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# The Legal 500 Country Comparative Guides

## United States

# ENVIRONMENTAL, SOCIAL AND GOVERNANCE


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This country-specific Q&A provides an overview of environmental, social and governance laws and regulations applicable in United States.

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# UNITED STATES
# ENVIRONMENTAL, SOCIAL AND GOVERNANCE

## 1. Climate – the law governing operations that emit Greenhouse Gases (e.g. carbon trading) is addressed by Environment and Climate Change international guides, in respect of ESG: a. Is there any statutory duty to implement net zero business strategies; b. Is the use of carbon offsets to meet net zero or carbon neutral commitments regulated; c. Have there been any test cases brought against companies for undeliverable net zero strategies; d. Have there been any test cases brought against companies for their proportionate contribution to global levels of greenhouse gases (GHGs)?

a. More than 190 countries, including the United States, adopted the Paris Agreement in 2015, a legally binding international treaty on climate change. The signatories to the Paris Agreement agreed to "pursue efforts" to limit global temperature increases to below 1.5°C and there is general consensus that to have a chance to achieve this target, global greenhouse gas emissions are required to be 'net zero' by 2050. By COP26 in 2021, twelve countries had passed legislation on net zero targets with others making policy commitments.

In the United States, there is no law generally applicable across industries and jurisdictions mandating net zero commitments or the adoption of a transition strategy, and there remains continuing uncertainty surrounding the future enactment of federal climate legislation. The Long Term Strategy published by the Biden Administration, which seeks to achieve net zero carbon emissions by 2050 through reducing emissions across four core sectors (electricity, transportation, buildings, and industry), increasing carbon removal activities, and reducing emissions of non-carbon greenhouse gas emissions, relies on federal leadership, monitoring, technology innovation, state action, and other non-legislative tools. The Inflation Reduction Act, enacted in August 2022, is expected to help facilitate these goals by spurring clean energy investments via tax incentives. Certain states, such as in California and New York, have announced net zero commitments, but state-level action remains a divisive and partisan issue.

Apart from the legislative landscape, however, the fiduciary obligations of directors and officers require consideration of the potential impacts of climate change on a company's financial condition and operations. The fiduciary duties of loyalty and care require directors to act in the best interest of the company and shareholders, to make informed decisions, and exercise proper oversight. In order to carry out these duties, directors and officers must be able to identify and consider risks and opportunities impacting shareholder value, which necessarily includes consideration of steps that could or should be taken to minimize or mitigate material risk, including from climate change.

In addition, companies are at times required to disclose actual or anticipated material impacts on the company. If a company has articulated a net zero strategy, it would need to consider disclosing material changes to that strategy or material changes to progress in implementing the strategy or achieving the goal on the time frame reported. A fact is "material" if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote," or "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

b. Carbon offsets are not regulated in the United States and remain controversial. To the extent companies are making use of carbon offsets in connection with publicly disclosed net zero commitments, they should consider the quality of the offset in terms of meaningful greenhouse gas reduction and disclosing their use as part of an overall net zero plan. On January 23, 2023, the Chairman of the Commodity Futures Trading Commission

 

("CFTC"), Rostin Behnam, **announced** in his keynote speech at the Commodity Markets Council's annual conference that the CFTC "can play a role in voluntary [carbon] markets." This is not the first time that the CFTC has publicly stated that it is considering its role vis à vis regulation of voluntary carbon markets ("VCMs") or compliance carbon markets ("CCMs"), but it is the first time that the CFTC Chair has articulated a clear action plan for regulation. According to Chairman Behnam, carbon markets "must have integrity and adhere to basic market regulatory requirements." These statements confirm the CFTC's authority to "play a role" in VCMs because carbon itself, as well as carbon and other environmental offsets, credits and allowances, generally are considered "commodities" as defined in Section 1a(9) of the Commodity Exchange Act of 1936 (CEA) and as explained in CFTC and Securities and Exchange Commission guidance. As a "commodity," transactions involving carbon or carbon offsets on VCMs are subject to CFTC's anti-fraud and anti-manipulation enforcement jurisdiction. Because VCMs and CCMs are commodities markets, the CFTC not only "can" but is bound to police these markets pursuant to the CEA. Commodities originating in VCMs and CCMs are now also traded as listed futures and options contracts on CFTC-regulated designated contract markets – *e.g.*, commodity exchanges.

