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Gibson Dunn Environmental, Social and Governance Update (October 2023)

Client Alert | November 13, 2023

We are pleased to provide you with Gibson Dunn's ESG monthly update for October 2023. This month, our update covers the following key developments. **I. INTERNATIONAL**

1. **UN Global Compact issues new guidance on sustainable infrastructure under China's Belt and Road Initiative**

During an event in Beijing on October 18, 2023 attended by high-level representatives from governments, business and academia, the UN Global Compact unveiled new guidance and assessment tools for companies to advance sustainable infrastructure under the Chinese government's Belt and Road Initiative (BRI) — a global infrastructure development strategy adopted in 2013 to invest and cooperate with over 150 countries and international organisations. The guidance includes A Practical Guide for Private Sector Players on the Human Rights and Labour Principles, the Environment Principles, and the Anti-Corruption Principle, designed to promote application of the UN Global Compact's Ten Principles in the infrastructure sector, and a Guidance and Assessment Tool for Companies on Maximizing Impact towards the SDGs, which aims to engage private sector players participating in infrastructure projects under the BRI to align their operations with the UN's Sustainable Development Goals.

2. **Network for Greening the Financial System publishes conceptual note on short-term climate scenarios**

On October 3, 2023, the Network for Greening the Financial System — a group of central banks and financial supervisors working to help develop environment and climate risk management in the financial sector, and mobilise finance to support the transition toward a sustainable economy—released a Conceptual Note on Short-term Climate Scenarios. This note follows a public feedback survey conducted in February 2023 which identified short-term scenarios as a key priority. The note explains that short-term scenarios covering a three-to-five-year period enable better understanding of the near-term macro-financial impact of transitioning to a net zero economy upon the real economy, individual financial institutions, and the broader financial system—which is of particular importance against the backdrop of heightened uncertainties resulting from fossil energy supply and mounting scientific evidence that the world might exceed global temperatures increases of 1.5 °C within the next five years. The note proposes five short-term climate scenario narratives ('Highway to Paris' (implementation of an ambitious mitigation pathway), 'Green Bubble' (glut of green private investment), 'Sudden wake-up call' (sudden change in public opinion and accelerated transition), 'Low Policy Ambition and Disasters' (severe acute physical disasters and higher risk premia), and 'Diverging Realities' (severe natural disasters, lack of external financing, disruption of transition-critical mineral supply chains hampering global transition)), all driven by different geopolitical, economic and technological factors to result in a range of plausible futures, and designed to provide the basis for climate stress testing related to central banks' prudential and supervisory responsibilities.

3. **The International Capital Markets Association releases paper on market integrity and greenwashing risks in sustainable finance**

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On October 10, 2023, The International Capital Markets Association (ICMA) released a new paper on market integrity and greenwashing risks in sustainable finance, which expands on its response in January 2023 to the European Supervisory Agencies' Call for Evidence on greenwashing on November 15, 2022. In the paper, ICMA sets out its concerns regarding proposals for a definition of greenwashing for regulatory purposes flagging that exhaustive definitions of greenwashing are problematic as they risk market paralysis or regression due to excessive reputational or litigation concerns, and that a broad catch-all definition of greenwashing would not distinguish between intentional and unintentional behaviour, having the unintended consequence of exacerbating "greenhushing". ICMA instead proposes a focussed definition of greenwashing for consideration by regulators, but suggests that unpacking greenwashing into areas of actual concern is a more effective approach than expanding the current definitions. The proposed definition for consideration reads as follows: "*For financial regulatory purposes, greenwashing is a misrepresentation of the sustainability characteristics of a financial product and/or of the sustainable commitments and/or achievements of an issuer that is either intentional or due to gross negligence*". ICMA also finds that, while ambition and materiality in the early development of the new sustainability-linked bond market may have been insufficient, there is a positive trend in the last 12 months, and that greenwashing is *not* prevalent in the green and sustainable bond market.

4. **Financial Stability Board publishes annual progress report on climate-related disclosures**

On October 12, 2023, the Financial Stability Board (FSB)—an international body that promotes the stability of the global financial system by coordinating national financial authorities and international standard-setting bodies—published its annual progress report on climate-related disclosures, which was delivered to G20 Finance Ministers and Central Bank Governors. The report finds that significant further progress has been achieved on climate disclosures in the past years, including the publication of the International Sustainability Standards Board (ISSB) Standards in June 2023, which will serve as a global framework for climate-related and sustainability disclosures. It further finds that all FSB member jurisdictions have either requirements, guidance, or expectations in respect of climate-related disclosures currently in place or have taken steps to do so. The report also references the findings of the Task Force on Climate-Related Financial Disclosures (TCFD) in its 2023 Status Report, which utilised artificial intelligence technology to analyse reporting by more than 1,350 public companies, highlighting that while the percentage of companies making TCFD-recommended disclosures continues to grow, more progress is needed.

