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Sustainability-Linked Loans and Sustainability-Linked Bonds – Trends and Perspectives

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Today's Panelists



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Ben Myers is a partner in the London office of Gibson, Dunn & Crutcher and a member of the firm's Global Finance, Business Restructuring and ESG practice groups. Mr Myers' practice focuses on advising funds, sponsors, corporates and financial institutions with a particular focus on leveraged finance, special situations and restructuring transactions.



Yair Y. Galil is of counsel in the New York office of Gibson, Dunn & Crutcher, where he is a member of Gibson Dunn's Global Finance, Business Restructuring and ESG practice groups. His experience includes representation of sponsors, issuers, financial institutions and investment funds in complex financing transactions. The business contexts for these transactions have ranged from corporate finance (including sustainability-linked credit facilities), to leveraged acquisitions and dividend recaps, to debt buybacks and other out-of-court capital restructuring transactions, to debtor-in-possession and bankruptcy exit financings.

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Development of ESG Finance



Investor ESG Focus

- The past decade has witnessed intense institutional investor, proxy advisor, activist investor and regulatory focus on corporate ESG issues including:
 - Environmental sustainability;
 - Corporate social responsibility (particularly regarding diversity and inequality issues);
 - Corporate political practices, including lobbying and contributions;
 - ESG corporate governance, including board and management diversity and oversight of ESG issues and reporting; and
 - Transparency around ESG issues, including the quality of ESG reporting.
- Growth of specialized ESG funds cater to this focus, investing in sustainable issuers and ESG financial products.
- Institutional and other funds increasingly pursue ESG products in order to:
 - Meet investor demand and signal ESG commitment;
 - Push issuers to pursue ESG strategies that contribute to long-term business prospects and mitigate risk; and
 - Diversify ESG portfolios to hold both sustainable issuers (e.g. clean energy companies) and ESG bonds/loans from issuers in other industries (finance, consumer goods, technology, etc.).



ESG Finance Products

- ESG Loans
 - Green and Social Loans
 - Sustainability-Linked Loans
- ESG Bonds
 - Bonds with an ESG-related Use-of-Proceeds
 - Green Bonds
 - Social Bonds
 - Sustainability Bonds
 - Transition Bonds
 - Bonds with Cost of Debt Tied to ESG-related metrics
 - Sustainability-Linked Bonds
- ESG Investments
 - Issuances from “inherently” sustainable issuers (what PIMCO calls “Climate Leaders”), such as clean energy companies, that are not explicitly labeled as Green or Social Bonds.

ESG Finance – Spotlight: Sustainability-Linked Loans

- Defining Characteristic: Loan terms are linked to, and incentivize achievement of, predetermined sustainability performance targets (SPTs) along predetermined, sustainability-relevant, key performance indicators (KPIs).
 - Typically a discount, or penalty to, the interest margin for exceeding, or falling short of, the targets.
 - No restriction on use of proceeds – making the product accessible to a broader range of issuers.
- Key challenges for the product are establishing meaningful KPIs and suitably ambitious SPTs.
 - Market consensus building around the need for external reporting and verification
 - No consensus yet on what constitutes a “meaningful” incentive – margin discounts and penalties vary significantly across industries and issuances
- First SLL issued in 2017 by Philips, a Dutch health technology company. In the US, first two SLLs were entered into by energy companies, CMS Energy and Avangrid, in mid-2018.

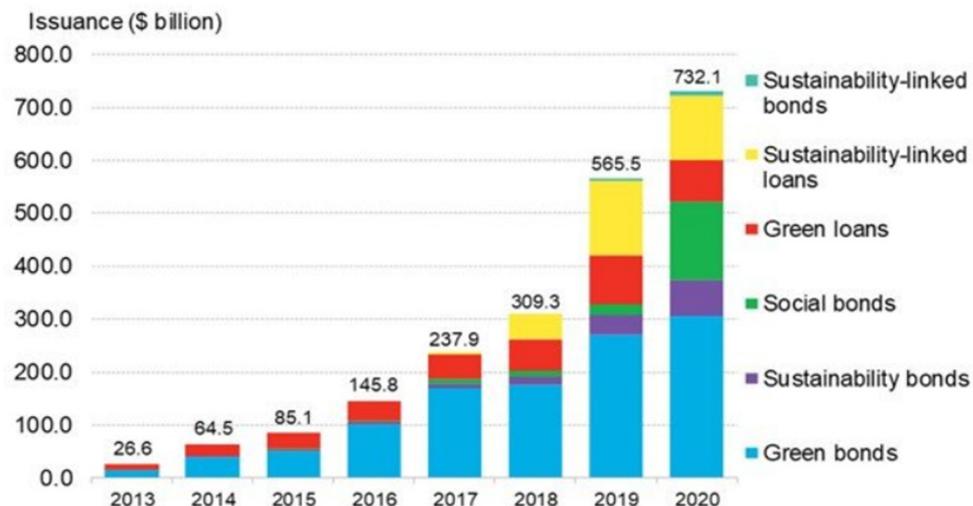
ESG Finance – Spotlight: Sustainability-Linked Bonds

- SLBs are simply bonds that have an interest rate step-up if a stated SPT is not achieved by a certain date
- SLBs have similar structure to SLLs
 - SLBs do not limit allocation of offering proceeds
 - ESG status is achieved through a pricing mechanism allowing for an interest rate adjustment based on the issuer's achievement of specified quantitative goals.
 - As with SLLs, SLBs are structured around the selection of “core,” “relevant” and “material” ESG KPIs and a pricing mechanism tied to the verified achievement of a KPI target.
 - Benefits of SLBs as compared to traditional bonds:
 - Built-in ESG pricing benefits (tends to have lower interest rates given demand)
 - Avoid allegations of “green washing” insofar as SLBs have concrete economic consequences for failing to meet sustainability goals
 - Allow issuers without eligible green projects or in “brown” industries to access “green” investors
- Broad range of issuers to date (ie, ratings, industry, size)

ESG Finance: Market Overview

- The first quarter of 2021 has witnessed record growth in Green, Social and Sustainability bonds, including approximately \$130B in global Green Bond issuances.
- Financial institutions/development banks and sovereign issuers are the most significant global ESG finance issuers, representing 41% and 21% respectively of Q1 2021 Green Bond issuances.