The CFTC's division of enforcement will likely become more active in prosecuting fraud and manipulation in commodity or cash VCMs and CCMs (*e.g.*, greenwashing, or fraud in claiming reduction in carbon capture or reduction), as well as in related exchange or OTC-traded derivatives markets. The CFTC will also likely become more involved in the regulation of these markets in the United States in coordination with other regulators and global initiatives.

c. In Europe, there have been a number of cases challenging compliance with net zero strategies. For example, three NGOs filed a claim against the British government challenging its net zero strategy as insufficient to meet the requirements of the UK Climate Change Act. The court ruled that the net zero strategy adopted by the government did not provide sufficiently detailed strategies as required by that Act. Similar lawsuits have been filed against oil companies TotalEnergies, Shell, and Santos for failing to adopt sufficient strategies to achieve net zero by 2050.

Litigation in the United States has been less prevalent, although there have been some challenges in states (*e.g.*, California) that have legislation mandating companies to consider and disclose their climate impact and other issues.

d. Claims challenging proportionate contributions of global levels of greenhouse gases have largely been unsuccessful in the United States due to the United States Supreme Court's 2011 decision in *American Electric Power Company, Inc. v. Connecticut*, et al., 564 U.S. 410 (2011). In *American Electric*, several state and local governments and land trusts sued five United States energy companies on the grounds that those companies' emissions were contributing to global warming and sought an order to cap and reduce the emissions. The Supreme Court found that plaintiffs' claims were preempted by the Clean Air Act, and that Congress entrusted the Environmental Protection Agency to decide how greenhouse gases should be regulated.

Nonetheless, recently, governments and municipalities have pursued similar claims against oil companies. For example, on November 22, 2022, sixteen municipalities of Puerto Rico filed a lawsuit in federal court claiming that fossil fuel companies were responsible for damages caused by the 2017 hurricane season because they knowingly marketed products causing climate change harms but concealed the dangers associated with those harms. Other lawsuits against oil companies challenging the impact of their GHGs have been brought in state courts, presumably to avoid the federal pre-emption issue discussed above. For example, the City and County of Honolulu sued a number of oil companies alleging their emissions and decades-long efforts to discredit scientific proof of climate change has caused damage to Oahu.

## 2. Biodiversity – are new projects required to demonstrate biodiversity net gain to receive development consent?

Yes, the EPA considers biodiversity as part of its review under the National Environmental Policy Act ("NEPA"), which requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions." The publication *Incorporating Biodiversity Considerations into Environmental Impact Analysis under NEPA* "outlines general concepts that underlie biological diversity analysis and management, describes how biodiversity has historically been addressed under NEPA, and discusses methods for considering biodiversity in current and future NEPA analyses." This publication is a reference document to "provide useful information when considering important resource components" as part of the EPA's review to its cumulative impact analysis.

Federal agencies also must commission an Environmental Impact Statement "if a proposed major federal action is determined to significantly affect the quality of the human environment." The EPA's website also describes the agency's three different levels of analysis under NEPA (categorical exclusion determination, environmental assessment/finding of no significant impact, environmental impact statement). As part of the environmental impact statement, the agency must describe the affected environment and the environmental consequences of the proposed action.

There are various agencies that would consider biodiversity in the normal course of their NEPA review and analysis, including :

- Department of the Interior
- USDA – Forest Service
- Department of Homeland Security
- Federal Communications Commission
- Federal Energy Regulatory Commission
- Environmental Protection Agency
- Department of Transportation
- Department of Energy

The Health Resources and Services Administration guidance makes clear that a "NEPA EA [Environmental Assessment] is a comprehensive study that identifies environmental impacts of a land development action and analyzes a broad set of parameters including biodiversity, environmental justice, wetlands, air and water pollution, etc."

States similarly require agencies to provide a report on the environmental effects of activities that could have a potentially negative environmental effect upon natural resources. Here are a few examples:

- State Environmental Quality Review Act (New York)
- California Environmental Quality Act (CEQA) Review
- North Carolina Environmental Policy Act

In Section 207 of the Executive Order on Tackling the Climate Crisis at Home and Abroad (January 27, 2021), President Biden required a review, by the Secretary of the Interior, of the siting and permitting processes on public lands and in offshore waters." The goal is to make these processes more amenable to renewable energy initiatives to "doubl[e] wind by 2030 while ensuring robust protection for our lands, waters, and biodiversity."

