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Connecting Climate Change and the Law

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Energy Companies' Advertisements Banned by UK Regulator Despite Being Factually Accurate

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The UK's advertising watchdog, the Advertising Standards Authority (ASA), has banned recent advertisements by three oil and gas majors. The advertisements, by **Shell**, **Repsol** and **Petronas** were banned on the basis of "greenwashing," with the ASA saying that the advertisements were misleading with respect to claims about the companies' climate and environmental profiles in the context of their overall operations.

The challenged advertisements for Shell appeared on billboards, television and YouTube.

- The billboard, seen in Bristol, featured large text that stated, "BRISTOL is READY for Cleaner Energy" superimposed over a cityscape shot of Bristol. Text at the bottom of the poster stated, "In the South West 78,000 homes use 100% renewable electricity from Shell Energy" above smaller text that stated, "Shell Energy's renewable electricity is supplied by the National Grid and certified by Renewable Energy Guarantees of Origin, matching electricity bought with the equivalent amount from 100% renewable sources."
- The TV ad, seen on 14 June 2022, opened with a man stating, "In the UK, 1.4 million households use 100% renewable electricity from Shell" as he helped a young child to cycle down the street. Throughout the ad, large individual letters appeared in the background of successive scenes to spell the word "READY." The video ended with large on-screen text "The UK is READY for Cleaner Energy" followed by the Shell logo and the hashtag "#PoweringProgress."
- The YouTube video, posted on Shell's YouTube channel on 9 June 2022, was titled "The UK is READY For Cleaner Energy" and included text in its caption that stated, "From electric vehicle charging to renewable electricity for your home, Shell is giving customers more low-carbon choices and helping drive the UK's energy transition. The UK is ready for cleaner energy.

The advertisements were challenged by Adfree Cities (a UK-based network of groups focused on the impacts of corporate advertising on the environment). Adfree claimed that while the advertisements promoted these companies' "green" product offerings and plans, they were misleading because they omitted information about the environmental impact of Shell's overall business activities in 2022.

The ASA did not uphold the challenge to the statement “in the UK, 1.4 million households use 100% renewable electricity from Shell” because Shell substantiated that statement as factually accurate. However, the ASA concluded that because the advertisements “gave the overall impression that a significant proportion of Shell’s business comprised lower-carbon energy products, further information about the proportion of Shell’s overall business model that comprised lower-carbon energy products was material information that should have been included. Because the ads did not include such information, we concluded that they omitted material information and were likely to mislead.” In reaching this conclusion, the ASA addressed a number of Shell’s arguments. First, it acknowledged “that Shell said they were taking steps towards net zero and promoting sustainable energy.” According to the ASA, however, Shell’s 2021 Sustainability Report disclosed that Shell’s operations “represented a large contribution to greenhouse gas emissions,” especially considering deductions linked to carbon offsets, and therefore, the ad was misleading in conveying the overall impression that a significant proportion of Shell’s business comprised lower-carbon energy products. Second, the ASA acknowledged Shell’s comment that, rather than being an explicit claim about Shell, the claim “The UK is READY for cleaner energy” “was intended as a forward-looking statement about the UK-wide demand for less environmentally detrimental energy sources. However, in the context of the claim’s appearance in an ad for Shell, a well-known provider of energy products, we considered that consumers were likely to interpret the claim as being, in part, a claim about Shell’s own products and capacity to deliver low-carbon energy.” Finally, the ASA “acknowledged that consumers were likely to understand that energy products derived from fossil fuels were environmentally detrimental. [It] further acknowledged that many consumers would closely associate Shell with petrol sales, and more broadly understand that the company was involved in oil and gas investment and extraction. However, they would also have an awareness that many companies in carbon-intensive industries, including the oil and gas sector, aimed to dramatically reduce their emissions in response to the climate crisis. [The ASA] considered that consumers were increasingly concerned about the environmental impact of activities related to higher-carbon products and services, and would be interested in seeking out businesses, including oil and gas companies, that were making meaningful progress towards transitioning away from higher-carbon products and services. However, they were unlikely to be aware of the details of this in relation to specific companies, and ads were therefore likely to mislead consumers if they misrepresented the contribution that lower-carbon initiatives played, or would play in the near future, as part of the overall balance of a company's activities.”

