CADWALADER

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Welcome to Cadwalader Climate

October 21, 2022

By Jason Halper
Partner and Co-Chair | Global Litigation

Welcome to *Cadwalader Climate*, a new twice-a-week publication.

Climate change is not only an existential issue for the planet, it also is likely to affect virtually every company around the world. New developments occur daily and the flood of information can be overwhelming. Our goal is to clearly and concisely summarize key climate news over the prior few days and, in a short paragraph, provide our assessment of the legal implications for business. Separately, we will continue to do deeper dives on certain climate-related legal issues, like our **long piece on the ESG Ratings industry**.

We hope you find *Cadwalader Climate* interesting and informative, and welcome your feedback as we strive to make it a valuable resource for you.

Jason Halper
Co-Chair, Global Litigation Group & ESG Practice

Disclosure: “Green Hushing” Climate Targets

October 21, 2022

Disclosure

By Duncan Grieve
Special Counsel | White Collar Defense and Investigations

South Pole, a Swiss carbon finance consultancy, has published a **report** which suggests that one in four companies around the globe have decided not to publicize details of their climate targets. This development has been described as “green hushing” and appears to be a response by some companies to fears of greenwashing allegations and non-compliance with legislation. South Pole surveyed 1,200 companies across 12 countries and found that “nearly a quarter of those surveyed . . . will not be publicizing their achievements and milestones beyond the bare minimum or as required by for example the Science Based Targets initiative.” Despite the trend for non-disclosure by a minority of the companies surveyed, it is also important to note that 72% of responding companies have set or committed to a science-based target (SBT) to reduce emissions; with a further 18% planning to implement targets in the next 12 months, and 67% having both a net-zero target and an SBT. A common example of an SBT commitment for a financial institution would be the alignment of in-scope assets under management to 2.19°C by 2030 and 1.5°C by 2040.

The CEO of South Pole, Renat Heuberger, in his foreword to the report, stated: “Long gone are the days when announcing a corporate net zero emissions target was exceptional. Today it is expected. Companies need to show, not just tell, how they are delivering on their critically important climate commitments.”

Taking the Temperature: South Pole’s report reflects concerns that the publication of science-based climate targets or progress meeting such targets may be overly-prescriptive and ambitious. That, in turn, raises concerns that these disclosures open companies up to regulatory enforcement and civil litigation challenges based on allegations of greenwashing. Despite these concerns, non-reporting or under-reporting climate targets is unlikely to be a sustainable long-term strategy. For years institutional investors have been advocating for greater climate-related disclosure, regulators in Europe already have mandated it, and U.S. regulators are not far behind, as evidenced, for example, by the SEC’s proposed climate change disclosure rule. And, notwithstanding greenwashing concerns, a majority of the respondents to South Pole’s survey committed to SBTs for emissions reductions. Nevertheless, companies need to be extremely thoughtful when defining and publicizing any climate-based targets so as not to over-promise and under-deliver.

Disclosure: Financial Institution Advertisement Banned by UK Regulator

October 21, 2022

Disclosure

By Rachel Rodman
Partner | White Collar Defense and Investigations

The UK's Advertising Standards Authority (ASA) has **ruled** that two UK retail banking advertisements, which made claims about the financial institution's green credentials, were "misleading" and "omitted material information." The billboard advertisements, which stated how HSBC was planting trees and transitioning to net zero, were posted on bus stops in Bristol and London in October 2021 just prior to the COP26 climate change summit. The ASA received 45 complaints, including from campaign group Adfree Cities. The ASA determined that the two advertisements should not be used again and that HSBC should ensure that future marketing communications making environmental claims were "adequately qualified and did not omit material information about its contribution to carbon dioxide and greenhouse gas emissions." This is the first example of the ASA taking action against a bank for 'greenwashing'. Notably, it does not appear that anything depicted in the advertisements was false. Rather, the ASA action appears to have been based on the fact that HSBC finances, among many companies and industries, fossil fuel companies.

HSBC responded to the announcement stating that the "financial sector has a responsibility to communicate its role in the low carbon transition to raise public awareness and engage its customers" and that they "will consider how best to do this as we deliver our ambitious net zero commitments."

Taking the Temperature: The ASA ruling is somewhat surprising. Nothing in the advertisement itself was alleged to be affirmatively false. And the fact that HSBC, like its peers, has not discontinued business with the fossil fuel segment of the energy industry is well known. Many participants on all sides of the green transition discussion acknowledge that transition to a green economy is not possible without energy provided by coal, oil and gas. HSBC also has stated it will "phase down" its financing of the fossil fuel industry, and that it will provide further details on that plan by the end of this year. Nonetheless, the ASA's action is a reminder, if one was needed, for participants in the financial services and other industries, that there is significant regulatory attention being paid to green claims, and any such claims need to have a robust factual basis.