In the United Kingdom, the government has set out biodiversity net gain strategy that imposes an obligation on all planning permissions and development consent orders ("DCOs") to improve the environment by at least 10% as a compulsory planning condition. Biodiversity net gain refers to the enhancement of biodiversity resulting from development activities. The idea is to ensure that development activities not only do not have a negative impact on the environment but that they contribute positively to the conservation and enrichment of biodiversity. Details of the government's strategy are set out in the Environment Act 2021, sections 98 and 99. The government aims to develop a market for buying and selling biodiversity land, which means this concept extends beyond planning.

## 3. Water – are companies required to report on water usage?

There is no current legal requirement for companies to report on their water usage. The SEC proposed a Rule on March 21, 2022 requiring the disclosure of water usage from areas considered "high-water stress risks." According to the SEC press release: "The proposed rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements." Under the proposed rule, if a company has set a climate-related target on water usage, the company would be required to disclose information surrounding that target.

In addition, the CEO Water Mandate, established by the UN to address global water challenges, issued Corporate Water Disclosure Guidelines (2014) to "provide guidance to help companies describe their water performance in quantitative, geographically explicit terms that allow disclosure audiences to understand how a company withdraws, consumes, and discharges water resources."

## 4. Forever chemicals – have there been any test cases brought against companies for product liability or pollution of the environment related to forever chemicals such as Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)?

**USA** The mounting apprehension about PFAS has already resulted in class actions in the USA, including the DuPont contamination litigation which became the subject of the 2019 film, Dark Waters, resulting in multimillion-dollar verdicts and settlements. Cases have been filed against companies for manufacturing and selling products containing "forever chemicals" used in, for example, fire fighter protective gear and cosmetics.

**Europe** In April 2021, following a civil claim made by the residents of Kallinge in South Sweden, a municipal water company was ordered to pay damages to residents who drank municipal water from a source contaminated by fire-fighting foam used in a nearby area for fire drills. The claimants suffered from elevated levels of PFAS in their blood which they alleged caused increased risks to their health. While we are not aware of active PFAS litigation in the United Kingdom, there has been public discussion among environmental activists, MPs and English claimant law firms which suggest such litigation is possible in the future. With the introduction of the EU Representative Actions Directive in 2020 (which ensures that consumers are able to protect their collective interests in the EU via representative actions), and a growing appetite for large scale group actions in the United Kingdom, environmental actions of this nature are most likely to proceed by way of group litigation given their potential to impact large numbers of individuals.

## 5. Circularity – the law governing the waste hierarchy is addressed by the Environment international guide, in respect of ESG are any duties placed on producers, distributers or retailers of products to ensure levels of recycling and / or incorporate a proportionate amount of recycled materials in product construction?

**US**

These types of laws are known as Extended Producer Responsibility laws. This is regulated, if at all, at the state-level. California, Colorado, Maine, Oregon, and Washington have enacted legislation governing recycling programs. These laws have varying requirements for plastic producers to create programs for incorporating recycled plastic into their products, or to facilitate recycling by improved processes or by creating incentives.

**EU**

In March 2020, the EU adopted the circular economy action plan ("CEAP") as part of the European Green Deal. The CEAP includes initiatives to address the entire life cycle of products—it addresses "how products are designed, promotes circular economy processes, encourages sustainable consumption, and aims to ensure that waste is prevented and the resources used are kept in the EU economy for as long as possible."

## 6. Plastics – what laws are in place to deter and punish plastic pollution (e.g. producer responsibility, plastic tax or bans on certain plastic uses)?

**US**

While there are no federal laws regulating plastic-use, California, Connecticut, Delaware, New Jersey, New York, Oregon, Vermont, and Washington, D.C. have enacted legislation limiting the use of plastic. Local municipalities may also restrict plastic use.

Companies may also face potential civil liability tied to plastic use. For example, The Coca-Cola Company was sued by Earth Island Institute (21-1926 (PLF)) on the grounds that its "marketing is false and deceptive because the company portrays itself as 'sustainable' and committed to reducing plastic pollution while polluting more than any other beverage company and actively working to prevent effective recycling measures in the U.S."

**Europe**

The European Union limits single-use plastic. As in the United States, companies are also facing liability in Europe in connection with plastic use. In September 2022, NGOs ClientEarth, Surfrider Foundation Europe, and Zero Waste France sent Danone a notice of intent to sue, where they claimed that the company does not adequately address the risks related to the plastic pollution it produces. Unsatisfied with Danone's response to their notice, the NGOs brought suit in the Judicial Court of Paris.

## 7. Equality Diversity and Inclusion (EDI) – what legal obligations are placed on an employer to ensure equality, diversity and inclusion in the workplace?

