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# Gibson Dunn Environmental, Social and Governance Update (January 2024)

Client Alert | February 15, 2024

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*We are pleased to provide you with Gibson Dunn's ESG update covering the following key developments during January 2024. Please click on the links below for further details.*

**I. GLOBAL**

1. **More than 300 companies to start reporting impact on nature**

Over 300 companies and financial institutions pledged at Davos to disclose their impact on nature, aiming to mitigate global biodiversity loss. The disclosures, led by the G20-backed Taskforce on Nature-related Financial Disclosures (TNFD), aim to provide more information on the risks and opportunities related to interaction with the natural world. This initiative aligns with the COP15 biodiversity agreement. TNFD's framework, launched in 2023, aims to compel companies to assess and manage nature-related issues.

2. **S&P Dow Jones adds two SDG indices**

S&P Dow Jones Indices has launched the S&P 500 SDG Index and the S&P Global LargeMidCap SDG Index, designed to provide equity exposure to companies aligned with the United Nations' 17 Sustainable Development Goals (SDGs). These indices utilize data from Impact Cubed to measure external impacts on society and the environment, independent of financial materiality. The indices leverage the S&P 500 and S&P Global Large MidCap indices for screening and selection, offering a different approach to tracking and measuring companies' alignment with specific UN sustainability targets.

3. **ISS ESG Enhances Biodiversity Impact Assessment Tool with Portfolio Report**

ISS ESG, the sustainable investment arm of ISS STOXX, launched the Biodiversity Impact Assessment Tool (BIAT) Portfolio Report, allowing investors to compare portfolios' biodiversity risk and impact against benchmarks. The tool, part of the expanded BIAT solution covering 17,000+ companies, offers insights into impact per sector, country, and biodiversity drivers. The tool also facilitates assessment of top and bottom holdings, economic activities' impact, and ecosystem service dependencies, supporting regulatory compliance like the UN Convention on Biological Diversity and the Task Force on Nature-related Financial Disclosures.

4. **IAIS Roadmap outlines key deliverables for 2024**

The International Association of Insurance Supervisors (IAIS) has set out its key deliverables for 2024 in its updated Roadmap. In 2024, the IAIS will finalize the global Insurance Capital Standard (ICS) as a prescribed capital requirement for internationally active insurance groups. It will also focus on climate risk, as well as publish a comprehensive application paper addressing climate risk's impact on insurers' solvency. The roadmap also maintains continuity from the current strategic plan, with emphasis on climate risk, digital innovation, diversity, financial inclusion, and cyber risk. Additionally, IAIS will shift focus towards implementing IAIS standards, preparing for a new strategic plan for 2025-2029.

## Related People

Lily Loeffler

Elizabeth A. Ising

Cynthia M. Mabry

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5. **IESBA launches public consultation on new ethical benchmark for sustainability reporting and assurance**

The International Ethics Standards Board for Accountants (IESBA) has released exposure drafts for global standards on ethical considerations in sustainability reporting and assurance to combat greenwashing and enhance the quality of sustainability information. Seeking feedback from various stakeholders, including accountants, regulators, and investors, the proposed rules aim to bolster confidence in sustainability reporting amid incoming mandatory disclosure requirements. The drafts address ethics for sustainability assurance practitioners and accountants, emphasizing principles like integrity and professionalism. The consultation period ends in May, with the standards expected to align with global efforts to ensure the integrity of sustainability information.

6. **GRI launches updated biodiversity standards**

The Global Reporting Initiative (GRI) has launched an updated Biodiversity Standard, GRI 101: Biodiversity 2024, to address the urgent need for transparency in biodiversity reporting amid increasing corporate and investor focus on the issue. The standard, developed in consultation with stakeholders, aims to enhance disclosure on biodiversity impacts throughout the supply chain, including location-specific reporting and new disclosures on drivers of biodiversity loss. It aligns with global frameworks like the Taskforce on Nature-related Financial Disclosures (TNFD) and aims to bolster accountability for biodiversity impacts, with a formal implementation date set for January 2026.

