Climate Governance Initiative

Commonwealth Climate and Law Initiative

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CLIMATE CHANGE LITIGATION: WHAT BOARD DIRECTORS NEED TO KNOW

The Commonwealth Climate and Law Initiative has partnered with the Climate Governance Initiative to prepare this Quarterly Update for the CGI network. This is the first update of a series of quarterly learning materials on climate change as it relates to boards' duties and governance.

Climate change litigation is increasing, both in terms of the number of cases being brought and the routes which claimants are taking. Claims against governments can affect the policy and operating environment for companies, or result in delays or rejection of regulatory approvals. Litigation against companies is increasing, and claims are now being brought against directors and officers for their actions or perceived inaction on climate issues in their governance, disclosure and oversight of risk management and strategy.

The key trends in climate litigation and questions for boards is supported by a more detailed Climate Litigation: Briefing Note for Boards (15 minute read) accessible **here**.

KEY TRENDS IN CLIMATE LITIGATION

Advancements in climate change attribution science are being tested in a new generation of climate damages claims, with claimants presenting scientific evidence on the causal chain between defendants' emissions and climate impacts.

Claims cover the whole range of laws and forums, from corporate to contract law, human rights to tort law, in domestic, international courts and before tribunals, seeking damages, declarations on breaches of rights, duties of care, misleading disclosures, or refusal of project approvals.

Physical and transition risks catalyse legal risk, and the litigation that arises does not respect geographic boundaries. One physical or transition risk, or set of impacts after that risk materialises, can give rise to multiple legal actions within and across different jurisdictions.

Litigation alleging "greenwashing" is on the rise. To date these cases have mainly been brought by NGOs against high-emitting companies, and are based on statements in public filings and/or advertising.

Claims that have been successful against governments are being tried against corporations, with the *Urgenda* duty of care claim against the Dutch government replicated against Shell. Similarly, **claims against corporations could be stepping stones to or inspiration for claims against directors and officers** in the near future.

Disruption to business operations and supply chains caused by the **impacts of climate change increase the likelihood of traditional compensatory litigation** for contractual default or damage to third parties.

Not all climate litigation is 'pro' climate action. There is a growing countertrend of entities seeking to challenge climate change policies and regulations, or seeking compensation for the impacts of that regulation on their operations or assets.

KEY TYPES OF LEGAL CLAIMS AND EXAMPLES

Fiduciary duty claims, for which shareholders may have a renewed appetite following recent cases.	Boards should consider climate change to ensure they are acting in the best interests of their company and exercising their powers with care and diligence. A recent claim against Shell by ClientEarth (a UK NGO bringing the claim in its capacity as a shareholder of Shell) alleges Shell's board breached its duties in failing to put in place a Paris-aligned transition plan to address transition risk to the business: ClientEarth v Shell. Conversely, boards may take comfort that fiduciary duty claims challenging 'pro-climate' actions of boards are noted in the main climate litigation databases.
Greenwashing and misleading disclosure claims, which may increase in the near future as companies' sustainability commitments are scrutinised. These may lead to direct liability for directors.	Shareholders, NGOs and regulators are scrutinising net-zero commitments and transition plans carefully. Beyond public statements or shareholder votes against directors, companies and their directors may face litigation or regulatory action where they are perceived to be 'saying one thing and doing another' on climate specifically (e.g., the UK complaint ClientEarth v BP) or sustainability generally (e.g., the US securities class action Bentley v Oatly Group AB).
Climate damages claims; sub-national governments and citizens are using developments in climate change attribution science.	A claim by a Peruvian farmer Mr Lliuya against German utility company RWE seeking 0.47% of the cost of erecting flood defences to protect his town, reflecting RWE's historic contribution to emissions, serves as a bellwether for a suite of climate damages claims: Lliuya v RWE. Claims against major oil and gas companies seeking compensation for climate-related losses have been working through the US courts, with some now proceeding to trial (*City & County of Honolulu and BWS v. Sunoco, LP, et al*)
Human rights-related claims potentially offer a new risk in relation to climate change for private companies.	Courts are increasingly recognising failure to act on climate change as potentially breaching human rights; this may affect whether companies which have failed to consider climate change may be found to have breached legal standards of care or regulations under which they are required to consider impacts on human rights. In May 2021, a Dutch court ordered Royal Dutch Shell (as it was called at the time) to reduce the CO_2 emissions of its corporate group by 45% by 2030, relative to 2019 levels: Milieudefensie v Shell. The NGO has since informed 30 other multinational companies that it is willing to take them to court, using the same type of claim as used against Shell, if they do not produce transition plans.
Compensatory claims arise as the impacts of climate change cause damage to assets and third parties, and breaches of contract.	As the first climate-driven bankruptcy, Californian utility PG&E and its former directors and officers have faced a suite of compensation claims from property owners, injured citizens, shareholders and bondholders: see, e.g., Trotter, Trustee of the PG&E Fire Victim Trust v Chew et al.
Anti-climate litigation, as entities bring claims against governments challenging climate policies and their effects.	Energy utility RWE has initiated arbitration proceedings against the Dutch government under the Energy Charter Treaty seeking compensation for environmental restrictions placed on coal-fired power plants under the government's coal phase out law: RWE v Netherlands.

