



# KIRKLAND & ELLIS

NOVEMBER 2023

## Global ESG Regulatory Overview

Presenters: Abbey Raish, Ariel Giumarelli, and Rhys Davies

The views, opinions, statements, analysis and information contained in these materials are those of the individual presenters and do not necessarily reflect the views of Kirkland & Ellis or any of its past, present and future clients. These materials (1) do not constitute legal advice; (2) do not form the basis for the creation of the attorney/client relationship; and (3) should not be relied upon without seeking specific legal advice with respect to the particular facts and current state of the law applicable to any situation requiring legal advice. These materials may only be reproduced with the prior written consent of Kirkland & Ellis. These materials are provided with the understanding that the individual presenters and Kirkland & Ellis are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters, and, accordingly, such entities assume no liability whatsoever in connection with their use. Pursuant to applicable rules of professional conduct, this material may constitute Attorney Advertising. Prior results do not guarantee a similar outcome. © 2023 Kirkland & Ellis LLP. All rights reserved.

1



### Presenters



**Abbey Raish**  
Partner | Los Angeles  
abbey.raish@kirkland.com  
T +1 310 552 4293

Abbey Raish is a partner in the Los Angeles office of Kirkland & Ellis LLP and provides legal advice on ESG to public and private companies, financial institutions and private equity firms in connection with a variety of corporate and transactional matters. Her practice focuses specifically on ESG disclosures in SEC filings, corporate governance, ESG transactional diligence, voluntary ESG reporting, and human capital.



**Rhys Davies**  
Partner | London  
rhys.davies@kirkland.com  
T +44 20 7469 2127

Rhys Davies is a partner in the ESG & Impact Practice Group in the London office of Kirkland & Ellis International LLP. Rhys has more than 15 years of ESG experience, including advising private equity firms, public companies and project sponsors in relation to the design and implementation of ESG strategies across a range of sectors, including energy and natural resources, infrastructure, real estate and technology.



**Ariel Giumarelli**  
Partner | Washington, D.C.  
ariel.giumarelli@kirkland.com  
T +1 202 389 3461

Ariel Giumarelli is a partner in the Washington, D.C., office of Kirkland & Ellis LLP and member of the ESG & Impact Practice Group, which advises some of the world's most sophisticated companies and private equity firms on complex and evolving issues related to environmental, social and governance (ESG), human rights and climate-related regulatory requirements, strategic opportunities and reporting frameworks.

2

# ▶ Contents

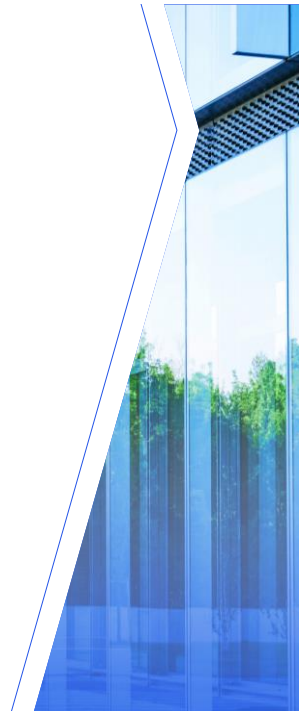
- 1 Emerging Global ESG Regulatory Trends
- 2 Disclosure Risks and Considerations
- 3 Best Practices

3

## Emerging Global ESG Regulatory Trends

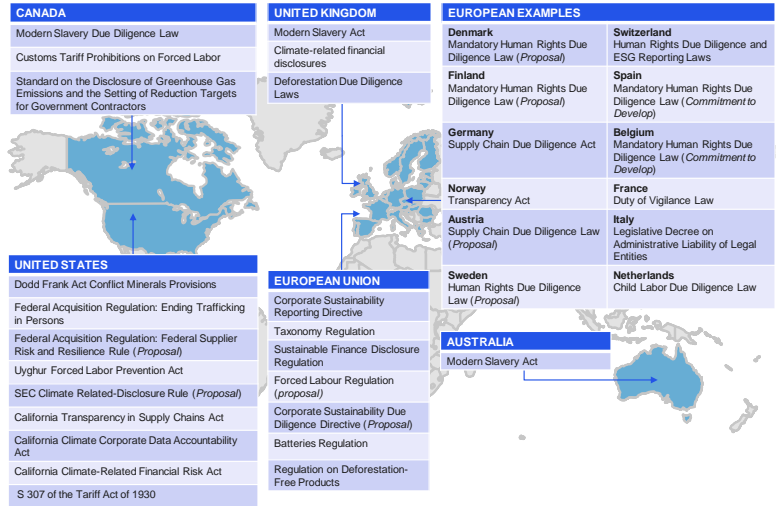
KIRKLAND & ELLIS

4



# Emerging ESG Regulation: A Global Landscape

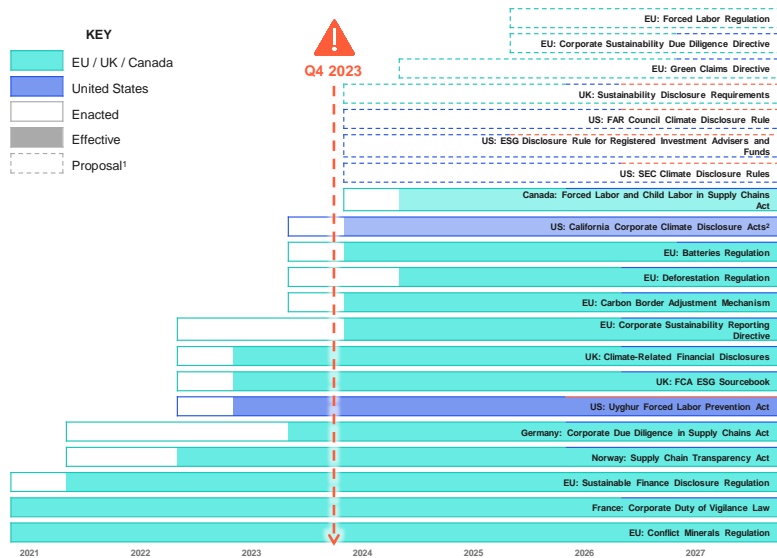
ESG regulations – both existing and proposed – with potentially overlapping and interacting requirements are emerging across the globe.



Note: The regulations and proposals listed here are representative examples and not intended to be exhaustive. Each company requires a fact-specific analysis to determine which regulations and proposals may be relevant based on, for example, where the company is listed, its operational or supply chain locations, and/or its headcount or revenue.

KIRKLAND & ELLIS

# Wave of Oncoming ESG Legal Requirements



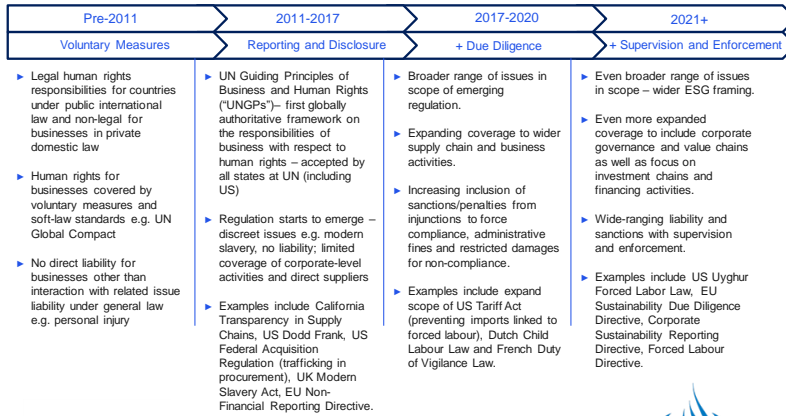
1. Dates are based on best estimates and projections from past rulemaking. Timelines are meant only to be broadly representative. Final dates may be subject to change.  
 2. As of September 18, the California Legislature had passed four bills requiring extensive climate-related corporate disclosures, and Governor Gavin Newsom had committed to signing at least two of them into law (though he had not yet done so). All four bills will become law by October 14<sup>th</sup> if Gov. Newsom either (1) signs them or (2) takes no action.

