EVERSHEDS SUTHERLAND

Navigating the future: Helping your business succeed in an ever-changing world

State of the World on ESG

November 3, 2022

ACC Association of Corporate Counsel

CHICAGO

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ESG
ENVIRONMENT
SOCIAL
GOVERNANCE

Environment issues

- Climate reporting and disclosures
- Climate disputes
- Procurement of renewable energy by corporations
- E-mobility and sustainable transport
- Emissions trading and carbon offsets
- Sustainable finance
- Investments in clean energy projects

Social issues

- Human rights
- Health and safety standards at work
- Board composition and employee/stakeholder voice
- Labor standards in the supply chain
- Impact of business activities on the communities
- DEI data reporting and related risks
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Governance issues

- Reporting, compliance and disclosure of information
- Business ethics, bribery and corruption, and money laundering
- Data protection and cybersecurity
- Executive pay
- Pay gaps
- Discharge of Board duties with regards to ESG

Roundtable discussion on ESG

The in-house lawyer's perspective

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APPENDIX

Inflation Reduction Act of 2022: A summary of the energy tax provisions

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Inflation Reduction Act of 2022: A summary of the energy tax provisions

The Inflation Reduction Act of 2022 (the Act) was signed into law on August 16, 2022, and includes about $370 billon for American energy security and climate change. Those changes include very substantial extensions, expansions and modifications of the tax credits for renewable and alternative energy development.

Following is a summary of the changes made to the Act since its July 27 introduction.

Changes to the Act since introduction

- Clarification that the wage and apprenticeship requirements also apply to workers employed by the taxpayer, as well as contractors and subcontractors. The July 27 bill did not address workers employed by the taxpayer.

- Clarification with respect to the energy community bonus requirement, that such bonus is available for projects in a metropolitan statistical area or non-metropolitan statistical area which, as determined by the Secretary of Treasury has:
  - at any time during the period after 2009 had 0.17% or greater direct employment or 25% or greater local tax revenues related to extraction, processing, transport, or storage of coal, oil or natural gas; and
  - an unemployment rate at or above the national average unemployment rate for the previous year.

  The July 27 bill included a similar provision, but with less detail regarding the areas for which the bonus was available. The bonus also remains available for facilities constructed in brownfield sites or any census tract (or adjoining tract) that had either a coal mine close after 1999 or coal-fired electric generating unit retired after 2009.

- Revisions to the domestic content requirement to revise the percentages of US components mined, produced or manufactured such that the percentage of manufactured products that are attributable to the US. must be 40% if construction begins before 2025, 45% if in 2025, 50% if in 2026 and 55% if after 2026. For offshore wind projects, such percentages are 20%, if construction begins before 2025, 27.5% if in 2025, 35% if in 2026, 45% if in 2027 and 55% if after 2027.

- Revision to direct pay reduction phaseouts for facilities not satisfying the domestic content requirement such that if construction begins before 2024, there is no reduction in the direct pay amount, if in 2024 there is a 10% reduction, if in 2025 there is a 15% reduction, and if after 2025 no direct payment is available.

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- Renumbering the Section 48D technology-neutral ITC to Section 48E. This change was made necessary by the passage of the Creating Helpful Incentives to Produce Semiconductors Act on August 9, 2022, which created an incentive tax credit under section 48D for semiconductor manufacturing facilities. For a description of that credit, click here.

- Revisions to the Section 45U nuclear PTC including (1) correcting the phase-out calculation for the credit by replacing the reduction percentage from 80% to 16%, and (2) providing an exclusion from inclusion of zero emission credit payments in the tax credit calculation if the availability the tax credit would reduce the availability of the zero emission credit.

- Revisions to the new minimum capture threshold rules under Section 45Q that require, for electric generation facilities, that the carbon capture unit have a capture design capacity of not less than 75% of such electric generation unit. The change revises the calculation methodology and other rules for determining whether the 75% test is satisfied.

- Clarification of direct pay eligibility for any corporation operating on a cooperative basis, which is engaged in furnishing electric energy to persons in rural areas.

- Inclusion of a gross up of direct payments of 6.0455% to address the required sequestration of government payments.

- Clarification that the 45W commercial EV credit is not subject to the modified adjusted gross income and MSRP requirements that apply for the section 30D credit, as added by the Act.

- Allowance of an election under the section 45X Advanced Manufacturing PTC to treat sales to related persons as sales to unrelated persons, subject to guidance to be issued by the Secretary of the Treasury.

Below, we break down the Act as enacted.

New concepts

The Act contains several new concepts that apply across numerous credits. When evaluating the applicability of many of the credits provided for in the Act, taxpayers will need to be aware of the following.

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Prevailing wage and apprenticeship requirements

Certain credit provisions provide that only 1/5th of the credit amount is available unless one of the following is satisfied:

1. The facility's maximum net output is less than 1 MWac;
2. Construction of the facility begins prior to (or within 60 days after) the release by Treasury or the IRS of guidance for the implementation of the prevailing wage and apprenticeship requirements; or
3. The prevailing wage and apprenticeship requirements are satisfied.

Generally, to meet the prevailing wage requirement, laborers and mechanics employed by the taxpayer, contractors and subcontractors in construction, alteration, and repair of a facility must be paid wages not less than prevailing rates as determined by the Secretary of Labor. The apprenticeship requirement generally requires that (1) certain labor hour requirements for the construction, alteration or repair work with respect to the facility must be performed by apprentices and (2) for a taxpayer or contractors with more than four employees, at least one employee must be a qualified apprenticeship. Failure to satisfy the wage and apprenticeship requirements may be cured through additional payments to the affected workers and to the government. These requirements vary slightly for different credits and exceptions apply.

ES Observation: The final version of the Act clarifies that the prevailing wage and apprenticeship requirements also apply to the taxpayer, in addition to contractors and subcontractors. Since the prevailing wage and apprenticeship requirement is deemed satisfied if construction begins before (or within 60 days after) Treasury or the IRS releases guidance on these requirements, there remains an incentive to begin construction earlier than the extended deadlines for beginning construction (as discussed below). For taxpayers needing to comply with these requirements, practical guidance from Treasury and IRS implementing these rules will be critical. For example, it is unclear how a taxpayer can reasonably utilize the cure provisions without having direct access to employee information (including name, contact information and wages) of contractors and subcontractors. We expect this guidance to be the subject of substantial input from industry.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

Energy community bonus credit

Certain bonus credits may be available for facilities constructed in an energy community, which includes:

- brownfield sites,
- metropolitan statistical areas or non-metropolitan statistical areas which at any time during the period after 2009 had areas with 0.17% or greater direct employment or 25% or greater local tax revenues significant employment (post-1999) related to extraction, processing, transport, or storage of coal, oil or natural gas; and has any unemployment rate at or above the national average unemployment rate for the previous year, or
- any census tract (or adjoining tract) that had either a coal mine close after 1999 or coal-fired electric generating unit retired after 2009.

ES Observation: The Act has been revised to provide more specificity regarding "areas with significant employment," which existed in the previous iteration of the Act. Guidance is still needed to provide taxpayers certainty as to what constitutes a "a metropolitan statistical area" or "non-metropolitan statistical area."

Domestic content requirement

Bonus credits also may be available if domestic content requirements are satisfied. To satisfy this requirement, taxpayers must certify that any steel, iron or manufactured product that is a component of the facility (upon completion of construction) was produced in the US. Generally, manufactured products are deemed to have been produced in the US if 40-55% of costs of the manufactured products (depending on the year in which construction begins) are attributed to components mined, produced or manufactured in the US (a lower 20-55% threshold applies for offshore wind facilities).

Further, if domestic content requirements are not satisfied, any direct payment made in lieu of a tax credit (discussed below) may be subject to a haircut.

ES Observation: The domestic content rules are coupled with new incentives (discussed below) for the manufacture of renewable energy components in the US. Until US manufacturing catches up with US renewable energy development, these rules may be difficult to satisfy. There are exceptions available to avoid the direct payment haircut if domestic content is unavailable or prohibitively expensive.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

Payments in lieu of credits

Direct payments: The Act provides for an election for direct payment in lieu of a tax credit. Any direct payment election must be made on a per facility/project/equipment basis. Direct pay is allowed for many of the credits mentioned in this alert including the following:

- Section 30C alternative fuel vehicle refueling property credit
- Section 45 renewable electricity production tax credit
- Section 45Q carbon capture and sequestration credit
- Section 45U zero-emission nuclear power production credit
- Section 45V clean hydrogen credit
- Section 45W qualified commercial vehicle credit (for certain tax-exempt entities)
- Section 45X advanced manufacturing production credit
- Section 45Y clean electricity production credit
- Section 45Z clean fuel production credit
- Section 48 energy investment tax credit
- Section 48C qualifying advanced energy project credit
- Section 48E clean electricity investment tax credit

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

Tax-exempt entities, state or local governments (or political subdivisions thereof), the TVA, an Indian tribal government, any Alaska Native Corporation, or any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas may make an election for direct pay. Other taxpayers are eligible for direct pay only for sections 45V (clean hydrogen), 45Q (carbon capture and sequestration), and section 45X (advanced manufacturing production credit), with certain limitations including for the 45X and 45Q credits that such election is available only for the year in which the project is placed in service and the subsequent four taxable years.