Global sustainable debt issuance, 2013-2020



Source: BloombergNEF, Bloomberg LP, 2020.



ESG Finance: Benefits to Issuer

- Issuing a credible ESG debt product can provide both internal and external benefits.
 - Expand investor base
 - Access additional pools of capital (issuances are often heavily over-subscribed)
 - Enhance external ESG branding; positive impact on credibility of ESG efforts
 - Signal credible ESG commitment to employees and business partners (customers, suppliers); build stronger, values-based relationships with stakeholders
 - Support recruiting and employee retention initiatives
 - For some sustainability-linked products, economic benefits (lower interest rate) if company exceeds the negotiated KPI benchmarks



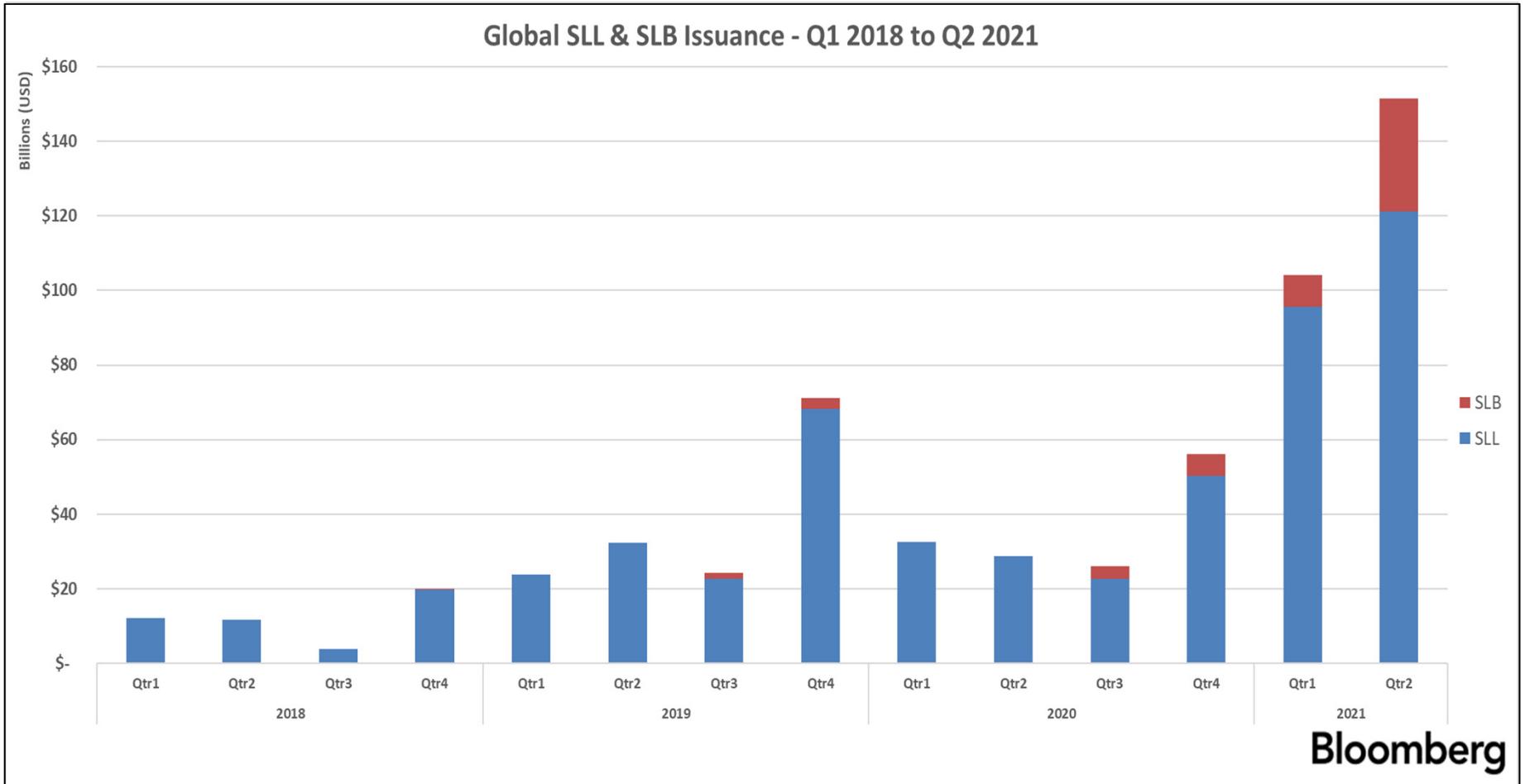
ESG Finance: Costs / Drawbacks to Issuer

- Initial issuance / finance is more time consuming
- Issuer / Lender may need to adjust business operations
- Disclosure risks must be managed
- Risk of increased cost of capital if the SPT if not achieved

