recently introduced rules and regulations specifically related to ESG matters, but until those rules are formalised, existing securities laws will continue to govern sustainable finance.

Recent trends in sustainable finance in the United States are primarily driven by the current political environment, with certain lawmakers moving forward to regulate and promote sustainable finance and climate change initiatives and certain other lawmakers taking steps to restrict ESG investments and penalise market participants that disfavour companies that do not engage in positive climate transition steps. The current political environment has resulted in increased scrutiny of ESG investments and sustainable finance products, resulting in an optimistic, but cautious, mood for sustainable finance investors and issuers.

II YEAR IN REVIEW

The year 2022 saw both developments and setbacks in the sustainable finance market in the United States. The most significant development was the announcement of various proposed Securities and Exchange Commission (SEC) rules that may affect sustainable finance, but as further discussed in Section III, those rules have not yet been formalised and are therefore not yet in effect. While 2021 and early 2022 showed increased activity in sustainable finance products, the volume has slowed in 2022, although there continues to be significant market interest, especially in sustainability-linked loans (SLLs) and SLBs. The increased focus on sustainable finance in the political landscape has also resulted in both investors and issuers more carefully evaluating the reputational risks of sustainable finance initiatives.

1 J Paul Forrester and Jennifer Kratochvil are partners at Mayer Brown LLP.

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III REGULATION AND POLICY

In the United States, one of the significant obstacles to moving sustainable finance initiatives forward and addressing climate change issues is the tension between federal initiatives and state and local government statutes and policies. While the federal government under the Biden Administration is working to advance ESG-related enforcement and disclosure initiatives, certain states are passing various 'anti-ESG' legislation for their states. This section discusses the regulatory landscape related to ESG matters at the federal level as well as challenges at the state level.

i Federal government

On 4 March 2021, the SEC launched the Climate and ESG Task Force within the Division of Enforcement (Task Force). Its aim is to 'develop initiatives to proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment'.[2] The Task Force is 'using sophisticated data analysis to mine and assess information for registrants, to identify potential violations including material gaps or misstatements in issuers' disclosure of climate risks under existing rules, and disclosure and compliance issues relating to investment advisers' and funds' ESG strategies'.[3] The Task Force has brought several actions against companies for alleged violations that have been the subject of wide attention and further focused attention on related reputational risks.

Under existing laws, the applicable reporting requirements fall into two categories: reporting requirements for issuers and reporting requirements for investment advisers and investment companies.

Reporting requirements for issuers

For issuers, disclosure requirements for SEC registrants are currently principles-based with some specific line item disclosure requirements based on materiality. If something is material to a company, the company needs to disclose it, but companies have some flexibility to determine what is material and what is disclosed. ESG-related information is disclosed in the same way that other information is disclosed, which is based on that principles-based materiality disclosure standard. SEC registrants are also subject to the 2010 Commission Guidance Regarding Disclosure Related to Climate Change,[4] which specifies that certain disclosures may not be explicitly referenced in Regulation S-K, but disclosure is required if it is material. For example, the business description, legal proceedings, risk factors, and management's discussion and analysis may need to discuss climate change if it is material for a particular company. In 2022, the SEC staff sent comment letters to SEC registrants based on this guidance.

The SEC has also made new disclosure proposals, which would shift reporting requirements to prescriptive disclosure for certain ESG-related matters instead of the

2 Securities and Exchange Commission, Spotlight on Enforcement Task Force Focused on Climate and ESG Issues: https://www.sec.gov/spotlight/enforcement-task-force-focused-climate-esg-issues.

3 id.

4 Securities and Exchange Commission, Commission Guidance Regarding Disclosure Related to Climate Change (2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf.

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principles-based requirements with the goal of achieving consistent and comparable disclosure among SEC registrants. These proposals are discussed below, but at this time, they are proposed rules that have not been finalised and made effective.

SEC Climate Change Disclosure Rules

On 21 March 2022, the SEC issued the SEC Climate Change Disclosure Rules,[5] a 490-page set of proposed rules that would require extensive reporting by public companies of climate change-related disclosures and expand reporting beyond the current materiality standard. The proposed rule draws many aspects of reporting requirements from the Task Force on Climate-Related Financial Disclosures (TCFD). Among other things in the proposed Rule, public companies would be required to report:

a direct greenhouse gas (GHG) emissions (Scope 1) and indirect GHG emissions from purchased electricity and other forms of energy (Scope 2); and

b indirect emissions from upstream and downstream activities in a company's value chain (Scope 3), if material, or if the company has set a GHG emissions target or goal that includes Scope 3 emissions.

