GIBSON DUNN

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# GIBSON DUNN ENVIRONMENTAL, SOCIAL AND GOVERNANCE UPDATE (JULY 2023)

To Our Clients and Friends:

We are pleased to provide you with Gibson Dunn's ESG monthly updates for July 2023. This month, our update covers the following key developments. Please click on the blue links below for further details.

## International

### 1. SBTi consults on guidance for financial institutions' targets

The Science Based Targets initiative ("**SBTi**") is developing new resources to provide financial institutions with clear guidance, criteria and recommendations to set science-based near and long-term targets consistent with net-zero and limiting global temperature rise to 1.5°C. On July 6, 2023, SBTi held two webinars to discuss the public consultation on the three new draft finance sector resources, being: (i) SBTi financial institutions net-zero standard, conceptual framework and initial criteria; (ii) SBTi near-term financial sector science based targets guidance and SBTi near-term criteria and recommendations for financial institutions; and (iii) SBTi fossil fuel finance position paper. The consultation is open for feedback until August 14, 2023.

### 2. International Maritime Organization adopts revised strategy on GHG emissions from ships

On July 7, 2023, Member States of the International Maritime Organization ("**IMO**") adopted the 2023 IMO strategy on reduction of greenhouse gas ("**GHG**") emissions from ships, which includes an enhanced common ambition to reach net-zero GHG emissions from international shipping close to 2050, a commitment to ensure an uptake of alternative zero and near-zero GHG fuels by 2030, as well as indicative check-points for 2030 and 2040. The 2023 Strategy sets out a timeline towards the adoption of a basket of measures focused on mid-term GHG reduction measures with a view towards adopting a further revised strategy in 2028.

### 3. ISDA publishes conceptual framework for climate scenario analysis in the trading book

The International Swaps and Derivatives Association ("**ISDA**") published on July 12, 2023 a conceptual framework for climate scenario analysis in the trading book, which is in response to the survey of ISDA members carried out in 2022 that highlighted that trading book scenario analysis is a priority for many banks. The framework, which was prepared in collaboration with Deloitte and over 30 ISDA member banks, sets out a detailed approach to the design and implementation of climate scenarios and their impact on traded assets. At the implementation stage, the impact of the climate scenario on macroeconomic factors is translated into market risk factors and applied to trading book portfolios. During the second half of 2023, ISDA plans to test the usefulness of the Conceptual Framework and to generate estimates of potential climate risk impacts on a set of hypothetical portfolios.

**4. IFRS Foundation publishes comparison of the new IFRS S2 with the TCFD Recommendations**

On July 24, 2023, the International Financial Reporting Standards Foundation ("**IFRS Foundation**") published a comparison of the requirements in IFRS S2 climate-related disclosures and the Task Force on Climate-related Financial Disclosures ("**TCFD**") recommendations. The requirements in IFRS S2 are consistent with the four core recommendations and 11 recommended disclosures published by the TCFD, and companies that apply the International Sustainability Standards Board ("**ISSB**") Standards will meet the TCFD recommendations. IFRS S2 includes additional requirements for companies to disclose industry-based metrics, to disclose information about their planned use of carbon credits to achieve their net emissions targets and to disclose additional information about their financed emissions. Although the work of the TCFD is completed, the TCFD recommendations remain available for companies to use. Going forward, the IFRS Foundation will take over the monitoring of the progress of companies' climate-related disclosures from the TCFD.

**5. IOSCO endorses the ISSB standards on sustainability disclosure and climate-related disclosures**

On July 25, 2023, IOSCO announced its endorsement of the IFRS S1 and IFRS S2 sustainability-related financial disclosures standards issued by ISSB. After an independent review and analysis of the ISSB Standards, IOSCO has determined that the ISSB Standards are "appropriate to serve as a global framework for capital markets to develop the use of sustainability-related financial information in both capital raising and trading and for the purpose of helping globally integrated financial markets accurately assess relevant sustainability risks and opportunities". As per their press announcement, IOSCO now calls on its 130 member jurisdictions to consider ways in which they might adopt, apply or otherwise be informed by the ISSB Standards, "in a way that promotes consistent and comparable climate-related and other sustainability-related disclosures for investors".

