



**March 31, 2023**

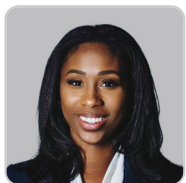
**March 31, 2023**

**Table of Contents:**

- [State Legislative Developments: Oklahoma and West Virginia](#)
- [Canada Releases New Climate-Focused Guideline for Banks and Insurers](#)
- [Nuclear Power Classified as Environmentally Sustainable in UK's Green Taxonomy](#)
- [Joint ESAs-ECB Statement on Climate Disclosure for Structured Finance Products](#)

## State Legislative Developments: Oklahoma and West Virginia

March 31, 2023



**By Kya Henley**  
Associate | Global Litigation



**By Timbre Shriver**  
Associate | Global Litigation

On March 21, 2023 the Oklahoma House of Representatives passed [House Bill 2547](#), which claims to be “designed to continue protections of state pension funds from strategies that would be harmful to the state’s energy industry.” The bill was introduced by Rep. Terry O’Donnell (R-Catoosa). On March 28, 2023, the Governor of West Virginia, James Justice, signed into law [House Bill 2862](#), which prohibits state investment boards within West Virginia from casting their proxy votes “for the purpose of furthering non-pecuniary interests.”

Oklahoma House Bill 2547 follows on from [legislation](#) co-authored by O’Donnell in 2021 and signed by the Governor in May 2022 that is [similar](#) to legislation passed or proposed elsewhere requiring state treasurers to maintain lists of financial institutions that “boycott energy companies,” and to divest assets from such investment managers that “continue to boycott energy companies” after notice from the Treasurer and an opportunity to respond. The new bill addresses proxy voting by investment managers. If enacted, it would mandate that “all shares held directly or indirectly by or on behalf of a governmental entity and/or the participants and their beneficiaries shall be voted solely in the pecuniary interest of plan participants and their beneficiaries,” government pension funds could not “rely on any voting decision guidance” from any blacklisted financial institution, and, “unless no economically practical alternative is available, a governmental entity may not grant proxy voting authority to any person who is not a part of the governmental entity, unless that person has a practice of, and in writing commits to, following guidelines that match the governmental entity’s obligation to act solely upon pecuniary factors.” The term “pecuniary interest” is not defined in the bill.

In a [statement](#) from the Governor announcing that he was joining an alliance of Republican governors opposing the Biden Administration’s [ESG policies](#), Oklahoma Treasurer Todd Russ was quoted as stating that “[t]hese harmful policies that are regulating the use of ESG in the financial arena are ultimately hurting Oklahoma businesses and our taxpayer” and that “I am glad to have the support of the Governor as I direct these investments of Oklahoma taxpayer dollars toward financial institutions that support Oklahoma industries and values.”

Like the Oklahoma bill, West Virginia House Bill 2862 is focused on voting of proxies by investment managers of public pension fund assets. The bill would require the board to directly vote shares, or to instruct investment managers to vote shares (based on a written commitment from the manager to abide by the statute), consistent with a “duty to ensure that all shareholder

votes are cast solely in the pecuniary interests of the beneficiaries, based on a consideration of only pecuniary factors.” The proscription extends to recommendations of proxy advisory firms, which must “commit, in writing, to make all shareholder voting recommendations to the board or the board’s fiduciary according to the” foregoing standard of care. The bill also requires investment managers to provide advance notice “of any shareholder vote concerning non-pecuniary interests and to provide the board with a reasonable opportunity to instruct the fiduciary, in writing, how the vote must be cast.”

“Pecuniary factor” is defined as a factor that “has a direct and material effect on the financial risk or financial return to beneficiaries based on appropriate investment horizons consistent with an investment pool’s objectives and funding policy.” It goes on to state that “[e]nvironmental, social, corporate governance, or other similarly oriented considerations are not pecuniary factors, unless a prudent investor would determine that such a consideration directly and materially affects the financial risk or financial return to beneficiaries based on appropriate investment horizons consistent with an investment pool’s objectives and funding policy.”