KIRKLAND & ELLIS



## Key Trend: Increased Global Focus on Business & Human Rights Regulation

Companies have faced increased pressure from shareholders and other stakeholders in recent years against a backdrop of global regulatory attention to corporate human rights policies and processes.



KIRKLAND & ELLIS

7

7

## US Regulatory Overview

KIRKLAND & ELLIS

8



## SEC ESG Rulemaking Agenda

The SEC is moving quickly on proposed ESG rulemakings in the areas of climate change, cybersecurity, and human capital management/board diversity.

### AGENDA

#### Climate Change Disclosure

- Proposed rules for public companies released **March 2022**
- Final rules on Agency Agenda for **October 2023**

#### Cybersecurity Risk Governance

- Proposed rules for Advisers released **February 2022**, final rules on Agency Agenda for **October 2023**
- Final rules for public companies released **July 2023**

#### Rules Related to Investment Companies and Investment Advisers to Address Matters Relating to Environmental, Social and Governance Factors

- Proposed rules released **May 2022**
- Final rules on Agency Agenda for **October 2023**

#### Human Capital Management Disclosure – On Agency Agenda for **October 2023**

#### Corporate Board Diversity – On Agency Agenda for **April 2024**

### Hot Topics for 2023

**E**

Climate Change  
Biodiversity

**S**

Human Rights  
Diversity  
Human Capital

**G**

Cybersecurity  
Business Ethics  
Lobbying Transparency

KIRKLAND & ELLIS

9

9



## Proposed SEC Climate Disclosure Requirements

On March 21, 2022, the SEC issued a Proposed Rule that would require public companies to include extensive climate-related information in their registration statements and periodic reports, as well as in the notes to their consolidated financial statements.

### OVERVIEW OF PROPOSAL

**Public companies would be required to disclose detailed qualitative and quantitative information, including:** (1) Climate-related risks, impacts (operational and financial), oversight and management, (2) climate-related financial statement metrics and (3) emissions, targets, goals and plans.

#### ► Emissions disclosure obligations:

- Would require all public companies to disclose Scope 1 and 2 GHG emissions (irrespective of materiality), and for larger companies, would require third party assurance.
- Would also require disclosure of Scope 3 emissions **if material or if a company has set Scope 3 emissions targets.**

#### ► Additional disclosure obligations for certain companies, including:

- Companies with transition plans;
- Companies that use scenario analysis or internal carbon pricing;
- Companies that have set climate-related targets or goals.

► Disclosures would generally be filed, rather than furnished, and subject to officer certifications as to disclosure and financial controls.

### COMMENT PERIOD AND FINAL RULE

The proposed rule has drawn thousands of public comments while open to public comment, and the final rule is expected to be published in **Q4 2023**.

### POTENTIAL IMPLICATIONS/TAKEAWAYS

- **Controls.** Reported information would be subject to substantial incremental liability exposure and companies would need to develop or “uplift” procedures to collect, measure, analyze and report new and voluminous data.
- **Governance.** Disclosure of governance practices could influence investor and regulatory expectations of board composition and expertise, especially for companies with more significant climate-related risks.
- **Strategy, Business Model and Outlook.** Companies may need to expend significant resources to build out climate risk assessment processes and evaluate areas of heightened vulnerability, including by working with consultants to conduct physical climate risk assessments of assets and assessing supply chain vulnerabilities.
- **Targets and Goals.** Companies that have adopted transition plans, completed scenario analyses, set public emissions targets or goals, or deployed internal carbon pricing should inventory their existing disclosures and consider the compliance burdens under the proposed rules on existing and future goals/targets.

KIRKLAND & ELLIS

10



## Proposed Climate Disclosure Rule for Federal Contractors

Under the Federal Acquisition Regulation Council's November 2022 Federal Supplier Risk and Resilience Rule, certain federal contractors – may be subject to climate and emissions related disclosure obligations and emissions reduction target requirements.

- ▶ Proposed rule applies to federal contractors defined under two categories<sup>1</sup>:
  - “Significant contractors,” i.e., receiving \$7.5M to \$50M in federal contract obligations in the previous fiscal year
  - “Major contractors,” i.e., receiving over \$50M in federal contract obligations in previous fiscal year
- ▶ Requirements under the rule:
  - Significant and major contractors must complete an annual inventory of their GHG emissions
  - Significant contractors must disclose Scopes 1 and 2 emissions; major contractors must also disclose “relevant” Scope 3 emissions
  - Major contractors must complete an annual disclosure of climate-related financial risks, including completing “those portions of the CDP Climate Change Questionnaire that align with” the Task Force on Climate-related Financial Disclosures (TCFD) recommendations as [identified](#) by CDP, and publish those on a public website<sup>2</sup>
  - Major contractors must develop science-based targets for reducing GHG emissions in line with the goals of the Paris Agreement, to be validated by the Science Based Targets Initiative (SBTI)

EVENT	DATE/TIMELINE
Final rule	No set date — potentially late 2023 or early 2024
Scope 1 & 2 emissions inventory (significant and major contractors)	One year after final rule is published
Scope 3 emissions inventory, preparation of CDP questionnaire and setting science-based emissions targets (major contractors)	Two years after final rule is published
SBTI validation for science-based targets	Proposed rule is ambiguous on this point, but likely two years after final rule is published

1. These thresholds align with federal cost accounting standards (CAS) thresholds. If a government contractor is subject to CAS thresholds, this typically indicates that it depends substantially on government contracts for a significant portion of its revenue.
2. The Proposed FAR Rule provides limited guidance on how to determine the portions of the CDP Questionnaire that align with the TCFD recommendations, other than providing a link to a technical note on CDP's website describing its alignment with TCFD. The technical note states that CDP has sought to integrate the TCFD recommendations into its questionnaire and does not expressly outline the questions in the CDP Questionnaire that are aligned / not aligned, thus leading to potential confusion by contractors looking to comply with this aspect of the Proposed FAR Rule.

KIRKLAND & ELLIS



## California Enacts Landmark Climate Disclosure Bills

Three pieces of far-reaching legislation, signed into law on October 7, 2023, will impose broad climate-related disclosure obligations on thousands of companies with certain ties to California

BILL	SUMMARY	SCOPE	FIRST REPORT	PENALTIES
<a href="#">Climate Corporate Data Accountability Act</a>	Publicly disclose and verify Scope 1, 2 and 3 greenhouse gas (GHG) emissions annually	Public and private U.S. companies that “do business in California” and have >\$1b total annual revenue	2026 (for information from FY 2025)*	Up to \$500,000 per reporting year
<a href="#">Climate-Related Financial Risk Act</a>	Prepare and publicly disclose every other year a climate-related risk report in line with the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) or the International Sustainability Standards Board's (ISSB) Climate-Related Disclosures Standard	Public and private U.S. companies that “do business in California” and have >\$500m annual revenue (other than insurers)	On or before January 1, 2026	Up to \$50,000 per reporting year
<a href="#">Voluntary Carbon Market Disclosures Act</a>	Publicly disclose detailed information related to the methodology, verification, and/or carbon offsets used to support climate-related claims; and — for companies marketing or selling carbon offsets — publicly disclose detailed information about the offsets' characteristics	Companies making climate-related claims or purchasing / using carbon offsets sold —and companies marketing / selling offsets — in California	Beginning January 1, 2024	Up to \$2,500 per individual violation  (Up to a total of \$500,000)