Among the SEC's proposed rules is a change to Regulation S-X that would require companies to include climate-related disclosures in a note to their audited financial statements, including climate-related impacts on line items in their financial statements. Since this climate-related information would be part of a company's audited financial statements, it would be subject to audit by the company's auditors. The financial statement disclosures would also require the company to include reporting on activities the company is undertaking to mitigate the impact of climate change, such as GHG emission reductions. The proposed rules also include changes to Regulation S-K that require climate change reporting outside the financial statements, including with respect to corporate governance oversight as it relates to climate change. In addition to board oversight, companies would need to disclose management's role in assessing and managing climate change risks. There are a number of other reporting requirements that companies will need to complete under the proposed SEC rules. The comment period for the proposed SEC rules initially ended on 20 May 2022, but was subsequently extended to 17 June 2022 and, due to a technical glitch, was further extended to 1 November 2022. While the comment period has ended, around 16,000 comment letters were submitted, and as of today, the SEC has not issued the formal climate-related disclosure rules. The SEC frequently changes rules from the initial drafts following the comment period, so it remains unclear what the final rules will be as well as the timeline for implementing those rules.

Reporting requirements for investment advisers and investment companies

Currently, asset managers are required to disclose material information about a fund to investors and potential investors. Investment companies are also subject to Rule 35d-1 under the Investment Company Act of 1940 (commonly referred to as the Names Rule),[6] which prohibits investment companies from using materially deceptive or misleading names. Currently, if a registered investment company's name suggests that it makes investments of a

5 Securities and Exchange Commission, The Enhancement and Standardization of Climate-Related Disclosures for Investors (2022), https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

6 17 CFR § 270.35d-1.

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certain type, under the Names Rule, the company must invest at least 80 per cent of the value of its assets in investments of that type. Neither of these rules is specific to ESG reporting, but the SEC has proposed two new rules related to asset managers and funds that specifically relate to ESG, each of which is further described below.

ESG Disclosure Proposal

On 25 May 2022, the SEC announced the ESG Disclosure Proposal, which is a proposed rule that would require enhanced disclosure by investment funds and advisers regarding ESG.[7] The proposed rule would require investment funds and advisers that claim to consider ESG factors to disclose in their prospectuses and annual reports the ESG factors they consider as well as their strategies, specific ESG criteria and data. It would also require certain ESG funds to disclose ESG metrics they consider such that a fund that considers GHG emissions in its investment decisions would have to disclose the GHG emissions of the companies in its portfolio. The proposed rule provides for a standard table for ESG funds to disclose information, which would allow investors to more easily and efficiently compare data across ESG funds.

The amount and type of disclosure by funds and advisers varies depending on the degree to which ESG factors into the fund's strategy. The proposal identifies three types of funds:

a integration funds, which incorporate both ESG and non-ESG factors in their investment decisions, would be required to disclose how ESG plays a role in their investment criteria;

b ESG-focused funds, for which ESG factors are a significant focus of their investment decisions, would be required to submit detailed disclosures, including information about their strategies, impacts they are pursuing and any inclusionary or exclusionary screens they are using; and

c impact funds, which are a subset of ESG-focused funds, and pursue a specific ESG-related impact, would be required to disclose how they measure progress and a summary of progress toward achieving their stated ESG goals.

The comment period for these proposed rules ended on 16 August 2022, and final rules have not yet been issued.

Proposal to amend the Names Rule

The SEC has also proposed changes to the Names Rule.[8] As it currently exists, the Names Rule requires certain funds to invest 80 per cent of their assets in investments that align with the name of the fund. The proposed changes to the Names Rule would amend it so that it applies to funds that have names that imply the fund focuses on investments that have certain characteristics. A fund that has 'ESG', or any other ESG-related term, in its name would be subject to the Rule because inclusion of such terms in the name suggests that the fund makes decisions based on ESG factors. Under the proposal, funds would have to define the terms

7 Securities and Exchange Commission, Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices (2022), https://www.sec.gov/rules/proposed/2022/ia-6034.pdf.

8 Securities and Exchange Commission, Investment Company Names (2022), https://www.sec.gov/rules/proposed/2022/33-11067.pdf.

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used in their names; a fund that uses ESG factors, along with other non-ESG factors, where the ESG factors are not relied on more heavily than the non-ESG factors, would not be able to use 'ESG' in its name.

In addition to the SEC's proposed rules and formation of the Task Force, in 2021 the SEC announced an 'all agency' focus on ESG, including in the SEC's Division of Examinations. Various other federal agencies have made statements or taken other actions demonstrating the Biden administration's commitment to addressing climate change. For example, in September 2022, the board of governors of the Federal Reserve System announced that it would conduct a climate scenario analysis exercise with six of the largest US banking organisations, and in June 2022, the US Commodity Futures Trading Commission released a request for information on how climate-related financial risk is related to the derivatives markets and underlying commodities markets.

ii State government

States also enact ESG-related legislation, and the recent trend in some state governments is anti-ESG initiatives. For example, a Texas statute was recently passed that prohibits state investment in financial companies that do not invest in certain energy companies based on ESG metrics.[9] In Florida, a proposed law would prevent state fund managers from considering ESG factors when investing state money; such fund managers would only be allowed to invest state funds with the goal of 'maximizing financial return', thereby making profit the only measure for analysing investments. Other states are also seeking to limit or prohibit ESG considerations when investing state funds. Those states include Texas, Oklahoma, Kentucky, Ohio, Arizona, Idaho and West Virginia. The bills passed in these states are representative of the different types of anti-ESG legislation taking hold in some parts of the United States. That legislation generally takes three forms:

a Legislation that prohibits state agencies from doing business with financial companies that do not invest in certain industries for environmental, social or governance reasons. This legislation often focuses on industries that are important to a particular state's economy, such as fossil fuel production, mining and certain types of agriculture. States justify this legislation on the basis that their citizens are harmed by the non-investment in an industry that makes up a substantial part of a state's economy.