KEY ACTIONS FOR BOARDS, AND KEY QUESTIONS TO CONSIDER

What legal risks does our company face due to climate change? (1)

What **climate litigation** has been threatened or brought **against our peers**?

Claims against companies in similar sectors could indicate that **similar claims could be forthcoming.**

Boards should **put in place systems to identify climate-related legal risks** faced by companies of similar size and operating in similar sectors.

What are our **material contractual relationships** and **regulatory compliance actions** which could be **affected by climate change impacts** and could translate into legal risk?

Climate change leads to increased risks of contractual breaches or regulatory compliance.

Boards should implement and monitor a system to **review their company's exposure to increased risks of breaching contracts or regulations** as a result of climate change, and to mitigate such exposures.

In particular, do our **existing human rights compliance obligations** increase our exposure to climate change-related claims?

Human rights-based claims are increasingly being incorporated into climate cases.

Boards should make enquiries of delegated management functions as to whether climate-related issues are considered as part of their existing human rights obligations (such as supply chain due diligence, compliance statements etc.), and the extent to which the company may be exposed to litigation or regulatory compliance risks because of this.

What are the views of our **shareholders and other key stakeholders** on climate change? Could these escalate into campaigns, engagement or litigation?

Boards should consider **views of shareholders and key stakeholders** such as financiers, insurers, customers and potentially activist stakeholders such as indigenous communities and NGOs on climate action generally and the company's climate position specifically, including **identifying potential escalations to public campaigns, shareholder engagement or litigation exposure**.

Have climate-related **legal challenges against governments** influenced, or are they likely to influence, the **business environment in which we operate**?

Claims against governments can affect the commercial context in which a business operates (for example, by impacting a government's climate policy), or can leverage similar claims against corporates themselves.

KEY ACTIONS FOR BOARDS, AND KEY QUESTIONS TO CONSIDER

What legal risks does our company face due to climate change? (2)

How are **climate litigation risks**, and our responses to them, **disclosed** in our annual reports and other disclosure documents?

Climate litigation risks may be material, and boards should make enquiries as to whether these should be included in regulatory filings. **Boilerplate statements** on the uncertainty of climate litigation risk generally or the outcome or specific litigation **may no longer be adequate** if and when relevant cases progress through key hurdles.

For boards of companies considering initiating climate litigation seeking compensation or challenging climate-related regulation: is this contrary to our publicly-stated sustainability goals or strategy to manage climate-related risks? Is bringing this litigation in the best interests of the company over the long-term?

Boards companies seeking to challenge government action on climate change should consider carefully whether they risk incurring reputational damage, or are increasing the risk of stakeholder engagement or greenwashing litigation.

Do we face legal risks for greenwashing?

Are our sustainability disclosures, targets and statements **reasonable**, **transparent**, **defensible** and **sufficiently ambitious**?