KIRKLAND & ELLIS \* Pending implementation details from the California Air Resources Board



## Climate Corporate Data Accountability Act (CCDAA)

Annual reporting and verification of Scope 1, 2, and 3 emissions

### KEY DETAILS

- ▶ **Scope:** U.S.-organized public and private entities that "do business in California"<sup>1</sup> and have total annual revenues in excess of **\$1 billion** (based on prior fiscal year)
- ▶ **Reporting:** Annually calculate and disclose Scope 1 (directly controlled assets), Scope 2 (procured energy), and Scope 3 (supply chain and investments) emissions
- ▶ **Verification:** Obtain independent, third-party verification for emissions inventories, with: (1) Scope 1 and 2 assurance required at a limited level beginning in 2026 and a reasonable level beginning in 2030, and (2) Scope 3 assurance required at a limited level beginning in 2030<sup>2</sup>
- ▶ **Timeline:** Scope 1 and 2 emissions reporting will begin "starting in 2026,"<sup>2</sup> with Scope 3 emissions no sooner than 2027 (but within 180 days of a company's Scope 1 and 2 emissions disclosure)
- ▶ **Penalties:** Enforced by the California Air Resources Board, and **not to exceed \$500,000** in a reporting year



### TAKEAWAYS FOR SPONSORS

- ▶ The CCDAA does not explicitly address whether sponsors are in scope, but the broad text of the law seems to encompass such U.S. entities. It remains to be seen how California may interpret the "do business in California" requirement with respect to sponsors
- ▶ For publicly listed sponsors, the CCDAA's requirements go beyond the SEC's proposed climate disclosure rule in the CCDAA's requirement for all subject entities to report Scope 3 emissions. However, similar to the SEC's proposed rule, the CCDAA provides a safe harbor for Scope 3 emissions disclosures that are made with a reasonable basis and disclosed in good faith
- ▶ Disclosure can be made through a report "prepared to meet other national and international" requirements, which may reduce the reporting burden for companies already calculating and verifying their emissions pursuant to requirements in other jurisdictions

1. This term is undefined in the legislation, but the California Tax Code uses similar language and defines "doing business" as actively engaging in any transaction for the purpose of financial gain within California, being organized or commercially domiciled in California, or having California sales, property, or payroll exceed specified amounts  
 2. This provision is subject to change, pending further guidance from the California Air Resources Board (CARB)



## Climate-Related Financial Risk Act (CFRA)

Biennial reporting in line with the TCFD or ISSB frameworks

### KEY DETAILS

- ▶ **Scope:** U.S.-organized public and private entities that "do business in California"<sup>1</sup> and have total annual revenues in excess of **\$500 million** (based on prior fiscal year)
- ▶ **Reporting:** Biennially prepare and publicly disclose a report detailing (1) the entity's climate-related financial risk in line with the recommendations of the TCFD or the ISSB climate disclosure standard, and (2) measures adopted to reduce and adapt to those risks
- ▶ **Timeline:** Report must be prepared and posted on the entity's website on or before **January 1, 2026** and **updated at least once every two years** thereafter
- ▶ **Penalties:** Enforced by the California Air Resources Board, and **not to exceed \$50,000** in a reporting year



### TAKEAWAYS FOR SPONSORS

- ▶ The CFRA does not explicitly address whether sponsors are in scope, but the broad text of the law seems to encompass such U.S. entities. It remains to be seen how California may interpret the "do business in California" requirement with respect to sponsors
- ▶ The CFRA contains comply-or-explain provisions allowing entities — to the extent their reporting does not fully meet the TCFD or ISSB standard — to provide an explanation for any reporting gaps and outline planned measures to close them
- ▶ If completed in their entirety, the CFRA's required disclosures go beyond those required by the SEC's proposed climate disclosure rule in some regards, and certain types of CFRA-required disclosure (e.g., use of scenario analysis, establishment of climate goals and transition plans) could trigger the obligation to disclose such information to the SEC under its proposed rule
- ▶ Several global jurisdictions (e.g., the [UK](#), [Canada](#), [Australia](#), [New Zealand](#), [China](#), [Hong Kong](#), and [Japan](#)) have signaled an intent to adopt climate-related disclosure requirements line with the ISSB standard, potentially easing the reporting burden for sponsors subject to those jurisdictions' requirements in addition to those of the CFRA
- ▶ The CFRA allows reporting to be consolidated at the parent company level

1. This term is undefined in the legislation, but the California Tax Code uses similar language and defines "doing business" as actively engaging in any transaction for the purpose of financial gain within California, being organized or commercially domiciled in California, or having California sales, property, or payroll exceed specified amounts

## Voluntary Carbon Market Disclosures Act (VCMDA)

Reporting on climate-related claims and the purchase/use or marketing/sale of voluntary carbon offsets

### DISCLOSURES ON CLIMATE-RELATED CLAIMS & OFFSET PURCHASES

- ▶ **Focus:** Applies to enterprise-, affiliate-, or product-level claims related to (1) the achievement of net zero emissions, (2) the status of being "carbon neutral," or (3) the achievement of "significant reductions" to GHG emissions; although the title of the bill and legislative counsel's [digest](#) suggest an exclusive focus on such claims tied to voluntary carbon offsets, the text of Section 44475.2 suggests the bill may also apply to such claims that are not tied to use of offsets
- ▶ **Scope:** Entities operating in California and (1) whose climate-related claims are made within California and/or (2) who purchase or use offsets sold within the state
- ▶ **Reporting:** Publicly disclose on the entity's website detailed substantiation for any climate-related claims (see "focus" above), including (1) process for determining claims' accuracy, (2) measurement of progress against claims (incl. use of third-party standards or verification), and (3) detailed information about any voluntary carbon offsets purchased in conjunction with claims



### DISCLOSURES ON MARKETING OR SALE OF CARBON OFFSETS

- ▶ **Scope:** Entities that market or sell voluntary carbon offsets within California
- ▶ **Reporting:** Publicly disclose on the entity's website detailed information about sold or marketed offsets, including (1) location and timeline of offset project(s), (2) offset durability and type, (3) verification or third-party standards used, (4) relevant data and calculation methods, and (5) accountability protocols

#### TIMELINE & PENALTIES

- ▶ Requirements will apply from effective date of **January 1, 2024**
- ▶ Each violation subject to civil penalties of **up to \$2,500 per violation per day** (not to exceed a total of \$500,000)

#### KEY TAKEAWAYS

- ▶ The VCMDA does not expressly define what constitutes making claims within California; entities with publicly accessible climate-related claims may wish to exercise caution and assume that those claims may be subject to the VCMDA
- ▶ The VCMDA's specific focus on (1) rigorous substantiation for climate-related claims and (2) details related to voluntary carbon offset sale and purchase mirrors mounting national-level regulatory scrutiny in the [US](#), [UK](#), and [EU](#)
- ▶ In particular, use of the term "carbon neutral" is [discouraged](#) by broadly-supported third-party standard setters and has been subject to recent litigation against [Danone](#), [Delta Air Lines](#) and [EnergyAustralia](#)

KIRKLAND & ELLIS

15

15

## Human Rights as a Growing ESG Issue in the U.S.

Companies are experiencing rising scrutiny of forced labor and child labor risks in their operations and supply chains, even as state-level legislative priorities diverge on the issue

