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Table of Contents:

- FTC Considering Updates to Environmental “Green Guides”
- Recent Climate-Related Developments in Asia
- FSB Secretary-General Warns Financial Incentives Are Required to Counter Climate Change
- Kentucky Is Latest State to Blacklist Financial Institutions Over ESG Policies

FTC Considering Updates to Environmental “Green Guides”

January 6, 2023

By Joel Mitnick
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On December 14, 2022, the Federal Trade Commission (FTC) **announced** that it is seeking public comment “on potential updates and changes to the Green Guides for the Use of Environmental Marketing Claims” (the Notice). The purpose of the FTC’s Green Guides, first published in 1992, is to assist marketers in avoiding making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act.

In issuing the Notice, FTC Bureau of Consumer Protection Director Samuel Levine highlighted the increasing consumer attention paid to environmental claims by marketers, saying that “Consumers are increasingly conscious of how the products they buy affect the environment, and depend on marketers’ environmental claims to be truthful.”

The Commission identified the following specific issues on which it seeks comment:

- Carbon Offsets and Climate Change: Whether historical guidance on carbon offsets and renewable energy claims sufficient or should future Guides include additional information on related claims and issues?
- The Term “Recyclable”: Whether the current thresholds are adequate, and whether recycling programs should consider whether items are ultimately recycled or merely picked up at recycling collection sites?
- The Term “Recycled Content”: Whether consumers understand “pre-consumer” and “post-industrial” content claims, and whether alternative methods of substantiating recycled content claims may be appropriate.
- The Need for Additional Guidance: Whether there is a need for additional guidance regarding claims such as “compostable,” “degradable,” “ozone-friendly,” “organic,” and “sustainable,” as well as those regarding energy use and efficiency.

The vote to issue the Notice was unanimous. Chair Lina Khan issued a separate statement noting that American consumers increasingly want to buy Green. She said, “[b]efore making a purchase, many American consumers want to know how a product contributes to climate change, or pollution, or the spread of microplastics. Businesses have noticed. Walk down the aisle at any major store – you’re likely to see packages trumpeting their low carbon footprint, their energy efficiency, or their quote-unquote ‘sustainability.’ ” Of particular interest, Chair Khan emphasized a practical aspect to all this, pointing out that many consumers believe that the plastics they set out for recycling actually end up in landfills and are not recycled at all. She called for comments and research about this possible perception and whether it should be addressed by marketing claims.

Taking the Temperature: As Chair Khan outlined, environmental claims made by businesses in the financial sector and the broader economy are on the rise. The Commission has a history of enforcement actions under Section 5 brought based on allegedly deceptive environmental claims and it is telling that the notice links to those cases. Given this record, it is not surprising that the vote to update the FTC Green Guides was unanimous. Of course, different marketers and consumer groups are likely to hotly dispute the appropriateness of many of the specific proposals that may be reflected in the coming public comments. We will continue to report on this area as it develops further.

Recent Climate-Related Developments in Asia

January 6, 2023

Investing

By Duncan Grieve
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Taiwan's central bank announced it will begin incorporating climate change related risks into its forecasts and modelling for inflation and economic growth. The central bank will also amend its monetary policy to better promote sustainable development. The bank said it would "incorporate weather factors into forecast models and analyze their impact on forecasts such as prices and GDP growth" and "establish an overall model related to climate change at the industry level." President of the central bank, Yang Chin-long, first announced the changes at a press conference on December 15: "If a company does not pay attention to ESG, for example, if it produces serious air pollution and does not meet the standards, then the (commercial) bank may not lend you money."

In Japan, the Tokyo-based banking and financial services company Mizuho **announced** a series of initiatives to support its climate and sustainable finance goals. This includes the launch of a framework to aid the assessment of customer transition plans. Mizuho was the first Japanese financial institution to join the Partnership for Carbon Accounting Financials (PCAF) in July 2021. The PCAF, consisting of financial institutions from around the world, aims to develop and implement a coherent approach to the assessment and disclosure of greenhouse gas emissions associated with loans and investments. Mizuho stated that the announced initiatives "may result in a temporary increase in our exposure in high-risk areas. However, assisting our clients with their transition strategy design and execution enables us to manage our transition risk appropriately and mitigate our medium- to long-term transition risk."

This announcement follows the **publication** of the Code of Conduct for ESG Evaluation and Data Providers issued by Japan's Financial Services Agency (FSA). The voluntary code is based on recommendations prepared by a panel of experts established by the FSA, which initially published a draft of the code that was then subject to public comments. The final code was published on December 15, 2022.

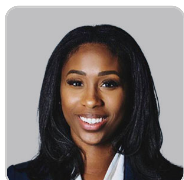
Additionally, the IFRS Foundation **announced** the execution of a memorandum of understanding with the Ministry of Finance in China to establish a Beijing office of the IFRS Foundation. ISSB Chair Emmanuel Faber stated that "China is the world's second largest economy and plays a vital role in supply chains for companies around the world—making it an important jurisdiction as the ISSB develops its global baseline of sustainability disclosures for the capital markets. The Beijing office will play a vital role in this endeavor".

Taking The Temperature: These developments, across multiple jurisdictions in the region, illustrate the continued rapid cross-border evolution of private and public climate policies and approaches, particularly in the financial services industry. In

addition to Asia, banks in the United States, Europe and other jurisdictions have been announcing emissions-financing reduction targets and net-zero aspirations for their own operations. Other banks recently announcing policies or policy updates include ABN Amro, Deutsche Bank, and Royal Bank of Canada. We anticipate that financial institutions will continue to refine and advance climate goals while, at least in the United States, continuing to have navigate "anti-ESG" pressure from various state-level finance officials.