Boards should seek confirmation from delegated management teams that the company's targets and other sustainability commitments – both in regulatory filings and consumer-facing marketing – are transparent, substantiated and reasonable, and that the assumptions underlying those targets are disclosed.

Is there an actual or perceived **gap** between our **stated net-zero commitments and policies on climate change or sustainability**, and the emissions of our operations or financial activities, capital expenditure, or business model that could create **legal risks for greenwashing**?

Boards should also make enquiries of sustainability committees and management as to the extent to which the actions of the company are inconsistent with any sustainability commitments or net-zero targets.
Boards should put in place a process to reduce **material discrepancies between the two**, or, where a non-sustainable action is decided as being in the best interests of the company, ensure that this decision is properly made, recorded correctly, and, where material, discussed in the company's disclosures.

KEY ACTIONS FOR BOARDS, AND KEY QUESTIONS TO CONSIDER

Are we governing our company to best manage the risks and opportunities of climate change in a way that reduces our legal risks?

Are we **actively considering how climate change**, the energy transition and foreseeable changes in climate policy around the world **could affect the company**, its operations and value chains, and its business model?

Directors are under duties to act in the best interests of the company with due care, skill and diligence. **Given the regulatory and social focus on climate change, boards should consider climate change risks and opportunities in order to best fulfil these duties** and reduce the risk of shareholder engagement or litigation.

Have we articulated a climate-aligned corporate purpose, and are our actions consistent with this?

Stakeholder governance is increasingly being recognised as good governance. Boards should consider how their company's material stakeholders have been identified (including the environment and communities likely to be disproportionately affected by the impacts of climate change), and how to bring these voices into the boardroom. Boards should ensure that their performance metrics and compensation are aligned with the company's wider purpose and sustainability goals.

What systems are in place to report to the board and externally? Does the company have **adequate systems and skills in place to manage these risks**, and is the reporting system adequate for board and external scrutiny?

Boards should put in place management and reporting systems to ensure that relevant climate-related risks are escalated appropriately.

Have we integrated risk of climate litigation into our enterprise risk management and scenario analysis to determine how our exposure to physical and transition risks translates to legal risks over our investment and planning horizons and into the future?

The physical and transition risks of climate change may increase the legal risks faced by a company. Boards should make enquiries of management as to whether legal risk has been integrated into scenario analysis, including identifying how physical and transition risk may increase exposure to legal risk.

FOR MORE DETAIL, PLEASE SEE THE CLIMATE LITIGATION: BRIEFING NOTE FOR BOARDS HERE.

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Important note

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CLIMATE CHANGE DISCLOSURES: WHAT BOARD DIRECTORS NEED TO KNOW

The [Commonwealth Climate and Law Initiative] (CCLI) has partnered with the [Climate Governance Initiative] (CGI) to prepare this Quarterly Update for the CGI network. This is the second update of a series of quarterly learning materials on climate change as it relates to boards' duties and governance.

KEY POINTS ON CLIMATE-RELATED DISCLOSURES

- Climate disclosure obligations have become increasingly common in recent years, and are now required on at least a 'comply or explain' basis in many jurisdictions.
- Companies and directors could face legal risks if they were to make misleading disclosures or omissions relating to climate or sustainability issues.
- Financial entities are often subject to additional requirements to report on the risks and impacts of financial products and services, in particular those marketed as 'green'.
- Directors should ensure that their climate and/or sustainability disclosures are well-supported and, importantly, reflected in the company's financial statements, as directors are responsible for signing-off on company accounts.
- Directors should ensure that they consider material climate and sustainability risks when deciding on courses of action for the company, in particular actions which may seem to impact or be affected by those risks.

WHY DO CLIMATE AND SUSTAINABILITY DISCLOSURE REQUIREMENTS MATTER FOR DIRECTORS?

Following the publication of the Taskforce on Climate-related Financial Disclosure's recommendations in 2017, **national governments and financial and securities regulators have increased their expectations and requirements for companies to disclose sustainability- and/or climate-related information to the market**.