b Legislation that prohibits use of a state's funds for environmental and social investments, in which people who enter into contracts on behalf of the state or invest funds on behalf of state entities (such as pension funds) are prohibited from doing so with companies that are deemed to 'discriminate' against certain companies because of ESG concerns.

c States sometimes achieve anti-ESG legislation by passing laws or regulations that specify that a state agency can only make investment decisions for the purposes of maximising returns, which would prevent a state agency from making an investment decision based on ESG factors.

Attorneys general in some states have also taken action against certain banks to investigate antitrust and consumer protection law violations arising from those banks' involvement in the United Nations' Net-Zero Banking Alliance. Kentucky was among the states that joined

9 Tex. Gov't Code Sec. 809.051.

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that action, and in response to the action of the Kentucky attorney general, the Kentucky Bankers Association sued the Kentucky attorney general in state court alleging that the attorney general exceeded his authority in making these investigative demands of banks.

The full impact of state anti-ESG measures has yet to be seen, but the anti-ESG wave creates uncertainty as to whether meaningful change can be achieved through sustainable finance in the United States.

IV SUSTAINABLE FINANCE INSTRUMENTS

In the United States, green, social and sustainable bonds and loans, and SLBs and SLLs are supported. The key defining feature of a green, social or sustainable bond or loan is that the proceeds must be used for green, social or sustainable projects. In contrast, SLLs and SLBs do not have to be used for a specific 'green' purpose. Instead, SLLs and SLBs are used to incentivise the borrower to achieve certain predetermined sustainability goals. Green, social and sustainable loans and bonds are also expected to meet certain criteria with respect to project evaluation and selection, management and reporting of the use of proceeds. On the other hand, SLBs and SLLs should include key-performance indicators (KPIs) and sustainability performance targets (SPTs) consistent with the Sustainability-Linked Loan Principles (SLLPs) published by the APLMA, LMA and LSTA. The SLLPs specify that KPIs should be 'relevant, core and material to the borrower's overall business' and should be measurable on a consistent basis. The SPTs should be ambitious, which means that they should 'represent a material improvement in the respective KPIs and beyond a "business as usual" trajectory'. When determining KPIs and SPTs, lenders and borrowers face a challenge of ensuring that the KPIs and SPTs remain ambitious for the borrower following a change in the borrower's circumstances, such as following an acquisition or a divestiture, or after a change in law. If a change in law results in the SPTs being the same as the minimum required by law, lenders and borrowers alike should consider whether those SPTs need to be modified, since at that point they are arguably not ambitious. Similarly, lenders should also consider whether the loan documents should include a mechanism for adjusting the SPTs following a material acquisition or divestiture since that acquisition or divestiture could allow the borrower to more easily meet its SPTs than had initially been intended, resulting in the ongoing metrics not being at the intended level of ambitiousness.

Since SLLs and SLBs do not finance a specific green project, lenders and investors in SLLs and SLBs face increasing scrutiny with respect to the loans they are making and whether they are truly moving the needle to advance companies' green initiatives or whether they constitute greenwashing. In SLBs and SLLs, the issuer or the borrower receives a financial incentive for achieving its SPTs with respect to the selected KPIs. To avoid claims of greenwashing, it is increasingly important for lenders to ensure that the KPIs that are selected are material and relevant to the borrower and are sufficient in number to incentivise meaningful change by the borrower. Similarly, the SPTs need to be ambitious and meaningful. When lenders agree to make an SLL, they should be performing diligence on the borrower's business, ESG policies and strategies and reporting, while giving special consideration to the borrower's locations and the nature of the borrower's business. Another key question related to SLLs and SLBs is whether the financial incentive for meeting the SPTs is sufficient to cause the borrower to change its practices and become more green. If the KPIs and SPTs are set

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at levels that the borrower can achieve while maintaining business as usual and the financial incentive for making ESG-related changes is not significant for that particular borrower, lenders, as well as borrowers, put themselves at risk for claims of greenwashing.

Another key distinguishing feature of SLBs and SLLs as compared to green bonds and green loans is reporting. Whereas green loans and green bonds require specific reporting as to the use of proceeds for the project, SLLs and SLBs have a more general reporting requirement as to the KPIs and SPTs that should be determined prior to making the loan. Discrepancies in reporting requirements among a company's reports to its lenders, its offering documents, its marketing materials and its corporate sustainability reports can also lead to claims of greenwashing. As scrutiny of SLLs and SLBs increases, it is especially important to ensure that reporting requirements are consistent not just for an individual company but also across all borrowers to ensure SLLs and SLBs that are offered are based on consistent and comparable data. Recently, the LSTA has been working to provide resources to harmonise ESG reporting and diligence questions to achieve the goal of consistent and comparable reporting, particularly with respect to private companies whose ESG strategies and progress are not as widely reported as for public companies and who will also not be subject to enhanced SEC disclosure rules (once those rules are finalised). For lenders and investors, being able to access similar data across borrowers will be especially important as those lenders and investors face heightened reporting requirements with respect to their ESG loans and investments.