Transferability: Additionally, taxpayers may make a yearly election to transfer all (or any portion) of an eligible credit (which are those listed above as eligible for direct payments) to an unrelated taxpayer, provided that consideration for such transfer is paid in cash. Such consideration is not includible in the transferor's gross income, and is not deductible by the transferee. Any taxpayer other than persons that are entitled to direct payments are entitled to transfer the credits. The credit is taken into account in first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined. Many of the credits mentioned herein are eligible for the transfer provision.

ES Observation: Importantly, the final version of the Act expands the ability to receive direct pay to certain electric cooperatives. The Act notes that IRS may request further information before providing any direct payments, which could delay the receipt of payments and increase the likelihood of IRS audit. Further, note that although these monetization opportunities address credit monetization, they do not address monetization of the depreciation benefits.

Renewable power credits

Current credits for renewable power are extended under the Act until 2025, whereupon the credits would switch to a technology-neutral approach that would provide credits based on the applicable emissions rate.

<u>Section 45 PTC</u>

Under the Act, the beginning of construction deadline is extended to December 31, 2024 for wind facilities, solar energy, closed-loop biomass, open-loop biomass, landfill gas, trash, qualified hydropower, marine and hydrokinetic renewable energy, and geothermal energy. The existing phase down for wind facilities applies only to facilities placed in service before January 1, 2022.

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The Act would reinstate the full value of the PTC; however, the Act provides for a credit amount equal to 1/5th of the otherwise available amount if the prevailing wage and apprenticeship requirements are not satisfied.

The amendments to the section 45 PTC apply to facilities placed in service after December 31, 2021, except for domestic content and energy credit bonus credits, and the domestic content direct pay reduction, which all apply to facilities placed in service after December 31, 2022.

ES Observation: A welcome change for many, solar facilities are now eligible for the PTC. For regulated public utilities, the ability to claim PTCs for solar facilities can avoid the normalization requirements applicable to the ITC.

Section 45Y clean electricity PTC

Under the Act, facilities placed in service after December 31, 2024 are eligible for a 10-year technology neutral PTC. Taxpayers are not eligible for section 45Y if a credit was allowed under sections 45, 45J, 45Q, 45U, 48, 48A, or 45Y. The credit begins to phase out over three years after the later of (1) the year the Secretary determines the annual GHG emissions from production of electricity is equal or less than 25% of GHG emissions in 2022, or (2) 2032.

ES Observation: Some facilities may be able to choose between the section 45 PTC and the Section 45Y PTC, if construction began before January 1, 2025 and the project is placed in service on or after January 1, 2025

Facilities must be (1) owned by the taxpayer, (2) used for generation of electricity, (3) placed in service after December 31, 2024, and have a GHG emissions rate that is not greater than zero to be eligible for the credit. The credit amount is equal to 0.3 cents (or 1.5 cents if prevailing wage and apprenticeship requirements satisfied) per KWh of electricity produced in US or US possession by taxpayer at a qualified facility and either (a) sold to a unrelated person, or (b) if equipped with a metering device owned and operated by an unrelated person, sold, consumed or stored by taxpayer.

Section 48 ITC

The Act generally extends the beginning construction deadline for current energy property to December 31, 2024. New energy property eligible for the property includes energy storage technology, qualified biogas property, and microgrid controllers. Certain interconnection property is also now eligible. Similar to the PTC, the existing credit percentages are reduced to 1/5th of the otherwise available amount if the prevailing wage and apprenticeship requirements are not satisfied.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

The amendments to the section 48 ITC apply to facilities placed in service after December 31, 2021, except for domestic content and energy credit bonus credits, and the domestic content direct pay reduction, which all apply to facilities placed in service after December 31, 2022.

ES Observations: The continued expansion of the ITC to additional technologies, including the long-awaited addition of energy storage technology (as a stand-alone credit) acknowledges the need to continue to incentivize additional technologies as we move toward a technology neutral tax credit regime. The energy storage ITC also includes an opt-out from the normalization rules.

Section 48E clean electricity ITC

Under the Act, facilities placed in service after December 31, 2024 are eligible for a 10-year technology neutral ITC. Projects for which a credit was allowed under sections 45, 45J, 45Q, 45U, 48, 48A, or 48Y are not eligible. The credit phases down in the same manner as Section 45Y.

Facilities must be (1) placed in service by the taxpayer; (2) used for generation of electricity; (3) placed in service after December 31, 2024, (4) have an anticipated GHG rate not greater than zero, (4) include tangible personal property or other tangible property (not including building or structural components) used as an integral part of the qualified facility, and (5) depreciable or amortizable.

The credit amount is equal to 30% of qualified investment in qualified facility if prevailing wage and apprenticeship requirements are satisfied (otherwise 6%). The credit is subject to recapture if Secretary determines GHG emissions rate is greater than 10 grams of CO2e per KWh.

Section 45U zero-emission nuclear PTC

Nuclear facilities already in service and not receiving a credit under section 45J, are eligible for the new Section 45U credit, which provides for a credit equal to 0.3 × KWh of electricity produced by taxpayer and sold to an unrelated person less the reduction amount (equal to 16% of the gross receipts less the product of 2.5 cents and the energy produced and sold). Amounts received from a zero-emission credit program are excluded from the gross receipts amount if the tax credit is used to reduce payment from such zero-emission credit program. That credit amount is multiplied by 5 if the prevailing wage and apprenticeship requirements are satisfied. As with the section 45J credit, if a facility has more than one owner, the production is allocated pro rata to interests in gross sales.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

The credit is available for electricity produced and sold for taxable years beginning after December 31, 2023 and before December 31, 2032.

ES Observation: This bill reverts to the correct formula used in the Build Back Better Act, a welcome correction for the nuclear industry.

Section 45V clean hydrogen PTC

The Act provides for a new 10-year clean hydrogen PTC under section 45V for facilities that begin construction before January 1, 2033 and for clean hydrogen produced after December 31, 2022. A qualified facility must produce hydrogen that results in a lifecycle greenhouse gas emission of not greater than 4 kilograms of CO2e per kilogram of hydrogen. Hydrogen must be produced in the US, in the ordinary course is a trade or business of the taxpayer, and in compliance with other requirements as determined by the Secretary.

The amount of credit is based on the kilograms of qualified clean hydrogen produced by the taxpayer; the credit amount equals $0.60 (increased by 5x if the wage and apprenticeship requirements are satisfied) if the facility produces qualified clean hydrogen that results in lifecycle greenhouse gas emission of less than 0.45 kilograms of CO2e per kilogram of hydrogen; if the CO2e level is between 0.45 kilograms and 4 kilograms, the credit is available albeit at a lower credit rate. Taxpayers can make an election to claim the ITC in lieu of the PTC. A taxpayer cannot receive the section 45V credit if facility includes carbon capture equipment and the taxpayer receives 45Q credit.

ES Observations: This is another long-awaited tax credit incentive that is finally available. Taxpayers engaged in hydrogen production should assess the lifecycle greenhouse gas emissions of such production to determine the credit amount for any hydrogen produced and sold.

Carbon capture

The Act provides support for carbon capture and sequestration by increasing the credit amounts and reducing minimum threshold requirements.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

Section 45Q CCUS credit

Section 45Q is extended to facilities the construction of which begins before 2033. Notably, the Act reduces minimum capture thresholds, and increases the tax credit rate.

Under the Act, the new minimum capture thresholds are as follows:

- in the case of a direct air capture facility, the annual minimum capture amount is 1,000 metric tons of qualified carbon oxide;
- in the case of an electricity generating facility, (1) the annual minimum capture amount is 18,750 metric tons of qualified carbon oxide and (2) the carbon capture equipment for the applicable electric generating unit at such facility must have a capture design capacity of not less than 75 percent of the baseline carbon oxide production of such unit; and
- in the case of any other facility, the annual minimum capture amount is 12,500 metric tons of qualified carbon oxide

The credit amount increases to $85 for disposal, $60 for injection or utilization, and $180 for direct air capture, subject to a 1/5th reduction if the prevailing wages and apprenticeship requirements are not satisfied.

The amended provisions generally apply to facilities or equipment placed in service after December 31, 2022.

ES Observations: These are positive changes for the industry, allowing smaller and capital intensive carbon capture projects to be constructed. Congress should continue to expand this credit to allow for additional facilities that similarly are used to capture and store CO2 to benefit from this credit.

Fuels

Importantly, the Act revives expired alternative fuel credits and provides credits for sustainable aviation fuel and clean fuel.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

Existing fuels tax credits

The Act extends existing biodiesel, renewable diesel, alternative fuels and second generation biofuels tax credits to the end of 2024 (with expired credits retroactively reenacted and extended to January 1, 2022). Hydrogen is no longer eligible for the alternative fuels tax credits for fuel sold or used after December 31, 2022 (as it is entitled to a separate credit, as discussed above).