### MOUNTING REGULATORY & MEDIA SCRUTINY

- ▶ Since 2018, the U.S. Department of Labor (DOL) has seen a **69% increase in companies illegally employing minors**, [finding 835 violations in 2022](#) alone, and a **283% increase** in the number of minors employed in violation of child labor laws since 2015
- ▶ On February 27, the DOL and Department of Health and Human Services [announced](#) a joint **task force to combat illegal child labor** — indicating that the DOL has **over 600 child labor investigations underway** and will now **investigate potential violations more aggressively**
- ▶ The announcement came two days after a high-profile New York Times [investigation](#) found that **several U.S. companies** — including suppliers to major brands — had **violated child labor laws** by employing minors in domestic factories

#### KEY TAKEAWAY

- ▶ As regulators and investors **ramp up scrutiny of child labor risks**, the importance of comprehensive **due diligence** in selecting and monitoring **suppliers and business partners** and evaluating **potential acquisitions** will increase

*Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*

Arbiting in record jobs that violate state-protection of the Leon. DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES ANNOUNCE NEW EFFORTS TO COMBAT EXPLOITATIVE CHILD LABOR

### STATES DIVIDED IN APPROACH

- ▶ States such as [Illinois](#) and [Colorado](#) have recently introduced bills that **build upon existing child labor restrictions and penalties**
- ▶ Simultaneously, at least ten states (such as [Arkansas](#), [Georgia](#), [Iowa](#), [Ohio](#), and [Minnesota](#)) have recently proposed bills that would **roll back or weaken existing child labor laws**

### SHAREHOLDERS FOCUS ON CHILD LABOR RISKS

- ▶ The 2022 proxy season saw at least **four proposals** focusing specifically on child labor-related supply chain risks<sup>1</sup>
- ▶ In their 2023 AGMs, [Tesla](#) and [Mondelēz](#) faced resolutions — for which results have not been released — focused on supply chain child labor risk reporting and target setting

#### Examples of Recent Global Regulations Targeting Child Labor



- ▶ On **May 3**, Canadian lawmakers [passed](#) an act requiring companies operating in Canada that exceed certain thresholds, as well as Canadian listed companies, to report publicly on their efforts to identify, address, and prevent forced labor — including child labor — in their supply chains. This legislation is modeled on the UK and Australian modern slavery laws
- ▶ Subject companies must file a supply chain diligence report before May 31, 2024 for the calendar year 2023



- ▶ The EU's Corporate Sustainability Reporting Directive, which went into force in **January 2023**, will **require** in-scope entities to disclose risks associated with forced and child labor, as well as measures in place to address these risks
- ▶ In **September 2022**, the European Commission [introduced](#) a proposal for legislation to prohibit products made using forced labor — including child labor — from being imported into or exported from the EU



- ▶ Germany's [Corporate Due Diligence in Supply Chains Act](#), which went into force in **January 2023**, and the EU's **February 2022 Corporate Sustainability Due Diligence Directive proposal** will also require certain entities to identify, assess, prevent and remedy forced and child labor risks and impacts in their supply chains and operations

KIRKLAND & ELLIS

Source: (1) ISS Governance Research & Voting

16

16





## What is the UFLPA and Why Does it Matter

The UFLPA is designed to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of China do not enter the U.S. market.

### The UFLPA is largely a supply chain risk

- ▶ Although prohibitions on forced labor imports are not new, CBP can now presume forced labor was used in a good unless an importer can clearly demonstrate otherwise
- ▶ Although CBP's authority to seize, exclude, and detain merchandise is not new, CBP can now operate on a 30-day clock, giving private parties little time to resolve issues
- ▶ CBP has already issued over 2,200 letters to importers who have previously imported goods subject to the UFLPA

### The UFLPA could create collateral effects

- ▶ These include:
  - Civil penalties (including up to quadruple duties, taxes, and fees) under the customs civil penalty statute
  - Increased corporate disclosure requirements
  - Impacts on credit and financing agreements
  - ESG considerations
  - Reputational impacts



## Context: Human rights and national security concerns in a shifting economic environment

### The UFLPA passed the Senate unanimously and passed the House by a vote of 428-1



Sen. Jim Risch  
R-ID

"This legislation is long overdue – it's past time we hold the CCP accountable for its ongoing internment and oppression of Uyghurs and other Muslim minorities in China."



Sen. Jeff Merkley  
D-OR

"America can't stay silent in the face of this genocide, nor can we be complicit— meaning we have to make sure that items produced through such forced labor aren't sold on American soil."



Sen. Marco Rubio  
R-FL

"We will not turn a blind eye to the CCP's ongoing crimes against humanity, and we will not allow corporations a free pass to profit from those horrific abuses."



Sen. Elizabeth Warren  
D-MA

"The Chinese government's cruel, bigoted treatment of Muslims and ethnic minorities is a horrifying human rights violation."

### While the UFLPA is here to stay, the political context has changed since December 2021

- ▶ **Business Sentiment:**
  - Major companies lobbied against the UFLPA, arguing that the "clear and convincing" evidence standard is difficult to meet
  - The U.S. government recently intervened in solar markets to address import and tariff challenges
- ▶ **Ukraine Invasion:**
  - Russia's invasion of Ukraine has led to new rounds of Western sanctions, commodity price increases, energy market impacts, and other business risks
- ▶ **Higher Inflation:**
  - High consumer inflation coupled with tightening monetary policy has stoked recession fears and tempered pandemic recovery expectations

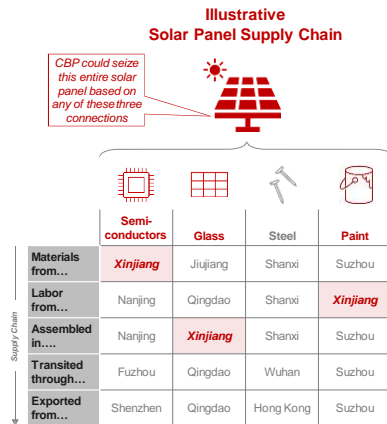


## Compliance with the UFLPA involves five key questions

- 1 Is the company an **importer**?
- 2 Is the company in a **high-priority sector** or **exposed to a high-priority sector**?
- 3 Does the company transact with a party on a **restricted list**?
- 4 Does the company have any **connectivity with Xinjiang**?
- 5 If the company has a Xinjiang connection, are there any indicia of the **use forced labor**?



## Any links to Xinjiang can have adverse impact



### CBP expects companies to be able to trace their entire supply chain

- ▶ **Any** supply chain connection with Xinjiang matters, because CBP will not employ a *de minimis* rule
  - Which means that all inputs used to produce an imported good—no matter their value or significance to the final product—must not have been made with forced labor
  - Any portion of production connected to Xinjiang can be grounds for the whole product to be refused entry to the U.S.
- ▶ Note that labor or goods in any city **can still be comprised of or made with** forcibly relocated Xinjiang workers
- ▶ Published reports suggest that Chinese solar panel manufacturers actively are attempting to de-risk their supply chains



## Compliance Best Practices

	Internal Approaches	External Approaches
<b>Basic</b>	<ul style="list-style-type: none"> <li>❑ Create a <b>culture</b> of compliance throughout the company</li> <li>❑ Conduct ongoing monitoring through regular supplier <b>screening and re-screening</b></li> <li>❑ Conduct periodic, independent <b>self audits</b></li> <li>❑ Create a comprehensive and public <b>social compliance system</b></li> </ul>	<ul style="list-style-type: none"> <li>❑ Adopt <b>contractual terms</b> that prohibit forced labor</li> <li>❑ Create a supplier <b>code of conduct</b></li> <li>❑ Conduct <b>trainings</b> across the supply chain</li> <li>❑ Require diligence <b>questionnaires</b></li> </ul>
<b>Enhanced</b>	<ul style="list-style-type: none"> <li>❑ Enhance <b>know-your-customer</b> processes</li> <li>❑ Hire local supply chain <b>analysts</b></li> <li>❑ Develop effective supply chain <b>tracing</b></li> </ul>	<ul style="list-style-type: none"> <li>❑ Negotiate <b>audit rights</b> with suppliers</li> <li>❑ Conduct unannounced supply chain <b>audits</b></li> <li>❑ Leverage audit <b>findings</b> to drive change</li> </ul>



Companies should take a risk-based approach that is tailored to UFLPA-specific scenarios

Note: For more information on social compliance systems, visit <https://www.dol.gov/lab/complychain/>.