These include **narrative disclosures on material information** to be included in **regulatory filings**, such as the front end of annual reports, prospectus, initial listing disclosures, and the notes to financial statements. In jurisdictions where information disclosed to the market outside regulatory filings is subject to legal rules, climate-related information may be required in such disclosures.

Some jurisdictions have introduced **specific regulations** requiring the disclosure of climate- and/or sustainability-related disclosures. In other jurisdictions, regulators have demonstrated an increasing understanding that climate- and/or sustainability-related risks can be financially material, and therefore fall within existing reporting obligations or accounting standards.

These developments are relevant for directors because of: **(i) their primary role in assuring annual reports and financial statements**; and **(ii) their role in ensuring that their company has systems in place to meet disclosure requirements and are not misleading**.

OVERVIEW OF DISCLOSURE OBLIGATIONS BY JURISDICTION

Different jurisdictions have advanced their disclosure requirements on these issues to different extents. Some jurisdictions (such as New Zealand and the UK) have passed **statutory regulations** requiring all listed, and certain non-listed, companies to disclose climate-related risks. Others (such as India, Malaysia, and Japan) have issued **regulatory requirements** for listed companies to disclose such climate and/or sustainability risks on a 'comply or explain' basis.

In many jurisdictions, **regulators have published guidance stating that they perceive climate risks to be potentially financially material**, and setting their expectations that companies disclose such risks where necessary. Financial institutions, in particular those offering ESG-focused products, are a particular focus of disclosure requirements.

The content of these disclosures varies between jurisdictions. However, commonly required disclosures include, for example:

- Material climate- or sustainability-related risks and opportunities;
- The governance and strategy regarding those risks, including the process for identifying, managing and monitoring such risks and opportunities;
- Scope 1 (those produced by the company), scope 2 (those associated with energy purchased by the company) and (generally, where material) scope 3 (those for which the company is indirectly responsible in its value chain) greenhouse gas (GHG) emissions; and
- Sustainability and climate targets and metrics.

Financial entities are generally subject to increased disclosure requirements with respect to climate or sustainability issues. For example, in the EU, asset managers are required to disclose sustainability information, including their policies on integrating sustainability factors into their investment decisions, and the impacts of financial products on environmental issues.

Many of the requirements issued to date have used international guidelines, such as the TCFD recommendations or SASB standards, to benchmark their requirements. **Developments in international reporting requirements may help to address differences between reporting requirements: in particular, the publication of the IFRS' International Sustainability Standards Board (ISSB) draft standards**. These require disclosures which are generally aligned with the recommendations of the TCFD, including narrative disclosures on governance, strategy, risk management, and metrics and targets, but also cover sustainability risks more broadly. The draft standards include requirements relating to governance and financial statements which may, if brought into effect, impact directors' duties to their company and to sign off on company accounts. These draft standards form part of the ISSB's actions to deliver a global baseline of standards, which have been welcomed by the G7, G20, IOSCO and the FSB.

The Annex to this update contains an overview of the specific climate- and sustainability-related disclosure requirements put in place to date in the majority of the jurisdictions in which a Climate Governance Initiative Chapter has been established as of September 2022.

POTENTIAL LEGAL RISKS FOR COMPANIES AND BOARD MEMBERS (1)

The specific legal risks which a company faces via its climate and/or sustainability disclosures will vary between jurisdictions. This section summarises these common legal risks for many jurisdictions at a high level.

Misleading disclosures: companies can be liable for misleading disclosures or omissions in prospectuses or as part of their continuing disclosure obligations, either under statutory regimes (either under specific statutes relating to corporate disclosures, or under more general regimes relating to fraud or misrepresentation) or under common law (in applicable jurisdictions).

When investors' judgment in deciding whether to invest in the company was impacted by a particular statement or set of statements, they may be able to claim damages from the company if the statement was false, the company's directors (and in some cases senior executives) knew or ought to have known that the statement was false, and the investors suffer losses as a result.

Companies should therefore be careful not to disclose or fail to disclose climate- or sustainability-related risks without a reasonable belief in the truth of the statement; in particular in light of investors' contemporary interest in climate and sustainability issues.