ES Observations: While hydrogen is no longer eligible for the alternative fuels tax credits for fuel sold or used after December 31, 2022, it is eligible for the alternative fuels tax credits for fuel sold or used in 2022 under the retroactive reenactment.

Section 40B sustainable aviation fuel credit (section 40B, section 6426(k) and section 6427)

The Act provides for a new credit available with respect to sustainable aviation fuel (SAF) mixtures sold or used after December 31, 2022 and through December 31, 2024. A qualified mixture must be a mixture of SAF (as defined in the Act) and kerosene, produced by the taxpayer in the US, used by the taxpayer or sold for use in an aircraft in the ordinary course of business, and the fueling must occur in the US.

The amount of the credit is equal to the number of gallons of SAF in the qualified mixture multiplied by the sum of $1.25 and a supplementary amount for each percentage point over 50% reduction of lifecycle greenhouse gas emissions, capped at a total credit amount of $1.75 per gallon of SAF. Certain substantiation requirements also apply.

Section 45Z clean fuel production credit

The credit applies to transportation fuel produced after December 31, 2024, and is only applicable to transportation fuel sold before December 31, 2027. Transportation fuel must be produced by the taxpayer at a qualified facility and used by an unrelated person in the production of a fuel mixture, in a trade or business, or for sale at retail.

The amount of the credit is equal to the product of (1) $1.00 (or $1.75 for SAF) per gallon or (gasoline gallon equivalent) of transportation fuel and (2) the emissions factor for such fuel. The credit is reduced by 1/5 if prevailing wage and apprenticeship requirements are not met.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

ES Observation: Taxpayers should analyze 2022 fuel activities to see if they are eligible for one of the reinstated and retroactive fuels credits.

Clean vehicle credits

Existing clean vehicle and refueling property credits

Section 30D for clean vehicles is no longer allowed for taxpayers with AGI exceeding $300,000 for joint returns, $225,000 for head of household, and $150,000 for all other taxpayers. Section 30D is subject to recapture if the taxpayer is determined ineligible for the credit. Section 25E for previously-owned clean vehicles is not allowed for taxpayers with AGI exceeding $150,000 for joint returns, $112,500 for head of household, and $75,000 for all other taxpayers.

Section 30C(g) for alternative fuel refueling property is extended through 2032, and reduced to 1/5 of the amount for failing to meet wage and apprenticeship requirements. The credit is revised to limit $30,000 for any property, and $100,000 for any such item of property.

Section 45W credit for qualified commercial clean vehicles

Section 45W is available for qualified commercial vehicles acquired after 2022 and placed in service before 2033. A qualified commercial vehicle must be made be a manufacturer and acquired for use or lease by the taxpayer, be depreciable, be either a motor vehicle or machinery, and have an electric fuel cell motor.

The amount of the credit is generally the lesser of 15% of the vehicle's basis (or 30% for vehicles not powered by a gasoline or diesel internal combustion engine); or the incremental cost of the vehicle (the amount the purchase price of the commercial clean vehicle exceeds that of a vehicle comparable in size and use powered solely by a gasoline or diesel internal combustion engine). The credit is capped at $7,500 for vehicles with a gross vehicle weight rating of less than 14,000 pounds, and $40,000 for all other vehicles.

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Inflation Reduction Act of 2022: A summary of the energy tax provisions *(cont'd.)*

ES Observations: The above clean vehicle credits must generally be used in the US and a vehicle can only receive either the 30D or 45W credit. The determination of how to calculate the incremental cost of a vehicle will require guidance from Treasury and the IRS.

Superfund

Section 4611 hazardous substance Superfund financing rate reset

The Superfund financing rate is increased from 9.7 cents to 16.4 cents (the rate has effectively been $0 since 1996). This new rate is effective January 1, 2023.

ES Observation: The Superfund tax is back as of July 1, 2022. To learn more about the effects of the tax, read our alert.

Manufacturing credits

Section 48C advanced energy project credit extension

Section 48C is extended to provide an additional $10B in credits allocable to qualified investments with maximum $6B allocated to investments not in energy communities, effective January 1, 2023. The base credit of 6% is increased to 30% if the wage and apprenticeship requirements are met. Taxpayers are not eligible for section 48C if they received prior credits under sections 48B, 48E, 45Q or 45V. Existing and modified industrial or manufacturing facilities may be eligible for the credit.

Section 45X advanced manufacturing PTC

New Section 45X provides a credit for each eligible component produced in the US or a possession and sold by taxpayer to unrelated person in the taxpayer's trade or business. The taxpayer can also elect to treat a sale to a related person as a sale to an unrelated person, however additional registration may be required by the Secretary. Eligible components include specified solar, wind, inverter, and battery components and critical materials, with the exact amount of credit dependent upon the component. The credit applies to components produced and sold after December 31, 2022

ES Observation: With many of the energy tax credits in the Act requiring the use of domestic content for bonus credit amounts and for full amounts upon a direct pay election, the credit for additional manufacturing of components in the US is welcome.

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EVERSHEDS SUTHERLAND

Greenwashing liability

Trends, direction of travel and best practices

November 3, 2022

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Topics we will cover:

- Introduction to Greenwashing Litigation
- Highlight Greenwashing trends
- Pressure points
  - Review recent Greenwashing lawsuits
  - Review recent regulatory changes/risks for ESG disclosures
- Best practices

Greenwashing defined

- **"Greenwashing"** – When an organization makes false, unsubstantiated, or outright misleading statements or claims about the sustainability of a product or a service, or even about business operations more broadly

"Disinformation disseminated by an organization… so as to present an environmentally responsible public image; a public image of environmental responsibility promulgated by or for an organization… but perceived as being unfounded or intentionally misleading."

—Oxford English Dictionary

Types of Greenwashing

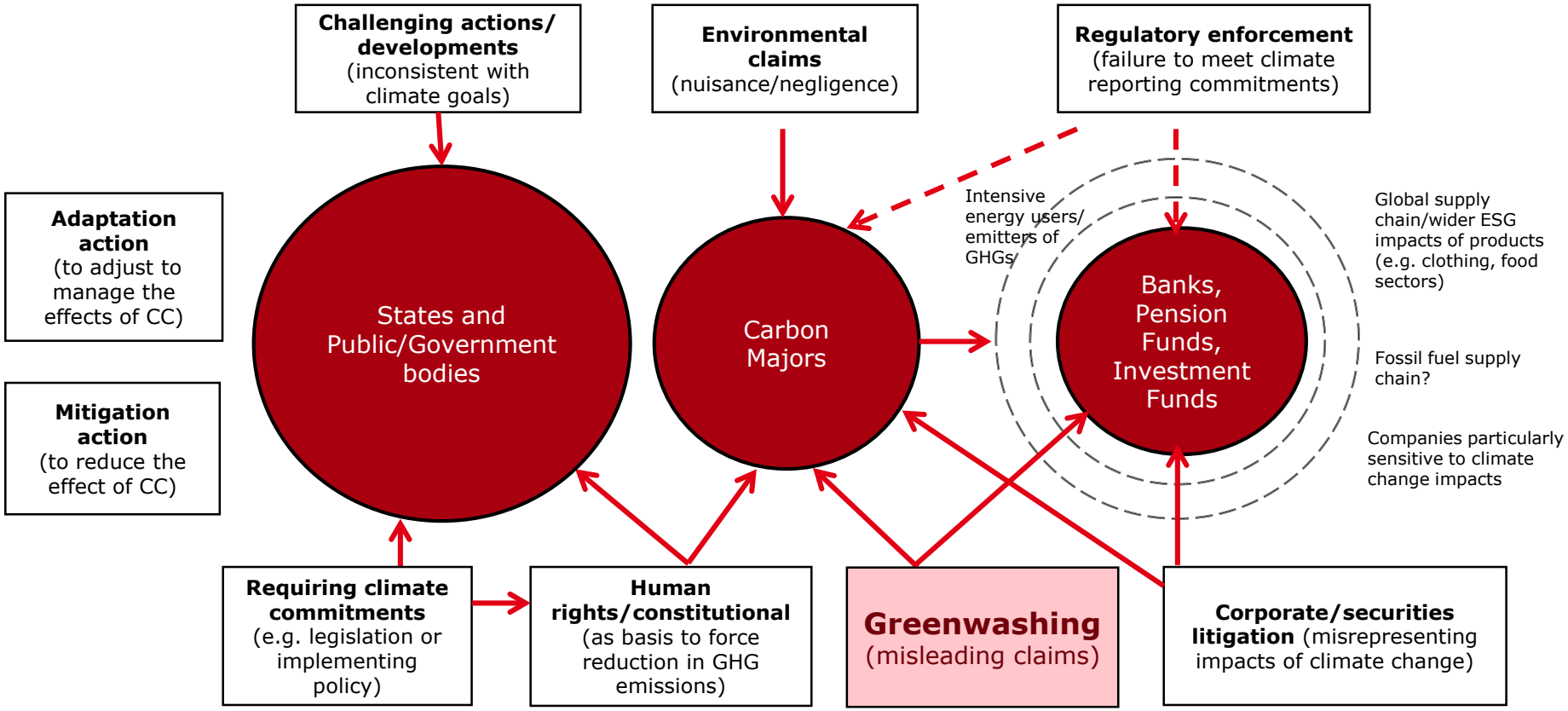
Greenwashing (generally):