# EU ESG Regulatory Landscape





## Overview

- ▶ Bloc-level requirements commenced 5 January 2023 to be transposed into Member State law by 6 July 2024, **first cohort** (EU-listed entities) required to report in respect of financial years commencing after **1 January 2024**
- ▶ Requires inclusion of a **sustainability statement** in management report, replacing previous non-financial statement
- ▶ Substantially expands **scope of application** of Non-Financial Reporting Directive (NFRD) – requires reporting in line with 12 standards and up to ~1200 data points
- ▶ Where thresholds are met, reporting includes **non-EU operations with a parent based in the EU** and, for financial years commencing after 1 January 2028, **non-EU parents**
- ▶ **Limited assurance** required

KIRKLAND & ELLIS

23



## Key Criteria – “Large Undertaking” or “Large Group”



*Two out of three criteria required to be met*

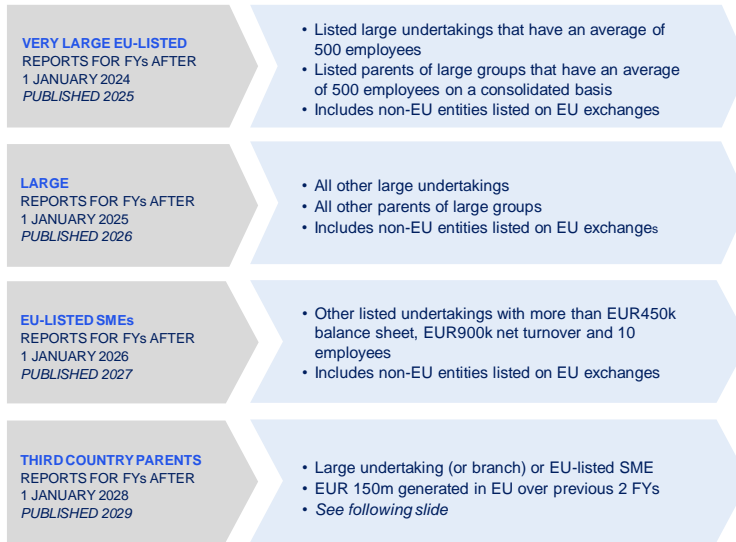
*\* Proposed revised thresholds*

KIRKLAND & ELLIS

24



## Phase-in – Four Cohorts

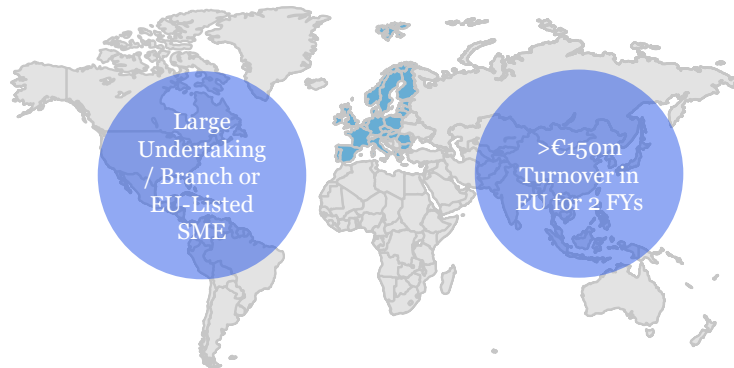


KIRKLAND & ELLIS

25



## Key Concept – Third Country Parents



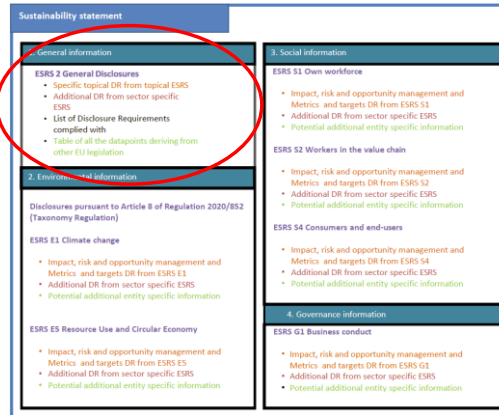
KIRKLAND & ELLIS

26



## Sustainability Statement – Structure

- ▶ **Mandatory**
  - General information
- ▶ **Subject to Materiality**
  - Environmental information
    - ▶ *EU Taxonomy disclosures*
  - Social information
  - Governance information



KIRKLAND & ELLIS

27



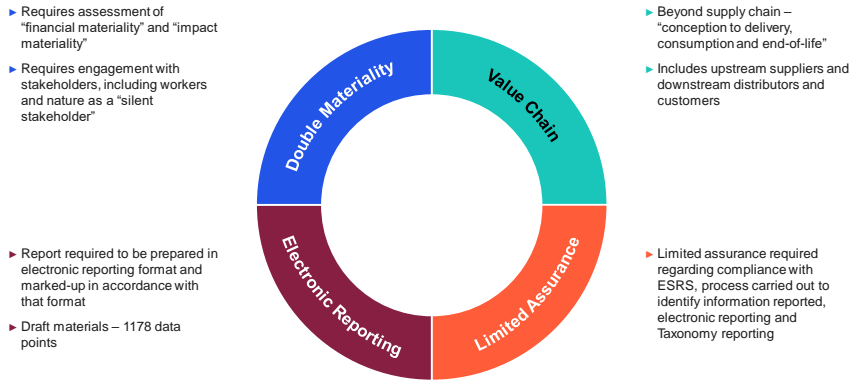
## European Sustainability Reporting Standards