In addition to sustainability loan products, social bonds and social loans are also being offered in the United States, although the market for social and governance-focused loan products has not developed as quickly.

V SUSTAINABLE DISCLOSURE REQUIREMENTS AND TAXONOMY

The United States has not adopted the Task Force on Climate-related Financial Disclosures (TCFD) framework, although the proposed SEC Climate Change Disclosure Rules discussed above are similar in many ways to the TCFD. As noted above, at this time, however, those rules are only proposed rules and are not yet in effect. The United States has also not adopted a specific taxonomy for ESG-related disclosures. One of the challenges to adopting a taxonomy in the United States are the multiple federal and state agencies that issue rules and regulations governing disclosures by market participants and the agencies that oversee and take enforcement actions against market participants. Adoption of a uniform taxonomy will require coordination among those agencies.

VI ESG DATA AND REPORTING

As discussed above, the SEC has proposed rules that would require reporting related to sustainable investments, but there are not yet formalised ESG reporting rules related to sustainable investments. ESG data reporting requirements for public companies or for ESG funds, other than the general existing reporting rules and regulations, do not yet exist. Coverage of Scope 1, 2 and 3 level emissions in reporting is not yet required.

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VII SUSTAINABLE FINANCE INCENTIVES

The federal government does not currently offer incentives for general sustainable finance investments (there are some targeted incentives for certain renewable energy and energy transition investments, including carbon capture, sequestration and utilisation, hydrogen and offshore wind). Thus far, those incentives are offered in the private market, such as the interest rate reductions available if the SPTs are met in SLLs.

VIII GREEN TECHNOLOGY

There is currently debate as to the extent to which emerging technologies should be included in sustainable finance investments. As the market expands and a taxonomy for sustainable finance in the United States is developed, there may be greater clarity as to the degree to which emerging technologies, such as hydrogen, ammonia and carbon trading, are influencing sustainable finance.

IX CLIMATE CHANGE IMPACT

As discussed in Section III, the SEC Division of Enforcement formed the Task Force in March 2021. The formation of the Task Force was a significant step by the SEC toward ensuring that representations in offering materials and other statements by companies, funds and investment advisers are accurate and reflect the actual nature of the ESG investment products. As the proposed rules discussed above have not yet been formalised, the Task Force is currently identifying disclosure and compliance issues related to ESG investments under the SEC's existing rules. There have been a few notable enforcement actions taken by the Task Force in the past few years.

In April 2022, the SEC brought an enforcement action against Vale SA, a Brazilian mining company, alleging material misstatements about dam safety. The SEC's complaint was filed in the US District Court for the Eastern District of New York. It charged Vale with violating antifraud and reporting provisions of the federal securities laws and sought injunctive relief, disgorgement plus prejudgment interest and civil penalties. The complaint alleged that, beginning in 2016, Vale 'deliberately manipulated multiple dam safety audits; obtained numerous fraudulent stability declarations; and regularly and intentionally misled local governments, communities, and investors about the dam's integrity'[10] through Vale's ESG disclosures as well as its SEC regulatory filings. While, ultimately, the Vale enforcement action is about alleged fraud, there is an environmental and social angle that the SEC highlights in its complaint. This case underscores the SEC's attention to ESG disclosures, both in required public filings as well as in voluntary corporate sustainability reports.

In May 2022, the SEC announced that it had charged 'BNY Mellon Investment Adviser, Inc. for misstatements and omissions about Environmental, Social, and Governance (ESG) considerations in making investment decisions for certain mutual funds that it

10 Securities and Exchange Commission (2022), Complaint, https://www.sec.gov/litigation/complaints/2022/comp-pr2022-72.pdf.

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managed'.[11] The SEC's order found that despite BNY Mellon Investment Adviser's statements that all of the investments in the relevant funds had been subject to an ESG quality review, multiple investments in those funds had not undergone the ESG quality review. BNY Mellon Investment Adviser agreed to pay a US$1.5 million penalty to settle the charges. In the SEC's press release announcing the charges, Adam S Aderton, co-chief of the SEC Enforcement Division's Asset Management Unit and a member of the Task Force, said 'As this action illustrates, the Commission will hold investment advisers accountable when they do not accurately describe their incorporation of ESG factors into their investment selection process'.[12]

These SEC enforcement actions demonstrate that the Task Force is working to identify misstatements and omissions related to ESG disclosures and is willing to take actions when it identifies material issues. As noted above, these enforcement actions were based on existing securities rules and regulations. If the SEC's proposed ESG Disclosure Proposal and SEC Climate Change Disclosure Rules are adopted, they will add to the Task Force's ability to take enforcement actions with respect to ESG matters.