- Misleading statements about eco-friendly products and services
- Misleading statements about recyclability

Climate related Greenwashing ("climate-washing")

- Misleading statements about climate commitments (e.g. "net zero" pledges)
- Misleading statements related to the level of risk the organization faces based on its climate-change efforts
- Misinformation about the problem of climate change by underplaying the danger of climate change

Nexus between Greenwashing and Climate Change



Typical representations

Greenwashing can take shape through various channels of communication

- Representations can appear anywhere, such as in:
  - Advertisements
  - Marketing materials
  - Branding and packaging
  - Product information guides
  - Investor prospectus and reports
  - **ESG disclosures**
  - Interviews (sustainability comments)
  - Social media (Twitter, Facebook)

Greenwashing Claims – Trends

Legal Theory

- Plaintiffs allege misrepresentation and false or deceptive advertising about a company's movement to green business solutions (services, product, energy consumption, carbon emissions, etc.)

Types of Plaintiff

- State and City governments
- Environmental Groups
- State Attorneys General
- Federal Trade Commission

Example Claims

- Exxon targeted by representing "*that it engages in cleaner forms of energy at a significant level, when in fact, its core business remains entrenched in the production and delivery of fossil fuels.*"
- Other targets: Volkswagen, Chevron, Walmart, Coca Cola, Allbirds

Pressure points

Why greenwashing is growing?

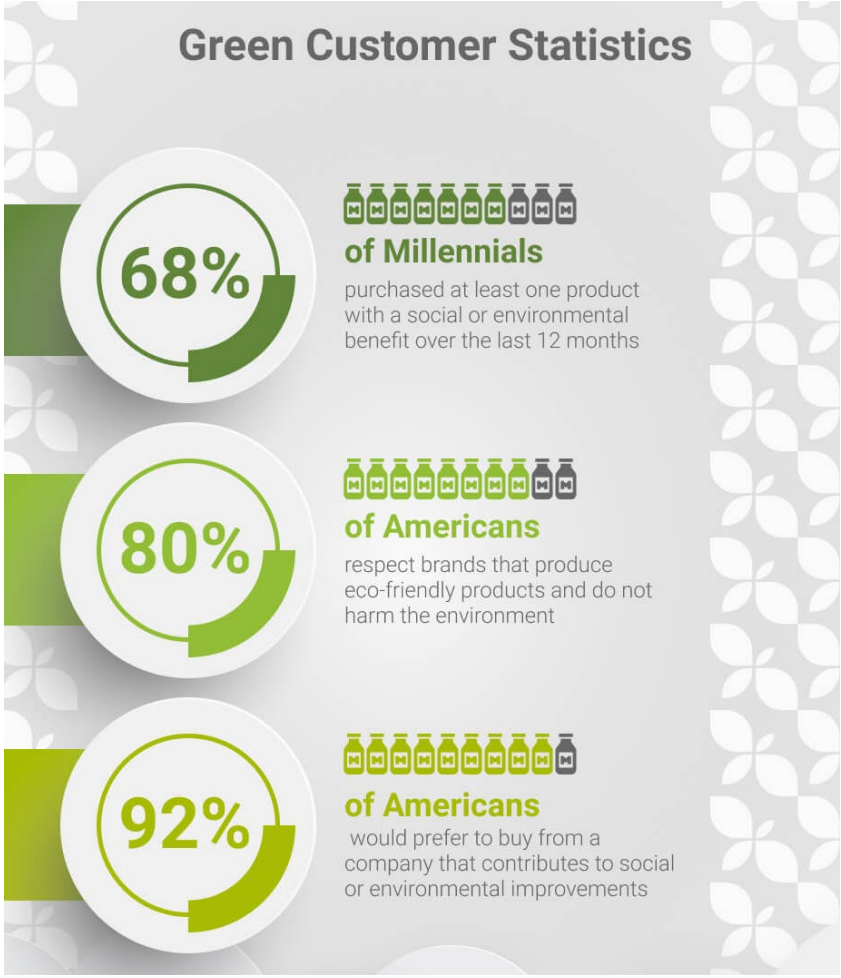
- Consumer demand (Private Plaintiffs)
- State and local governments
- Federal Trade Commission – Green Guides (2022 Guides for the Use of Environmental Marketing Claims)
- SEC Disclosure Regulations
- Investor pressure (ESG-mandates)

Consumer demand (Private Plaintiffs)

1. Consumer demand for more environmentally responsible products is continuously growing
2. Sales of environmentally oriented products have increased
3. In order to stay competitive, businesses need to advertise/build a "green" reputation

Result:

- Consumer Class Action (alleging Fraudulent Misrepresentation & Deceptive Advertising)



Examples:

Commodore v. H&M (US)

"H&M states that certain of its Products, called the Conscious Collection, contains 'at least 50% sustainable materials, such as organic cotton and recycled polyester.'" (H&M)

"By falsifying the Sustainability Profiles with inaccurate and misleading data, [H&M] misrepresents its Products as being better for the environment than comparable garments, when they are not."
(Commodore – class action group)

Dwyer v. Allbirds, Inc. (US)

"…the average footprint of our products is 7.6 kg CO2e." (Allbirds)

"Allbirds' life cycle assessment (LCA) tool currently only measures the carbon footprint of each product, meaning that it doesn't assess any other environmental impact of wool production, including on water, eutrophication, or land occupation."
(Dwyer – class action group)

State and Local Governments

1. All states have laws preventing misrepresentation, fraud advertising, deceptive practices, etc…
2. States are enacting California-like laws restricting green marketing

Result:

- Class Action brought by State AG (alleging Fraudulent Misrepresentation & Violation of state marketing laws, etc.)

Examples:

City of New York v. Exxon Mobil Corp, et. al.

"we can all agree we need strong climate solutions, and with natural gas as a dominant energy source, U.S. carbon emissions are the lowest levels in a generation."

"Defendants falsely present[ed] themselves as corporate leaders in the fight against climate change" (City of New York)

Examples:

State of Vermont v. Exxon Mobil Corp, et. al.

"[w]e're continually innovating to develop products that enable customers to reduce their energy use and CO2 emissions"

"Although fully aware for decades of the causal link between the use of their fossil fuel products and harmful climate change, Defendants and their proxies have taken extraordinary steps to keep that information a secret and to distort or misrepresent what they knew." (State of Vermont)

"The campaigns direct consumer attention away from the fact that Defendants' core businesses remain focused upon expanding the production, distribution, and sale of fossil fuel products that exacerbate climate change, and that any alternative energy efforts of the Defendants are miniscule in comparison" (State of Vermont)

Federal Trade Commission – Green Guides

1. FTC's Green Guides were first introduced in 1992 and most recently updated in 2012
2. Due to the increase in consumer demand for green products and services, the FTC is projected to initiate its review and update the Green Guides this year

Result:

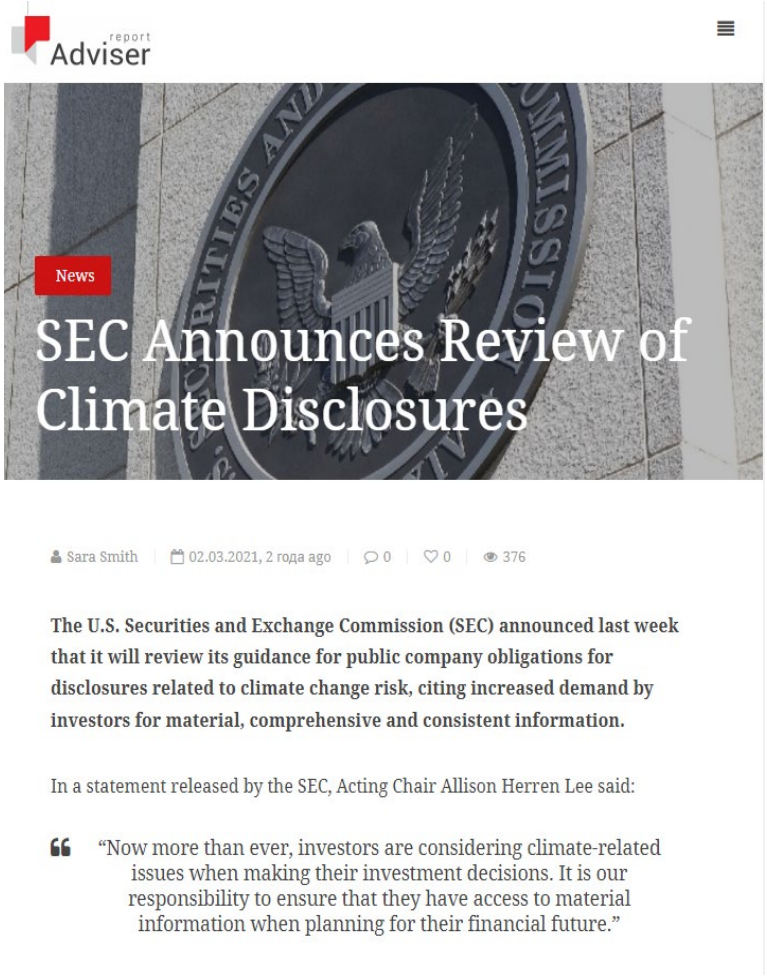
- FTC has continuously investigated businesses misleading consumers with greenwashing type claims, and have since imposed civil penalties
- In light of consumer demand, investigations are only likely to increase