Claims by shareholders testing the veracity of companies' statements in their annual reports and other regulated communications have already been brought. In Australia, shareholders have brought claims against an oil and gas company (ACCR v Santos: alleging that the net-zero strategy set out in the company's 2020 annual report, investor briefings and climate reports was likely to mislead investors) and a bank (Abrahams v Commonwealth Bank of Australia: obtaining disclosure of board minutes and other internal documents to assess how investments in oil and gas projects were compatible with the bank's stated environmental policies).

Regulatory enforcement: Securities regulators are becoming increasingly active in relation to climate and sustainability disclosures. The Australian Securities and Information Commission (ASIC) has announced that it will focus on climate disclosures by listed companies, and has intervened regarding a mining company's disclosures on its net-zero targets. The US Securities and Exchange Commission (SEC) has announced a Climate and ESG Task Force which will examine misstatements in disclosures. The Securities Commission Malaysia has similarly indicated that it will focus on sustainability disclosures in the coming years.

Enforcement authorities in the US have already investigated and fined oil and gas companies for misleading shareholders as to climate risks. Notable examples include the New York Attorney General's investigation of Peabody Energy in relation to 'cherry picking' of the International Energy Agency (IEA) projections to support disclosures, and their investigation of ExxonMobil (which was dismissed, but similar subject matter is the subject of ongoing shareholder litigation: Ramirez v ExxonMobil).

Financial institutions, in particular asset managers, appear to have become a particular focus of ESG-related regulatory investigations. In May 2021, the SEC charged BNY Mellon Investment Adviser for misstatements and omissions about ESG considerations for which the company paid $1.5 million, has announced an investigation into Deutsche Bank's asset management arm DWS regarding its use of sustainable investment criteria (the German Federal Financial Supervisory Authority has raided DWS' offices in a related investigation), and is also undertaking a similar investigation into Goldman Sachs.

POTENTIAL LEGAL RISKS FOR COMPANIES AND BOARD MEMBERS (2)

Claims against directors: In some jurisdictions, **board members and executive officers may be held liable for misleading disclosures**; claims in this regard can variously be brought by regulators, the company, and in some cases shareholders. Directors could also be directly exposed to civil liability for misrepresentation.

In many jurisdictions, directors are responsible for signing-off on the company's accounts, stating that they give a 'true and fair' view of the company's financial position, which reflects the requirements of IFRS, as well as many jurisdictions' generally accepted accounting principles (GAAP). **Directors should therefore ensure that, where necessary, company accounts reflect material climate and sustainability risks**.

Various regulatory bodies and standard setters, including the International Financial Reporting Standards (IFRS), and the UK Financial Reporting Council (FRC), have indicated that narrative disclosures, including those on climate, should be reflected in the financial statements where material. Similar requirements are contained in the International Sustainability Standards Boards (ISSB) draft standards, and the US SEC has proposed that climate disclosures should specifically be included in financial statements. In some jurisdictions, courts have ruled that, despite being permitted to consult external experts, the contents of the company's financial statements remain the ultimate responsibility of the directors.

In cases of dishonesty or recklessness, directors may find themselves exposed to criminal liability; for example for fraud, making false statements, or for creating false accounts.

In some cases, where the company has suffered loss as a result of a misleading disclosure, the company may seek to bring a claim against a director alleging that the director **has breached their fiduciary duty to the company in allowing the disclosure to be made**.

Concerns and protections: Boards may be comforted that there are generally high bars to liability for misleading disclosures (generally, an intention to deceive, or recklessness as to whether an investor would be deceived, on the part of the director is required).

If directors are careful and considered in their company's disclosures, they should minimise this risk. Directors should therefore ensure that their disclosures accurately represent a robust, good-faith process of assessment that applies the best evidence reasonably available at the relevant time: and where those disclosures are appropriately caveated or qualified.

While boards may be concerned about the difficulties in identifying climate risks and the uncertainty in doing so, they should be aware that statutory regimes often contain 'safe harbour' provisions in many jurisdictions which limit liability for forward-looking statements (which will commonly include climate- and sustainability-related targets). For example, the US SEC's proposed climate rules, propose a specific 'safe harbour' provision in respect of Scope 3 emissions disclosures in recognition of the difficulties in measuring these.