5. **Principles for Responsible Investment seeks support for Spring initiative addressing nature loss**

The Principles for Responsible Investment (PRI)—a UN-supported international network of financial institutions—invited endorsers (asset owners, investment managers and service providers) on October 3, 2023 to publicly sign up to its Spring investor expectation statement. The statement sets out the PRI's stewardship initiative ("Spring") to urge target companies to take action addressing deforestation and biodiversity loss either directly through their own engagement with policy makers or indirectly through engagement with investees with regards to their responsible political engagement practices given the importance of strong public policy design and implementation in this area. Investors endorsing the statement are not obligated to engage with the target companies but can choose simply to signal their support for the effort. A list of the target companies is due to be published in early 2024 and the PRI are encouraging investors to sign up by 19 January 2024 to be included the first list of endorsers.

6. **Institutional Shareholder Services announces results of annual global benchmark policy survey**

On October 31, 2023, Institutional Shareholder Services (ISS) published the results of its

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2023 Global Benchmark Policy Survey to inform its proxy development for the 2024 proxy season. The report sets out key findings related to: increased investor scrutiny of non-GAAP adjustments in US companies' incentive pay program metrics; the ISS Japan benchmark policy of recommending votes against the re-election of top executives of companies based on return on equity performance; the ISS policy for Korea on director accountability and material governance failures; ISS director independence classification for directors who provide professional services; ISS policy on Foreign Private Issuers and companies listed on US markets; and investor preference regarding ISS approach (globally consistent versus market-specific) to policy guidelines relating to various Environmental and Social topics. The Society for Corporate Governance submitted a comment letter on September 21, 2023, drawing attention to the *"survey bias"* observed by its members in the survey questions. The letter observes that given the *"increased politicisation of ESG"* there is a lack of consensus among the general public and investors regarding ESG generally. It questions the appropriateness of the ISS assuming the role of a quasi-regulator on the issue of Environmental and Social disclosure, and urges the ISS to avoid adopting benchmark policies that are prescriptive or standardised. **II. UNITED KINGDOM**

1. **UK Energy Act 2023: Landmark legislation becomes law**

The UK Energy Act 2023 (EA 2023) Energy Bill, which originated as the Energy Bill in the House of Lords in July 2022, received royal assent on October 26, 2023. The Department for Energy Security and Net Zero's announcement describes it as the "*biggest piece of energy legislation in the UK's history*". The EA 2023 sets out measures to promote investment in low-carbon industries, protect consumers from unfair energy pricing and safeguard the country's security of energy supply, including:

- introduction of business models for the transport and storage elements of carbon capture usage and storage and hydrogen projects, industrial carbon capture and low-carbon hydrogen;
- creation of a specific merger regime for energy networks under the Competition and Markets Authority;
- introduction of a low-carbon heat scheme;
- support for an increase in investment in the consumer market for electric heat pumps (as an alternative to domestic gas boilers) by providing for a new market standard and trading scheme;
- facilitate the first large-scale hydrogen heating trial;
- creation of a new regulatory environment for fusion energy; and
- speeding up the deployment of offshore wind, while maintaining environmental protection.

2. **Global First – UK's Transition Plan Taskforce launches 'first of its kind' globally applicable Transition Plan Disclosure Framework**

The Transition Plan Taskforce was launched by HM Treasury in April 2022 to develop a "gold standard" disclosure framework (the Disclosure Framework) for best practice climate transition plans, representing a key step in the UK's efforts towards becoming the world's first net-zero aligned financial centre. The Disclosure Framework, published in October 2023 together with a one-page summary, sets out good practice for robust and credible transition plan disclosures, recognising that listed firms and investors need clear guidance on how best to comply with developing voluntary and mandatory corporate reporting rules, which in the UK will require large firms in the UK to produce transition plans that detail how they intend to deliver on net zero emission goals and respond to climate-related risks. The UK's Financial Conduct Authority has welcomed the launch of the Disclosure Framework and has already signalled its intention to consult on transition

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plan disclosures by UK listed companies in line with the Disclosure Framework. The Disclosure Framework is designed to be available for voluntary and mandatory use internationally. Of particular note, the framework was designed to be consistent with and build on the final Climate-Related Disclosures standards (IFRS S2) issued by the International Sustainability Standards Board and has also drawn upon the Glasgow Financial Alliance for Net Zero framework for transition planning. The Disclosure Framework applies three guiding principles of Ambition, Action and Accountability and is organised across five elements (foundations, implementation strategy, engagement strategy, metrics & targets and governance) and 10 disclosure sub-elements. The final version of the Disclosure Framework is based on the draft launched for consultation in November 2022, the key findings of which can be found here.