**United Kingdom**

**1. Draft voluntary code of conduct for ESG ratings and data product providers issued for consultation**

On July 5, 2023, the ESG Data and Ratings Working Group commissioned by the United Kingdom Financial Conduct Authority ("**FCA**") published a draft voluntary code of conduct for ESG ratings and data product providers. Once adopted, the code will apply to all UK based companies that compile ESG ratings on market participants. The draft code is based on recommendations made by the International Organisation of Securities Commission ("**IOSCO**") in an effort to ensure global interoperability and coherence. The public consultation is open until October 5, 2023, with the final version of the code expected to be published by the end of the year. In the UK, regulation is being considered in parallel, with the possibility that ESG ratings and data providers could become subject to the regulatory auspices of the FCA.

**2. UK Emissions Trading Scheme Authority publishes report on the functioning of the UK carbon market and announces new limits on emissions**

In July 2023, the UK Emissions Trading Scheme Authority (the "**UK ETSA**") published a report on the functioning of the UK carbon market, which provides a high-level summary of the 2021 and 2022 scheme years of operation. In parallel with its report, on July 3, 2023, the UK ETSA announced a new set of reforms that propose to limit industrial, power and aviation emissions from 2024. The UK ETSA also stated that these reforms will be extended to cover more sectors, namely the domestic maritime transport industry from 2026 and the waste industry from 2028, with an intention to roll out a phased removal of free carbon allowances for the aviation industry in 2026.

**3. The UK Endorsement Board consults on draft letter considering connectivity between ISSB sustainability and disclosure standards and IASB accounting standards**

In May 2023, the ISSB published a request for information in a consultation on ISSB's agenda priorities, which will inform its strategic direction and priorities over the next two years. On July 13, 2023, the UK Endorsement Board issued a draft comment letter to ISSB, which specifically focuses on connectivity between ISSB sustainability and disclosure standards and IASB accounting standards. Stakeholder comments were received until July 23, 2023, with a view to sending the letter to ISSB in August 2023.

**4. FCA delays finalisation of its SDR and investment labels consultation for the second time**

On July 18, 2023, the Regulatory Initiatives Forum under the FCA announced that it was delaying providing updates to its Regulatory Initiatives Grid, which includes the publication of its conclusion to the sustainability disclosure requirements ("**SDR**") and investment labels consultation. The FCA published its first Discussion Paper (DP 21/4) in November 2021, which was followed by a Consultation Paper (CP 22/20) in October 2022. The FCA's final Policy Statement was previously scheduled to be published in the first half of 2023, but it is now due to be released during Q4 of this year due to the significant number and range of responses received. The latest SDR proposals require asset managers and investment advisers to provide mandatory ESG disclosures, including to prevent greenwashing. Whilst announcing the delay, the FCA commented that the anticipated changes "will help the UK's asset management sector thrive by setting standards that improve the sustainability information consumers have access to".

**5. The Financial Reporting Council Lab releases ESG data distribution and consumption report**

On July 20, 2023, the UK's Financial Reporting Council Lab published a new report on ESG data distribution and consumption which examines how investors obtain and use ESG data on companies, and highlights what actions companies can take to optimise the flow of ESG data. The findings of the report identify, among others, that investors want companies to include ESG risks, opportunities and progress relevant to their business in their annual reports.

**6. UK High Court dismisses renewed oral application from ClientEarth to bring derivative claim against the directors of Shell**

On July 24, 2023, the High Court of Justice in the UK dismissed a renewed oral application by ClientEarth to bring a derivative claim on behalf of Shell plc against Shell's board of directors for alleged failure to effectively address climate related risks to the detriment of Shell's shareholders. ClientEarth announced on the same day that they intend to appeal the decision.