SEC Disclosure Regulations

1. 2010: SEC first published the "Commission Guidance Regarding Disclosures Related to Climate Change" (voluntary)
2. 2021: SEC created Climate and ESG Task Force within its Division of Enforcement in order to investigate ESG-related violations, and develop initiatives to proactively identify ESG-related misconduct
3. 2022: SEC proposed new mandatory climate-related disclosures

Result:

- Many predict an increase in SEC enforcement action seeking to curb overzealous marketing in ESG Disclosures



report Adviser

News

SEC Announces Review of Climate Disclosures

Sara Smith | 02.03.2021, 2 года ago | 0 | 0 | 376

The U.S. Securities and Exchange Commission (SEC) announced last week that it will review its guidance for public company obligations for disclosures related to climate change risk, citing increased demand by investors for material, comprehensive and consistent information.

In a statement released by the SEC, Acting Chair Allison Herren Lee said:

> "Now more than ever, investors are considering climate-related issues when making their investment decisions. It is our responsibility to ensure that they have access to material information when planning for their financial future."

Proposed Rule (Summary)

SEC's Proposed Rule will now require public companies to provide climate-related disclosures in periodic reports, requiring ***mandatory*** disclosures regarding:

- the *oversight and governance* of climate-related risks by the *company's Board and management*;
- how climate-related risks identified by the company have *had or are likely to have a material impact on its business and consolidated financial statements*, as well as how climate risks affect its *strategy, business model, and outlook*;
- the company's *processes for identifying, assessing, and managing* climate-related risks and *whether any such processes are integrated into the company's overall risk management system or processes*;
- Scope 1 (direct) and Scope 2 (indirect emissions from purchased electricity or other forms of energy) greenhouse gas ("GHG") emissions, separately disclosed, expressed in absolute terms *(not including offsets)* both: by disaggregated constituent greenhouse gases and in the aggregate, and in terms of intensity;
- Scope 3 GHG emissions and intensity (from upstream and downstream activities in its value chain), if material, or if the company has *set a GHG emissions reduction target* or goal that includes its Scope 3 emissions; and
- details on the company's *public climate-related targets or goals* (including any use of carbon offsets or renewable energy certificates to achieve such targets and goals), transition plan, use of scenario analysis, and/or use of internal carbon pricing.

Proposed Rule (Results & Trends)

- Increased need for regulatory guidance and increased litigation arising from alleged failures to properly disclose "climate-related risks that are reasonably likely to have a ***material impact on its business***, results of operations, or financial condition" and adhere to various other disclosure requirements
- Increased strain on corporate governance as these additional requirements demand increased efforts to track and monitor the business, something most businesses are not accustomed to
- Increase in shareholder lawsuits
  - with respect to climate-related disclosures, claims alleging boards are failing to devise appropriate climate strategies
- Increase in private plaintiff (consumer) class actions
  - Disclosures will provides ammunition for plaintiffs attorneys and environmental activist to pursue greenwashing claims

Proposed Rule (Results & Trends)

- Allegations of greenwashing are also extending to other environmental objectives, such as the "net-zero" pledge and "water-positive" pledges
- In light of the new SEC proposed rules regarding climate-related disclosures, businesses many now be required to disclosure details on the company's public climate-related targets, transition plan, use of scenario analysis, and/or use of internal carbon pricing, increasing corporate costs

Investor pressure (ESG-mandates)

1. Institutional investors are pushing world leaders and U.S. regulators to mandate that companies disclose climate risks
2. Institutional investors are further pushing businesses directly via shareholder proposals, bulletins, etc., to adopt certain climate friendly ESG activities

Result:

- Investor pressure increased on both sides (i.e., green investing v. "anti-woke" investing)

BlackRock.

Investment Stewardship

Vote Bulletin: Chevron Corporation

Company	**Chevron Corporation (NYSE: CVX)**
Market and Sector	United States/Energy
Meeting Date	26 May 2021
Key Resolutions[1]	**Item 4**: Reduce Scope 3 Emissions (Shareholder proposal) **Item 5**: Report on Impacts of Net Zero 2050 Scenario (Shareholder proposal) **Item 6**: Amend Certificate of Incorporation to Become a Public Benefit Corporation (Shareholder proposal) **Item 7**: Report on Lobbying Payments and Policy (Shareholder proposal) **Item 8**: Require Independent Board Chair (Shareholder proposal) **Item 9**: Reduce Ownership Threshold for Shareholders to Call Special Meeting (Shareholder proposal)
Key Topics	Climate risk, board quality and effectiveness, corporate political activities
Board Recommendation	The Board recommended voting AGAINST the shareholder proposals listed above (Items 4-9)
BlackRock Vote	BlackRock voted FOR the shareholder proposal on scope 3 emissions targets (Item 4), and AGAINST all other shareholder proposals. Because we did not have material governance or oversight concerns, BlackRock voted FOR all management proposals (Items 1-3), including the re-election of all directors.

Overview

Chevron Corporation (Chevron) is a global integrated energy, chemicals, and petroleum company, operating through the upstream and downstream segments.

BlackRock Investment Stewardship (BIS) has a long history of constructive engagement with Chevron where we discuss corporate governance and sustainability topics that we believe drive long-term shareholder value. This has included climate risk, corporate strategy, and human capital management, among others. We have found Chevron to be receptive and open to shareholder feedback and BIS has had regular engagement with independent members of Chevron's Board. We therefore do not currently have concerns about the company's governance and oversight practices.

We welcome the steps that the company has taken to enhance the oversight, management, and disclosure of climate-related risks and opportunities. In March, Chevron published its third Climate Change Resilience Report that is aligned with the recommendations of the Task Force on Climate-related Financial Disclosure (TCFD).[2] The report outlines the company's approach to the global energy transition, including testing the resiliency of

[1] Chevron, "2021 proxy statement".

[2] Chevron, "climate change resilience".

BLACKROCK

Post-ESG mandate ("Anti-Woke" investing trend)

- "We are concerned that Chevron faces immense pressure from its large institutional "shareholders" including Blackrock, State Street, and Vanguard to adopt value-destroying limitations on its business that do not align with Chevron's best interests."
- "We recognize that this departs from the popular refrain that energy companies should instead increase investments in non-carbon energy while maximizing short-term dividend yields."
- ". . .we believe certain of the company's recent decisions reflect Chevron's response to social pressures exerted by large ESG-linked asset managers to advance political agendas that do not serve the best interests of Chevron's owners."

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Our Letter to Chevron

September 6, 2022

Michael K. Wirth

Chairman of the Board and Chief Executive Officer

Chevron, Inc.

RE: Strive Engagement with Chevron

Dear Mr. Wirth,

Strive Asset Management recently became a shareholder of Chevron. We write to you and your board of directors on behalf of our clients to deliver what we term a "post-ESG" shareholder mandate.

We believe that Chevron has the potential to become one of the world's most valuable companies, both in terms of market capitalization and impact on human flourishing. As recently as 2013, Chevron was among the top 10 most valuable public companies in the world by market capitalization. At the beginning of 2022, Chevron did not make the top 50 and is still outside the top 20, but we believe that can change: the growing supply-demand imbalance for energy around the world creates a unique opportunity for a great American oil company like Chevron to meet that need.