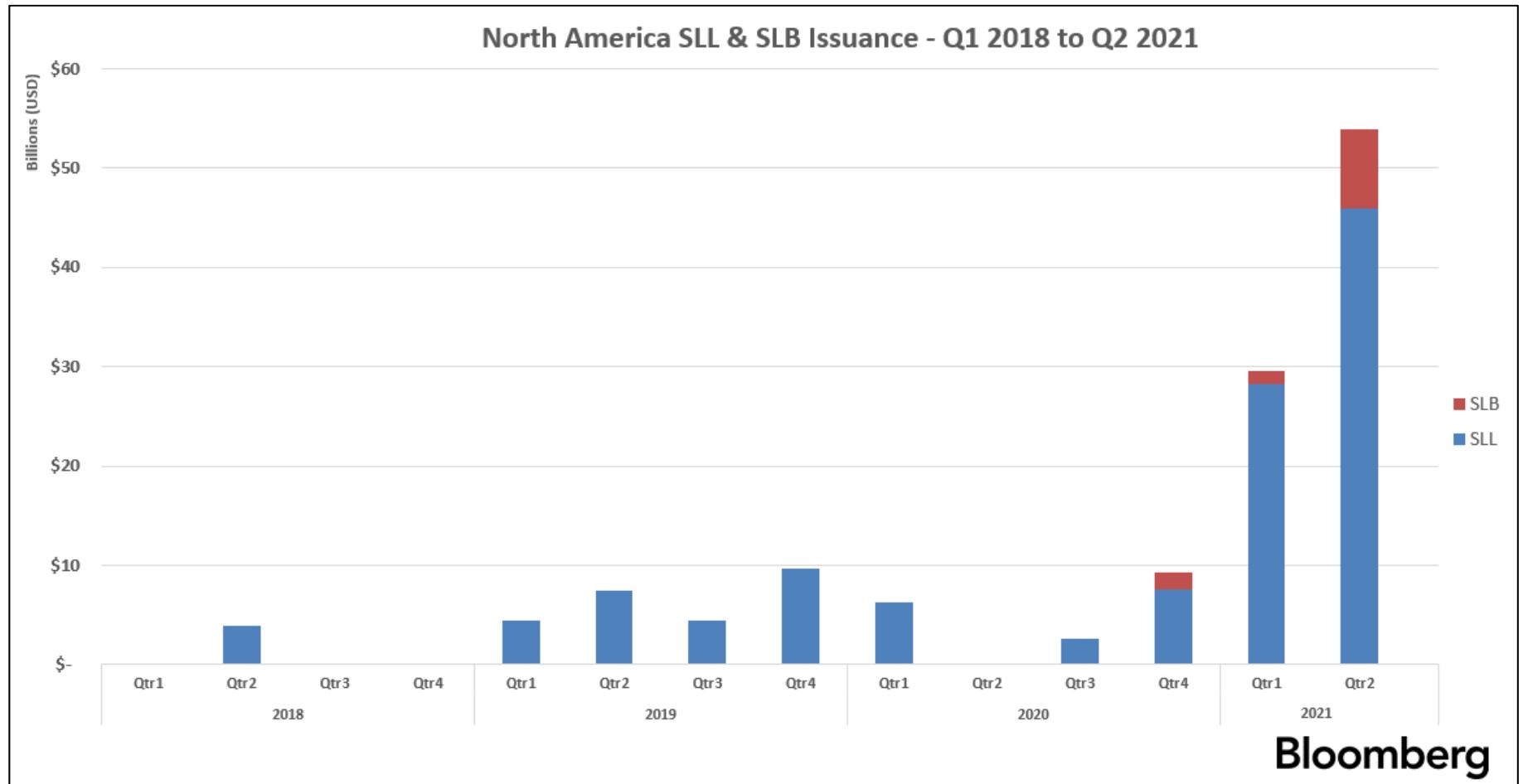
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SLLs and SLBs – Market Metrics

Volume Globally ...

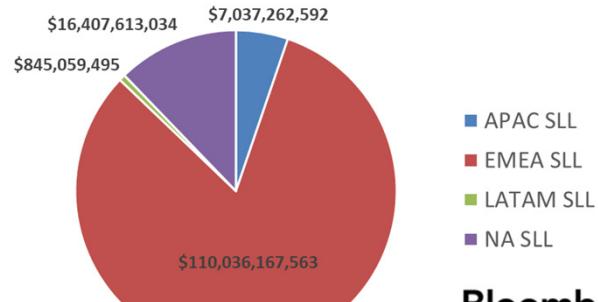


... and in North America



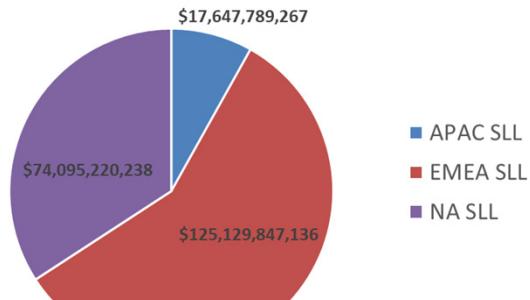
Regional Breakdown

2020 Regional breakdown of SLLs



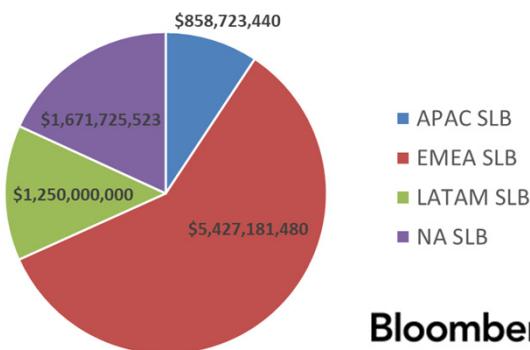
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2021 H1 Regional breakdown of SLLs