7. **ISDA introduces sustainability-linked derivatives clause library**

On January 17, 2024, the International Swaps and Derivatives Association (**ISDA**) has launched a clause library for sustainability-linked derivatives (SLDs) to streamline negotiations by providing standardized drafting options for market participants. SLDs incorporate sustainability-linked cash flows in derivatives structures and employ key performance indicators to monitor adherence to ESG targets. The clause library offers standard-form options in areas such as evidence of sustainability performance, mechanisms for adjusting cash flows based on ESG target outcomes, and available options for counterparties during disruptions and review events. **II. UNITED KINGDOM**

1. **UK to set out biggest nuclear power expansion in the last 70 years**

On January 11, 2024, The Guardian reported that the UK government is considering a significant expansion of nuclear power, potentially Britain's largest in 70 years, with plans to construct a fleet of reactors capable of generating 24GW of power within 26 years. This initiative aims to propel the UK towards achieving net zero emissions by 2050 in a gradual and sustainable manner, with aims that the government's substantial investment will attract further private sector funding into the industry. However, there are concerns regarding the project's potential impact on the UK's energy security, particularly given the existing uncertainties surrounding previous large-scale reactor projects such as Hinkley Point C and Sizewell C.

2. **UK announces changes to the Variable Monetary Penalties (VMPs) and introduces Unlimited Financial Penalties for Environmental Offences**

On December 11, 2023, the UK government published a Press Release announcing that companies violating environmental permits and causing pollution may now face unlimited financial penalties. The scope of offences covered by Variable Monetary Penalties (VMPs) has been expanded, affecting firms with environmental permits, including those in water and waste, agriculture, and process industries. The immediate implementation of these changes aims to enforce stronger regulations, especially within the water system, as part of the UK Government's Plan for Water. The penalties, determined based on Sentencing Council guidelines, consider a company's size and the nature of the environmental

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offence. The widened range of offences now subject to unlimited penalties includes breaches related to sewage treatment works, storm overflows, illegal discharges to water, illegal waste activities, and permit violations from manufacturing industries and power stations, all aimed at curbing pollution in both water and air. Serious breaches are still liable to criminal proceedings.

3. **FCA establishes working group to support financial advisers with product sustainability claims**

On January 16, 2024, the Financial Conduct Authority (FCA) published a Press Release announcing its establishment of an industry-led working group for financial advisers, led by Daniel Godfrey as chair and Julia Dreblow as vice-chair. The group's membership is intended to range across the advice sector to include players from both small and larger industries, and is for the benefit of both professional and institutional investors as well as retail investors. The establishment of this working group comes in line with the FCA's Policy Statement release in November 2023 containing its final rules and guidance on sustainability disclosure requirements (SDR) and investment labels. The purpose of the working group is to support the aims in the policy statement, which is to improve trust and transparency to the market for sustainable investment products and advise consumers on all products with sustainability-related claims.

4. **HM Treasury extends the mandate of the Transition Plan Taskforce**

On January 24, 2024, the Transition Plan Taskforce (TPT), initially formed with a two-year mandate, revealed that it has received an extension of its mandate from HM Treasury until at least July 31, 2024, potentially extending to the end of October 2024. This extension is aimed at supporting the Transition Finance Market Review (TFMR), initiated on January 22, 2024. The TPT's mandate and timeline now align with the TFMR's objectives, which involve assessing the measures required for the UK financial and professional services sector to become a leading hub for transition financial services. The focus of the TFMR is on facilitating transition-focused capital raising, maximizing opportunities for UK-based financial services, and positioning the UK's professional services ecosystem as a global hub. As of January 2024, the TPT reports significant progress in completing tasks outlined in its original terms of reference. This includes the release of the TPT Disclosure Framework, accompanied by implementation guidance and preliminary sector guidance. In the course of 2024, the TPT anticipates delivering its final outputs. These will consist of comprehensive sector guidance for asset owners, asset managers, banks, electric utilities & power generators, food & beverage, metals & mining, and oil & gas. Additionally, it will provide notes on adaptation, nature, just transition, emerging markets & developing economies, and SMEs. A forward pathway on transition plans will also be presented, incorporating considerations for maintaining a strong ecosystem around transition plans.