Under federal law, almost all employers are required to prevent discrimination in the workplace on the basis of membership in a protected class and ensure that employees are not subject to a hostile work environment. Federal statutes that create a personal cause of action for employees include:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- The Pregnancy Discrimination Act (amending

 

Title VII)
- The Equal Pay Act of 1963 (EPA)
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Title I of the Americans with Disabilities Act of 1990 (ADA)
- Sections 102 and 103 of the Civil Rights Act of 1991
- Sections 501 and 505 of the Rehabilitation Act of 1973
- The Genetic Information Nondiscrimination Act of 2008 (GINA)
- For employees of an educational institution, Title IX of the Education Amendments of 1972 (Title IX) may also apply.

"The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy and related conditions, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information." An employee must first exhaust his or her administrative remedies with the EEOC before filing a claim for workplace discrimination in federal court.

State and local regulations also prohibit workplace discrimination and promote workplace protections for diverse employees. These guidelines are in addition to the applicable federal rules.

State and local rules can be more expansive and protective of employee rights than the analogous federal law. This may include applying regulations to more employers. For example, small businesses with fewer than 15 employees are exempt from certain federal employment regulations, but may nonetheless be subject to similar regulations under state or local law. This can also entail expanding the definition of protected classes to include additional groups and/or characteristics. In New York City, for example, the New York City Human Rights Commission has issued guidance stating that employers are not allowed to prevent employees from maintaining natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities.

Companies are increasingly recognizing that supporting diversity has measurable positive benefits. Companies take steps to assess how well diversity is embodied throughout the company by engaging in a self-review, or audit, of their own policies and practices. "Diversity, equity, and inclusion ["DEI"] audits evaluate how well organizations support employees from minority backgrounds in their workplace, reveal what needs to be changed, and help chart a path toward a more inclusive work environment." A DEI audit may collect qualitative and quantitative data on the following areas:

- Recruitment and hiring
- Advancement, retention and promotion
- Representation in leadership and c-suite roles
- Pay and benefits
- Job satisfaction and engagement
- Participation in employee resource groups for diverse employees
- Company handbook and other policies

Federal legislation to require board diversity has been proposed, but not enacted. State legislation requiring board diversity has been proposed in certain states, including New York, California, and Hawaii. However, the statute enacted in California was struck down as violative of the California Constitution.

Voluntary industry measures have had more success:

- Nasdaq enacted a listing rule, approved by the SEC and implemented in 2021, requiring all listed companies to disclose board diversity statistics and, by certain dates, to either have one diverse director or explain why they do not.
- The "Big Three" institutional investors, BlackRock, State Street, and Vanguard, all launched board diversity campaigns and promoted board diversity in their stewardship principles.
- BlackRock encourages companies to work towards 30% diverse board membership, including at least two female directors and one director from an underrepresented group.
- State Street advocates that companies have at least one female board member and states that it may vote against or otherwise withhold support from the chair of the nominating committee of any company in the S&P 500 that does not disclose board diversity statistics or have one director from an underrepresented community.
- Vanguard does not mandate specific approaches for board diversity absent regulatory requirements or market norms, but does encourage well-composed and diverse boards.
- ISS's policy is to vote against the chair of the nominating committee of any public company where there are no women on the company's board.
- Glass Lewis generally recommends voting against the chair of the nominating committee

 

if a company's board has no gender diverse directors or, for companies in the Russell 1000 index, if a board has no directors from underrepresented communities. Additionally, it recommends voting against the chair of the governance committee at Russell 1000 companies if the company has not provided disclosure on the racial or ethnic minority demographic information for directors.

## 8. Workplace welfare – the law governing health and safety at work is addressed in the Health and Safety international guide, in respect of ESG are there any legal duties on employers to treat employees fairly and with respect?

The laws identified in the previous answer require fair and equal treatment of employees. Companies are also incentivized to treat employees fairly as consistent with company policies and corporate governance principles designed to achieve business goals related to avoiding unwanted worker attrition, avoiding litigation or internal complaints related to unfair treatment, and having a healthy culture in the event there ever is an issue with regulators or other stakeholders. Recent litigation involving the alleged hostile work environment created at McDonald's Corporation highlights some of these issues.

## 9. Living wage – the law governing employment rights is addressed in the Employment and Labour international guide, in respect of ESG is there a legal requirement to pay a wage that is high enough to maintain a normal standard of living?