KIRKLAND & ELLIS

28

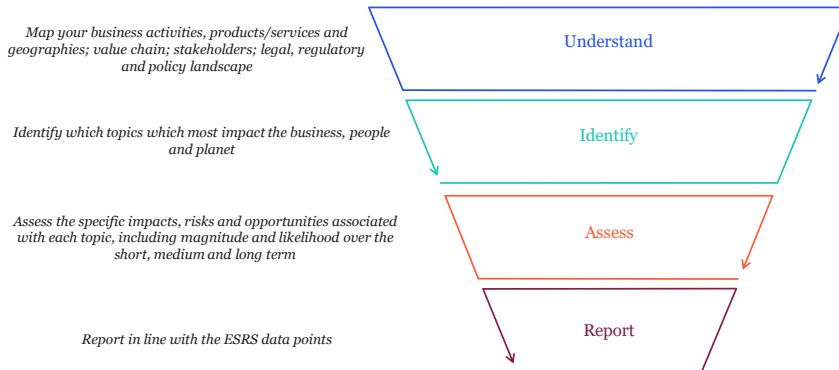
## Novel Components



KIRKLAND & ELLIS

29

## Materiality Assessment

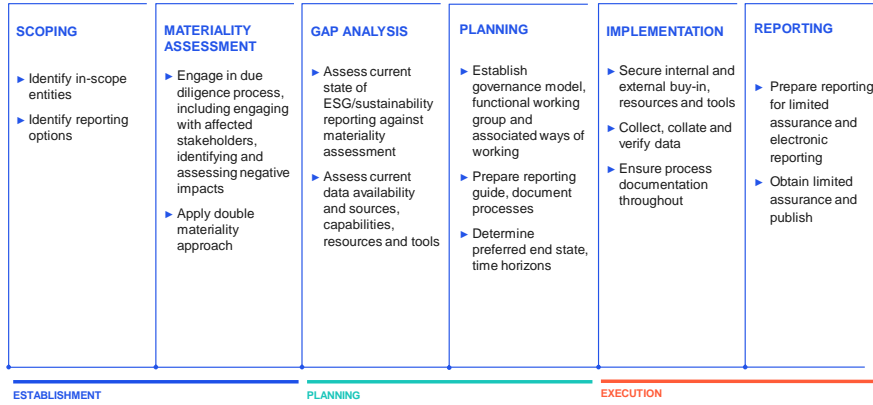


KIRKLAND & ELLIS

30



## Indicative Process



KIRKLAND & ELLIS

31

## SFDR Overview

KIRKLAND & ELLIS

32







## When Does SFDR Apply?

1



All financial market participants and financial advisers based in the EU

2



Non-EU investment managers who market (or intend to market) their products to clients in the EU under Article 42 of the Alternative Investment Fund Managers Directive

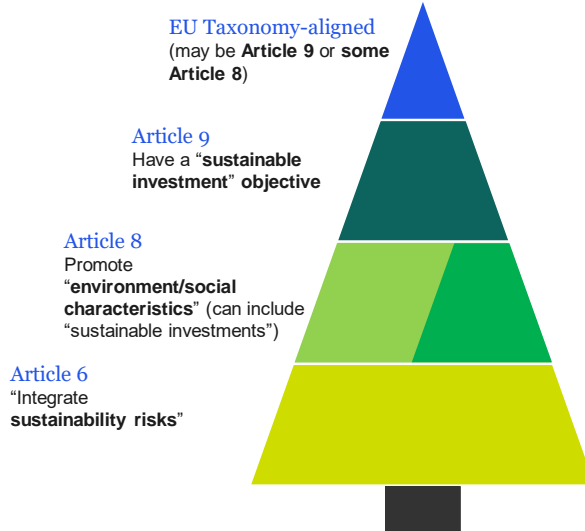


## Overview of Key SFDR Disclosure Requirements

<b>Firm-Level</b> (on the website)	Article 3	▶ How <b>sustainability risks</b> are taken into account at the firm level
	Article 4	▶ How <b>adverse impacts on sustainability factors</b> are taken into account
	Article 5	▶ How <b>sustainability risks</b> are taken into account in <b>remuneration policies</b>
<b>Pre-contractual Product-Level</b> (in the AIFMD Disclosure Statement + website disclosures – uploaded to investor portal )	Article 6	▶ How <b>sustainability risks</b> are taken into account in investment decisions
	Article 7	▶ How <b>adverse impacts on sustainability factors</b> are considered at the product level
	Article 8	▶ Describe the <b>environmental and/or social characteristics</b> promoted by the fund
	Article 9	▶ Describe the <b>sustainable investment objective</b>
	Taxonomy	▶ Are investments expected to <b>align with the EU Taxonomy Regulation</b> ?
<b>Periodic Product-Level</b>	Article 11	▶ How the <b>environmental and/or social characteristics</b> or the <b>sustainable investment objective</b> of the fund were achieved*
	Taxonomy	▶ Are investments <b>aligned with the EU Taxonomy Regulation</b> ?



## SFDR: The ESG Tree



KIRKLAND & ELLIS

35

35



## EU | Taxonomy Regulation

The EU Taxonomy Regulation is a transparency tool based on a classification system translating the EU's climate and environmental objectives into criteria for specific economic activities for private investment purposes.

It is a science-based transparency tool for companies and investors. The purpose of this classification system is to avoid greenwashing and to drive investments towards the transition.

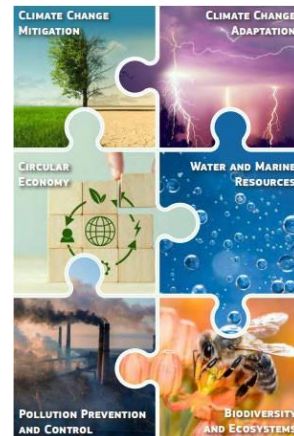
To be "Taxonomy-aligned" an eligible economic activity must:



KIRKLAND & ELLIS

36

36

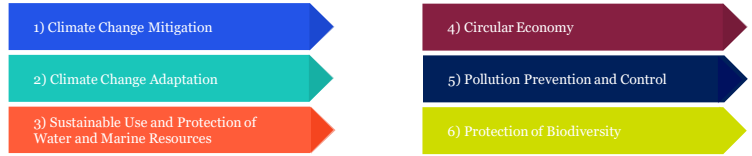


Source: European Commission



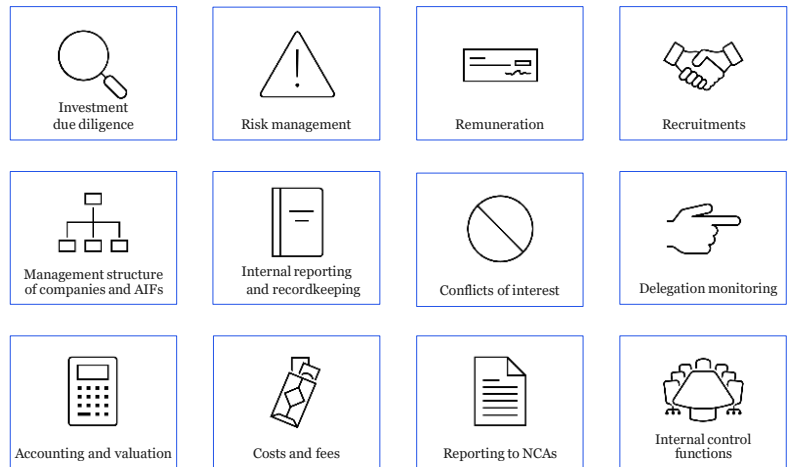
## Process for Getting to Taxonomy Alignment

Determining Taxonomy alignment follows a four step process to align with one of the following environmental objectives:

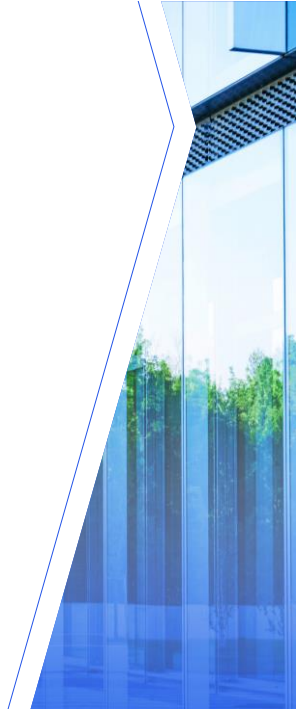


## Underlying Systems and Governance Will Need to be Robust and Aligned with Sustainability Commitments

Regulators will adopt a risk-based, desk-based and/or on-site reviews of the adequate implementation and effective application of the relevant policies and procedures by AIFMs relating to the following will be undertaken



# Disclosure Risks and Considerations



KIRKLAND & ELLIS



## ESG Risks

ESG risk is wide-ranging. The following is a high-level overview of potential litigation categories that boards and senior executive teams should consider when assessing mitigation of risks relevant to their organization.