The ASA upheld Adfree’s challenge to Respol’s advertisement based on similar reasoning. The advertisement appeared on a newspaper website and “featured several images of leaves with text that stated, ‘At Repsol, we are developing biofuels and synthetic fuels to achieve net zero emissions.’ After which a car was shown parked in a wooded area, surrounded by leaves, with text that stated, ‘Renewable fuels for more sustainable mobility.’ In the top left-hand corner of the ad was a stylised outline of a petrol pump within which was a leaf.” According to the ASA, consumers were likely to interpret the advertisement as “meaning that Repsol’s development of biofuels and synthetic fuels formed a significant element of their current activities that were making meaningful progress towards achieving net zero emissions.” However, “notwithstanding current actions towards improving their environmental impact,” the ASA “understood that a number of Repsol’s new biofuel and synthetic fuel initiatives were not yet in operation” and “the production of biofuels and synthetic fuels to achieve net zero emissions was a fraction of their business activities when compared to their substantial, ongoing, and expanding fossil fuel production.” The ASA also acknowledged “Repsol’s comment that there is no single solution for sustainability, and that renewable fuels are one element in the company’s strategy to reach net zero by 2050. However, while [it] agreed that synthetic fuels and biofuels could contribute towards Repsol’s goal of achieving net zero emissions, they would not as a single measure ‘achieve’ net zero emissions.”

The challenge before the ASA to a Petronas television advertisement was upheld based on similar reasoning.

Taking the Temperature: We have reported on the increasing frequency of greenwashing challenges. These most recent ASA findings follow a ruling in October 2022, when UK retail banking advertisements, which made claims about a financial institution’s green credentials, were also found to have been “misleading” and to have “omitted material information.” The billboard advertisements, which stated how the bank 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. Australia’s securities regulator, the Australian Securities and Investments Commission, likewise has been active in pursuing alleged greenwashing by regulated entities. And, earlier this month, a consumer class action was commenced in federal court in California challenging an airline’s claim that it is the first “carbon-neutral airline.”

The ASA’s decisions call into question the ability of companies in carbon intensive industries to engage in green advertising. It upheld the challenges to the advertisements even though the statements were not factually incorrect. Rather, they were deemed misleading in context given that the companies’ overall operations were still heavily oriented toward fossil fuel production and in the absence of information clarifying that fact. The ASA also rejected arguments that consumers are well aware that these companies remain significantly invested in fossil fuel energy production and distribution, primarily on the basis that “they were unlikely to be aware of the details” of the companies’ business activities. That calls into question the ability of companies, at least in the UK, to truthfully promote legitimate renewable energy projects and commitments in advertisements because in that context it is not possible to provide the type of disclosure that ASA seems to be demanding. By and large, it still remains to be seen how regulators in other jurisdictions approach greenwashing challenges and whether they will take a similarly restrictive approach. Ultimately, the resolution of any allegation of greenwashing necessarily turns on the unique facts and circumstances of the statement in question, including the industry in which the company operates, the content of the statement and its target audience. However, companies should consider that even vague, factually accurate “green” claims could raise greenwashing challenges, and given the unsettled state of regulation and enforcement precedent in this area, it is unclear how those claims will be resolved.

EU-Based Asset Managers Press J-Power on GHG Emissions Targets and Disclosures, Signaling Shift in Focus to Japan

June 20, 2023

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In May 2023, the shareholder advocacy group **Australasian Centre for Corporate Responsibility (ACCR)**, HSBC Global Asset Management (UK) Limited and Amundi Asset Management filed shareholder resolutions pressing Japanese power company Electric Power Development Co., Ltd., known as J-Power, to take action to reduce greenhouse gas emissions and to include disclosures in its annual reporting detailing both the company's plans and progress on GHG emissions and its policies linking compensation to achieving its emissions targets. Shareholders will consider the resolutions at the company's annual general meeting scheduled for June 28, 2023.