In addition to potential SEC enforcement actions, companies also face ESG-related litigation risks from various stakeholders. The groups of potential stakeholders related to ESG claims is broader than in 'traditional' litigation, which leads to a wider list of potential claimants. Those stakeholders have different goals for the litigation they engage in. Some claimants want to affect a company's ESG-related conduct by encouraging certain behaviours and discouraging others, and other claimants seek to raise awareness of issues. In either instance, the litigation can be expensive and result in significant reputational risk for a company.

X OUTLOOK AND CONCLUSIONS

While there are certainly challenges in the sustainable finance market in the United States, particularly given the current economic and political climate, there is much to be positive about as demand for sustainable finance products remains strong. Scrutiny of sustainable finance products and the related ESG strategies and claims by issuers will continue to increase. However, the market may see greater uniformity in reporting across companies and ESG-related funds following the issuance of the SEC's proposed rules.

11 Securities and Exchange Commission (2022), SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations, https://www.sec.gov/news/press-release/2022-86.

12 id.

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Appendix 1

ABOUT THE AUTHORS

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Ayomide Agbaje is an associate in the firm's banking and finance practice. Her core practice areas include corporate and project finance, project development and banking. She brings a multidisciplinary approach to delivering innovative and commercially sound solutions for clients. She also maintains strong interests in ESG and sustainability practice.

Ayomide is a member of the Nigerian Bar Association.

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Boluwatife Anjola is an associate in the firm's banking and finance practice, with a core practice focus on loan syndication, corporate law, project and corporate finance, and financial technology. Boluwatife advises a wide range of clients, including corporates and domestic and international financial institutions in secured and unsecured finance transactions. Boluwatife

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Laura Archange is a counsel in the finance and capital markets practice of Arendt & Medernach. She specialises in the fields of securitisation, financing and sustainable finance. Laura has significant experience structuring both public and private securitisation transactions and related issuance of debt instruments. She is well versed in credit enhancement mechanisms, and in both Luxembourg securitisation law and EU securitisation legislation. She is a member of the securitisation working groups of the Association of the Luxembourg Fund Industry and the Luxembourg Capital Markets Association. Laura also assists international clients with various types of financing, including real estate and asset finance, with a focus on fund financing. Before honing her financing specialisation, Laura spent three years as part of Arendt & Medernach's investment fund team, where she advised on the set-up, organisation and marketing of Luxembourg investment funds. She recently authored an article entitled 'Subscription Facilities in Luxembourg: Overview of a Decade of Legal Practice', which will soon be published by the Luxembourg Association of Banking Jurists. Laura is also part of the Arendt team that helps credit institutions implement European and Luxembourg environmental, social and governance rules and regulations.

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Seyi Bella is a partner in the firm's corporate, securities and finance group and leads the firm's banking and finance practice. She frequently advises on a diverse range of banking and loan syndication transactions, including secured, unsecured, multi-currency and syndicated lending arrangements, and routinely structures complex financing deals. Seyi has experience advising domestic and international financial institutions, as well as multinationals, on project and corporate financings in various sectors, including financial services, energy, real estate and telecommunications.

Seyi also has experience advising on sustainable finance-type loan syndication and private equity transactions. She has an excellent track record of delivering brilliant and complex solutions for her clients and, in recognition of that, is consistently cited in respected local and international legal directories.

CLARA BOURGI

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Clara Bourgi is a senior associate in the banking and financial services and insurance and reinsurance practices of Arendt & Medernach. She advises financial institutions such as banks, investment firms and other financial sector professionals on regulatory matters, including licensing requirements, organisational and governance requirements, drafting and review of contractual and business documentation and issues pertaining to anti-money laundering and counter-terrorist financing. She has developed an extensive knowledge of environmental, social and governance (ESG) requirements to assist credit institutions in implementing legal

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obligations that have been imposed upon them in that respect, ranging from transparency duties to risk management, conduct of business and product design requirements. She has contributed to a series of training sessions to help clients adapt their day-to-day activities to the ESG regulatory landscape. She specialises in assisting actors of the financial sector in the day-to-day management of complex and cross-border disputes, investigations and litigation. She has developed a special focus on mastering cutting-edge forensic tools to assist clients in navigating regulatory and criminal proceedings, as well as litigation cases. Her expertise further encompasses advising clients in responding to inquiries from authorities, including in the context of international letters rogatory.

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J PAUL FORRESTER

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J Paul Forrester is a Chicago-based corporate and securities partner who founded the firm's ESG group, which currently comprises over 130 lawyers from every office and practice group of the firm. Paul's practice is focused on structured credit, including collateralised loan obligations, energy (including oil and gas, utilities, shipping, refinery and pipeline) financings and project development, and financing (especially concerning renewable energy, industrial, petrochemical, power and transportation projects and infrastructure).