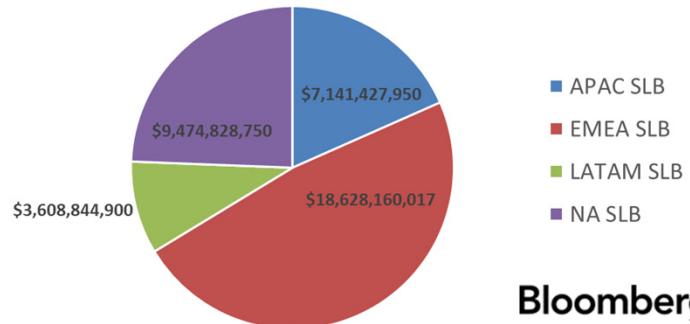
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2020 Regional breakdown of SLBs



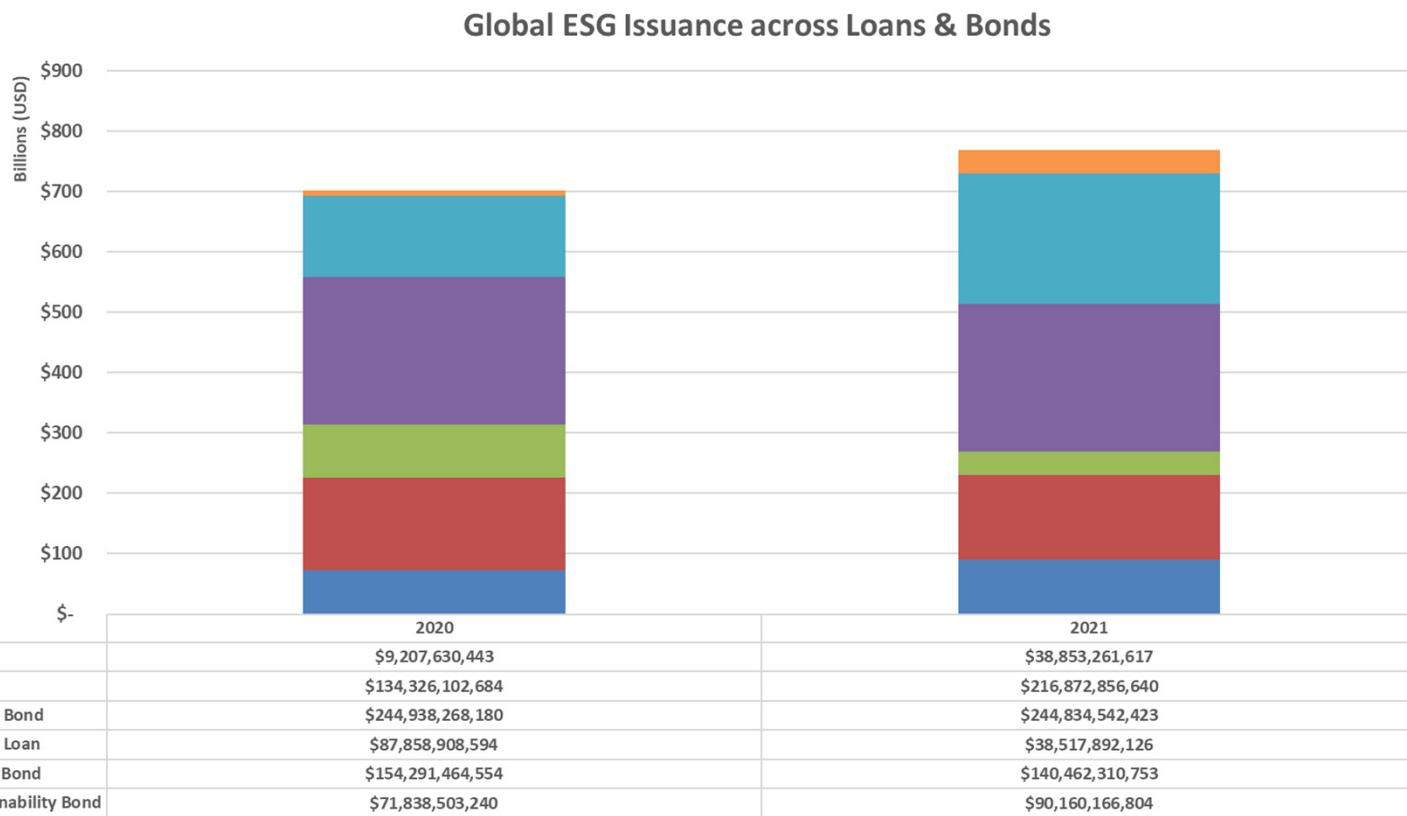
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2021 H1 Regional breakdown of SLBs