Government Investigations		Includes investigations by <b>governmental agencies</b> such as the US SEC, FTC, EPA and others, as well as <b>Congress</b> , of ESG-related disclosures, greenwashing claims and other ESG issues.
Government Enforcement Litigation		Includes <b>enforcement actions</b> concerning a company's activities related to ESG issues, including ESG disclosures and company operations affecting communities.
Consumer Class Action Litigation		Includes <b>consumer fraud</b> litigation concerning <b>sustainability</b> claims. Recent examples include: <i>Earth Island Institute v. The Coca-Cola Company</i> , <i>Smith v. Keurig Green Mountain, Inc.</i> , <i>Lee v. Canada Goose US Inc.</i> and <i>Dwyer v. Allbirds, Inc.</i>
Shareholder Litigation		Includes claims under <b>securities law</b> relating to a false statement or omission of material fact, claims under U.S. state laws against <b>board directors</b> concerning alleged breach of fiduciary duty and claims relating to broadening <b>parent company liability</b> in the UK.
NGO Litigation		Includes <b>challenges by NGOs</b> directly to corporations (e.g., climate-related standard of care suit against Royal Dutch Shell in the Dutch courts), claims against governments with indirect effects on corporations, petitions to government for proceedings related to ESG disclosures and challenges to approvals of major infrastructure projects.

KIRKLAND & ELLIS

## SEC Charges Vale for Allegedly Fraudulent ESG Disclosures

In April 2022, the SEC charged Vale S.A., a publicly traded mining company, for allegedly false and misleading ESG disclosures about dam safety included in its SEC filings and sustainability reports. Vale agreed to settle the charges in March 2023 for \$55.9M.

### Core Case Details

- ▶ Vale is a Brazilian company and one of the world's largest iron ore producers
- ▶ Vale's American depository shares trade on NYSE
- ▶ Vale's Brumadinho dam collapsed in January 2019, resulting in the death of 270 individuals. Also led to a loss of more than \$4 billion in Vale's market capitalization
- ▶ The SEC alleged Vale violated antifraud provisions of federal securities laws and sought civil penalties
- ▶ Vale's SEC filings, as well as an ESG webinar hosted by the Company and its public, annual Sustainability Reports, were alleged to have misrepresented the amount of risk present at Vale's mining sites
- ▶ The SEC's complaint extensively detailed allegedly fraudulent actions, including manipulating auditors, disregarding accepted best practices and minimum safety standards, and making false and misleading statements to investors
- ▶ SEC alleged Vale executives fraudulently signed false SOX sub-certifications
- ▶ This was the first action brought by the SEC's Climate and ESG [Task Force](#) that was formed in March 2021
- ▶ To settle the charges, Vale agreed to pay a civil penalty of \$25M and disgorgement and pre-judgment interest of \$30.9M

"Many investors rely on ESG disclosures like those contained in Vale's annual Sustainability Reports and other public filings to make informed investment decisions . . . . By allegedly manipulating those disclosures, Vale compounded the social and environmental harm caused by the Brumadinho dam's tragic collapse and undermined investors' ability to evaluate the risks posed by Vale's securities"

— GURBIR GREWAL, DIRECTOR OF THE SEC'S DIVISION OF ENFORCEMENT

### Takeaways

- ▶ The SEC is using sustainability reports and ESG presentations as a basis for disclosure enforcement actions
- ▶ The case highlights that ESG disclosures are a basis for disclosure claims at the same time the SEC is proposing to expand climate and other ESG disclosure requirements
- ▶ Companies should consider litigation risk when preparing ESG reports and other voluntary ESG disclosures









KIRKLAND & ELLIS

41

41

## Novel Approaches Emerge in ESG Investigations, Enforcement and Litigation

Regulators and other stakeholders are employing increasingly creative methods to push companies to improve their ESG performance. While most of the high-profile cases to date have involved public companies, the greenwashing and transparency themes they evoke are important for both investors and private companies to monitor in addition to listed entities.

Target	Action
 <p><b>DELTA</b> May 31, 2023</p>	<ul style="list-style-type: none"> <li>▶ A California resident filed a consumer class action lawsuit in U.S. federal court, alleging that Delta's claim to be "carbon-neutral" is demonstrably false and misleading to consumers due to the purportedly low quality of carbon offsets purchased by Delta in conjunction with the claim</li> </ul>
 <p><b>Lufthansa</b> March 1, 2023</p>	<ul style="list-style-type: none"> <li>▶ The UK's Advertising Standards Authority (ASA) banned Lufthansa from using an ad whose environmental claims, the regulator ruled, cannot be substantiated by Lufthansa's actual climate initiatives</li> </ul>
 <p><b>Mercer</b> February 28, 2023</p>	<ul style="list-style-type: none"> <li>▶ The Australian Securities and Investment Commission sued superannuation fund Mercer Super for allegedly misleading investors about its sustainable fund's investments in companies with significant fossil fuel revenues</li> </ul>
 <p><b>Shell</b> February 1, 2023</p>	<ul style="list-style-type: none"> <li>▶ An NGO filed a complaint with the SEC, alleging that Shell's annual report misrepresents its spending on "renewable and energy solutions" by including natural gas within that category</li> </ul>
 <p><b>JBS</b> January 17, 2023</p>	<ul style="list-style-type: none"> <li>▶ An NGO filed a complaint with the SEC alleging that JBS misled investors in its issuance of sustainability-linked bonds by excluding Scope 3 emissions from the GHG target and failing to give investors necessary information for evaluating progress toward this target</li> </ul>
 <p><b>HSBC</b> October 19, 2022</p>	<ul style="list-style-type: none"> <li>▶ The UK's ASA banned HSBC advertisements touting the bank's net-zero financing commitment and tree-planting efforts as misleading to consumers, concluding that HSBC omitted material information related to its financing of emissions-intensive industries</li> </ul>
 <p><b>Volkswagen</b> October 19, 2022</p>	<ul style="list-style-type: none"> <li>▶ Six European pension funds sued Volkswagen in Germany, requesting that the court recognize shareholders' right to force VW to include a climate-focused lobbying transparency resolution on its AGM agenda. In May 2023, Volkswagen <a href="#">published</a> a review of its trade association memberships, potentially in response to the litigation</li> </ul>
 <p><b>Washington Gas</b> August 4, 2022</p>	<ul style="list-style-type: none"> <li>▶ Three NGOs sued Washington Gas, alleging that the utility violated Washington, D.C.'s consumer protection laws by misleadingly labeling its natural gas as clean and sustainable. Superior Court <a href="#">dismissed</a> on September 1, 2023, ruling the NGOs were required to file their claims with the DC utility regulator.</li> </ul>

KIRKLAND & ELLIS

42

42



## SEC Examines Differences Between Form 10-K and Voluntary Climate Disclosures

Following a [sample comment letter](#) published in September 2021, the SEC has contacted several companies about alleged differences in the extent of the climate-related disclosures included in Form 10-K filings and those included in company websites or voluntary ESG reports.

- ▶ Since the beginning of 2022, at least 30 companies have received comment letters concerning climate-related disclosures in their SEC filings, including:



- ▶ Some letters, including those issued in September, ask for justification as to why certain climate-related information that was included in corporate sustainability reports – such as emissions reduction targets or greenhouse gas inventories – was omitted from Form 10-K
- ▶ SEC guidance instructs companies to disclose climate-related factors if material to their business and the letters from September indicate an evolving set of focus issues for the SEC as investors' and regulators' scrutiny of climate-related financial risk intensifies
- ▶ All companies contacted defended their disclosure practices, though some agreed to consider more comprehensive climate-related disclosures in future 10-K filings



We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report.