The first resolution would require J-Power, Japan's sixth largest energy utility company and the country's largest operator of coal-fired power stations, to set and disclose science-based short- and medium-term emissions reduction targets aligned with the Paris Agreement, and to report on its progress against these goals. In presenting the resolution, the investor group noted that while J-Power does have a stated objective to achieve carbon neutrality by 2050, it has not yet set emissions targets in line with that goal, and in particular it has not provided any schedule for the retirement of its coal-fired power plants.

The second resolution would require J-Power to disclose in its annual reporting how remuneration is linked to progress toward emissions reduction targets, noting that the investors considered a direct link between executive compensation and the achievement of those targets to be important to incentivizing management performance and protecting corporate value.

The resolutions are also reportedly supported by Man Group. The three asset managers, which together have nearly $3 trillion in assets under management, filed a similar resolution with J-Power in 2022, calling it the first climate-related proposal by an institutional investor group to a Japanese company. J-Power promised to "carefully consider" this year's proposals and will disclose the opinions of the directors in due course.

Taking the Temperature: The shareholder resolutions co-filed by ACCR, HSBC and Amundi reflect a global trend characterized by increasing climate-focused shareholder activity. While the trend has been predominant among investors in their home territory, their focus is increasingly turning to making an impact in foreign jurisdictions, including

Japan. Last year, Sumitomo Corp faced shareholder-initiated climate resolutions. And in April of this year, climate advocacy organizations submitted climate-related shareholder resolutions for consideration to some of the largest Tokyo-listed public companies, including Sumitomo Mitsui Financial Group (SMFG), Tokyo Electric Power (Tepco), and Mitsubishi Corp.

The oil and gas sector has been a particular area of focus. Somewhat predictably, fossil fuel-generated energy has also been a lightning rod for climate-related litigation, regulation, and partisan political pressure, predominantly, but not exclusively, in the U.S.

UN-Initiated and Bank-Led Working Group Formed to Encourage Banks to Achieve Biodiversity Targets

June 20, 2023

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On May 4, 2023, the United Nations **announced the formation** of a 35-member bank-led working group to promote nature- and biodiversity-related target setting that is aligned with the Kunming-Montreal Global Biodiversity Framework (GBF) adopted at COP15 last year, as well as to implement other climate-related market standards such as the recommendations of the Taskforce on Nature-related Financial Disclosures (TNFD). The Co-Leads of the Working Group are UBS, Crédit Agricole S.A. and First Abu Dhabi Bank, and all working group members are signatories to the **Principles of Responsible Banking (PRB)**.

In a statement setting out the mandate of the working group, the UN stated that the global decline of nature "at an alarming and unprecedented" rate presents a significant risk to businesses, and particularly to those in the financial sector given that the majority of the world's GDP—as much as $58 trillion—relies on nature in some way. Banks participating in the working group will focus on how banking activities affect the natural world by analyzing resources that are currently available and determining what is needed to close the biodiversity financing gap. The banks will also suggest measures to encourage the development of environmentally friendly business. Additionally, the working group will take into account the rights of indigenous peoples and local communities as it develops nature targets and practices. Existing climate mitigation and net-zero targets also will be integrated into the plans for addressing biodiversity loss.

The PRB builds on the existing **Guidance on Biodiversity Target-Setting**, which encourages the banking sector to take action to achieve biodiversity targets using a systematic approach. The guidance is supported by stakeholders that focus on the environment, including the Science Based Targets Network (SBTN), TNFD, UNEP World Conservation Monitoring Centre (UNEP-WCMC), and the Finance for Biodiversity Foundation. The working group will seek to promote alignment and consistency with existing frameworks, such as the PRB Biodiversity Community and UNEP FI-led TNFD projects. It will also offer high-level recommendations on how financial institutions can align their portfolios with PRB targets and GBF goals.