5. **UK Government Plans to Consult on Extending SDR Regime to Overseas Funds**

On 31 January, it was announced that the UK government is consulting on expanding the Sustainable Disclosure Regulation (SDR) to cover overseas funds, following the Treasury's equivalence for UCITS ETFs under the Overseas Fund Regime (OFR). The OFR, launching in April 2024, aims to facilitate EU-domiciled ETFs' entry into the UK market. This move aims to ease uncertainties for European asset managers in relation to the FCA's SDR rules excluding overseas funds like those from Ireland and Luxembourg. Additionally, the government plans to extend the Temporary Permissions Regime (TPR) until the end of 2026 to aid the transition to the OFR. **III. EUROPE**

1. **EU drafts plan to zero out industry's carbon footprint by 2050**

The European Union is drafting a currently uncompleted plan to capture and store hundreds of millions of tons of CO2 emissions by 2050, as revealed in a draft document. The plan envisions industries transitioning to green energy, as well as a focus on

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emissions-capturing for sectors with less technology. The draft proposes the capture of up to 450 million tons of CO2 annually by 2050, with a focus on industries like cement and chemicals. The draft further suggests building carbon capture and storage infrastructure this decade, necessitating both EU and national funding.

2. **EU to create target to cut emissions by 90% by 2040**

On 18 January 2024, Reuters reported that the European Commission is set to recommend a 90% reduction in the EU's greenhouse gas emissions by 2040, compared to 1990 levels. This target aligns with recommendations from the bloc's scientific advisory committee. The plan aims to bridge the gap between the existing 2030 and 2050 goals. It involves significant changes, including decarbonizing the power sector, reducing oil imports, and altering dietary habits. The proposal awaits further assessment and negotiation before potentially becoming law after EU elections.

3. **EU freezes F-Gases, Paving Way for Cleaner Future**

On January 16 2024, the European Parliament approved a deal to further reduce emissions from fluorinated gases (F-gases). The legislation outlines a complete phase-out of hydrofluorocarbons (HFCs) by 2050, including a trajectory for reducing EU consumption quotas between 2024-2049. The law imposes strict regulations prohibiting F-gas-containing products in the EU market and establishes specific phase-out dates for F-gases in sectors where feasible alternatives exist, such as domestic refrigeration and air conditioning. Additionally, the parliament adopted measures to address emissions of ozone-depleting substances (ODS) during building renovations, emphasizing the recovery and recycling of such substances.

4. **European Banking Authority (EBA) is consulting on draft guidelines on the management of ESG risks**

On January 18 2024, the European Banking Authority (EBA) initiated a public consultation on draft Guidelines regarding the management of Environmental, Social, and Governance (ESG) risks. The guidelines outline requirements for institutions in identifying, measuring, managing, and monitoring ESG risks, with a focus on addressing risks related to the transition to an EU climate-neutral economy. They aim to ensure the safety and soundness of institutions by setting requirements for internal processes and ESG risk management arrangements. The consultation, running until April 18, 2024, emphasizes the impact of climate change, environmental issues, and social factors on the financial sector. The consultation process invites stakeholders to provide feedback, and a virtual public hearing is scheduled for February 28, 2024.

5. **European Sustainability Reporting Standards come into force**

The European Sustainability Reporting Standards (ESRS), which were adopted by the European Commission In July 2023, have come into force. The standards mandate that large undertakings, SMEs with securities on EU regulated markets, and parent undertakings of large groups, report on sustainability impacts. Furthermore, the standards provide a comprehensive framework, including climate change, biodiversity, and human rights, enabling companies to showcase their efforts in line with the green deal agenda. The phased implementation of reporting requirements will occur over time for different companies, and the standards form part of the larger timetable for the Corporate Sustainability Reporting Directive.

6. **Commission publishes guidance on reporting environmental performance under the EU taxonomy**

On December 21st 2023, the European Commission released a Guidance Document addressing queries related to the Taxonomy Disclosures Delegated Act, aiming to enhance the usability of the sustainable finance framework. The guidance covers reporting

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obligations for large financial entities and those trading on EU markets regarding their financing, investment, or insurance activities aligned with the taxonomy. It clarifies the scope of reporting obligations, taxonomy assessments for specific exposures, and rules related to verification and evidence of compliance with the EU taxonomy, with a focus on credit institutions, insurance firms, and asset managers.