To seize this opportunity, Chevron must produce and distribute more fuel to customers around the world – proudly, publicly, and without apology. **We are concerned that Chevron faces immense pressure from its large institutional "shareholders" including BlackRock, State Street, and Vanguard to adopt value-destroying limitations on its business that do not align with Chevron's best interests.**

Rejecting these firms' mandates will require courage. We believe you have already exhibited unusual courage in your leadership as CEO, including most recently in your public letter to the President of the United States explaining the vital role that oil companies like Chevron play in addressing the current energy crisis. We also believe that Berkshire

Post-ESG mandate ("Anti-Woke" investing trend)

Trends (Damages)

- Reputational harm
- Fines (State & local governments)
- Class Action settlements
  - Volkswagen (emissions scandal) = $14.7 billon
  - Keurig ("recyclable" k-cup pods) = $3 million
  - Amazon ("biodegradable" products) = $1.5 million
  - PetSmart ("eco-friendly" bags) = $500,000

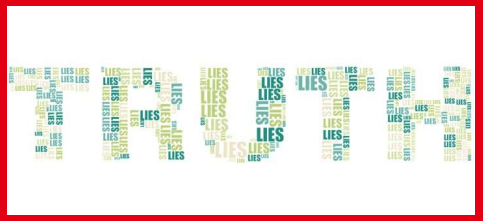
Best practices

Follow the FTC & EPA "Green Guides"

FTC recommends following these general principles for communicating environmental claims:

1. The environmental message must be clear and prominent, taking into consideration relevant language and proximity to the subject
2. The environmental attribute should clearly refer to a product, a service, packaging, or a portion of any of these
3. The claim should not overstate the environmental benefit, explicitly or by implication
4. Any comparative claims should clearly present the basis for the comparison

Best practices



1. **Accuracy and honesty** – Are your sustainability and climate-related claims true and can they be backed up with data?
   - Be transparent
   - Know your products' biggest impacts
   - Bolster your claims with independent verification
   - Avoid making claims "in a vacuum"
2. **Produce detailed plans** – If you have a "net-zero" goals, is there a plan to reach the goal?
   - This is marketing; it will receive the same level of scrutiny as all marketing
   - Aim to follow detailed guidance issued by industry advocacy groups
3. **Governance** – Is there a structure in place to substantiate the claims that the company is dedicated to sustainability?
   - Marketing and regulatory teams need to join efforts to substantiate claims

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Preparing for the SEC's Proposed Climate Change Rule

November 3, 2022

Darryl F. Smith
Partner, Atlanta

ACC Association of Corporate Counsel
CHICAGO

Overview

- Climate-related disclosure is a top SEC priority
- Part of Biden Administration's whole of government approach to climate issues
- March 2021: SEC created Climate and Environmental, Social, and Governance (ESG) Task Force
- March 2021: SEC requested public input on shaping climate-related disclosure requirements
- September 2021: SEC released sample letter sent to several reporting companies
- SEC is building on increased investor demands for climate-related disclosures
- Risks <u>and</u> opportunities

2010 SEC guidance

- Climate-related disclosure interpretation under existing regulatory framework
- Focus areas:
  - Description of business
  - Risk factors
  - Legal proceedings
  - Management's discussion and analysis of financial condition and results of operations

SEC proposed rule

- "The Enhancement and Standardization of Climate-Related Disclosure for Investors"
- Released March 21, 2022
- ~500 pages
- 14,000+ comment letter submitted to SEC
- Aspects based on Task force on Climate-related Financial Disclosures (TCFD) and GHG Protocol
- SEC's stated benefits:
  - In public interest and would protect investors
  - Promote efficient capital markets
  - Consistent, comparable and reliable information

10,000 Foot view

- The proposed rule would require both domestic and foreign registrants to:
  - Provide narrative disclosures describing climate-related risks and the actual or likely impact on the registrant's business, strategy and outlook
  - Discuss the registrant's governance and risk management process with regard to climate-related risks
  - Quantify and disclose the registrant's direct and indirect greenhouse gas emissions which, for some registrants, would be subject to third-party assurance
  - Include certain climate-related metrics and disclosures in a separate note to its audited financial statements
  - Disclose information about climate-related goals and transition plans, if any

Zooming in

- Disclose impacts of climate-related risks that are reasonably likely to have a material impact on a registrant's business, financial statements and business model over the short, medium and long-term
- Risks can be:
  - Physical risks – relate to changes in weather or seasonal patters, severe weather events
  - Transition risk – relate to the impact of broader trends of decarbonization; whether mandated by governments, driven by consumer preference or other stakeholder pressures

Zooming in

- Detailed description of oversight and governance of climate-related risks (and opportunities) by the board of directors and management
  - Disclose board and management expertise with regards to climate-related matters
- Disclose registrant’s process for identifying and managing climate-related risks

Zooming in

- Expanded scope of audited financial statements
  - With required extensive involvement of auditors
- Disclose impact of climate-related events, if greater than 1%, on individual line items of a registrant's financial statements
  - Line by line analysis
  - Physical and transitional risk
  - Positive and negative impacts on financial performance and capital expenditures
  - 1% is an exceptionally low threshold

Zooming in

- Greenhouse Gas Emissions
  - Not just CO_2
  - Seven different GHCs on an aggregate (CO_2e) and individual basis
  - Disclose emissions:
    - In absolute terms, without accounting for credits and offsets
    - In terms of intensity (per unit of economic value and unit of production)
- Scope 1
  - Direct emissions from sources that are owned or controlled by the registrant
  - Requirement applies to all registrants
  - If registrant is an accelerated or large-accelerated filer, there is an independent, third-party attestation requirement
- Scope 2
  - Indirect emissions from purchased electricity and other forms of energy used by the registrant
  - Requirement applies to all registrants
  - If registrant is an accelerated or large-accelerated filer, there is an independent third-party attestation requirement

Zooming in

- Scope 3
  - All other indirect GHG emissions
    - Includes upstream and downstream activities in a registrant's value chain
    - Extremely broad
  - Requirement only applies to a registrant if
    - Its Scope 3 emissions are materials, or
    - It has set GHG emissions targets that include Scope 3 emissions
  - Will affect non-SEC reporting companies who do business with registrant's subject to requirement
  - Safe harbor for Scope 3 emissions data prepared using a reasonable basis and in good faith
  - Third-party attestation is not required

Zooming in

- Descriptions of scenario analysis used to assess climate risk-business strategy, if applicable
  - Includes details regarding parameters, assumptions and projected financial impacts
- Internal carbon price (i.e. estimated carbon price), if applicable
  - Information about how price is determined

Zooming in

- If a registrant has transition plans or publicly stated targets or goals, information about:
  - The targets and time horizon, including interim goals
  - How the registrant intends to meet those goals
  - Relevant data regarding progress towards those goals
  - The role of carbon offsets or renewable energy credits in meeting those goals

- SEC is targeting greenwashing
  - Increased transparency and accountability for registrants who have publicly promoted transition plans
  - Brings climate change commitments into SEC reports, not just sustainability reports or websites

Transition period

– Proposed rule assumed effective date of December 2022

Registrant Type	Disclosure Compliance Date	
	All proposed disclosures, including GHG emissions metrics: Scope 1, Scope 2, and associated intensity metric, but excluding Scope 3	GHG emissions metrics: Scope 3 and associated intensity metric
Large Accelerated Filer	Fiscal year 2023 (filed in 2024)	Fiscal year 2024 (filed in 2025)
Accelerated Filer and Non-Accelerated Filer	Fiscal year 2024 (filed in 2025)	Fiscal year 2025 (filed in 2026)
Smaller Reporting Company	Fiscal year 2025 (filed in 2026)	Exempted

Filer Type	Scopes 1 and 2 GHG Disclosure Compliance Date	Limited Assurance	Reasonable Assurance
Large Accelerated Filer	Fiscal year 2023 (filed in 2024)	Fiscal year 2024 (filed in 2025)	Fiscal year 2026 (filed in 2027)
Accelerated Filer	Fiscal year 2024 (filed in 2025)	Fiscal year 2025 (filed in 2026)	Fiscal year 2027 (filed in 2028)

Expected challenges

- SEC is acting without specific statutory authority
- Congress has considered but not passed laws addressing climate-related disclosure requirements
- Impact on *West Virginia v. EPA*
- Final rule will be challenged
- Even without rule, failure to keep up with broad-based investor demands for climate-related disclosures could create liability under current SEC rules
- Rule 10b-5: it is illegal to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading
- Materiality is based on whether there is substantial likelihood that a reasonable investor would consider the information important when making an investment decision

Rumor mill

- Potential delay in the release of final rule for several months
  - Prior regulatory agenda noted October 2022 for release
- Potentially dropping Scope 3 emissions disclosure requirement

How to prepare?

- Start planning now
- Evaluate and assess current climate-change related policies and information infrastructure, if any
- Assess and identify climate-related risks and opportunities throughout the organization
  - Identify any third-parties you will need to provide information
- Discuss with auditors
- Consider third-party assurance providers

Questions?

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People aspects of ESG

November 3, 2022

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Partner, London

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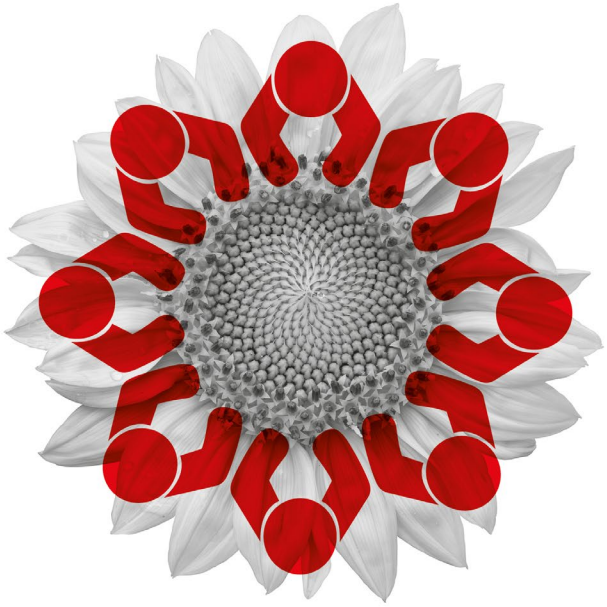
Associate, Washington DC



ACC Association of Corporate Counsel
CHICAGO

Agenda

- Overview
- Supply Chain and vulnerable workers
- D&I
- Employee voice

Introduction: setting the scene

Where do people issues sit in ESG?