**Europe**

**1. ESMA and NCAs to assess ESG disclosures and sustainability risks in the investment fund sector**

On July 6, 2023, the European Securities and Markets Authority ("**ESMA**") launched a common supervisory action ("**CSA**") with National Competent Authorities ("**NCAs**") on sustainability-related disclosures and the integration of sustainability risks in the investment fund sector. The main objectives of the CSA include: (i) assessing whether market participants adhere to applicable rules and standards in practice; (ii) gathering further information on greenwashing risks in the investment management sector; and (iii) identifying further relevant supervisory and regulatory intervention to address the underlying issues. Until Q3 2024, NCAs will undertake their supervisory activities and share knowledge and experiences through ESMA.

**2. European Council reaches agreement on Batteries Regulation 2023**

On July 10, 2023, the European Council adopted a new regulation that strengthens sustainability rules concerning batteries and waste batteries and promotes a circular economy. The regulation regulates the entire life cycle of batteries, from production to reuse and recycling. The regulation applies to all batteries including all waste portable batteries, electric vehicle batteries, industrial batteries, starting, lightning and ignition batteries (used mostly for vehicles and machinery) and batteries for light means of transport (*e.g.* electric bikes, e-mopeds, e-scooters). The new regulation will replace the current batteries directive of 2006.

**3. ESMA issues public statement on the sustainability disclosures in prospectuses and publishes latest sustainable finance implementation timeline**

On July 11, 2023, ESMA issued a public statement on the sustainability disclosures expected to be included in equity and non-equity prospectuses. The statement sets out how the specific disclosure requirements of the EU Prospectus Regulation in relation to sustainability-related matters should be satisfied.

In addition, ESMA published an updated timeline for the implementation of sustainable finance disclosure requirements and undertakings.

**4. European Parliament passes proposals for Nature Restoration Laws**

On July 12, 2023, the EU's proposal for a Regulation on Nature Restoration passed through the European Parliament. This regulation, which is a key element of the EU Biodiversity Strategy, aims to: (i) enable the long-term sustained recovery of biodiverse and resilient nature; (ii) contribute to achieving the EU's climate mitigation and climate adaptation objectives; and (iii) meet international commitments on nature restoration and preservation. The regulation contains seven specific targets, including protecting urban ecosystems by aiming for no net loss of green urban space by 2030 and improving river connectivity so that at least 25,000 km of rivers are restored to a free-flowing state by 2030.

**5. EU proposes new measures on circular economy with respect to the automotive sector**

On July 13, 2023, the European Commission issued a proposal for a regulation on Circularity Requirements for Vehicle Design and on Management of End-of-Life Vehicles and issued an associated Q&A on the topic. The proposed regulation, which would replace the current Directives on End-of-Life Vehicles and Reusability, Recyclability and Recoverability of Vehicles, is expected to have substantial environmental benefits, including an annual reduction of 12.3 million tons of CO2 emissions by 2035 and increased recovery of critical raw materials. The proposed actions are expected to generate €1.8 billion in net revenue by 2035, with additional jobs created and enhanced revenue streams for the waste management and recycling industry.

**6. European Banking Association publishes decision concerning ad hoc collection of institutions' ESG data and consults on draft templates for collecting climate-related data from EU banks**

On July 18, 2023, the European Banking Authority ("**EBA**") published a decision of July 6, 2023 concerning ad hoc collection by competent authorities of Member States of institutions' ESG data. The EBA intends to collect data from large, listed institutions based on their Pillar 3 quantitative disclosure requirements on ESG risks, until a supervisory reporting framework on ESG has been put in place. The ad-hoc data collection will provide national competent authorities with data to monitor ESG risks and contribute to the European Commission's Strategy for financing the transition to a sustainable economy. Competent authorities shall submit to the EBA the data on a semi-annual basis, with a first submission set for December 31, 2023.