**Taking the Temperature: By focusing on proxy voting, the Oklahoma and West Virginia bills take aim at an issue receiving increasing attention from an ESG perspective. We have [reported](#) on similar proposed legislation in Kansas and other jurisdictions. Likewise, in January 2023, 21 Republican state attorneys general [wrote](#) to proxy advisory firms Institutional Shareholder Services and Glass Lewis claiming that the firms’ “climate and diversity, equity, and inclusion priorities” may conflict with the contractual agreements they have with states’ investment vehicles, including because these agreements “typically require that [the firms] consider only one goal: the economic value of the investments.” And in December 2022, the Minority Staff of the U.S. Senate Committee on Banking, Housing and Urban Affairs [issued a report](#) regarding the influence of the “liberal views” toward ESG of the “Big Three” asset managers, Blackrock, State Street, and Vanguard. The report asserted that, contrary to what it deems appropriate for passive investment strategies such as index funds, asset managers that are members of the Net Zero Asset Managers initiative commit to engage with portfolio companies toward a goal of achieving net zero emissions by 2050. At the same time, at the end of last year several major asset managers including Blackrock and Vanguard [announced](#) plans to expand programs providing investors with greater say over how their shares are voted, some of which announced similar plans for some individual index fund shareholders.**

# Canada Releases New Climate-Focused Guideline for Banks and Insurers

March 31, 2023



**By Jason Halper**  
Partner and Co-Chair | Global Litigation



**By Sara Bussiere**  
Special Counsel | Global Litigation

On March 7, 2023, the Office of the Superintendent of Financial Institutions (“OSFI”), the Canadian government agency responsible for supervising federally-regulated financial institutions (“FRFI”) and insurance companies, released a new **guideline** (“Guideline”) on climate risk management. The Guideline will become effective in fiscal year 2024 for “Domestic Systemically Important Banks” and “Internationally Active Insurance Groups headquartered in Canada” and in fiscal year 2025 for smaller financial institutions. OSFI released the Guideline following a public consultation that generated over 4,300 submissions, which the accompanying press release **reported** is “one of the most extensive consultations in OSFI’s history.”

The Guideline identifies three broad goals for FRFIs: 1) understand and mitigate potential impacts of climate-related risks to its business model and strategy; 2) implement appropriate governance and risk management practices to manage identified climate-related risks; and 3) remain financially resilient through “severe, yet plausible, climate risk scenarios, and operationally resilient through disruption due to climate-related disasters.”

The guidance document itself comprises two chapters. The first covers governance and risk management principles, expectations, and best practices. The governance section requires FRFIs to develop and implement a Climate Transition Plan for managing climate-related risk in line with each entity’s business plan and strategy, including assessments of achievability under different climate-related scenarios, as well as internal progress and success metrics. The guidance notes that “senior Management has overall accountability for the FRFI’s climate risk management,” and suggests (but does not require) that compensation policies should be tied to climate-related risk considerations.

The risk management section makes clear that FRFIs must develop robust systems and processes for identifying, managing, monitoring, and reporting on climate-related risks, including through the use of climate scenario analyses to stress test their risk profiles, business models, strategies, and the adequacy of capital and liquidity buffers. OSFI also plans to require FRFIs to complete standardized climate scenario exercises, in addition to undertaking bespoke climate scenario analyses, and to report the results of OSFI-devised analyses to the regulator periodically.

The second chapter of the Guideline outlines a detailed set of expectations for the substance, format, and timing of required climate-related financial disclosures, which are to be aligned with the recommendations of the Task Force on Climate-related Financial Disclosures (“TCFD”). The disclosure expectations are premised on the principles of relevance, specificity and comprehensiveness, clarity, quality and reliability, appropriateness, and consistency. Reporting is required at least annually. FRFIs must make their climate-related disclosures publicly available “no later than 180 days after fiscal year-end,” and must maintain “an ongoing archive of all disclosures relating to prior reporting periods.”

The minimum mandatory financial disclosure template annexed to the Guideline includes, among other things, disclosure of:

- metrics and targets used by the financial institution to assess climate-related risks and opportunities;
- Scope 1, 2, and 3 greenhouse gas emissions; and
- any public climate-related commitment(s) whether through an industry-led Net-Zero alliance or otherwise.

According to the Superintendent, the Guideline “balances the concerns of stakeholders in all regions of Canada and remains in line with the expectations of global and domestic investors who fund Canadian federally regulated financial institutions.”