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Rafael José Lopes Gaspar is a partner in Pinheiro Neto's banking and finance and capital markets departments, practising in the São Paulo office. His practice includes domestic and cross-border banking and finance transactions, derivatives, agribusiness finance, mergers and acquisitions, debt restructuring and capital markets transactions. Rafael holds an LLM from the University of California, Berkeley (2016), a certificate in business administration from Insper – Instituto de Ensino e Pesquisa (2013) and a degree in law (LLB) from Pontifical Catholic University of São Paulo (2008). Rafael worked at Clifford Chance as a foreign consultant from 2010 to 2011. He is also recognised as a notable practitioner by *IFLR1000* in equity capital markets, debt capital markets, and banking and finance.

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Bill G Gilliland is a member of Dentons' corporate, securities and M&A practice group. Bill advises power and energy infrastructure companies on capital markets and M&A transactions, as well as board governance generally. Bill is a leader in ESG finance, representing Dentons Canada as a member of the International Capital Markets Association Green Bond Principles since 2014 and also as a member of the CSA Group's technical committee developing the Made in Canada Transition Finance Taxonomy following the 2019 recommendations of the Federal Government's Expert Panel on Sustainable Finance. Bill is a member of the Advisory Council to the Green and Social Bond Principles Executive Committee. Bill's work includes ESG and sustainable finance, including in the areas of green, transition and sustainability bonds. Bill holds the ICD.D designation from the Institute of Corporate Directors and has completed the board oversight of climate change course. Bill is a co-leader of Dentons Canada's Sustainability Committee.

TIMOTHY GOH

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Tim Goh advises clients on a broad range of cross-border corporate and commercial matters, including private equity, venture capital, mergers and acquisitions, restructuring, joint ventures, fund establishment and secondaries.

Mr Goh has worked in the ASEAN region and the Middle East for private equity, venture capital, start-ups, multinational companies, multilateral development banks and development finance institutions, and sovereign funds.

Mr Goh also has experience advising on sustainable finance matters including environmental, social and governance matters, green bonds and green financing, green funds, climate change and sustainability, public and government finance, regulatory compliance, sustainable debt and equity investments in emerging markets.

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DAVID GOOD

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David Good practices in the areas of energy and infrastructure projects and corporate transactions, with a particular focus on the Southeast Asia region. He also has experience representing public and private companies in international arbitrations, and has advised clients across a range of jurisdictions.

Prior to joining Dechert, Mr Good trained and qualified at the London office of an international law firm, and was seconded to the Tokyo headquarters of a global construction and engineering company.

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Dwiti Goyal is an associate at TT&A and has advised clients on domestic and cross-border financing transactions, acquisitions, anti-trust and merger control.

RAHUL GULATI

Talwar Thakore & Associates

Rahul has over 21 years of experience specialising in debt capital markets (consistently rated by *Chambers and Partners*) and structured finance transactions. His experience includes advising issuers and lead managers on international and domestic debt offerings and he has advised on a number of significant financing transactions at TT&A. Rahul also leads the financial regulatory practice at the firm and is recognised as being a trusted adviser to banks and financial institutions.

PHILIPPE HARLES

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Philippe Harles is a counsel in the corporate law, mergers and acquisitions and finance and capital markets practices of Arendt & Medernach. He specialises in corporate projects, advising domestic and global companies, including financial and insurance companies, as well as private equity houses on the structuring of international transactions, private equity investments, corporate reorganisations, mergers and acquisitions and governance matters. He also specialises in capital markets transactions. He has been a member of the Luxembourg Bar since 2014 and joined Arendt & Medernach in the same year. Philippe is involved in the lawyers' community in Luxembourg and abroad. He was treasurer of the Luxembourg Young Bar Association (2014). He currently serves as an officer of the Young Lawyers' Committee of the IBA. He is a lecturer in general company law at the Luxembourg Chamber of Commerce and also a teaching assistant in general corporate law at the University of Luxembourg. He holds a master's degree in law (*licence en droit*) from the Université Libre de Bruxelles (Belgium) and also a master of laws degree (LLM) in corporate and securities law from the London School of Economics (UK). Philippe participated in an exchange programme with Bocconi University.

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Susanne Harris is a partner in the Hong Kong office of Mayer Brown's litigation and dispute resolution practice. Susanne is experienced in commercial disputes and investigations, with a focus on cross-border, compliance advisory and regulatory investigations. She advises corporates and financial institutions on regulatory and enforcement, and governance and compliance issues.

Susanne has conducted internal investigations for financial institutions and acted for financial services clients in SFC, HKMA and other regulatory investigations and enforcement matters. She has advised on a range of issues for banks with a financial crime risk focus, including money laundering and sanctions.

As a litigator, Susanne has advised on disputes concerning banking, tax, shareholder disputes, directors' duties and insolvency-related matters. She has worked for clients from a variety of industry sectors including finance, property, professional services, transportation and retail.

IFLR1000 has named Susanne as a highly regarded lawyer for financial services regulatory (2020–2022). She is also recognised as a future leader – partner in *Who's Who Legal: Investigations* (2019, 2020). *The Legal 500 Asia Pacific* recommended Susanne for cross-border financial services sector investigations (2018) and clients have praised her for being 'very thorough' and 'responsive' (2014). In 2018, Susanne was awarded 'government enforcement/investigations lawyer of the year' by the Asia Legal Awards.