The federal minimum wage is $7.25/hour. States have varying wage laws, with 30 states having minimum wage laws that provide for a wage that is higher than the federal wage; 15 states provide for the same wage as under federal law; and five states have no minimum wage law. In 2015, the SEC promulgated a rule requiring companies to disclose the ratio of the compensation of its chief executive officer to the median compensation of its employees. In addition, many companies periodically have non-binding say on pay shareholder votes, through which they may express their views on company compensation policies.

## 10. Human rights in the supply chain – in relation to adverse impact on human rights or the environment in the supply chain: a. Are there any statutory duties to perform due diligence; b. Have there been any test cases brought against companies?

There is not federal legislation in the United States specifically addressing human rights issues in supply chains. The SEC's proposed Regulation S-K amendments would require registrants to include certain climate-related disclosures, which potentially could include disclosures concerning supply chains. In addition, Sections 1502 and 1504 of the Dodd-Frank Act require "any reporting company that uses the 'conflict minerals' tin, tungsten, tantalum, and/or gold as part of its business model to determine and report on the country of origin of these minerals. If the minerals originated from the Democratic Republic of Congo (DRC) or its neighboring countries, the company must disclose its due diligence processes relating to these minerals. The law was designed to prevent money from conflict minerals from being used to finance human rights violations in the DRC." Section 1504 of the Dodd Frank Act requires corporations "to disclose whether they have made any payments to foreign governments. It is an attempt to 'prevent the exploitation of citizens and the enrichment of corrupt government officials in resource-rich States.'" State-level legislation governing human rights is also common.

European countries have taken steps to address supply chain due diligence. On January 1, 2023, the German Act on Due Diligence in Supply Chains came into effect, which requires companies to take "appropriate measures" to respect human rights and the environment within their supply chains "with the goal to prevent or minimize risks related to human rights or the environment or end the violation of duties related to human rights or the environment." The EU Commission has also proposed a new framework for supply chain due diligence, which would impose broad due diligence obligations with respect to climate and environmental protections and associated human rights issues.

In 2019, IRAdvocates, a US-based NGO, filed a class action lawsuit in the United States District Court for the District of Columbia against Apple, Google, Tesla, Alphabet, Microsoft, and Dell alleging the corporations profited from child labor in their cobalt supply chains in the Democratic Republic of Congo. Plaintiffs are either guardians of children killed in cobalt mining tunnels or children who were maimed while working in the mines. On March 2, 2021, an international coalition of eleven NGOs sued the French supermarket chain Casino in the

 

France Saint-Étienne Judicial Court for its involvement in the cattle industry in Brazil and Colombia, which plaintiffs allege cause environmental and human rights harms.

## 11. Responsibility for host communities, environment and indigenous populations – in relation to adverse impact on human rights or the environment in host communities: a. Are there any statutory duties to perform due diligence; b. Have there been any test cases brought against companies?

The United States does not appear to have any such legislation. Nor did we identify litigation in the United States against private companies concerning human rights issues arising from supply chains, except in the context of claims challenging company disclosures as misleading. For example, a plaintiff sued Mars in the United States District Court for the North District of California for selling products claimed to be ethically sourced without disclosing the likelihood that its supply chain relied upon child and forced labor practices. These types of cases have been largely unsuccessful.

The European Union's Corporate Sustainability Due Diligence Directive requires diligence around companies' environmental and social impacts, as well as the impacts of its suppliers. European Union law under the Corporate Sustainability Reporting Directive requires all large companies and all listed companies (except listed micro-enterprises) to disclose information on what they see as the risks and opportunities arising from social and environmental issues, and on the impact of their activities on people and the environment.

In June 2022, the United Nations released a policy brief, entitled "Essential elements of effective and equitable human rights and environmental due diligence legislation," which highlighted the "rampant" human rights abuses by business actors. The brief makes recommendations for due diligence legislation seeking to mitigate and remedy adverse human rights and environmental impacts.

## 12. Have the Advertising authorities required any businesses to remove adverts for unsubstantiated sustainability claims?

**US**

Last year, the Federal Trade Commission ("FTC") imposed the largest-ever civil penalty against Kohl's, Inc. and Wal-Mart, Inc. for falsely marketing dozens of rayon textile products as bamboo. They also advertised that the products were made using eco-friendly processes when, in reality, converting bamboo to rayon requires the use of toxic chemicals and produces hazardous pollutants. In 2017, the FTC approved a final consent order against Slumber, LLC for falsely advertising that its mattresses were "organic" when the "substantial majority" of the mattresses were non-organic. Likewise, the FTC approved consent orders against four paint companies that misled customers by claiming their products were free of emissions or volatile organic compounds, and, in some instances, made safety assurances for babies, pregnant women, and other vulnerable persons without evidence supporting those claims.