7. **ECB Report finds 90% of EU Banks misaligned with Paris Agreement**

On January 23rd 2024, the European Central Bank (ECB) disclosed in a report that a significant majority of major eurozone banks are financially supporting polluting companies not on track to align with the Paris Agreement over the next five years. This marks the first measurement by the European supervisor of the gap between bank credit portfolios and the Paris Agreement. The ECB's methodology identifies companies misaligned with the Paris Agreement by comparing their emissions intensity or technology deployment over a five-year timeframe to the requirements of a net-zero 2050 climate scenario. The study covers six carbon-intensive sectors—oil and gas, coal mining, power generation, automotive, steel, and cement—across 95 large EU banks and their clients. The ECB also warned that about 70% of the assessed banks face "elevated" litigation and reputational risks for publicly committing to the Paris Agreement despite portfolio misalignment. EU banks will be required to report on the Paris alignment of exposures to aviation, maritime transport, and chemicals, in addition to the six sectors already analysed by the ECB.

8. **The EBA seeks inputs from credit institutions on the classification methodologies for exposures to ESG risks**

On 29 January 2024, the European Banking Authority (EBA) initiated a voluntary survey under the Capital Requirements Regulation, seeking input from credit institutions on methodologies to classify ESG risks and the availability of relevant data. The survey, launched on January 29, 2024, aims to inform the EBA's assessment on the feasibility of standardizing ESG risk identification. Credit institutions are encouraged to participate in the survey, which is part of the EBA's broader efforts to address ESG risks in the financial sector. The deadline for responses is March 29, 2024. The EBA may conduct an industry workshop for further discussion based on survey findings.

9. **ECB announces climate focus areas of its 2024 and 2025 work programme**

On 30 January 2024, the European Central Bank (ECB) announced an expanded focus on climate change with a new Climate and Nature Plan 2024-2025. This initiative aims to address the increasing impact of climate change on the economy and financial system. It identifies three key areas: the green transition's risks, physical climate change impact, and risks from nature loss. Concrete measures include analysing transition funding effects and integrating climate scenarios into macroeconomic projections. The ECB will also enhance its own operations' environmental management. **IV. NORTH AMERICA**

1. **U.S. Chamber of Commerce challenges California climate legislation**

On January 30, 2024, the U.S. Chamber of Commerce, California Chamber of Commerce, and other business and trade organizations filed a complaint in California federal court challenging the Climate Corporate Data Accountability Act (Senate Bill No. 253) and Greenhouse Gases: Climate-Related Financial Risk Act (Senate Bill No. 261). As described in our September 2023 ESG alert, Senate Bill No. 253 requires U.S. business entities with revenues of more than $1 billion that do business in California to annually report their greenhouse gas emissions and the emissions of upstream and downstream entities with which they do business.  Senate Bill No. 261 requires entities with more than $500 million in revenue to bi-annually report their climate-related financial risks. The complaint challenges the laws as violating (i) the First Amendment of the U.S. Constitution by impermissibly compelling speech; (ii) the Supremacy Clause because they are preempted by the Clean Air Act; and (iii) constitutional limitations on extraterritorial regulation, namely by regulating interstate commerce in violation of the Dormant

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Commerce Clause.

2. **ExxonMobil sues activist investors to omit climate-related shareholder proposal**

On January 21, 2024, ExxonMobil ("ExxonMobil") filed suit in a federal district court in Texas seeking a declaratory judgment that ExxonMobil can exclude a shareholder proposal submitted by activist investor groups Arjuna Capital and Follow This from the company's proxy materials for its 2024 annual meeting of shareholders. The proposal asks ExxonMobil to go "beyond current plans, further accelerating the pace of emission reductions in the medium-term for its greenhouse gas (GHG) emissions across Scope 1, 2, and 3, and to summarize new plans, targets, and timetables." In its complaint, the company accuses the activists of being driven by an "extreme agenda," states that the proposal "does not seek to improve ExxonMobil's economic performance or create shareholder value," and argues that the proposal is excludable under both the SEC's ordinary business exception and the resubmission exception, the latter of which applies where a substantially similar proposal previously received a low level of shareholder support. Bringing suit to exclude a shareholder proposal is unusual, as companies typically rely on informal guidance from SEC staff regarding whether proposals may be properly excluded from their proxy statements under SEC rules. ExxonMobil's complaint also focuses on how the Staff applies Rule 14a-8, noting that changes in Staff interpretations have likely caused a significant increase in the number of proposals submitted and voted on in the last two years (an 18% increase generally from 2021 to 2023, and a 52% increase for environmental and social proposals over the same period), and that the costs of addressing a single shareholder proposal can be high (up to $150,000). Arjuna Capital and Follow This subsequently withdrew the proposal on February 2; however, ExxonMobil has indicated it will proceed with the suit.