The guidance created by the working group will seek to effectively tackle "the loss of biodiversity and nature to apply a holistic and systemic approach to set and achieve nature targets," said the UN.

Taking the Temperature: In January we reported on the GBF reached at the conclusion of COP15, which amplified the importance of nature and biodiversity concerns and established them as a permanent feature of the sustainability discussion. This has informed recent EU policy initiatives, which include biodiversity considerations as part of the EU's goal to achieve carbon neutrality by 2050. It is also notable that the European Green Deal also includes an aim to promote biodiversity in line with the EU's Biodiversity Strategy for 2030.

As we discussed previously, nearly 200 countries have adopted the Kunming-Montreal Global Biodiversity Framework and are working to achieve the goals set out by that regime, which includes four goals for 2050 and 23 targets for 2030, creating "an ambitious pathway to reach the global vision of a world living in harmony with nature by 2050."

The establishment of the PRB is one more step in this direction to address climate change and loss of biodiversity. The 35 signatories constitute about half of the world's global assets and hail from 24 countries, indicating that the banking industry is taking forward-looking steps to address the biodiversity financing gap and other issues facing nature, joining, as we have noted in the past, other sectors, including the insurance industry.

World Economic Forum and ISSB Form Partnership to Provide Guidance on ISSB Reporting

June 20, 2023

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On June 6, 2023, the World Economic Forum (WEF) **announced the formation** of the Forum ISSB Preparers Group in partnership with the International Sustainability Standards Board (ISSB). The ISSB is a standard-setting organization established by the International Financial Reporting Standards to promote common, consistent and reliable climate sustainability-related financial disclosures. The ISSB's aim with the standards is to provide "a comprehensive global baseline of sustainability disclosures designed to meet the information needs of investors in assessing enterprise value."

The Preparers Group aims to share insights for those adopting the ISSB sustainability reporting standards, the first two of which are **due to come into force** in January 2024. Comprising 20 senior preparers with expertise in sustainability reporting, the Preparers Group will collate information on best practices and practical examples from companies applying the ISSB Standards and share these with ISSB and other companies. The Preparers Group will provide feedback to the ISSB on the application and feasibility of the standards, offer insights into "corporate reporting transformations," and contribute to the development of guidance material.

The collaboration between WEF and ISSB is supported by a Memorandum of Understanding (MoU) and builds on the **WEF's Stakeholder Metrics initiative** published in September 2020. Stakeholder Metrics is a set of universal metrics focused on four themes - People, Planet, Prosperity and Governance Principles - which companies can use for non-financial disclosures related to ESG, including metrics for the measurement of greenhouse gas emissions. The MoU between WEF and ISSB outlines further areas of collaboration, including through "sharing case studies and perspectives from companies on their experiences."

Olivier Schwab, Managing Director of the World Economic Forum, highlighted that "[a]s the world gets closer to universal sustainability reporting standards, it is important for businesses, policy-makers and other leaders to ensure that businesses from across all regions are ready and able to effectively report on a common set of sustainability disclosures."

Taking the Temperature: As we observed previously, the ISSB Standards help to unify global climate-related reporting, but collating consistent data for disclosure and building a general consensus on climate-related reporting among companies remains a

challenge. This newly-formed collaboration may help resolve some of these challenges. The expertise of the Preparers Group will be used to create a library of practical examples of sustainability reporting best practices for companies transitioning into reporting. This will enhance the capacity of companies to effectively adopt and implement the ISSB Standards. The formation of the Preparers Group comes ahead of the implementation of IFRS S1 "General Requirements for Disclosure of Sustainability-related Financial Information" and IFRS S2 "Climate-related Disclosures." The gap between the release of the standards in June 2023 and the effective date of January 2024 was intentional so as to allow best practice examples to emerge but is nonetheless a relatively short period of time. The Preparers Group will hopefully disseminate examples allowing companies to implement the ISSB Standards more effectively. By convening the Preparers Group the WEF and the ISSB aims to contribute to the establishment of a comprehensive global baseline for sustainability reporting and ensure consistent and comparable disclosures across businesses worldwide.