From "Sample Letter to Companies Regarding Climate Change Disclosures" (SEC, September 2021)

### Considerations for Climate and Other ESG-Related Disclosures

- ▶ ESG disclosures should undergo the same **rigorous review** as traditional disclosure, as potential litigation, liability and negative PR / IR risks exist whether or not an ESG disclosure is included in an SEC filing
- ▶ Potential exposure is likely to **increase** as companies make more ESG disclosures and a wider range of stakeholders scrutinize and call for action based on these disclosures



## 2023 Environmental & Social Proxy Proposals: Key Themes

According to AsYouSow's [Proxy Preview 2023](#) report, environmental and social (E&S) shareholder action has continued to grow, with climate change remaining a leading issue and "anti-ESG" emerging as a hot topic.

### Proposals are up, withdrawals are down

- ▶ 2023 is on track to break 2022's **record number of E&S shareholder proposals**, and the **pace of withdrawals has fallen** by about 30% since March 2022, with just 12 proposals omitted so far
- ▶ The SEC has granted **fewer no-action requests** since **proposing** amendments to Rule 14a-8 in July 2022; for instance, on March 24 the agency **rejected** Exxon's attempt to exclude a proposal requesting climate-related risk disclosure. However, on April 7 the SEC **allowed** Amazon to exclude a request for Scope 3 emissions disclosure, citing micromanagement

### Climate tops the charts

- ▶ There have been **122 climate-related proposals** so far in 2023, **up 11%** from 2022
- ▶ 60% of climate-related proposals focus specifically on **emissions reduction and reporting**, while the majority of the remaining proposals focus on **strategy and risk assessment**

### Reproductive health emerges as a focus issue

- ▶ There have been at least **23 reproductive health proposals** filed so far in 2023, a **sharp increase** from 2022
- ▶ The proposals, falling in the first proxy season since the overturning of *Roe v. Wade*, focus primarily on reporting on the **risks of restricting access to reproductive healthcare** and the **sharing of abortion-related data**

### Anti-ESG resolutions grow, but support remains low

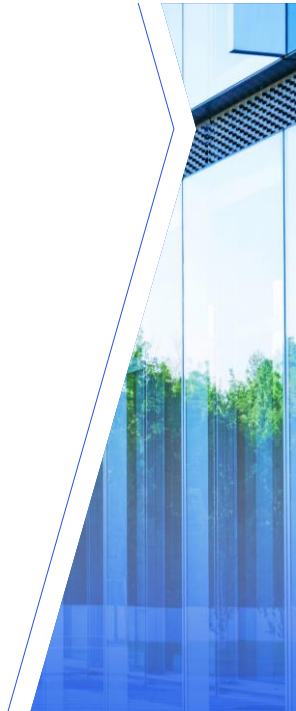
- ▶ The volume of anti-ESG proposals — which generally take the form of repealing or opposing ESG initiatives such as racial equity audits or emissions reduction targets — is **up 60% from March 2022**; some proposals are structured as "trojan horse" proposals, mimicking the language of pro-ESG proposals but including very different supporting statements
- ▶ Follows a larger trend of proliferating state anti-ESG legislation, although anti-ESG shareholder resolutions have earned lower than 4% average support so far
- ▶ On March 30, Republican attorneys general from 21 states **warned** asset managers not to push ESG goals during upcoming proxy season, calling on managers to "choose between their legal duties to focus on financial return, and the policy goals of ESG activists"



### RESOLUTION SPOTLIGHT Starbucks Shareholders Approve Proposal for Audit of Company Labor Practices

- ▶ On March 29, shareholders at Starbucks voted 52% in favor of a resolution asking it to assess how the company adheres to its stated commitment to **workers' freedom of association and collective bargaining rights** — the first time a proposal of this kind has received majority support
- ▶ Starbucks has since committed to "undertaking an **independent, third-party human rights impact assessment**, which will include a deeper-level review of the principles of freedom of association and the right to collective bargaining"
- ▶ This follows an **announcement** by Apple in January that it would conduct a similar assessment

# Best Practices



KIRKLAND & ELLIS

45



## Benefits of a Strong ESG Program

### Attract Long-term Investors

ESG investors are values-based investors who are generally more interested in what happens during the next decade than the next quarter; they tend to prioritize building long-term value over a multi-year period over flipping the stock in the near term.

### Improve Customer Retention

Companies who take steps to improve labor conditions, enhance the diversity of their teams, give back to their communities, and take a stand on sustainable environmental policies also strengthen their brand and customers generally reward them with loyalty.

### Increase Stock Liquidity

Individual and institutional investors are increasingly prioritizing investments in corporations that proactively govern and operate in an ethical and sustainable manner. Investment research and consulting firms (Sustainalytics, MSCI) developed indices that measure and rank companies based upon ESG criteria relative to their industry peers. The investment funds and ETFs that benchmark these indices are raising trillions of dollars to be deployed toward companies that execute sound ESG policies; these are long-term oriented shareholders that can potentially fuel demand for your stock.

### Strengthen Employee Relationships

Companies that espouse strong ESG values tend to attract and retain the best talent. Employees who are passionate about the organization, who are loyal, and who feel valued drive an intangible good will that strengthens the brand of the company and improves the overall productivity of the workforce.

### Mitigate Shareholder Activism

Activists are increasingly targeting management teams and boards that fail to take a proactive stance on potential environmental or social issues.

KIRKLAND & ELLIS

46

46



## Considerations for Building an ESG Program

### ESG Strategy & Policy

- ▶ What are the ESG policies and requirements of key stakeholders?
- ▶ What regulations could be implicated?
- ▶ What is the level of ESG ambition?
- ▶ What amount of internal and external resources are available for ESG?

### ESG Governance

- ▶ Who is accountable for implementation and measurement?
- ▶ Management-level committee vs board oversight
- ▶ Tying executive compensation to achievement of ESG goals

### Monitoring & Improvement

Considerations include:

- ▶ ESG disclosure frameworks
- ▶ Peer benchmarking
- ▶ KPI's

### Voluntary Disclosures & Marketing

Considerations include:

- ▶ Marketing materials
- ▶ Greenwashing mitigation
- ▶ Voluntary disclosures
- ▶ Public commitment



## Tips for Mitigating & Avoiding Greenwashing in Disclosures



Distinguish clearly between factual and aspirational aspects of ESG disclosure by softening or avoiding definitive statements about the future (*e.g., opt for "would" rather than "will"*), and using qualifiers and disclaimers when appropriate



Develop a glossary of frequently used ESG terms to make sure they are applied consistently across marketing materials and over time



Carefully review ESG-related disclosures for consistency with other disclosures, including in regulatory filings and in voluntary disclosures



Confirm that any ESG-related claims (*particularly quantitative claims*) can be substantiated with rigorous documentation and are as current as possible



Avoid use of the term "impact" in relation to investments unless the intention was to generate positive impacts alongside financial returns when making the investment



Be cautious when using trigger words (*e.g., "net zero", "green transition", "carbon neutral", "sustainable"*) to ensure they reflect the legal or market definition and your actual practices or outputs



Consider seeking third-party assurance of ESG-related data where appropriate





# Company Action Plan on Human Rights Risk Management

The integration of human rights into companies' enterprise risk management and compliance systems can help ensure risks are identified and addressed.