On July 20, 2023, the EBA launched a public consultation on draft templates for collecting climate related data from EU banks. This effort is part of the EBA's work on climate stress-testing, notably the one-off Fit-for-55 climate risk scenario analysis, which the EBA will carry out together with the other European Supervisory Authorities and with the support of the European Central Bank and the European Systemic Risk Board. The draft templates are accompanied by a template guidance, which includes definitions and rules for compiling the templates. A workshop public hearing will be hosted on September 28, 2023, after which the consultation will remain open for comments until October 11, 2023. Seventy banks will take part in the exercise, being the same banks as those included in the 2023 EU-wide stress test. National competent authorities may request other banks in their respective jurisdictions to participate. The one-off Fit-for-55 climate risk scenario analysis is targeted to start by the end of 2023, with the publication of results expected by Q1 2025.

**7. European Commission adopts first set of European sustainability reporting standards**

On July 31, 2023, the European Commission adopted a Commission Delegated Regulation, with related Annexes 1 and 2, setting out the first set of EU sustainability reporting standards ("**ESRS**"), together with a Q&A on the adoption of the ESRS. The standards cover the full range of environmental, social, and governance issues, including climate change, biodiversity and human rights, and provide information for investors to understand the sustainability impact of the companies in which they invest. The European Parliament and Council are expected to formally review the Delegated Regulation for two months upon which they may reject it, but they may not amend it. Companies subject to the Corporate Reporting Sustainability Directive will have to report according to the ESRS. For further information on the CSRD, please refer to our client alert available here.

**United States**

**1. House Financial Services Committee begins month of hearings focused on ESG**

As our June 2023 Update anticipated, the House Financial Services Committee held a series of hearings that focused on concerns over ESG disclosures and regulations as part of "ESG Month". Of the numerous bills proposed, we highlight the following for their potential impact on the Securities and Exchange Commission (the "**SEC**"), public reporting companies, and the investment community:

- The "Guiding Uniform and Responsible Disclosure Requirements and Information Limits (GUARDRAIL) Act of 2023" would in part amend the Securities Act of 1933 to make clear that the SEC only requires issuers to disclose *material* Under proposed amendments to the Securities Exchange Act of 1934 (the "**Exchange Act**"), the SEC would be required to maintain a list of any *non*-material disclosure requirements for issuers and provide a justification every five years for such requirements. Additional Exchange Act amendments would remove private liability for issuers that fail to disclose non-material information under federal securities laws and establish a "Public Company Advisory Committee" within the SEC to provide the Commission advice on issues related to public reporting and corporate governance, the proxy process and capital formation, among other matters.

- The "Protecting Americans' Retirement Savings from Politics Act" would significantly impact the shareholder proposal process under Rule 14a-8 and the activities of proxy advisory firms, institutional investors, and investment firms. For Rule 14a-8 shareholder proposals, issuers would be authorised to simply exclude proposals relating to environmental, social, or political issues or significant policy issues from their proxy statements. The act would also nullify the SEC's July 2022 proposed amendments to Rule 14a-8 regarding the exclusion of proposals that have been substantially implemented or duplicate other submitted proposals and require the SEC to revise the current resubmission thresholds for proposals that substantially duplicate proposals previously included in the proxy statement or consent solicitations. Institutional investors would in part be required to disclose certain information about their shareholder proposal voting decisions, while large asset managers would have to include economic analyses for such decisions. Proxy advisory firms would be required to register with the SEC, disclose specific information, and set standards for managing conflicts of interest. And the Investment Advisers Act of 1940 would be amended to address how pecuniary and non-pecuniary factors are considered and to require the SEC to study climate change and environmental disclosures by municipal bond issuers, among other changes.

- Under the "Businesses Over Activists Act," the SEC would be prohibited from requiring issuers to include shareholder proposals in their proxy statements. The act further states that the SEC does not have the authority to override states' regulations regarding proxy/consent solicitation materials or shareholder proposals.

