CADWALADER

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SEC Faces Lawsuits From Across Political Spectrum

Following the U.S. Securities and Exchange Commission's (SEC) **adoption of a scaled back set of climate disclosure rules** on March 6, 2024, several states have filed lawsuits claiming that the rules go beyond the SEC's statutory authority. The lawsuits will be consolidated and reviewed by the U.S. Court of Appeals for the Eighth Circuit, a decision made by the Judicial Panel on Multidistrict Litigation as a result of a lottery drawing; the Republican attorneys general, various energy companies and other stakeholders filed challenges to review the rules in the U.S. Courts of Appeal for the Fifth, Sixth, Eighth and Eleventh circuits, all of which are conservative leaning. The Eighth Circuit court is comprised of 17 judges, one of which was appointed by a Democratic president, with the legal challenge filed there being led by Iowa. Other states that have filed include West Virginia, Georgia, Alabama, Alaska, Indiana, New Hampshire, Oklahoma, South Carolina, Wyoming, Virginia, Arkansas, Idaho, Missouri, Montana, Nebraska, North Dakota, South Dakota and Utah. The U.S. Chamber of Commerce, which opposed the rules at an early stage, also filed its own lawsuit, and described it as a "novel and complicated rule that will likely have significant impact on businesses and their investors." The claimants are looking for the courts to vacate the rule. On the other side of the political spectrum, the SEC was challenged by the Sierra Club and the Natural Resources Defense Council, who argue that the climate rule was scaled back too far. A spokesperson for the SEC stated that the commission "undertakes rulemaking consistent with its authorities and laws governing the administrative process and will vigorously defend the final climate risk disclosure rules in court."

It is likely that businesses will continue to prepare for compliance with the approved rule particularly given similar pre-existing, or imminent, climate reporting and disclosure obligations, such as in California (through **Senate Bills 253 and 261**), and the European Union's **European Sustainability Reporting Standards**.

Trending: "Scaled-Back" Climate Rules

Member States continue to vacillate on the Corporate Sustainability Due Diligence Directive (CSDDD), as the European Council **adopted a scaled-back version of the controversial legislation** on March 15. The announcement was made just weeks after the European Council failed to provide final approval on February 28, 2024. Among the changes to the more robust form proposed in December 2023 are:

- An increase of certain thresholds that would determine which companies are in-scope: from 500 to 1,000 employees, and from €150 million to €450 million in turnover. Estimations indicate that only a third of EU companies would now be covered.
- A three-staged phase-in approach. Companies with more than 5,000 employees and a turnover of €1,500 million or more will have three years to comply; those with more than 3,000 employees and a turnover of €900 million or more will be have four years; all in-scope companies should be in compliance within five years.
- Transition plans must still be produced, but financial incentives for directors linked to the implementations of those plans have been removed.

- Disposal and recycling responsibilities for companies have been removed.
- Civil liability provisions, for example, being sued for non-compliance, have been removed.
- The list of high-impact sectors has been removed.

As with the SEC's climate rule, companies are well-advised to plan ahead and prepare to comply with the rules. The CSDDD is likely to have significant global impact given that companies not headquartered in the EU, but operating there, will be in-scope.

Court Rules That Dutch Airline KLM Misled Customers

On March 20, a Dutch court held that airline KLM misled customers through vague environmental claims and depicted an "overly rosy picture" of its use of sustainable aviation fuel (SAF). The suit, **which we originally discussed in October 2023**, was brought by several environmental activist groups, including ClientEarth and Fossielvrij. The groups challenge KLM's "Fly Responsibly" campaign, which was comprised of advertisements promoting its use of SAF, reforestation and onboard changes to reduce its carbon footprint. Fifteen of the total 19 advertisements were determined to be misleading and vague. One, on a billboard at Amsterdam's Schiphol airport, which depicted a child on a swing, accompanied by a statement reading "join us in creating a more sustainable future," for example, did not set out how flying with KLM would have an environmental benefit. The court stated that the impression was reinforced by the background of sky, mountains and water. With respect to the airline's use of SAF and related advertising, the court ruled that the measures only "marginally reduce the negative environmental aspects and give the wrong impression that flying with KLM is sustainable."

The decision in this case is a significant one, given the slew of greenwashing lawsuits against airlines. For instance, in 2020, the UK's Advertising Standards Authority (ASA) censured Ryanair based on a finding that the airline made misleading and unsubstantiated comparative claims in its 2019 advertising touting that it was "Europe's lowest emissions airline." In April 2023, ASA found that two of Etihad Airways' claims concerning "sustainable aviation" lacked context and exaggerated the immediate positive environmental impact of flying the airline, and were therefore misleading. And a month earlier, the ASA found that Lufthansa's advertising claim "Connecting the world. Protecting its future," in the context in which it was presented, could be understood by consumers as an environmental claim, and that it was misleading because it suggested that Lufthansa had already taken action to mitigate its environmental impact, but that the airline's initiatives found on its website through a link in the advertisement were aspirational. In the United States, a consumer class action was filed in California federal court, alleging that Delta Air Lines **falsely claimed** that it is the world's "first carbon-neutral airline." Action against greenwashing continues to trend in the airline sector with little sign of abating.