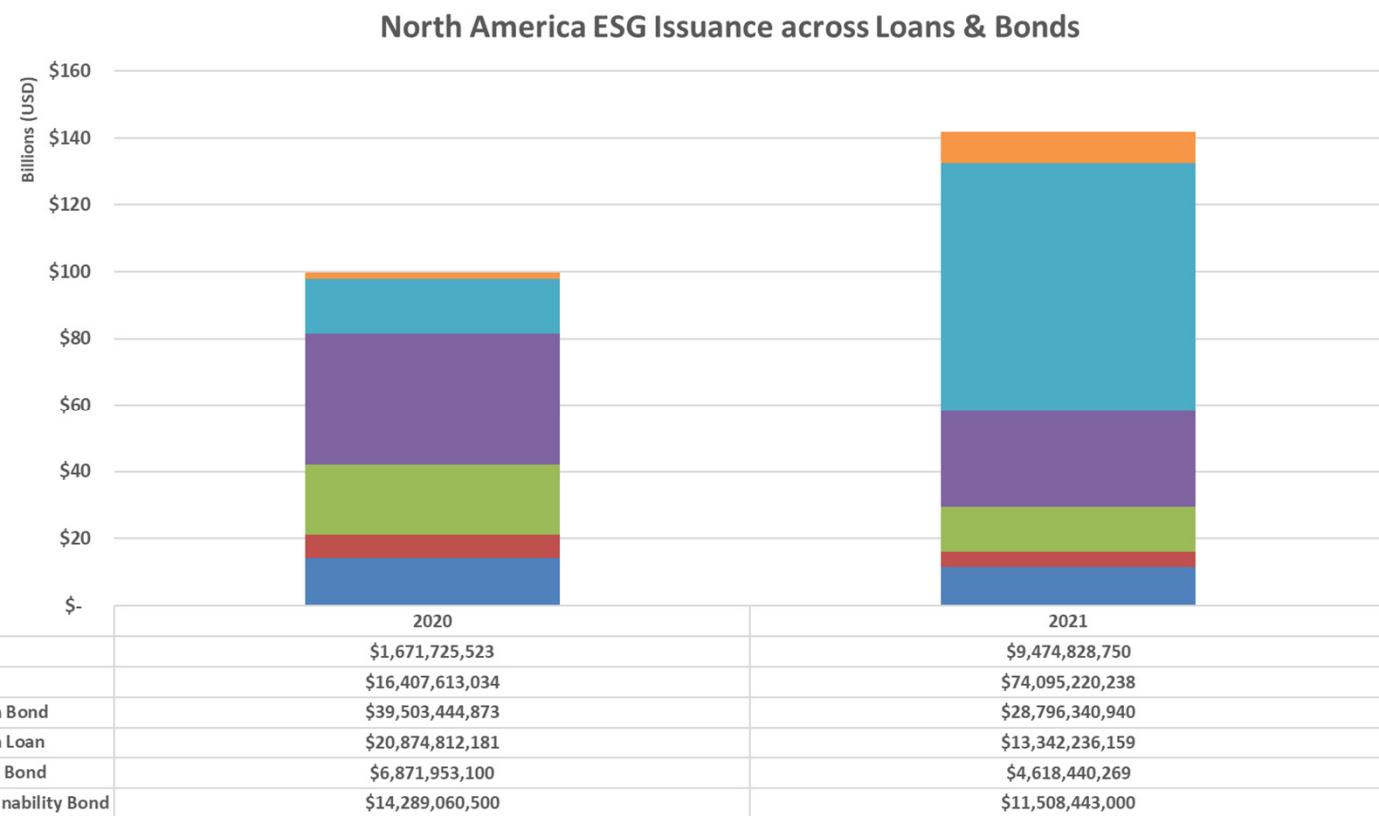


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Share of Broader ESG Finance

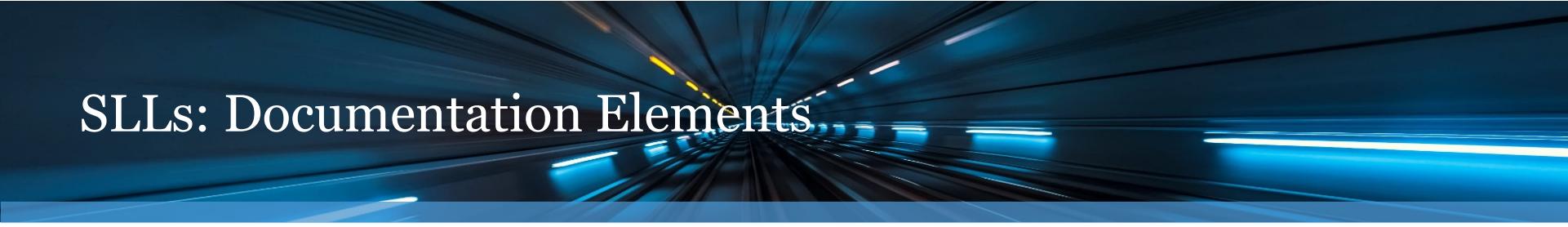


Share of Broader ESG Finance (continued)



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SLLs and SLBs –
Documentation and Features



SLLs: Documentation Elements

- KPIs defined, including methodology for measuring (e.g. by reference to SASB, GRI Standards or other)
- SPTs set forth, often in a table attached as a schedule, together with “escalator” to keep the SPTs relevant over the life of the loan
- Pricing mechanism:
 - Explicit link between the reported KPI performance, viz. whether it does or does not meet the SPT, and the pricing parameters (drawn margin, commitment fee)
 - Contingencies for late or inaccurate reporting
- Reporting provisions (including any requirements for external verification)
- Amendment provisions
 - All-lender consent for pricing changes (carveout for amending the ESG superstructure)
 - Other special rules for amending the sustainability-linked features



SLLs: Selection of KPIs

- Initially focused on “E” of ESG – environmental targets such as GHG emissions, percentage of building square footage that is certified for energy efficiency
 - Alternatively, reliance on “ESG score” compiled by third-party service provider such as Sustainalytics
- More recent SLLs have often included 2, 3 or even 4 KPIs
- More attention given to “S” and “G”
 - Reduction of workplace injuries / illnesses
 - Women and minorities in leadership positions
- Diminished use of outside ESG scores



SLLs: Streamlined Amendment Process

- Amendments of KPIs and SPTs
 - Metrics intended to stay relevant for the life of the loan – can be several years
 - Companies seek to “future-proof” the deal:
 1. Trigger for seeking adjustment
 2. Scope of adjustment
 3. Required consent

Example: “provided, further that notwithstanding any other provision contained herein, if the Company consummates a GHG Impacting Transaction, the Company and the Sustainability Structuring Agent shall be permitted to amend, modify or supplement the Sustainability Table in Schedule 1.01 (other than with respect to the amounts of the Sustainability Fee Adjustment or Sustainability Rate Adjustment); provided that such amendment, modification or supplement to the Sustainability Table shall become effective 15 Business Days after such amendment, modification or supplement is posted to the Lenders, unless the Required Lenders object to such amendment, modification or supplement within 10 Business Days after such posting”