3. **U.S. proposes fee on methane from big oil and gas producers**

The U.S. Environmental Protection Agency (EPA) has proposed a methane emissions fee on major oil and gas producers that exceed established emissions thresholds. The Inflation Reduction Act (IRA) set the fee, which is applicable to new and existing facilities reporting methane emissions exceeding 25,000 metric tons of carbon dioxide equivalent annually and starts at $900 per metric ton in 2024 before reaching $1,200 in 2025, and $1,500 in 2026 and going forward. The EPA's methane fee is designed to target a significant portion of the sector's emissions, which represent the largest industrial source of methane emissions in the United States according to the EPA. The EPA's stated objective for this fee is to encourage implementation of emission reducing technology, offering compliance exemptions to facilities that demonstrate lowered emissions over time.

4. **Letter to Public Company Accounting Oversight Board (PCAOB) seeks standardized environmental attestation standards**

On January 12, 2024, a group of over 25 "climate, environment, and consumer protection organizations" sent a letter to the PCAOB requesting updated attestation standards, guidance, and oversight for firms reviewing companies' emissions- and climate-related disclosures. In particular, the letter highlighted that companies will soon be required under the California legislation discussed above (and the Securities and Exchange Commission's proposed climate-related rules, if adopted as proposed) to publish audited climate-related disclosure at a limited and then reasonable assurance level, but that "[c]urrently, there is a lack of standardization around" what those assurance levels entail. The letter seeks a baseline from the PCAOB as to what these standards should entail to support consistency in practices and accurate information for investors.

5. **Judge's ruling permits "carbon neutral" class action lawsuit to proceed against Danone**

A New York judge, ruling on a motion to dismiss, will allow a class action to proceed

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against Danone challenging its “carbon neutral” claim on Evian bottles. Consumers allege they would not have purchased Evian if aware that Danone’s manufacturing process released net carbon dioxide into the atmosphere. Danone argued its use of “carbon neutral” is certified by the Carbon Trust, a global organization that provides carbon certification, but the judge found it plausible that “carbon neutral,” an “ambiguous term,” could “mislead a reasonable consumer” and that Danone “expects too much” for consumers to decipher it from Evian’s labels. Plaintiffs can now pursue fraud, unjust enrichment, and breach of warranty claims under California and Massachusetts consumer protection laws. The ruling highlights the growing trend of class actions against consumer products disputing label accuracy and product “greenwashing.” **V. APAC**

1. **A new partnership forms between the Voluntary Carbon Markets Integrity Initiative (VCMI) and the Carbon Markets Association of India (CMAI) aims to boost India’s participation in high-integrity international voluntary carbon markets (VCMs)**

On January 4, 2024, The Voluntary Carbon Markets Integrity Initiative (VCMI) and The Carbon Markets Association of India (CMAI) announced a new partnership to enhance India’s involvement in international carbon markets with a focus on integrity. Some key objectives of the partnership include empowering Indian stakeholders to engage in high-integrity international carbon markets, enabling fair carbon finance flows to India, and leveraging networks to scale up carbon finance activities across priority sectors.

2. **Oman unveils new sustainable finance framework**

On January 11, 2024, Oman introduced a sustainable finance framework aimed at reducing its dependency on fossil fuels and attracting Environmental, Social, and Governance (ESG) investors. The plan involves issuing various financial instruments, including green, social, and sustainability bonds, along with loans and sukuk compliant with Islamic law, to finance renewable energy projects.

3. **Australian regulator steps up enforcement on greenwashing claims**

On January 7, 2024, the Financial Times reported that Australia’s corporate regulator, ASIC, remains vigilant in combatting deceptive environmental claims by investment funds, continuing its crackdown initiated in 2023 with legal action against three entities — Mercer Superannuation, Vanguard Investments Australia and Active Super. Deputy Chair Sarah Court asserts ASIC’s firm stance against funds falsely marketing as “net zero” or “carbon neutral,” emphasizing the misleading nature of such practices. Notably, Mercer Superannuation faces a substantial penalty for allegedly misleading marketing of its Sustainable Plus fund, highlighting ASIC’s commitment to enforcing integrity in ethical investment promotions. Australia’s regulatory drive aligns with global efforts to address greenwashing, with financial authorities worldwide intensifying scrutiny to ensure compliance with ethical and environmental standards in investment marketing.