3. **Loan Market Association and the European Leveraged Finance Association publish updated best practice guide to sustainability-linked leveraged loans**

The Loan Market Association (LMA) and the European Leveraged Finance Association have worked with their respective committees to jointly update the Best Practice Guide to Sustainability-Linked Leveraged Loans (the Guide), in response to the growing appetite in the leveraged loan market for engagement with sustainability-linked financings. The Guide was published on October 5, 2023 and seeks to provide practical guidance on the application of the 'Sustainability-Linked Loan Principles' to leveraged loans, setting out what borrowers, finance parties and their respective advisers ought to consider when integrating sustainability factors into their facility agreements. It observes that the participants in leveraged loan markets are uniquely placed to lead sustainability efforts given that the asset class can lend itself to close relationships between borrowers and lenders, and that investors are already used to conducting "*deep dives*" into borrowers' businesses. In addition to the publication of the Guide, on October 12, 2023, the LMA published a Term Sheet for Draft Provisions for Sustainability-Linked Loans (SLL), prepared by a working group of financial institutions and law firms. The term sheet can be accessed by LMA members on its website.

4. **The Law Society of England & Wales publishes guide to climate risk governance and greenwashing risks for in-house and private practice lawyers**

On October 13, 2023, the Law Society of England and Wales published a guide providing information to in-house and private practice lawyers who advise companies on climate risk governance and greenwashing risks, and how these risks might impact solicitors' and directors' duties. The guide intends to inform lawyers as to their duty to advise companies on their duties under the UK Companies Act 2006 and climate-related disclosures. It also addresses what is meant by "good climate governance" and includes certain definitions such as "Greenwashing", "Climate risks" and "Net Zero". The guide also includes certain useful resources to learn more about UK directors' duties and climate risk and governance.

5. **UK Government launches a review of emissions reporting under the UK's existing streamlined energy and carbon reporting regime**

The UK Government is seeking views on the streamlined energy and carbon reporting regime **(**SECR). The SECR started to apply for financial years starting on or after 1 April 2019 to most UK publicly traded companies, as well as large non-traded companies and large limited liability partnerships. It requires in-scope entities to disclose Scope 1 and Scope 2 greenhouse gas (GHG) emissions in their annual reports, while disclosures of Scope 3 emissions (which are indirect emissions that occur in a company's value chain) are mostly voluntary. The SECR also requires disclosure of energy usage and energy efficiency measures. The UK Government is asking for feedback as to whether 'Scope 3 emissions' should be within the scope of SECR. The UK Government is seeking views on, among other things, the costs, benefits and practicalities of Scope 3 GHG reporting. The UK Government has asked for feedback by December 14, 2023. **III. EUROPE**

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1. **The Council of the European Council adopts the new Renewables Energy Directive**

On October 9, 2023, the Council of the European Union formally adopted the amended Renewable Energy Directive (RED III). RED III raises the 2030 target for the share of renewable energy in the EU's overall energy consumption from 32% to 42.5%, with a further indicative target of 2.5%, as well as introducing specific sub-targets for Member States in the industry, transport and building (district heating and cooling) sectors with a view to speeding up the integration of renewables in sectors where uptake has been slower. Member States now have 18 months to adjust national legislation accordingly. RED III is part of the broader 'Fit for 55' package, aligning the EU's energy and climate goals with the objective of reducing greenhouse gas emissions by at least 55% by 2030.

2. **The European Parliament and the Council of the European Union adopt the European Green Bonds Regulation, the new voluntary standard to fight greenwashing**

On October 5, 2023, the European Parliament formally adopted the regulation on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds (the EuGB Regulation), which was published on October 11, 2023. On October 24, 2023, the Council of the European Union has similarly announced its adoption of the EuGB Regulation. The EuGB Regulation set out a framework that bond issuers, whether within or outside the EU, must follow if they wish to use the "European Green Bond" (EuGB) designation. It also includes voluntary disclosure guidelines for other environmentally sustainable bonds and sustainability-linked bonds issued in the EU. The key aspects of this new standard are:

- the link between the use of proceeds and the EU Taxonomy Framework;
- increased transparency, through the required completion of a pre-issuance green bond factsheet and EU Prospectus Regulation compliant prospectus, post-issuance allocation report(s) and post-allocation impact report;
- the voluntary "lite" disclosure regime applicable to bonds marketed as environmentally sustainable and sustainability-linked bonds;
- the introduction of a supervised external reviewer regime; and
- the introduction of supervisory and sanctioning powers to "national competent authorities".