SLLs: “ESG Amendments”

- “ESG Amendments”
 - Set marker in the document allowing the Borrower and the Sustainability Structuring Agent to implement a sustainability linked feature in the future.
 - Specify boundaries (e.g. no more than 5 bps of margin adjustment up or down)
 - Specify required consent

Example: “After the Closing Date, the Borrower, in consultation with the Sustainability Coordinator, shall be entitled to establish specified key performance indicators (“KPIs”) with respect to certain environmental, social and governance (“ESG”) targets of the Borrower and its Subsidiaries. The Sustainability Coordinator and the Borrower may amend this Agreement (such amendment, the “ESG Amendment”) solely for the purpose of incorporating the KPIs and other related provisions (the “ESG Pricing Provisions”) into this Agreement, and any such amendment shall become effective at 5:00 p.m., New York City time, on the tenth Business Day after the Administrative Agent shall have posted such proposed amendment to all Lenders and the Borrower unless, prior to such time, Lenders comprising the Required Lenders have delivered to the Administrative Agent (who shall promptly notify the Borrower) written notice that such Required Lenders object to such ESG Amendment. In the event that Required Lenders deliver a written notice objecting to any such ESG Amendment, an alternative ESG Amendment may be effectuated with the consent of the Required Lenders, the Borrower and the Sustainability Coordinator.”



SLLs: “ESG Amendments” (continued)

Example (continued): “Upon the effectiveness of any such ESG Amendment, based on the Borrower’s performance against the KPIs, certain adjustments (increase, decrease or no adjustment) to the otherwise applicable facility fee, Applicable Rate for Base Rate Loans, Swingline Loans, Eurocurrency Loans, Alternative Currency Loans, LIBOR Daily Floating Rate Loans and Letter of Credit Fees will be made; provided that the amount of such adjustments shall not exceed (i) in the case of the facility fee, an increase and/or decrease of 0.01% and (ii) in the case of the Applicable Rate for Eurocurrency Loans, Alternative Currency Loans, LIBOR Daily Floating Rate Loans and Letter of Credit Fees, an increase and/or decrease of 0.04%, and the adjustments to the Applicable Rate for Base Rate Loans and Swingline Loans shall be the same amount, in basis points, as the adjustments to the Applicable Rate for Eurocurrency Loans and Letter of Credit Fees, provided that in no event shall the Applicable Rate for Base Rate Loans and Swingline Loans be less than zero. The pricing adjustments pursuant to the KPIs will require, among other things, reporting and validation of the measurement of the KPIs **in a manner that is aligned with the Sustainability Linked Loan Principles** and is to be agreed between the Borrower and the Sustainability Coordinator (each acting reasonably).”

SLLs - Europe: Comparative View

- SLLs originated in Europe so many of the SLL characteristics and trends already described by Yair in relation to the US SLL market were first seen in, and apply equally to, the European SLL market
- Coordinated approach taken by the LMA, LSTA and APLMA re: SLLPs and their alignment to the ICMA's SLBPs has assisting in developing consistent approaches to SLLs across different global markets
- Product originated in European corporate working capital facilities where sustainability linked metrics are now well-established and an increasingly standard feature of loan documentation
- More recently, SLLs have started to be seen in other European product areas including:
 - Leveraged finance including direct lender/unitranche deals
 - Fund finance
 - REF
 - Infra finance
- Market standard terms have not yet developed across markets (e.g. REF and infra deals typically have a greater focus on ESG reporting requirements) or within individual markets but, like in the US, some common features have emerged

SLLs - Europe: Trends

• Margin Adjustment

- As per US, sustainability performance typically linked to pricing
- One-way vs two-way adjustments
- Pricing adjustments vary across markets – generally larger in leveraged market compared to investment grade deals
- Sustainability criteria – ESG rating/KPIs and SPTs/Hybrid approach

• Reporting and verification

- Currently no standard methodology
- Anticipated to change over time as new regulations introduced e.g. EU Taxonomy on Sustainable Activities/Sustainable Finance Disclosure Regulation
- In January 2021, The European Leveraged Finance Association and the LMA jointly published a “Guide for Company Advisors on ESG Disclosures in Leveraged Finance Transactions” with the aim of encouraging a standardized approach to ESG reporting and disclosure in that market
- ESG Ratings typically provided by a third party provider on an annual basis
- KPI verification negotiated on a case by case basis. Notwithstanding SLLP guidance, self-reporting is increasingly common on leveraged deals
- Where performance is self-reported, delivery of a sustainability compliance certificate is common. In some cases, this certificate is required to include an auditor or third party verification statement.

SLLs - Europe: Trends (continued)

- **Reporting and verification (cont.)**

- Where performance is self-reported, a day 1 external review of the borrower's methodology is often required as a CP to funding
- External review and certification may also be required if the borrower changes its reporting methodology during the life of a SLL

- **Static or Dynamic Targets and Amendments**

- Early SLLs typically used static performance targets
- To encourage continuous performance improvements over time in return for on-going margin discounts, dynamic targets are now more common
- Some deals include obligations to negotiate in good faith if amendments to SPTs are required e.g. as a result of a major acquisition/change in regulation
- Other deals require third party input in any amendment process
- Also note Future Developments on next slide