- ESG considers how an organization is managed, directed and controlled, and how it manages environmental and social aims and responsibilities
- From an employment perspective, a key part to the '**S**' element is how the employer manages its business in ensuring appropriate labor standards, addressing D&I, encouraging staff engagement and protecting against human rights breaches
- With '**G**' influencing how those aspects are monitored and reported, as appropriate
- Increasingly, the '**E**' pillar is influencing terms of employment, including compensation and benefits
- All three ESG elements are key to recruitment and retention

Environmental	Social	Governance
The natural environment:	The rights, wellbeing and interests of your people and the wider community:	The governance of your organization:
• Carbon footprint/GHG emissions • Carbon reduction commitments • Energy, land & natural resources • Pollution and waste reduction • "E" and workers? Restructuring and retraining to meet E goals; new benefits/policies to drive change and much more	• Labor policies, e.g. forced labor, child labor, working conditions • Diversity & Inclusion • Supply chain human rights issues • Pay & benefits • H&S • Engagement with workers, local community and wider society	• Reporting, management oversight and assurance • Regulatory compliance • "G" and workers? Board diversity; exec pay; reporting duties on people issues – D&I, human rights etc; compliance with workers' rights; ethics

People aspects of ESG

ESG touchpoints in the employment lifecycle

People aspects of ESG

Why does it matter now? What has changed?

Regulation is increasing	Disclosure is more prevalent	An increasing part of risk management
Reputation, reputation, reputation	Employer of choice (& vendor of choice, investment of choice etc)	Stakeholder trust

- Some people aspects of ESG are not new (some are "HR business as usual")
- But, they are evolving and they are increasingly attracting the attention of new stakeholders
- And, we anticipate a hardening of expectations, including demands for evidence of standards and of improvements

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More Legal Chiefs Are Leading ESG; Many Others Want to Have Oversight

ALM | LAW.COM

Thales Group Taps General Counsel for New ESG Leadership Role

pwc

The General Counsel's role in ESG

REUTERS

General counsels & ESG: Range of skills needed to help corporate leaders navigate challenging terrain

Nasdaq

With ESG, General Counsels and Chief Ethics & Compliance Officers Lead the Team

ACC Association of Corporate Counsel

The Evolving Role of General Counsel in ESG

ESG and supply chain and other vulnerable workers

Global labor practices in supply chains

Business accountability: moving beyond transparency

Fast-evolving expectations of business:

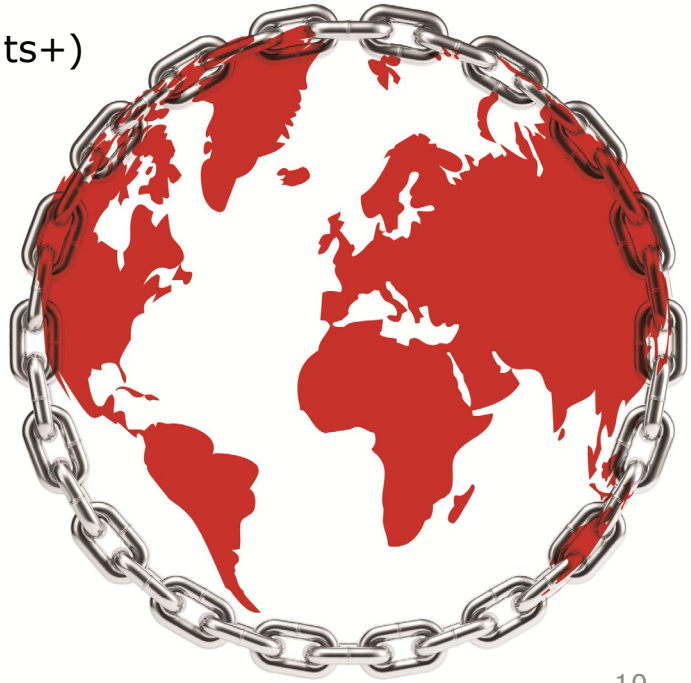
- Allegations of sweatshops, dangerous working condition, child/forced/trafficked labor and more
- Diverse representation in supply chains
- Across supply chains: all sectors and globally
- Growing legal/reputational/stakeholder/regulatory pressure on businesses to respond
- How? By pro-actively managing the risks to workers in their global supply chains
- Increasingly, this means more than publishing responsible business policies, commentary in annual reports, etc.
  - For example, it includes acting to address risk, such as training supply chain partners, collaborating to drive-up standards in high-risk jurisdictions

Global labor practices in supply chains

Business accountability: moving beyond transparency

Fast-evolving regulations/standards:

- Then: voluntary human rights standards (UN, OECD, etc.)
- Now: regulation is increasing, including:
  - EU draft Corporate Due Diligence and Accountability Directive
  - See also Germany, UK, France, Norway, Australia, USA and more
- It's scope: narrow (forced labor) to wide (human rights+)
- Broadly, they require a due diligence strategy of pro-actively identifying, managing and reporting on human rights risk across global operations and relationships
- May also require businesses to provide a remedy for harm
- Some propose new laws on directors' duties and liabilities
- Concerns that some are complex, legally uncertain, costly



Why are supply chain workers' rights important for business?

Factors driving employers to respond

Push factors	Pull factors
To avoid complicity in human rights abuses caused by others	A genuine desire to "do the right thing" in respecting human rights
The threat of another Bangladesh Rana Plaza-type disaster	To attain a level playing field which tackles the "bad operators"
The prospect of consumer boycotts resulting from such adverse publicity	To mitigate legal risks, including procurement terms incorporating human rights standards and address human rights due diligence in M&A and other transactions
Corporate governance reporting and associated ESG pressures from investors, stakeholders, regulators and Governments	Talent: the need to attract and retain the best staff
The prospect of increasing mandatory human rights due diligence duties	To access public procurement which may exclude businesses involved in grave misconduct
NGO/charity/trade union "naming and shaming" corporate campaigns	To develop a strong human rights reputation with associated goodwill
The threat of import bans on goods associated with forced labor (e.g. US and EU)	To attain positive sector benchmarking reports (e.g. Know the Chain)

Global labor practices in supply chains

Business accountability: moving beyond transparency

Platform, on-demand and gig workers – also part of the supply chain:

Background	
-Rapid growth of digital platform work	-With benefits for workers, but also risks

Recent developments	
-Status misclassification litigation in many countries	-Concerns over lack of benefits/earning levels/H&S etc

New policy responses	
-Jurisdictions proposing/passing legislation (US, EU, etc)	-A growing area of scrutiny by ESG stakeholders

How this plays out in the United States

A landscape in flux

ESG surfaces in various HR areas in the supply chain

- Independent Contractor Rules
- Disclosure of diversity representation
- Representation of compliance with key ESG tenets such as anti-harassment and anti-discrimination
- Exposure due to non-compliance with wage and hour laws
- Ex: Recent finding of child labor violations supplier facility which supplies lights and mirrors for Hyundai and Kia plans in the United States

ESG and Diversity & Inclusion

"#MeToo Contributes to CEO Exits"

US News

"Black Lives Matter May be the Largest Movement in U.S History"

The New York Times

"FTSE 100 companies hit boardroom diversity targets"

Financial Times

"Job Seekers More Likely to Apply to Companies That Prioritize Diversity, Equity & Inclusion, Survey Shows"

US Newswire

"US [fast food] Workers Strike to Protest Workplace Harassment"

US News

People aspects of ESG

ESG Diversity & Inclusion: A broad scope

- Corporate governance: Boardroom composition
  - Including reporting data, action planning, targets, KPIs
- Culture and ethics: Including harassment and bullying
  - Including whistleblowing, terminations, litigation, NDAs
  - Corporate scandals if disclosed – reputation
- Evolving D&I regulation: Holding employers to account
  - Including gender pay gap reporting, restrictions on NDAs, etc.