4. **China unveils comprehensive biodiversity strategy, proposing corporate disclosure and financial integration initiatives**

On January 18, 2024, China’s Ministry of Ecology and Environment has unveiled its National Biodiversity Strategy and Action plan (**NBSAP**), outlining 27 priority actions. One particular action proposes the establishment of a corporate biodiversity disclosure framework, encouraging representative industry enterprises to identify and regularly monitor, assess, and disclose the risk, dependencies, and impact of their operations on biodiversity. The NBSAP also encourages financial institutions to factor in biodiversity considerations into project investment and financing decisions. Other priorities include exploring a biodiversity impact index for key industries and establishing a multi-stakeholder industrial and commercial biodiversity protection alliance.

5. **China reboots voluntary carbon credit market**

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On 22 January, China restarted its voluntary carbon offset market, China Certified Emission Reduction (CCER), after a hiatus since 2017. The trading commenced in Beijing and reflects a strategic step in China's environmental goals to finance economically viable and eco-friendly projects. The China Beijing Green Exchange serves as the trading platform, initially offering credits for pre-2017 projects, and is in addition to China's national compliance carbon market. The CCER scheme will focus on four initial sectors: afforestation, solar power generation, offshore wind and mangrove planting. The Chinese government plans to approve new project categories like solar thermal power and offshore wind energy, with the move seen as a key attempt to reduce emissions and reach renewable energy targets, allowing companies to trade carbon credits and offset their emissions.

6. **Taiwan proposes new internal control rules on ESG disclosure**

On 16 January, Taiwan's Financial Supervisory Commission (FSC) announced plans to amend internal control guidelines, making it mandatory for listed companies, securities and futures firms, and related service enterprises to include the management of ESG information in their internal control systems. The proposed amendments aim to enhance the quality of ESG disclosure, improve companies' ability to compile sustainable information, and include ESG management as a required audit item in annual internal audits. The FSC will provide a buffer period for companies to adjust, and the amendments are set to be effective shortly.

7. **Shenzhen and Abu Dhabi Stock Exchange sign a memorandum of cooperation**

On 13 December, the Shenzhen Stock Exchange (SZSE) and the Abu Dhabi Securities Exchange (ADX) signed a memorandum of understanding (MoU) to expand cooperation and serve the integrated development of the capital markets in China and the United Arab Emirates. The MoU aims to encourage market players from both sides to participate in cross-border index, fixed-income, and other investment product cooperation. The exchanges also agreed to jointly research the feasibility of an ETF product link and depository receipt mechanism to facilitate cross-border financing for listed companies in each other's markets. Please let us know if there are other topics that you would be interested in seeing covered in future editions of this update. *Warmest regards,* Susy Bullock Elizabeth Ising Perlette M. Jura Ronald Kirk Michael K. Murphy Selina S. Sagayam Chairs, Environmental, Social and Governance Practice Group, Gibson Dunn & Crutcher LLP

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The following Gibson Dunn lawyers prepared this update: Lauren Assaf-Holmes, Elizabeth Ising, Lily Loeffler, Cynthia Mabry, Selina S. Sagayam, Saad Khan*, Yinn Lim*, and Daniel Szabo*.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's Environmental, Social and Governance practice group: **Environmental, Social and Governance (ESG):** Susy Bullock – London (+44 (0) 20 7071 4283, sbullock@gibsondunn.com) Elizabeth Ising – Washington, D.C. (+1 202-955-8287, eising@gibsondunn.com) Perlette M. Jura – Los Angeles (+1 213-229-7121, pjura@gibsondunn.com) Ronald Kirk – Dallas (+1 214-698-3295, rkirk@gibsondunn.com) Michael K. Murphy – Washington, D.C. (+1 202-955-8238, mmurphy@gibsondunn.com) Patricia Tan Openshaw – Hong Kong (+852 2214-3868, popenshaw@gibsondunn.com) Selina S. Sagayam – London (+44 (0) 20 7071 4263, ssagayam@gibsondunn.com) **Yinn Lim, Daniel Szabo, and Saad Kahn, trainee solicitors in the London office, are not admitted to practice law.* © 2024 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a

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## Related Capabilities

ESG: Risk, Litigation, and Reporting

Securities Regulation and Corporate Governance

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