The FTC recently updated its Green Guides to assist companies in marketing their products. The FTC's Green Guides offer guidance on how to avoid creating deceptive advertisements through careful use of terms such as "carbon offsets and climate change," "compostable," "degradable," ozone-safe/ozone-friendly," "recyclable," "recycled content," "energy use/energy efficiency," and "organic."

**UK**

The United Kingdom's advertising authorities have taken a number of actions challenging potentially false advertising:

**Omission of significant information.** Advertisements for a global bank highlighted its financing and investment to help clients transition to net zero and emphasised its tree planting activity. In making these claims about the bank's positive environmental contribution, the ASA considered that consumers would not expect that the bank would also be involved in financing businesses which made significant contributions to greenhouse gas emissions and would continue to do so for many years. The ASA concluded that the adverts omitted material information and were therefore misleading.

**Claims can be implied and misleading.** An advertisement for Innocent drinks encouraged people to "Reduce. Re-use. Recycle". While no specific environmental claims were made, the ASA considered the advertisement to be implying that purchasing Innocent products was a choice which would have a positive environmental impact. As Innocent was unable to produce evidence that its drinks had a net positive impact on the environment across their whole lifecycle, the ASA concluded that the advertisement was misleading and in breach of rules 11.1, 11.2 and 11.3 of the CAP Code and the equivalent rules in the BCAP Code.

 

**Absolute claims: evidence for whole product life cycle is needed.** An advertiser described its funerals as "green" and "environmentally-friendly". The ASA said consumers would understand these terms to be absolute claims about the whole life cycle of the funeral. While the advertiser's funeral plans included carbon offsetting and conservation options, it could not produce evidence that the whole funeral would have a net neutral or positive impact on the environment. The ASA concluded that the claims had not been substantiated and breached rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 11.1, 11.3 and 11.4 (Environmental claims).

**Ambiguous comparative claims breach the rules.** A TV advertisement for laundry liquid described the product as "kinder to our planet" as it was effective at removing stains in cold washes and its bottles used 50% recycled plastic. Because the advert did not explain the basis of the comparative claim "kinder", such as whether the product was "kinder" in comparison to the advertiser's previous products or competitor products, the ASA considered the claim was ambiguous and therefore in breach of rules 3.1 (Misleading advertising), 3.9 (Substantiation) and 9.2, 9.4 and 9.5 (Environmental claims) of the BCAP Code.

**Comparison must be equivalent.** An advertisement for Oatly claimed that the meat and dairy industries emit more CO2 than the transport industry. Oatly's evidence for the environmental impact of the meat and dairy industry took into account the full life cycle, whereas the evidence for the transport industry took into account part of the life cycle (just emissions coming directly from vehicle usage). Because equivalent parts of the life cycle had not been compared, the claim was misleading and breached rules 3.1 (Misleading advertising), 3.7 (Substantiation), 11.1, 11.3 and 11.4 (Environmental claims) of the CAP Code.

**Appropriate test conditions needed for adequate substantiation.** Advertisements for baby wipes said they were 100% biodegradable and break down in as little as 15 days even in landfill conditions. The advertiser's tests had been carried out under optimal conditions and did not replicate the conditions usually found when home composting or using landfill. The ASA concluded that the tests did not substantiate the biodegradability claim. The advertisements were therefore in breach of rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 11.3 and 11.7 (Environmental claims).

**Australia**

***ASIC v Mercer*.** ASIC sued Mercer for allegedly misleading statements regarding the sustainable characteristics of some of its superannuation options. This is the first time ASIC has taken an Australian entity to court over greenwashing concerns. The commission claimed that Mercer made inaccurate statements on its website regarding seven "sustainable plus" investment options, including describing the options as suitable for members "deeply committed to sustainability" and claiming that they excluded companies involved in carbon intensive fossil fuels, alcohol production and gambling. ASIC alleges that several of the companies were involved in these cited exclusions.

## 13. Have the Competition and Markets authorities taken action, fined or prosecuted any businesses for unsubstantiated sustainability claims relating to products or services?

Certain FTC activity relevant to this topic is described above.

The UK's Competition and Markets Authority ("CMA") is "investigating how products and services claiming to be 'eco-friendly' are being marketed, and whether consumers could be being misled." The CMA has opened investigations into three fashion brands to evaluate their "green" claims, as well as fast-moving consumer goods such as food and drink, cleaning products, toiletries, and personal care items. The CMA has not made a determination of a violation yet, but has found evidence that some businesses are making misleading claims or omissions regarding the environmentally friendly nature of their products.