3. **European Parliament's Committee on Economic and Monetary Affairs has published a draft report on the proposal for a regulation of the European Parliament and of the Council on the transparency and integrity of Environmental, Social and Governance rating activities**

On October 6, 2023, the European Parliament's Committee on Economic and Monetary Affairs published a draft report on the European Commission's proposal for a regulation of the European Parliament and of the Council on the transparency and integrity of environmental, social and governance (ESG) rating activities. The draft report was prepared by Rapporteur Aurore Lalucq, who submitted 97 amendments to the text proposed by the European Commission. In the explanatory statement to the report, the Rapporteur outlines her views on the proposed regulation, including the following:

- the disclosure requirements should be more stringent and instructive;
- entities seeking multiple ratings should prioritise at least one provider with a market share below 5% to ensure diversity and competitiveness in the marketplace;
- the reliability and transparency of ESG rating activities needs to be improved;
- ESG rating providers should actively incorporate standardized ESG data into their

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assessments; and

- the objectives of the rating providers need to be clarified.

4. **The European Securities and Markets Authority has published a report on the climate-related matters in the financial statements**

On October 25, 2023, the European Securities and Markets Authority (ESMA) published a report on disclosures of climate-related matters in the financial statements, which aims to assist and enhance the ability of issuers to provide more robust disclosures and create more consistency in how climate-related matters are accounted for in the financial statements drawn up in accordance with International Financial Reporting Standards. The report does not, however, set out best practices or prescribe the way in which the disclosure of climate-related matters should be made in the financial statements. The report focuses on the following key topics, for which ESMA has deemed climate-related matters to likely have a higher impact: significant judgements, major source of estimation uncertainty and accounting policies; impairment of non-financial assets; useful lives of tangible and intangible assets; and provisions and other accounting topics. **IV. UNITED STATES**

1. **Federal banking regulators finalize guidance for large financial institutions on managing physical and transition risks associated with climate change**

On October 24, 2023, the Office of the Comptroller of the Currency, Treasury, Board of Governors of the Federal Reserve System, and Federal Deposit Insurance Corporation collectively finalized principles for climate-related financial risk management for large financial institutions (i.e., those with more than $100 billion in assets). Federal Reserve Chair Jerome H. Powell stressed in a same day statement that the principles are "*squarely focused on prudent and appropriate risk management*," not making policy decisions addressing climate change, and that banks must understand and manage their material risks.

2. **Financial officers of 21 states continue dialogue with proxy advisory firms on ESG proposals**

State treasurers, auditors, and other financial officers from 21 states sent a follow-up letter on October 24, 2023 to proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis that continued to express their concern regarding political, ideological, and personal bias in the firms' voting recommendations made on ESG-related Rule 14a-8 shareholder proposals. In particular, the letter raised the potential for unfair treatment of proposals submitted by conservative proponents. It also focused primarily on proposals related to "debanking" risks as an area for the firms "*to demonstrate [their] commitment to avoiding political bias*" in the upcoming proxy season. This correspondence continued dialogue among the parties that began in May 2023. Prior responses from ISS and Glass Lewis are available here and here, respectively.

3. **U.S. Department of Energy announces selection of seven sites to establish clean hydrogen hubs with a $7 billion investment**

On October 13, 2023, the U.S. Department of Energy's (DOE) Office of Clean Energy Demonstrations announced a $7 billion investment from the Bipartisan Infrastructure Law to launch seven Regional Clean Hydrogen Hubs (H2Hubs) across the country. The investment aims to foster "*a national network of clean hydrogen producers, consumers, and connective infrastructure*," aligning with the DOE's U.S. National Clean Hydrogen Strategy and Roadmap and Pathways to Commercial Liftoff: Clean Hydrogen. If the H2Hubs proceed as planned, the DOE expects them to annually reduce 25 million metric tons of carbon dioxide emissions from end-use and produce three million metric tons of hydrogen, in addition to substantial job creation.