D&I are key elements of the 'S' and the 'G' pillars in ESG

People aspects of ESG

Boardroom diversity and inclusion

A recent UK example:

- New Rules require UK listed companies to include in their annual financial report whether they have met the following targets in relation to board diversity:
  - At least 40% of the board are women
  - At least one senior board member is a woman, and
  - At least one board member is from a non-White ethnic minority background
- If targets not met, must explain why
- Companies will also have to publish specified numerical data on the sex or gender identity and ethnic diversity of their boards, senior board positions and the most senior executive management

EU example: Gender balance on company boards draft directive

People aspects of ESG

The growing importance of D&I data reporting

- D&I reporting and disclosures have become an area of increased focus globally for regulators and investors
  - Some are voluntary, some mandatory
  - With pressure being applied to push progress (investor voting, etc.)
- Also, boards may decide to monitor D&I data:
  - To track D&I goals
  - To respond to procurement processes
  - To respond to employee expectations
- Obtaining that data comes with a number of challenges across jurisdictions, with the added complexity of different local laws, cultures and practices, including:
  - Data privacy laws
  - Labor laws: restriction or mandating data reporting

ESG and employee voice

ESG and employee voice – an evolving landscape

ESG and employee voice

Overview of whistleblowing legislation in selected jurisdictions

EU	UK	USA
The Whistleblowing Directive (in force 2021) sets new EU-wide minimum standards for protecting WB'ers and requires EU member states to establish a comprehensive WB protection framework, including, for e.g: - Establishing internal and external reporting channels for receiving and investigating complaints - The scope of activities that WB'ers can report - Protections for WB'ers - Some discretion left to MSs on the detailed implementation	Longstanding WB legislation: - The Public Interest Disclosure Act 1998 (PIDA) came into force in Great Britain in 1999 and provides protection for employees/workers who report malpractices by their employers or third parties against detriment or dismissal - See also provisions covering financial services firms - No qualifying service to make a claim and no upper limit on compensation	Federal and state protections: Section 21F of the U.S. Securities Exchange Act of 1934 - Protects WB'ers who submit to the U.S Securities and Exchange Commission (SEC) information relating to a violation of the U.S. federal securities laws, or an SEC rule or regulation - WB'ers must have a "reasonable belief" that the information they provide reveals a possible securities law violation - Anti-retaliation provisions State laws couch WB'er protections in employment and anti-retaliation laws
No specific financial rewards for WB'ers other than sanctions/penalties	No specific financial awards for WB'ers other than sanctions/penalties	Awards for WB'ers in cases where SEC obtains monetary sanctions totalling more than $1,000,000 (could be 10%-30% of money collected)

ESG and employee voice

Whistleblowing

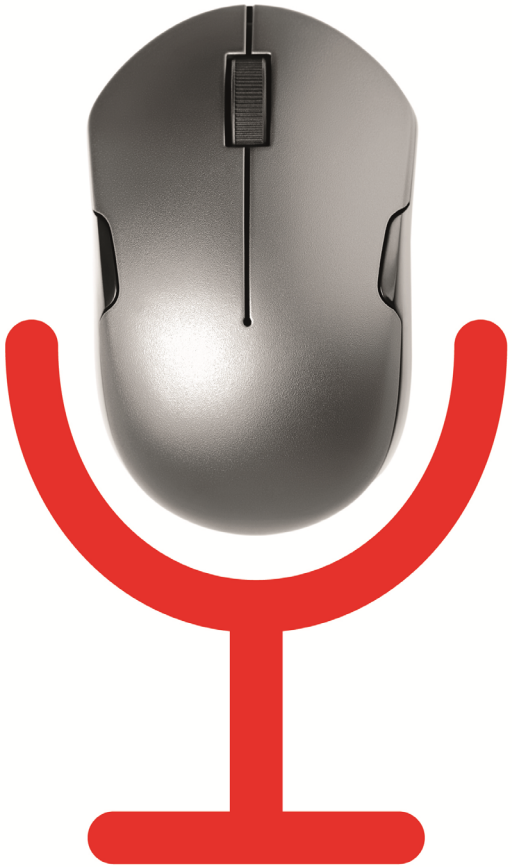
Key takeaways:

- Whistleblowing procedures should form part of the overall governance and risk management framework
- They must be trusted by workers: some whistleblowers encounter retaliation or are simply ignored, reflecting a potential disconnect between policies and culture in the workplace
- Whistleblowing has the potential to:
  - Damage corporate reputation
  - Absorb a huge amount of management time
  - Involve considerable costs, legal risk & new sanctions (including criminal)
- Whistleblowers handled well have the potential to become assets to the business, but treated poorly they will become liabilities

ESG and employee voice

Existing and new regulation – including consultation

- ESG-related measures may trigger information and consultation under a jurisdiction's existing regulation, for example:
  - Where they result in changes to working terms, conditions or working models, or, they introduce major technological/other workplace changes
  - Where trade union consultation or works councils' duties are engaged
  - Employee consent may be needed
- New regulation may require greater ESG-related employee engagement, for example:
  - France



Other ESG-related HR considerations in the United States

Other ESG-related HR considerations in the United States

- Compensation is a key area of focus
  - Pay transparency laws
  - Salary ban laws
  - Federal contractor compensation analyses
  - Equal pay rules
- Leave laws
  - Expansion of paid sick leave coverage in several jurisdictions
  - FMLA and other protected leave
- Executive compensation
  - SEC's compensation clawback rule (for current and former executives)
  - Eliminating single trigger change in control payouts
  - Not paying dividends on unvested equity compensation
  - Performance conditions based bonuses

Other ESG-related HR considerations in the United States

- ESG-themed investment funds within 401(k) plans
  - Pending
- Inclusive health and welfare plans
  - Medical plans required to comply with mental health parity requirements and to avoid certain uses of genetic information
  - Medical benefits for transgender employees and all domestic partners
  - Human Rights Campaign certifications for employers that provide employee benefits that are viewed as inclusive by the organization

Other ESG-related HR considerations in the United States

- Employee Data Privacy
  - Increased call for protection of employee data
  - California leads the way with CCPA/CPRA protections and rights to access, delete, and rectify data as of January 1, 2023
  - Illinois' protection of biometric data
  - Protections under various state privacy laws if employees also double as consumers
  - Don't forget laws that fly under the radar such as Georgia's rules that protect Social Security Numbers
- Automated Decision Making
  - Under the CPRA, the California Privacy Protection Agency (CCPA) has a mandate to issue regulations on automated decision making – we wait and watch
  - New York City regulations for automated decision making – effective as of January 1, 2023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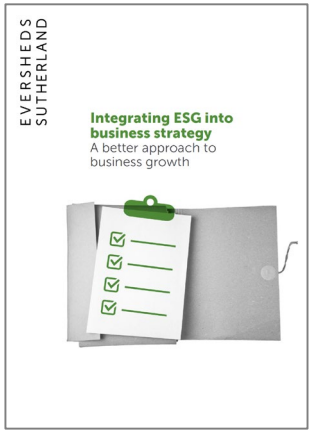
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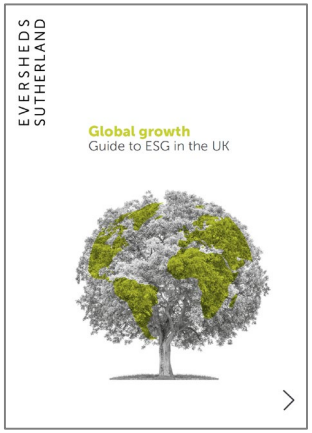
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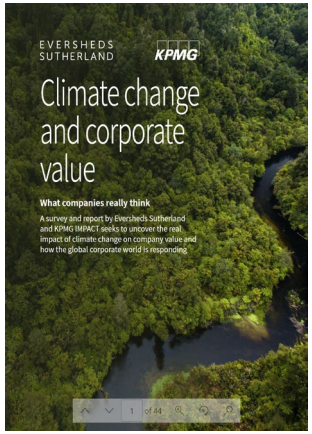
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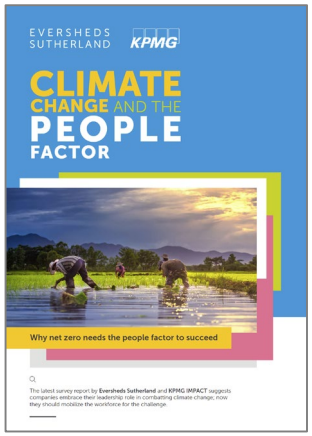
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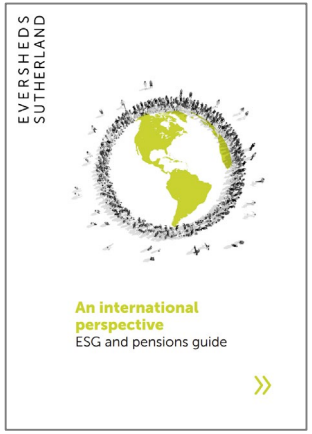
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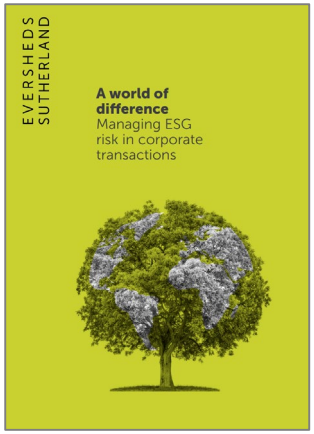
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