## 14. Have there been any test cases brought against businesses for unsubstantiated enterprise wide sustainability commitments?

Yes. For example, in *People of the State of New York v Exxon Mobil Corp*. (filed in 2018), the New York Attorney General failed at trial in December 2019 to establish that ExxonMobil had violated the federal securities laws based on statements to investors regarding its management of climate transition risks, where the Attorney General claimed that the company publicly represented it applied a higher shadow price on carbon than it used in its internal calculations for its commercial decisions. The court found the issue was a matter of different terminology among ExxonMobil's business groups and that the Attorney General failed to prove that the disclosures misled investors.

In the United Kingdom, NGO ClientEarth filed a

 

Complaint against BP for violations of the Organization for Economic Cooperation and Development ("OECD") Guidelines for Multinational Enterprises alleging its advertising campaign misled the public in breach of the OECD Guidelines, which require clear and honest communications with the public. The complaint alleged that BP's advertising gave a false impression of the relative scale of BP's renewable energy business, misleadingly omitting full lifecycle emissions for natural gas and misleadingly asserting that increased global energy demand is desirable and inevitable. The complaint became moot after BP agreed to withdraw the advertisements in February 2020.

## 15. Is there a statutory duty on directors to oversee environmental and social impacts?

There is no statutory duty on directors to oversee environmental and social impacts. However, as discussed in response to Question No. 1, the common law fiduciary obligations of directors and officers require consideration of the potential material environmental and social impacts on a company's financial condition and operations. The fiduciary duties of loyalty and care require directors to act in the best interest of the company and shareholders, to make informed decisions, and exercise proper oversight. In order to carry out these duties, directors and officers must be able to identify and consider risks and opportunities impacting shareholder value, which necessarily includes the impacts of environmental and social issues. Companies must also disclose potentially material impacts on the company, including environmental and social impacts.

In the United Kingdom, the Better Business Act seeks to expand Section 172 of the Companies Act, which address the duties of directors, to incorporate the consideration of the long-term interests of people, planet, and profit.

## 16. Have there been any test cases brought against directors for presenting misleading information on environmental and social impact?

Yes. As previously mentioned, ExxonMobil Corp, its Chairman and CEO, and other directors are subject to several actions in the U.S. asserting federal securities law violations based on climate-related statements.

In February 2023, ClientEarth announced that it had commenced a derivative action in the High Court in the United Kingdom, against the board of Shell plc in its capacity as a shareholder, alleging that Shell's 11 directors have breached their legal duties to assess, disclose and manage material risks to the company under section 172 of the Companies Act 2006.

## 17. Are financial institutions and large or listed corporates required to report against sustainable investment criteria?

On March 21, 2022, the SEC proposed amendments to Regulation S-K and Regulation S-X that would mandate significant additional climate-related disclosures. In summary, the proposed rules consist of amendments to Regulation S-K and Regulation S-X that would require a registrant to disclose information about, among other things:

- Oversight and governance of climate-related risks by the registrant's board and management;
- How any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements of the company, and how those risks may manifest over the short-, medium-, or long-term;
- How any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook;
- The registrant's processes for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system or processes;
- The potential impact of climate-related events (severe weather events and other natural conditions as well as physical risks identified by the registrant) and transition activities (including transition risks identified by the registrant) on the line items of a registrant's consolidated financial statements and related expenditures, and disclosure of estimates of the financial impacts of such climate-related events and transition activities and the assumptions underlying those estimates;
- Scopes 1 and 2 greenhouse gas emissions metrics, both broken out by constituent greenhouse gases (eight different greenhouse gasses are specified in the proposal) and also presented in the aggregate;
- Scope 3 greenhouse gas emissions metrics, if material, or if the registrant has set a greenhouse gas emissions reduction target or goal that includes its Scope 3 emissions; and
- The registrant's climate-related targets or goals, and transition plan, if the registrant has

 

one.

In addition, Securities and Exchange Commission § 229.303 ("Item 303") requires a registrant to disclose any known trends or uncertainties that have had or that the registrant expects will have a material impact on revenues or will cause a material change in the relationship between costs and revenues.

With respect to existing U.S. reporting requirements, the materiality-based disclosure requirements previously discussed require sustainability statements to be accurate and, if circumstances change such that they are no longer accurate, that they be corrected.