**Taking the Temperature: Canada is the latest jurisdiction to introduce updated climate-related reporting requirements and risk management expectations for financial institutions and insurance companies, with similar initiatives advanced in other jurisdictions, including the [EU](#), [Switzerland](#), and the [UK](#). Similar to these regulatory efforts, Canada’s Guidance focuses on governance, disclosure, and overall financial resilience. As we have reported, financial institutions appear to be moving ahead proactively with enhanced climate-related disclosure and governance mechanisms, with evidence coming from recent reports from [Citi and Deutsche Bank](#) and [HSBC](#). For example, Citi recently stated that it “expanded [its] Board of Directors’ oversight of certain climate-related matters such as climate risk and climate and ESG disclosures;” “[c]odified the integration of climate-related issues with certain Board committees, including incorporating oversight of our climate disclosure risk and controls environment into the Audit Committee (AC) charter and climate risk oversight into the Risk Management Committee (RMC) charter;” “[c]ommenced an ESG Disclosure Committee to support the Board and AC and provide oversight of Citi’s disclosure controls and procedures;” and “[e]xpanded and realigned our Climate Risk team to be part of the Enterprise Risk Management function within Risk and further added subject matter expertise.” Citi added that it also continues to “educate [its] entire Board, as well as senior management, to build out climate-related expertise and capabilities,” and that “sustainability and climate-related goals are incorporated into several executive scorecards, which are key elements of performance management tied to the determination of incentive compensation for these executives.” While the U.S. climate-related regulatory scheme lags Europe, the [Federal Reserve](#), the [SEC](#), and other financial services and securities market regulators have issued proposed rules or high-level guidance akin to what has been issued elsewhere and, notwithstanding the**

**somewhat unique “anti-ESG” movement in the U.S., we expect the U.S. regulatory framework to continue to evolve over time.**

# Nuclear Power Classified as Environmentally Sustainable in UK's Green Taxonomy

March 31, 2023



**By Duncan Grieve**

Special Counsel | White Collar Defense and Investigations

On March 15, 2023, the UK's Chancellor of the Exchequer, Jeremy Hunt, **announced** that nuclear power will be classified as "environmentally sustainable" in UK's green taxonomy, "giving it access to the same investment incentives as renewable energy." He stated that "because the wind doesn't always blow and the sun doesn't always shine, we will need another critical source of cheap and reliable energy. And that is nuclear." The inclusion of nuclear power within the UK green taxonomy mirrors a **similar move** including nuclear within the EU green taxonomy last year.

The inclusion of nuclear in the UK Taxonomy, while controversial, is not surprising given the UK's stated commitment to building its nuclear fuel capacity. In a 2022 policy paper titled "**British energy security strategy**," the Johnson government committed to increase the portion of energy generated from nuclear power to 25%, and to launch a variety of related initiatives, including "backing Great British Nuclear with funding to support projects to get investment ready and through the construction phase." Great British Nuclear is planned to be a civil service body within the Department for Business, Energy & Industrial Strategy (BEIS). Additionally, up to £20 billion has been allocated to support early development of Carbon Capture Usage and Storage, a suite of technologies that enable mitigation of carbon emissions. The Sunak government has not yet released its energy security strategy, but Sunak hinted that its strategy will continue the ongoing commitment to increase the UK's nuclear energy capacity, by focusing on carbon capture and storage, small modular reactors and the like.

**Taking the Temperature: The British government increasingly has been actively pursuing investment and developing regulation related to a green transition. Early this year, BEIS received a report it had commissioned inquiring into the government's approach to delivering on net zero commitments. BEIS itself is being broken up along with the creation of four new departments, including the Department for Energy Security and Net Zero, which is tasked with "securing [Britain's] long-term energy supply, bringing down bills and halving inflation," and financial and competition regulators have issued updated climate-related guidance.**

**On the challenges of attractive capital to fund climate initiatives, the Green Technical Advisory Group's ("GTAG") paper, which we discussed earlier this month, argued that significant progress must be made by the UK to attract global capital commitments and suggested that the UK adopt the same broad concepts, methodologies, and metrics as the EU taxonomy, where possible. The UK's addition of nuclear power in the green taxonomy still under consideration follows similar steps in the EU last year. The European Commission believes there is a role for private investment in gas and nuclear**

activities in the green transition. It is worth noting, however, that although that the EU Taxonomy Delegated Act is in force, a regulation for UK's green taxonomy is not and there is no clear timeline for implementation. Rather, the UK government **announced** in December 2022 a delay in implementation following stakeholder engagement and in light of the complexity inherent in a climate taxonomy, which involves “multiple sectors of the economy and various legislative and regulatory frameworks.”