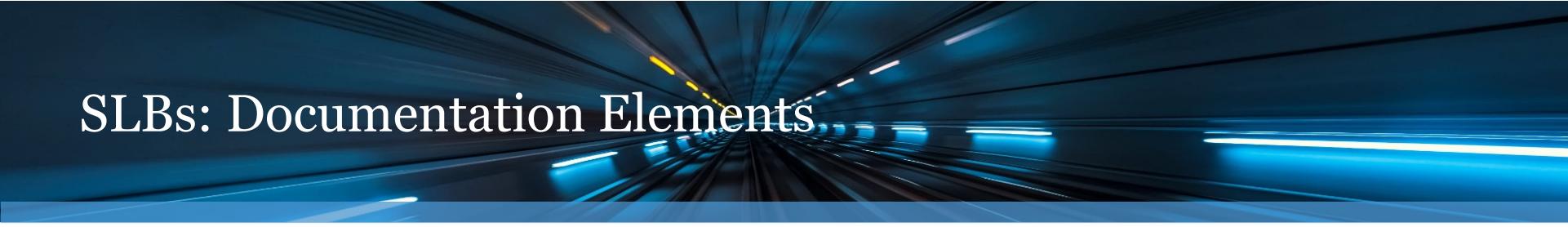
- **Failure to meet targets/report**

- As per US, generally no default or drawstop
- Consequence is typically the payment of a higher margin

SLLs - Europe: Future Developments



- **Charitable Donations/Sustainability Payments** – agreement that an amount equivalent to any margin reduction will be donated to charity or used to fund the borrower's own sustainability objectives
- **ESG Event/Controversy**
 - Anti-embarrassment clause for lenders and borrower
 - Provides that, if there is a significant event with an adverse ESG impact, any margin adjustment will not apply even if unrelated SPTs are met
- **Unilateral Borrower Right to Disapply SLL Provisions**
 - Some deals now include SLL opt-out provisions e.g. if a borrower deems provisions to be onerous
 - In some cases, this will not result in consequential margin adjustments (or, in the case of previous increases, may even result in a margin reduction)
- **Future Proofing Amendment Provisions**
 - A very limited number of deals include pre-agreed conditions to allow a borrower to update its SPTs without going through a formal amendment process with lenders e.g. in the context of a major acquisition or disposal
 - Anticipated to increase, and become more sophisticated, over time



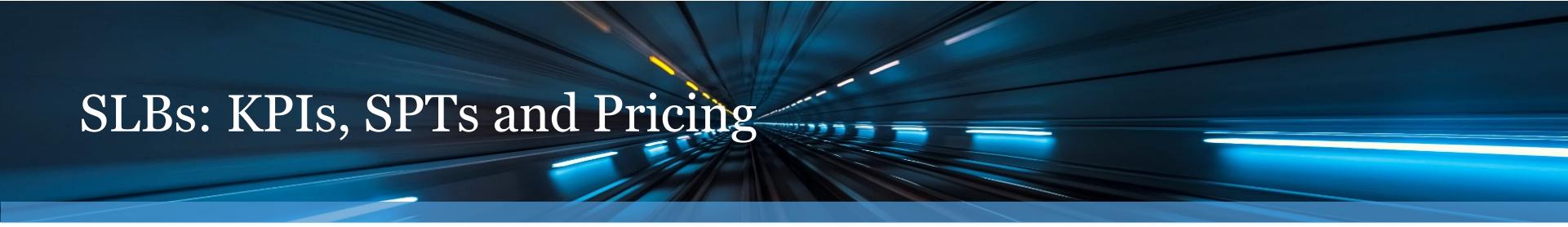
SLBs: Documentation Elements

- Typical bond offering documentation
 - Offering Memorandum and Roadshow
 - Purchase Agreement
 - Indenture
 - Ancillary offering deliverables driven by Securities Act requirements and market practice
- Elements unique to SLB feature
 - SLB Framework with KPIs
 - Third party Opinion
 - Audit of SPT
 - Indenture includes SPT
 - Special disclosure and marketing language in Offering Memorandum and Roadshow
- Issuer will communicate their rationale for the selection of their KPI(s) (i.e. relevance, materiality), the motivation for the SPT(s) (i.e. ambition level, consistency with overall strategic planning and benchmarking approach), the potential change of bond financial and/or structural characteristics and the trigger events leading to such a change, intended post issuance reporting and independent verification, as well as an overall representation of the issuer's alignment with the SLBP.
- Balance with cautionary disclosure



SLB Principles

- ICMA published “Sustainability-Linked Bond Principles” as a voluntary framework.
 - Voluntary process guidelines that outline best practices for financial instruments to incorporate forward-looking ESG outcomes and promote integrity in the development of the SLB market by clarifying the approach for issuance of a SLB.
- The SLBP are intended for broad use by the market:
 - Provide issuers with guidance on the key components involved in launching a credible and ambitious SLB
 - Aid investors by promoting accountability of issuers in their sustainability strategy and availability of information necessary to evaluate their SLB investments
 - Assist underwriters by moving the market towards expected approaches to structuring and disclosures that will facilitate credible transactions.
- Recommends a clear process and transparent commitments for issuers, which investors, banks, underwriters, placement agents and others may use to understand the financial and/or structural characteristics of any given SLB.
 - Emphasizes the recommended and necessary transparency, accuracy and integrity of information that will be disclosed and reported by issuers to stakeholders.
- SLBP have five core components:
 1. Selection of Key Performance Indicators (KPIs)
 2. Calibration of Sustainability Performance Targets (SPTs)
 3. Bond characteristics
 4. Reporting
 5. Verification.