Report Discusses Potential Impact of ESG Claims on Directors and Officers Insurance

June 20, 2023

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In its **2023 report** on trends in directors & officers (D&O) liability insurance policies, Allianz Global Corporate & Specialty highlighted risks associated with evolving ESG regulation and the increasing pace of climate change litigation. According to the report, "companies continue to see pressure around ESG issues as regulations are implemented around the world. Failure to disclose and lack of implementation could potentially lead to increased litigation for carriers as organizations navigate company policies to lessen their environmental impact surrounding greenhouse emissions and exposures." With respect to regulatory activity in particular, the report observed that while criminal fines and penalties are not covered in D&O policies, a policy can cover defense costs unless and until unlawful conduct has been established. The report also cited as risks for carriers increasing climate-focused litigation against companies and their boards, noting that "the cumulative number of climate change-related litigation cases has more than doubled since 2015." Particular types of cases cited included those asserting claims for greenwashing, failure to comply with international agreements such as the Paris Agreement, and claims based on companies making insufficient progress toward articulated sustainability targets. Ultimately, according to Allianz, "companies with strong ESG frameworks and governance will likely find insurers more willing to offer capacity."

Taking the Temperature: We have frequently reported on the types of ESG-related enforcement activity or litigation cited in the Allianz report. As we discussed earlier this year, for example, shareholders filed a derivative action against the board of directors of an oil major in the High Court of England and Wales alleging that the directors had allegedly breached their legal duties under the UK Companies Act by failing to implement a transition strategy aligned with the Paris Agreement. The case was subsequently dismissed in May based on the court's finding that the plaintiff failed to establish a *prima facie* case against the Board for its management of climate risks. The High Court has granted a hearing that will allow ClientEarth to argue for reconsideration.

As another example, in 2021, two members of the Universities Superannuation Scheme (USS), the principal pension plan provided by UK higher education institutions, sued USS and its directors on the grounds, among others, that they failed to act in the best interests of beneficiaries by not divesting the plan of fossil fuel investments, despite fossil fuels allegedly performing worst as a category among all plan assets, and the fact

that results of a USS survey indicated that the majority of members favored divestment. That suit was dismissed (and is currently on appeal) based on the court's conclusion that plaintiffs failed to allege that the directors committed a deliberate or dishonest breach of duty or improperly benefited themselves at the expense of USS by continuing to invest in fossil fuels. We have reported on numerous additional types of climate-related lawsuits and enforcement actions, all being commenced with greater frequency, including suits against oil majors to compel greater emissions reductions, suits by citizens against states to redress harm allegedly caused by failing to prevent the consequences of climate change, and consumer class or individual actions or regulatory activity related to alleged greenwashing.

The concerns raised by Allianz regarding the potential adverse impacts of climate litigation are consistent with the conclusions in a working paper from the London School of Economics and Political Science that looked at over 100 climate-related lawsuits between 2005 and 2021. The study found that the filing of a climate-based litigation claim or corresponding unfavorable court decision reduced the market capitalization of the defendant company by about 0.41%, on average. It is not surprising, then, that insurers are concerned that litigation against directors and officers has the potential to cause an adverse material impact. Likewise, we reported on the findings in Goldman Sachs Asset Management's 12th annual insurance survey, where just over one-third of insurance executives surveyed stated that climate change could also affect their ability to insure for extreme weather events. In addition, the industry has struggled to navigate the political issues spawned by ESG issues in the U.S., where Republican state and federal officials have raised antitrust and other challenges to insurers that participate in the UN-convened Net Zero Insurance Alliance or other industry climate groups, leading to a host of insurers (including Allianz) leaving the organization. The NZIA seeks to have members transition their insurance or investment portfolios to net-zero by 2050, in order to contribute to the implementation of the Paris Agreement.