Green Finance: Academics Accuse Large Financial Services Organization of Greenwashing

October 21, 2022

Green Finance

By Jason Halper
Partner and Co-Chair | Global Litigation

A large financial services organization and its asset-management arm are the subject of a **complaint letter** sent to the UN Principles for Responsible Investment (PRI) by almost 300 academics. TIAA and Nuveen collectively manage approximately $1.2 trillion and allegedly have approximately $78 billion of AUM invested in fossil fuels. PRI is an investor group, working in collaboration with the United Nations, whose signatories (including TIAA and Nuveen) commit to incorporate PRI's six principles into asset management decisions. The letter requests that PRI launch a formal investigation into TIAA's investment practices and, if PRI finds that such investments violate PRI's principles, expel TIAA from PRI's global sustainable investment initiative.

2020 was first year that the PRI de-listed signatories, and five organizations were officially de-listed, one of which has since been **reinstated**. The de-listing followed two years of engagement with, and guidance from, the PRI. Furthermore, 23 of the 165 organizations identified by the PRI in 2018 as not meeting its requirements have voluntarily de-listed or been de-listed for failing to submit their required annual report. The TIAA has been criticized for holding bonds issued by Adani, an Indian company with substantial operations in the coal sector including the Carmichael coal mine in Australia. According to the complaint, the TIAA is the fourth-largest investor globally in bonds across the coal value chain.

TIAA responded that extensive divestment from fossil fuels "does not offer TIAA an optimal way to influence the policies and practices of [firms] we invest in." A PRI spokesperson stated that it is a "big tent organisation" and it was not their responsibility to individually monitor investments made by its more than 5,000 signatories, instead they "must be monitored by the investor, in line with their own investment beliefs, investor duties, commitments, and policies."

Taking the Temperature: Continued investment in or financing for the fossil fuel industry remains a point of debate in the climate change area. While some have called for divestment or cessation of financing, others recognize that a transition to a green economy, at this point in time, requires energy from oil, gas and coal providers. Nor is there sufficient energy from green sources to meet existing demand. Therefore, while the discussion continues, the real current need for fossil fuel-generated energy is almost certain to prevail over aspirations for a purely green energy environment, at least in the near and medium terms.

Investing: Largest African Sustainability-Linked Real Estate Debt Arranged

October 21, 2022

Investing

By Samantha Hutchinson
Partner | Fund Finance

By Matthew Smith
Partner | Finance

Grit Real Estate Income Group has raised $306 million in sustainability-linked debt in the largest real-estate industry transaction to date in sub-Saharan Africa (excluding South Africa). The lower rates on the term loan and revolving credit facility, which was arranged solely by Standard Bank, are linked to the Group's ESG, carbon-emissions reduction and gender-equality targets. The Group intends to utilize the proceeds both to replace existing debt and to fund a re-development project in Senegal.

Grit's CEO, Bronwyn Knight, stated: "By refinancing almost all of our existing debt exposures into a single sustainability linked facility, we are streamlining our loan management process and bolstering our commitment to our ESG targets, including carbon-emission reduction and gender equality."

Taking the Temperature: This deal is significant in continuing to show the growth of sustainability-linked financings in developing markets and, in particular, Africa which is on the front line from a climate challenge perspective and has lagged behind other markets demand-wise. Whilst 2022 has presented tougher market conditions for issuers across the board, banks in the region continue to increase their focus on offering a larger number of sustainability-linked and other green products however there remains significant room for growth – one would hope this transaction presents an opportunity for lenders to further promote this market to local participants.

Disclosure: EU Platform on Sustainable Finance Publishes Recommendations on Data and Usability

October 21, 2022

Disclosure

By Simon Walsh
Special Counsel | Global Litigation

On October 11, the EC Platform on Sustainable Finance (PSF), an advisory group to the EC, published a **report** on its recommendations to resolve data and user difficulties that have been encountered while attempting to implement EU regulatory guidance on sustainable finance disclosures and reporting under the EU taxonomy. The PSF has recommended the establishment of an online channel to enable companies to propose amendments to existing criteria in the EU Taxonomy on the basis of implementation or usability issues. Furthermore, the report states that differences among different EU regulations remain an obstacle to achieving consensus regarding the classification of what constitutes a sustainable activity, “good governance” in this area, and appropriate approaches to risk assessment. The PSF previously addressed the significance of regulatory consistency in this area in its report on minimum safeguards (which we discuss in an earlier article **here**).

PSF categorized the recommendations as high, medium or low urgency. A high-priority issue raised by the PSF is the suggestion that the European Securities and Markets Authority (ESMA) be granted permission to carry out validation checks on data to ensure the reliability and usability of the information reported. Furthermore, the PSF also proposed that ESMA should be able to reject data that falls short of the minimum requirements.

Taking the Temperature: The PSF report demonstrates the challenges confronted by regulators and companies alike in determining how to accurately report sustainability-related information. Questions about what constitutes a sustainable activity or the reliability of data supporting sustainability reporting are not new, but are difficult to resolve. In the meantime, in the absence of consensus on these issues, companies need to diligently marshal factual support for climate-related disclosure while also recognizing the need to provide such reporting given the ever-increasing demands from various sectors, including the asset management and other industries and regulators, for more thorough and complete climate information.