# Joint ESAs-ECB Statement on Climate Disclosure for Structured Finance Products

March 31, 2023



**By Sukhvir Basran**  
Partner | Financial Services



**By Michael Ruder**  
Partner | Securitization & Asset Based Finance

On March 13, 2023, the European Supervisory Authorities (ESAs) and the European Central Bank (ECB), published a **Joint Statement** on climate-related disclosure for structured finance products. In describing the need for such guidance, the ESAs and ECB stated that “securitisation transactions are often backed by assets that could be directly exposed to physical or transition climate-related risks, such as real estate mortgages or auto loans. Since the value of these underlying assets could be affected by climate-related events, the ESAs and the ECB share the view that the reporting on existing climate-related metrics needs to improve, and that additional metrics are necessary. Additional climate related data will allow investors to better identify climate change-related risks while avoiding overreliance on estimates from external sources.”

In light of these concerns, the ESAs and ECB are “committed” to promoting climate-related “transparency and robust disclosure requirements for financial institutions and financial products,” including:

- developing advice and Regulatory Technical Standards (RTS) under the EU Taxonomy Regulation and the SFDR;
- reviewing the SFDR Delegated Regulation to “enhance ESG disclosures by financial market participants,” which includes requirements for additional disclosures of decarbonization targets; and
- developing templates for voluntary sustainability-related disclosures for “simple, transparent and standardized” (STS) securitizations. Although mandatory disclosure requirements are not yet in place, originators are being urged to collect the data needed to assess climate-related risks at loan origination, with a goal of providing “easy and seamless access to climate-related data” through “registered securitization repositories.”

The Joint Statement also observed that the European Securities and Markets Authority is “undertaking a review of the loan-level securitization disclosure templates,” with a goal to both “simplify the reporting templates where possible,” and also to introduce “new, proportionate and targeted climate change-related metrics that will be useful for investors and supervisors. The new metrics will have to meet investor needs, considering existing market practices and the

reporting standards stemming from the relevant EU legislation (the EU Taxonomy Regulation, the SFDR and the forthcoming EU Green Bond Standards). This requires engagement with both originators and investors as well as with the relevant regulatory bodies to achieve an effective and proportionate approach.”

The ECB previously announced that it will take steps to include climate change considerations in its purchase programs and collateral framework to better take into account climate-related financial risk in monetary policy implementation and “support the green transition of the economy in line with the EU’s climate neutrality objectives.”

Finally, new climate change-related disclosure requirements for securitizations may also become relevant for similar funding instruments backed by the same type of underlying assets, such as covered bonds. According to the ESAs and ECB, “consistent and harmonized requirements for these instruments are necessary for assessing and addressing climate-related risks and would ensure a level playing field across similar asset classes, foster comparability for investors and facilitate equal treatment by EU supervisors.”

**Taking the Temperature: Climate-related data assessment and disclosure arising in financing transactions remains a work in progress globally. For instance, last month the Council of the European Union and the European Parliament reached a deal to draft European Green Bonds Standards (“EUGBS”). The aim of the EUGBS is to [establish](#) the leading global framework for green bonds.” However, there are unique climate-related issues arising from securitization transactions, and it is unclear whether securitizations will be part of the EUGBS as per the [European Banking Authority’s report](#) (Report) on developing a framework for sustainable securitization. In addition, again as observed in the Report, the “EU taxonomy does not apply directly to securitisation transactions, and financial instruments issued within securitisation transactions are not ‘financial products’ as defined in the Sustainable Finance Disclosure Regulation (SFDR).” As a result, the input of regulators such as the EBA, ESAs and ECB ultimately should provide useful guidance in the EU for the development of a sustainable securitization regime. That guidance, in turn, may serve as a template for voluntary action or mandatory regulation in other jurisdictions. We have [previously reported](#) on the potential importance of securitization transactions to securing a portion of the massive financing necessary to fund efforts to transition to a green economy.**