SLBs: KPIs, SPTs and Pricing

- KPIs should be:
 - relevant, core and material to the issuer's overall business, and of high strategic significance to the issuer's current and/ or future operations;
 - measurable or quantifiable on a consistent methodological basis
 - externally verifiable; and
 - able to be benchmarked,
- KPIs primarily focused on “E” of ESG – environmental targets such as GHG emissions
 - Alternatively, reliance on “ESG score” compiled by third-party service provider such as Sustainalytics
 - Climate related KPIs may be measured by reference to SASB, GRI Standards or other; operational KPIs will be measured based on publishable and measurable operational metric
- SPT is defined as a specific quantitative target within the KPI
 - Issuer may have baseline and achieved SPTs audited
- Pricing mechanism:
 - Explicit link between the reported KPI performance, viz. whether it does or does not meet the SPT, and the pricing parameters (ie, interest rate)
 - Interest rate may have more than one step-up if SPTs not achieved as of multiple dates
- Reporting provisions are minimal



SLBs: Third Party Opinions

- Issuers should seek independent and external verification (for example limited or reasonable assurance) of their performance level against each SPT for each KPI by a qualified external reviewer with relevant expertise
 - Such as an auditor or an environmental consultant
 - At least once a year, and in any case for any date/period relevant for assessing the SPT performance, until after the last SPT trigger event of the bond has been reached.
- SLB third-party opinions are standard practice in the SLB market, with such opinions generally reporting on:
 - Selection of Key Performance Indicators (KPIs);
 - Calibration of Sustainability Performance Targets (SPTs);
 - SPT linked pricing mechanisms characteristics; and
 - Reporting and verification
- The TPO process is one of the most time consuming processes in an ESG product offering
 - Issuers often asked to supply reviewers with detailed information regarding the company's sustainability practices, reporting and industry
 - Providers suggest revisions to ESG offering framework documents to better align with ICMA principles and market expectations

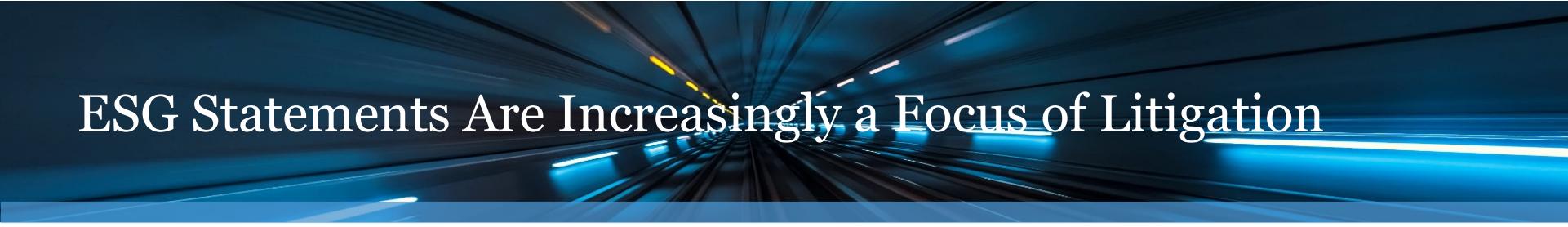
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Liability Risk Management



ESG Finance and Reporting Liability Considerations

- **Litigation risk can come from many angles:**
 - Federal and state securities laws.
 - Consumer protection laws.
 - Public nuisance and supply chain claims.
- **In the U.S., SEC has emphasized a focus on ESG:**
 - In March, Acting Chair gave speech discussing near-term agenda for SEC that centers on climate change and ESG topics.
 - SEC announced creation of Climate Change and ESG Task Force.
 - April 9, SEC issued ESG Risk Alert: “***will continue to examine firms to evaluate whether they are accurately disclosing their ESG investing approaches and have adopted and implemented policies, procedures, and practices that accord with their ESG-related disclosures.***”



ESG Statements Are Increasingly a Focus of Litigation

Private plaintiffs are alleging that ESG Statements in reports, on websites, and in marketing materials are misleading to consumers:

- ***Challenges to CSR statements:*** allegations that statements in annual corporate social responsibility report related to **sustainable farming, animal well-being, and fair treatment of employees** were misleading.
- ***Challenges to auditing programs:*** allegations that disclosures related to retailer auditing program related to labor performance by suppliers was deceptive.
- ***Supply Chain litigation*** (using TVPRA, ATS and similar) being used to accuse companies of aiding and abetting unlawful labor practices because of their ESG claims about supply chains.
- ***Recyclability focus*** multiple lawsuits filed against companies claiming that their products are recyclable when, in fact, they are not actually recycled.

Limiting Litigation Risk: ESG Bonds

- ✓ **Remember – Strict Liability for Offering Documents:** Securities Act Section 11—strict liability for any material misstatements or omissions.
- ✓ **Antifraud Liability for Other Disclosures:** Though the Framework and any Sustainability Report will only be published on websites and not filed with the SEC, they will be subject to 10b-5 liability, the same as any information disclosed outside of SEC filings that investors may rely on when buying/selling securities.
- ✓ **Disclaimers** in the Framework, Sustainability Report, Third Party Opinion and other ESG-related information should explicitly state that such documents do not constitute part of the offering materials for any current or future offering and caution reliance on the forward-looking information.



Limiting Litigation Risk: ESG Generally

- ✓ Consistent policies, procedures, and practices related to ESG and use of ESG-related terminology.
- ✓ Compliance personnel who are knowledgeable about the firm's ESG approaches and practices.
- ✓ Mindful positive impact reporting - don't overstate or misrepresent.
- ✓ Statements about hitting specific ESG targets should be clearly **forward-looking** and appropriately cautioned.
- ✓ Confirm company has **adequate diligence procedures** in place with respect to information about progress on ESG goals.

Limiting Litigation Risk: ESG Generally

Take steps to avoid misrepresentations:

- ✓ Simple and clear disclosures.
- ✓ Include risk factors.
- ✓ Include forward-looking statement disclaimers.
- ✓ Consider using well-established metrics and describing the parameters of the metrics in sufficient detail.
- ✓ Educate responsible individuals about growing risk of lawsuits based on alleged ESG misstatements or omissions.
- ✓ As with SEC filings, ESG disclosure should be subject to rigorous controls and procedures.

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