**2. SEC adopts new rules on cybersecurity disclosure for public companies**

On July 26, 2023, the SEC adopted a final rule requiring the disclosure of material cybersecurity incidents and cybersecurity risk management, strategy, and governance by public companies, including foreign private issuers. The final rule imposes a substantial reporting burden on public companies and introduces complexity to incident response for all public companies. The final rule will become effective 30 days after publication in the Federal Register. You can read a detailed summary and commentary on this topic in our client alert available here.

**3. Thirteen U.S. state attorneys general target Fortune 100 CEOs on diverse hiring following the Supreme Court's landmark affirmative action decision**

On June 29, 2023, the Supreme Court released its much-anticipated decisions in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*, where the Supreme Court held that the universities' use of race in their admissions processes violated the Equal Protection Clause and Title VI of the Civil Rights Act. Although existing law governing employers' consideration of the race of their employees (or job applicants) is not explicitly modified, the decisions have important legal and strategic ramifications for employers. In particular, the Court's broad rulings in favour of race neutrality could accelerate the trend of reverse-discrimination claims. Shortly after the decision, 13 state attorneys general sent a joint letter to the chief executive officers of the Fortune 100 to reiterate the Supreme Court's decision, request compliance with certain "race-neutral-principles", and threaten accountability for continued use of race-based preferences or quotas. You can read an extensive commentary on this topic in our client alert available here.

**APAC**

**1. The Philippines publishes inaugural sustainability report**

On July 2, 2023, the central bank of the Philippines, Bangko Sentral ng Pilipinas ("**BSP**"), published its inaugural sustainability report, which highlights BSP's integration of ESG considerations into strategic objectives and functions and the progress made in promoting sustainability in financial markets. The report provides an overview of BSP's ESG initiatives in the sphere of financial supervision, monetary policy, reserve management, credit operations and support operations. The report also identifies a number of proposed initiatives targeted at advancing sustainability objectives, including the creation of taxonomy, granting of regulatory incentives to encourage financing for sustainable projects and investments and improvements to stress-testing guidelines, prudential reports and disclosure requirements.

**2. ESG initiatives by the Securities and Exchange Board of India**

On July 3, 2023, the Securities and Exchange Board of India ("**SEBI**") introduced the Securities and Exchange Board of India (Credit Rating Agencies) (Amendment) Regulations, 2023, which specifically seek to regulate ESG rating providers. These regulations govern the activities of ESG rating agencies, ensuring transparency and reliability in their operations. According to the regulations, no person can act as an ESG rating provider unless they have first obtained a certificate from SEBI.

In addition, on July 12, 2023, SEBI set out a new regulatory framework prescribing the disclosure and assurance requirements for Business Responsibility and Sustainability Reporting Core, which require listed companies to make ESG disclosures covering firms in their value chain.

**3. Singapore launches public consultation to advance climate reporting**

On July 6, 2023, the Accounting and Corporate Regulatory Authority and Singapore Exchange Regulation launched a public consultation on the recommendations by the Sustainability Reporting Advisory Committee to advance climate reporting in Singapore. The recommendations provide that listed issuers lead the way and report International Sustainability Standards Board-aligned climate-related disclosures starting from financial year 2025. The public consultation is open for comments until September 30, 2023.

**4. Australian Prudential Regulation Authority publishes practice guide on investment governance for superannuation trustees**

In July, the Australian Prudential Regulation Authority published final guidance to trustees in the formulation, implementation, maintenance and oversight of an investment strategy. It sets out prudent practices in relation to investment risk management arrangements to assist trustees in meeting their obligations under the prudential standard on investment governance.

**5. Malaysia launches part 1 of the country's national energy transition roadmap**

On July 27, 2023, the Ministry of Economy of Malaysia launched the first part of the national energy transition roadmap, which sets out the country's roadmap to energy transition by outlining ten flagship catalyst projects and initiatives based on six energy transition levers, being energy efficiency, renewable energy, hydrogen, bioenergy, green mobility and carbon capture, utilisation and storage. Part 2, expected to be forthcoming later this year, will focus on establishing the low-carbon pathway, national energy mix and emissions reduction targets as well as the enablers needed for the energy transition.

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,

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