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Hiromi Hattori is a partner at Nagashima Ohno & Tsunematsu. Her main areas of practice are banking and finance, private equity, M&A, acquisition finance and other commercial transactions. She has more than 10 years' experience in both finance and corporate matters. She worked for a global trading company between 2017 and 2018 as a seconded in-house counsel, where she was involved in a variety of cross-border commercial transactions in the oil and gas industry. She is recognised as a 'Next Generation Partner' in *The Legal 500 Asia Pacific 2022* (banking and finance) and in *The Best Lawyers in Japan 2023* (private equity, private funds and venture capital law).

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Eileen Kelly is a senior associate in our finance practice. Eileen's practice focuses on banking and capital markets transactions. She has advised public and private companies, sponsors, lenders and financial institutions on a variety of debt, equity and financing transactions, including sustainable finance transactions, in the United States and Europe.

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Jennifer Kratochvil is a banking and finance partner in the Chicago office. She represents lenders and borrowers in syndicated secured and unsecured lending transactions, letter of credit transactions and other financing transactions. Her experience includes representation of borrowers and lenders in investment-grade credit facilities and secured financings. She is a member of the firm's ESG team, and she has worked on several sustainability-linked loan facilities.

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Tiago Araujo Dias Themudo Lessa is a partner at Pinheiro Neto Advogados and has been a member of the corporate area of the firm since 1997, based in São Paulo. His practice includes banking law (including regulatory, derivatives and foreign exchange matters), corporate law, aviation law, mergers and acquisitions, capital markets, regulation of financial institutions, project finance and agribusiness law. He holds a bachelor's degree in law from Mackenzie Presbyterian University (2000), an LLM in financial markets law from Insper – Instituo de Ensino e Pesquisa (2003) and a certification of introduction to US law from New York University (2008). He worked as a foreign associate at Allen & Overy LLP (New York, 2007–2008). He is a native speaker of Portuguese and is fluent in English.

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Emmanuelle Mousel is a partner in the insurance and reinsurance and banking and financial services practices of Arendt & Medernach. Emmanuelle advises banks, investment firms and other financial sector professionals, as well as payment service providers, insurance and reinsurance undertakings, insurance intermediaries and insurance sector professionals on regulatory, civil, commercial and insolvency law matters. Her areas of special expertise include licensing requirements, mergers and acquisitions, drafting and review of contractual and business documentation, as well as issues pertaining to anti-money laundering and anti-terrorism financing measures. She also advises on questions relating to pension funds. In addition, Emmanuelle assists institutional clients with criminal and regulatory investigations and litigation cases. She has received high praise for her work as an attorney in finance litigation. Emmanuelle has further developed proficient knowledge and expertise in environmental, social and governance matters and regularly advises clients on any requirements deriving therefrom, including disclosure, risk management, product governance as well as organisational and conduct of business rules. Emmanuelle has been a member of the Luxembourg Bar since 2012 and joined Arendt & Medernach in the same year.

ANTOINE PETER

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Antoine Peter is a manager at Arendt. Antoine started his career in 2014 in the banking industry. He held several positions at investment and depositary banks in both France and Luxembourg, acquiring significant knowledge and experience of capital markets and the financial sector as a whole. In 2017, Antoine joined Arendt. He gives regulatory and operational advice to clients in Luxembourg and abroad in the asset management and asset servicing businesses. He also assists clients by providing general compliance support and reviewing operating models related to governance, as well as to investment management, risk management frameworks and valuation models. Specialising in ESG and sustainable finance solutions, Antoine assists clients, among others, with the set-up and implementation of their ESG strategies, the preparation of sustainability-related disclosures and the integration of sustainability risks in internal processes. He is a speaker for the sustainable investment series, a three-module training programme by Arendt Institute. He also participates in the Association of the Luxembourg Fund Industry working groups on responsible investing (RI) and RI fund labels. Antoine holds a master's in corporate finance and financial markets from the University of Strasbourg, and is a graduate of Sciences Po Strasbourg.

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ANTOINE PORTELANGE

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Antoine Portelange is an associate in the investment management practice of Arendt & Medernach where he advises domestic and international clients on the legal, regulatory and corporate aspects of the creation, development and restructuring of Luxembourg investment funds and management entities. He also collaborates with the EU and competition law department. Since October 2019, Antoine has been studying at the Luxembourg Bar in order to become a qualified lawyer in Luxembourg. Before joining Arendt definitively in 2019, he completed an internship in the EU and competition law department of the same firm and an internship in the legal department of the prudential control department of the National Bank of Belgium. Antoine studied law at the University of Liège (Belgium) where he obtained a master's degree in business law, focusing on national and international aspects, with great distinction.

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Jesús A Sedano Lorenzo is counsel in Uría Menéndez's Madrid office. He joined the firm in September 2006 and is a member of the public and environmental law practice areas.

He advises public and private entities on all aspects of public and regulatory law (sanctioning procedures, public procurement, energy, public infrastructure, telecommunications, pharmaceutical and healthcare matters, authorisations and permits, public authority liability, subsidies, public property, historical heritage, etc.) and on all specific aspects of environmental law (such as climate change, pollution prevention and control, natural resources, waste, water, mines and coasts).