Existing regulations in Europe and Asia and, arguably, current disclosure requirements under U.S. securities laws could be construed to require disclosure of certain of the information covered by the proposed rule. The proposed rule, like disclosure regimes that have been implemented in other jurisdictions, adopts many of recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD"). Therefore, companies with operations outside of the United States likely already are in the process of or preparing to collect, analyze, and report on information that is subject to the SEC proposed rule.

In the European Union, the European Sustainability Reporting Standards (established by the European Financial Reporting Advisory Group as part of the Corporate Sustainable Reporting Directive) provides guidance on disclosure regarding many, if not virtually all, corporate activities and impacts, including, among other things, governance processes, controls, and procedures used to monitor and manage impacts, risks, and opportunities; how the company's strategy and business model interact with material impacts, risks, and opportunities; the processes by which impacts, risks, and opportunities are identified, assessed and managed; and how performance is measured, including toward targets. The ESRS provides further guidance for how to make disclosure with respect to these issues in the areas of climate change, pollution, water and marine resources, biodiversity, and resource use (ESRS E1-5); business conduct (ESRS G1); and workers in value chain, affected communities, and consumers and end users (ESRS S2-4).

## 18. Is there a statutory responsibility on businesses to report on managing climate related financial risks?

As discussed in response to Question Nos. 1 and 15, there are no statutory responsibilities in the United States to manage climate related financial risks. However, the fiduciary obligations of directors and officers require consideration of climate-related risks on a company's financial condition and operations. In order to carry out their fiduciary duties, directors and officers must be able to identify and consider risks and opportunities impacting shareholder value, which necessarily includes climate related financial risks. Companies must also disclose potentially material impacts on the company, which may include climate related financial risks.

## 19. Is there a statutory responsibility on businesses to report on energy consumption?

No, there are no statutory responsibilities on businesses to report on energy consumption in the United States.

In the United Kingdom, the law "require[s] all UK quoted companies to report on their global energy use in addition to greenhouse gas emissions in their annual Directors' Report. There are also requirements for large unquoted companies and limited liability partnerships to disclose their annual energy use and greenhouse gas emissions and related information. . . . The government encourages all other companies to report similarly, although this remains voluntary."

## 20. Is there a statutory responsibility on businesses to report on EDI and / or gender pay gaps?

In the United States, as discussed in response to Question No. 7, there are no statutory reporting requirements for diversity and inclusion issues or pay gaps. However, NASDAQ and other organizations require reporting on diversity statistics. Companies are also increasingly voluntarily opting to disclose this information.

In April 2022, the United Kingdom Financial Conduct Authority published a policy statement entitled Diversity and inclusion on company boards and executive management (PS22/3) governing the disclosure of diversity and inclusion measures, including whether they have met diversity targets, and if not, why.

## 21. Is there a statutory responsibility to report on modern day slavery in the supply chain?

There are no United States statutory requirements except in California. The California Transparency In

 

Supply Chains Act of 2010 provides that "[a] company must meet certain criteria to be subject to the law. It must: (a) identify itself as a retail seller or manufacturer in its tax returns; (b) satisfy the legal requirements for 'doing business' in California; and (c) have annual worldwide gross receipts exceeding $100,000,000. The law requires companies subject to the law to disclose information regarding their efforts to eradicate human trafficking and slavery within their supply chains on their website or, if a company does not have a website, through written disclosures."

The United Kingdom passed the Modern Slavery Act of 2015, which "requires certain businesses to disclose what activity they are undertaking to eliminate slavery and trafficking from their supply chains and their own business." Section 54 of the Act "requires a commercial organisation over a certain size to publish a slavery and human trafficking statement each year which sets out the steps it has taken to ensure there is no slavery or trafficking in its supply chains or its own business, or states that it has taken no such steps. Section 54 does not mandate what a slavery and human trafficking statement must contain (beyond the actual steps taken or a statement that the organisation has taken no steps) nor require commercial organisations to take any particular action beyond preparation of the annual statement."

Australia likewise has enacted the Modern Slavery Act of 2018, which "requires entities based, or operating, in Australia, which have an annual consolidated revenue of more than $100 million, to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks. Other entities based, or operating, in Australia may report voluntarily."

In Europe, "EU rules require large companies and listed companies to publish regular reports on the social and environmental risks they face, and on how their activities impact people and the environment." In January 2023, the European Corporate Sustainability Reporting Directive entered into effect, which expands on reporting rules covering a broader set of companies who will now be required to report on sustainability and also makes it mandatory for companies to audit the sustainability information they report, including supply chain issues.

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