In principle, the message is the same irrespective of the sector or industry: environmental and sustainability claims must be clear, accurate and substantiated. While the consequences in some cases may be the wasted costs of the offending advertising campaigns, and the warning to refrain from similar action in the future, the more embedded greenwashing legislation becomes, the greater the risk of high financial penalties being levied. And as KLM's lawyer stated at an inaugural lecture at Leiden University, "With climate litigation, you grab attention –

media attention – and, at least that is the hope, you instill fear in other companies. So interest groups are using it to try to bring about behavioural change."

ING Put on Notice of Climate Lawsuit

Environmental activist group Milieudefensie (Friends of the Earth Netherlands) announced its intention to file a lawsuit against Dutch banking group ING for breaching its Dutch law duty of care to not create dangers that can cause avoidable damage to people or property, by providing financial support to high carbon-emitting companies. ING has been given eight weeks to respond before Milieudefensie files the suit with a Dutch court. The group says it is targeting ING because it is the largest Dutch bank in terms of assets, equity and emissions. It is also considered to be one of the 30 global systematically important banks and the hope is that imposing change upon it will positively impact the banking ecosystem. In response to notice of the lawsuit, ING stated "[w]e're in regular dialogue with a variety of stakeholders, including Friends of the Earth Netherlands. We're confident that we take impactful action to fight climate change. We will of course respond in court if necessary."

Milieudefensie announced the threat of legal action via a **40-page letter** setting out its rationale, demanding that ING reduce its carbon emissions by at least 48% by 2030 compared with 2019. The group also called on ING to cease financing to all fossil fuel clients that intend to continue investing in fossil fuel projects or do not have adequate transition plans and stressed that ING should commence such engagement with its clients within three months of receiving the letter.

The basis of the threatened action is similar to action under France's corporate duty of vigilance law. The law requires companies to establish a "Vigilance Plan" to "identify and prevent risks of severe violations of human rights and fundamental freedoms, health and safety of people and to the environment in their entire sphere of influence." Several climate advocacy groups have filed lawsuits against companies for breaching their duty of vigilance, including Friends of the Earth France, Notre Affaire à Tous and Oxfam France, who **filed against BNP Paribas** in March 2023. ClientEarth also filed on the same basis against food products company, Danone. Prior to **filing its claim against Danone** for breaching the duty of vigilance law, ClientEarth served "legal warnings" on Danone and certain other French companies, including Auchan, Carrefour, Casino, Lactalis, McDonald's France, Les Mousquetaires, Picard, and Nestlé France. **As we reported in our previous edition** on March 5, three separate cases were heard before the Paris Court of Appeal in which it is alleged that energy companies Suez, EDF and TotalEnergies breached France's Duty of Vigilance Act. Once the decisions in these cases are handed down (in June 2024), the direction that pending cases may follow will become clearer.

Pre-approval for Sustainability Claims

In a bid to expand the protections provided to consumers purchasing products with environmental claims, **the European Parliament proposed** establishing a verification and pre-approval system. If enacted, each Member State would need to assign verifiers to pre-approve the use of claims such as "biodegradable," "less polluting," "water saving" or having "bio based content." The aim would be for claims and underlying evidence to be assessed within 30 days. Non-complying companies would face financial penalties of at least 4% of annual turnover or may, for example, be temporarily suspended from public procurement tenders.

Claims based solely on carbon offsetting and removals would be banned, but such initiatives could be referenced in advertisements where companies have already reduced carbon emissions as much as possible and only use such schemes for residual emissions. Additionally, the carbon credits in question would have to be certified under official frameworks such as the **Carbon Removals Certification Framework** if approved. The proposal is in early stages, and any follow up will now be after the European elections which take place between June 6 and 9.

As we discussed in our February 9 edition, the EU's Green Deal umbrella encompasses a number of initiatives aimed at increasing consumer protection when it comes to green claims. This includes the Green Claims Directive, which will prohibit companies from making statements such as "carbon neutral" or "environmentally friendly" unless they can substantiate those claims, the **Directive on Empowering Consumers for the Green Transition**, and amendments to two existing EC Directives – **2005/29/EC the Unfair Commercial Practices Directive**, and **2011/83/EU, the Consumer Rights Directive**. The European Parliament's proposal to implement a system whereby environmental claims would need to be verified prior to being made is in line with the EU's continued efforts to prevent greenwashing and protect consumers and investors.