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4. **California adopts legislation requiring diversity disclosure for private equity and venture capital funds, mandating climate-related disclosure, and regulating "green" claims**

On October 8, 2023, California enacted Senate Bill 54, "Venture Capital Companies: Reporting," which will be effective on March 1, 2025. The bill will require venture capital companies with certain connections to California to annually disclose to the California Civil Rights Department demographic data regarding portfolio company founding teams, including race, ethnic identity, disability status, gender identity, and veteran status, among other characteristics. More information on this development is available in our recent client alert here. In early October, California also enacted three bills that will impose significant climate-related reporting obligations on public and private companies with connections to the State. For further detail, see our September update, client alert, and blog post.

5. **New York Stock Exchange proposes new listing standards for securities of "Natural Asset" companies**

The New York Stock Exchange (NYSE) proposed new listing standards in late September for a category of public companies called "Natural Asset Companies" (NACs). The NYSE defines these companies as corporations "*whose primary purpose is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services*." Such companies may also "*seek to conduct sustainable revenue-generating operations*," if certain conditions are satisfied. The proposed listing rules include governance and reporting requirements related to corporate charters, license agreements, mandatory written policies (e.g., environmental and social, biodiversity, human rights, etc.), and a mandatory pre-listing "Ecological Performance Report." NACs would otherwise be subject to the Section 303A.00 corporate governance requirements, with specific responsibilities for their audit committees. The Intrinsic Exchange Group partnered with the NYSE for the proposal. **V. APAC**

1. **Australian Accounting Standards Board publishes draft sustainability reporting standards**

In October 2023, the Australian Accounting Standards Board published a draft of the country's sustainability reporting standards, out for consultation until March 1, 2024. The draft Australian Sustainability Reporting Standards (ASRS) - Disclosure of Climate-related Financial Information (ED SR1) have been developed using the International Sustainability Standards Board's two sustainability disclosure standards, released in June 2023, and include ASRS 1 for general requirements for disclosure of climate-related financial information (developed using IFRS S1 as the baseline) and ASRS 2 for climate-related financial disclosures (developed using IFRS S2). A third standard (ASRS 101, References in Australian Sustainability Reporting Standards) has been developed as a service standard that lists the relevant versions of any non-legislative documents published in Australia and foreign documents that are referenced in ASRS standards.

2. **Hong Kong's Securities and Futures Commission announces plans to sponsor the development of a voluntary code of conduct for ESG ratings and data product providers**

On October 31, 2023 the Hong Kong's Securities and Futures Commission (HKSFC) announced plans to support and sponsor the development of a voluntary code of conduct (VCoC) for ESG ratings and data product providers. The VCoC will be developed via an industry-led working group, namely the Hong Kong ESG Ratings and Data Products Providers VCoC Working Group (VCWG). The HKSFC has noted that the VCoC will align with international best practices as recommended by the International Organization of Securities Commissions. Further details of the VCWG are included in its terms of reference and a participation list has also been published by the HKSFC.

3. **Japan announces issue of new government transition bonds and efforts to**

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improve regional alignment on transition finance in Asia through the "Asia GX Consortium"

At the PRI in Person in Japan, on October 3, 2023, Prime Minister Fumio Kishida explained that the Japanese Government will work to improve regional alignment on transition finance in Asia. The Prime Minister outlined that the Japanese Government's efforts will be based on its "GX" or "green transformation" plan and will encourage specific implementation of transition finance across Asian countries, launching an "Asia GX consortium" by the middle of 2024. The consortium will aim to drive GX investment in Asia, across both the public and private sectors. Prime Minister Kishida also announced that the Japanese Government will issue new government transition bonds titled "Climate Transition Bonds" this fiscal year and these will be the "*world's first government-issued transition bonds aligned with global standards*".

4. **Monetary Authority of Singapore backs the use of carbon credits to finance the early retirement of coal-fired plants**

The Monetary Authority of Singapore and McKinsey & Company published a working paper setting out how high-integrity carbon credits can be utilised as a complementary financing instrument to accelerate and scale the early retirement of coal-fired plants (CFPPs). The paper explains that the phase-out of CFPPs is key to Asia's energy transition and should be accompanied by the further development of clean energy. The paper explores the role that high-integrity carbon credits can play in this process and considers what is required to further development in a market for high-integrity carbon credits.

Please let us know if there are other topics that you would be interested in seeing covered in future editions of the monthly update.

Warmest regards,

Susy Bullock Elizabeth Ising Perlette M. Jura Ronald Kirk Michael K. Murphy Selina S. Sagayam

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