FSB Secretary-General Warns Financial Incentives Are Required to Counter Climate Change

January 6, 2023



By Kya Henley
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In a recent valedictory **press interview,** the Secretary-General of the Financial Stability Board (FSB), Dietrich Domanski, posited that attempts to convince banks to combat climate change will be insufficient without financial incentives because "[i]n the end we are talking about profit-orientated institutions" and "[a]s long as you do not provide the necessary price signals, which then translate into profits or profit expectations, there is a limit to what one can expect." Domanski offered his view that these "price signals" "ideally" would be in the form of a global carbon tax. Domanski also opined that regulators across the world are misguided in their increased use of "detailed and very expensive planning exercises" and stress testing to supervise climate risk. Instead, he suggested that a "market-based solution" would likely be more effective.

The FSB, headquartered in Basel, Switzerland, is an international body that monitors, and makes recommendations about, the global financial system. It was established in 2009 after a G20 summit as a successor institution to the Financial Stability Forum. The board includes representatives from all G20 countries and the European Commission. Domanski has served as Secretary-General since January 2018.

Taking The Temperature: Domanski's views differ from most of the guidance issued by banking regulators around the world. In December, the Federal Reserve announced a public consultation on a proposed "framework for the safe and sound management of exposure to climate-related financial risks for large banking organizations." The proposals would apply to banks with over $100 billion in total assets and would cover both physical and transition risks associated with climate change. The proposed principles cover some of the very areas subject to Domanski's comments: governance; policies, procedures, and limits; strategic planning; risk management; data, risk measurement and reporting; and scenario analysis. The focus of the Fed consultation is substantially similar to earlier proposed guidance from the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. The Australian Prudential Regulation Authority and European banking regulators, including with the Bank of England and Banque de France, likewise have emphasized the importance of stress testing and scenario analysis. For our part, scenario analysis and stress testing on the one hand, and financial incentives such as carbon taxes on the other, are not mutually exclusive. Rather they are complementary approaches to help achieve the common end goal of global financial stability.

Kentucky Is Latest State to Blacklist Financial Institutions Over ESG Policies

January 6, 2023

Investing

By Jason Halper
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To ring in the new year, Kentucky's Treasurer, Allison Ball, **announced** a list of eleven financial institutions that she claims are engaged in "energy company boycotts." According to Ball, the list "was crafted after careful review of publicly available statements and commitments made by the companies." The list includes Blackrock, BNP Paribas, Citigroup, HSBC and JPMorgan Chase, among others. Kentucky **enacted a law** in July 2022 requiring the treasurer to prepare and maintain such a list. The new law **defines** an energy company boycott as:

without an ordinary business purpose, refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company: 1. Engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law; or 2. Does business with a company described in subparagraph 1. of this paragraph;

KRS 41.42. A financial institution has ninety days from receiving notice of its inclusion on the list to "cease engaging in energy company boycotts in order to avoid becoming subject to divestment by state government entities."

For many of the impacted financial institutions, this situation is, unfortunately, not their first rodeo, and they previously have responded by objecting to characterizations of their relationship with the oil and gas industry. In September, for instance, Blackrock **published** a letter in response to an August 4 letter from 19 Republican state attorneys general, critical of Blackrock's ESG positions. Blackrock observed, among other things, that:

- Blackrock's participation in "various ESG-related initiatives" is "entirely consistent with our fiduciary obligations."
- "We believe investors and companies that take a forward-looking position with respect to climate risk and its implications for the energy transition will generate better long-term financial outcomes."
- "Climate risk and the economic opportunities from the energy transition have become a top concern for many of our clients."
- "As the recent historic floods across the country as well as the droughts and wildfires throughout the West and around the world this past year have shown, climate change is testing the resilience of many industries and businesses."

- "As prudent risk managers and stewards of our clients' assets, it is imperative that we seek to understand and assess how these risks and opportunities will impact the companies in which we invest on our clients' behalf."
- "BlackRock does not boycott energy companies or any other sector or industry. As we have noted previously, BlackRock, on behalf of our clients, is among the largest investors in public energy companies, and has hundreds of billions of dollars invested in these companies globally, with approximately $170 billion invested in US companies."

Taking The Temperature: Kentucky is not alone in seeking to financially punish banks deemed insufficiently supportive of the energy industry. West Virginia and Texas have similar laws, and numerous other states, including Arizona, Florida, Louisiana, Missouri, South Carolina, and Utah, have announced that they may or will divest from banks or cease other financial activities with financial services firms (such as underwriting municipal securities) that are engaging in "energy boycotts." Pressure also has been exerted by the Minority Staff of the U.S. Senate Banking Committee, Republican members of the House Judiciary Committee, and the Ranking Member of the Senate Banking Committee. But as we have articulated, investment managers have fiduciary duties to clients that they likely would breach if they ignored a material issue, including climate change.

We also question how state treasurers are arriving at a conclusion that a financial institution is engaged in an energy boycott, which is vaguely defined in the applicable state laws, especially given the basis for the decision as to any particular institution is not publicly articulated in a meaningful way. Ball's press release, for instance, states that her conclusions were based on a "thorough review of publicly available statements, commitments, and/or an institution's failure to respond to inquiry." The West Virginia Treasurer's press release stated that "each financial institution placed on the Restricted Financial Institution List today has published written environmental or social policies categorically limiting commercial relations with energy companies engaged in certain coal mining, extraction or utilization activities, rather than considering the financial or risk profile for each company," and "these policies explicitly limit commercial engagement with an entire energy sector based on subjective environmental and social policies." The absence of a publicized rationale for placing a particular institution on a boycott list implies that these decisions are largely subjective, and poorly supported, and it leaves financial institutions without insight into how their conduct could potentially impact their ability to keep or win state business.