He regularly appears before Spain's contentious-administrative courts and the Constitutional Court, and also regularly participates in civil proceedings related to regulatory or environmental matters.

DINO SERAFINI

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Dino Serafini is an associate in the corporate law, mergers and acquisitions practices of Arendt & Medernach. He advises companies on the structuring and implementation of domestic and international transactions, private equity investments, mergers and acquisitions as well as corporate governance matters, including corporate sustainability. Dino has been a member of the Rome (Italy) Bar since 2017 and the Luxembourg Bar (List IV) since 2021, when he joined Arendt & Medernach. He holds a PhD in law from the University of Naples – 'Federico II', with a doctoral thesis on social enterprises and third sector entities and serves as co-chair of the sustainability board of the International Association of Young Lawyers.

WEI NA SIM

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Wei Na Sim is a counsel in the litigation and dispute resolution practice in Mayer Brown's Hong Kong office and a member of the firm's ESG product team. Wei Na advises and acts for companies in litigation, investigations and regulatory enforcement matters, with a focus on

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the financial services industry. Wei Na is experienced with handling independent compliance monitor reviews on financial crime issues conducted on banks in Asia, Europe and the US. Euromoney's *Expert Guides 2022* named Wei Na as a rising star in white-collar crime, Hong Kong.

Prior to moving to Hong Kong, Wei Na practised litigation in Singapore where she advised and represented public listed companies, banks, insurers and financial institution intermediaries in complex commercial disputes and financial services-related matters. Wei Na handled litigation at all levels of the courts of Singapore and represented clients in mediation. Wei Na also advised clients on regulatory matters such as show cause requests from Singapore regulators and requests for evidence from foreign regulators, and advised on customer due diligence requirements, anti-money laundering and confidentiality laws.

ANNA-MARIE SLOT

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Anna-Marie Slot is Ashurst's first global ESG/sustainability partner, appointed in 2019 and global head of high-yield debt. She leads the firm's ESG strategy both internally and for clients. She has delivered a number of significant initiatives including establishing the firm's sustainability goals, co-creating Ashurst's first digital product, ESGReady and launching Ashurst's first podcast channel, ESG Matters@Ashurst, and its first series, '30 for Net Zero 30'. Together with Tara Waters, she co-leads the Fintech Legal Labs powered by Ashurst. Anna-Marie was also named the 'Most Innovative Sustainable Lawyer' at the *Financial Times* Innovative Lawyers Europe Awards 2021.

Anna-Marie has over two decades of finance experience acting for investment banks and companies in a wide range of corporate finance and securities transactions, including high yield debt offerings, sustainable finance, liability management including consents and tender offers, refinancings and numerous securities transactions, such as Rule 144A and Regulation S debt offerings, as well as mezzanine debt investments and senior credit facilities.

MARK UHRYNUK

Mayer Brown

Mark Uhrynuk is a partner of Mayer Brown in the Hong Kong office. Mark represents asset managers, family offices and other investor groups, corporations and financial institutions in a variety of transactional matters. His wide-ranging experience includes private equity and venture capital investment and related financings; cross-border mergers, acquisitions, divestitures, joint ventures and strategic alliances; investment fund matters, including the formation of private equity, infrastructure and real estate funds; and international equity and debt capital markets transactions.

Mark is a key contact point for the ESG initiative within the Mayer Brown network and is a founding member of the firm's ESG steering committee. Mark also co-leads the firm's family office initiative in the region. An active thought leader in these fields, Mark has been widely quoted by the leading media and has authored a number of articles and legal updates on these and related topics.

Mark is qualified as a lawyer and has practised law in Hong Kong, New York and England. According to *IFLR1000* (2021), clients say 'Mark has deep experience in the field. He knows how to get deals done and has years of global practice experience to draw on to

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ensure we are able to see issues from all sides and pick the best path forward.' Mark has been nominated as a highly regarded Hong Kong lawyer by *IFLR1000* for private equity (2018–2022) and mergers and acquisitions (2018–2022).

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Luis Villar is a junior associate in Uría Menéndez's Madrid office. He joined the firm in September 2019 and is a member of the public and environmental law practice areas.

His professional experience primarily includes advising public and private entities on public law matters (such as sanctioning procedures, authorisation and permits, public domain and public subsidies); in particular, on all aspects related to environment law (including climate change, air emissions, water, waste, contaminated soils, protected natural areas, etc.) and urban planning matters.

Luis also advises on administrative and environmental law aspects in M&A transactions involving companies operating industrial and electricity production facilities.

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Dion Yu is a partner of Mayer Brown's banking and finance team in Hong Kong. Dion advises and represents banks and financial institutions in banking finance transactions ranging from bilateral loan transactions to syndicated secured loan financing. Dion has experience in advising loan financing transactions involving real estate investment trusts, private equity funds and asset managers, shares and assets acquisition financing, ESG-related financing, pre-IPO financing, hotel development project financing and other construction and development financing in Hong Kong, the PRC and Macao.

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Appendix 2

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