WHAT IS THE EFFECT ON DIRECTORS' DUTIES?

Directors are subject to a fiduciary duty to act in the best interests of the company; this generally includes responsibility for risk management processes.

Disclosure requirements do not directly affect directors' management of the company; however, given the disclosure requirements regarding climate, and in some cases sustainability, risks and the processes for managing and governing those risks, directors ought to ensure that they consider those risks in order to fulfil their duties to the company.

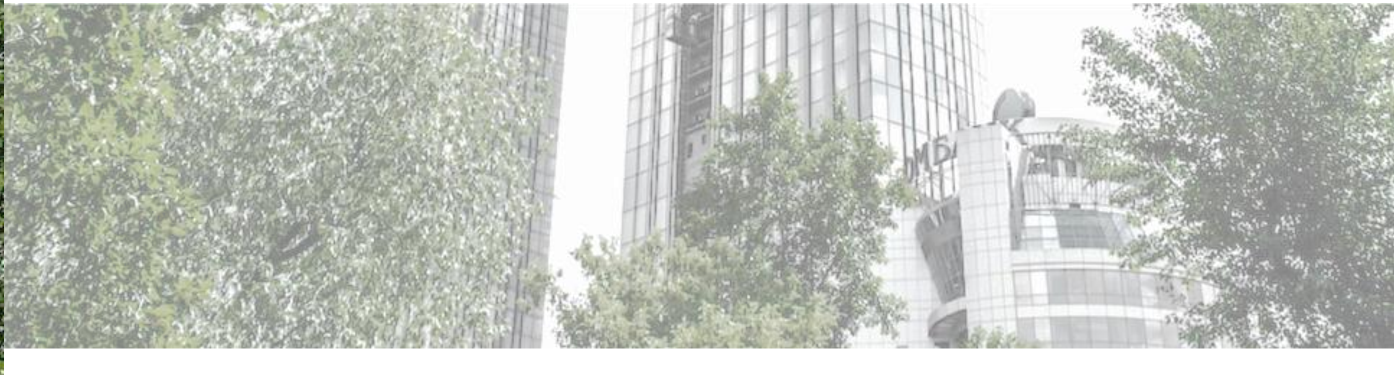
For example, the EU Non-Financial Reporting Directive requires companies to disclose the principal environmental risks facing the business, and how the company manages those risks. Given the board's responsibility for the risk management process, this effectively requires boards to put in place a system to identify and manage such risks. Similarly, the Singapore Exchange (SGX)'s Listing Rules require companies to issue a sustainability report, which must include a statement by the board that it has considered sustainability issues in the company's business and strategy, determined the material ESG factors and overseen the management and monitoring of the material ESG factors.

Therefore, while disclosure requirements do not directly alter directors' duties to the company, they affect how those duties will be interpreted. **If a company were to disclose material climate risks facing the company, and the board were not to consider those risks in its decision-making, the board could expose itself to litigation risk for failing to act in the best interests of the company.**

Additionally, as discussed above, directors could face allegations of not having acted in the best interests of the company if they made misleading disclosures, or failed to put in place a system for the company to comply with disclosure requirements.

Directors are also generally subject to a duty to act with due care, skill and diligence; whether they have done so is determined on an objective basis, with the court deciding if they have done what a 'reasonable director' would have done. **In the context of increased requirements and expectations to disclose climate and sustainability risks, a court may be more likely to find that a reasonable director would have considered such risks.**

Board members should consider material climate and sustainability risks when deciding on courses of action for the company, in particular actions which may seem to impact or be affected by those risks.



WHAT SHOULD BOARD MEMBERS DO?

In order to ensure that they are meeting their duties and their company's legal obligations, and reduce litigation risk, board members should:

- Ensure that financial statements for which they are responsible give a 'true and fair' view of the company's financial position, including reflecting any material climate or sustainability risks identified in the company's narrative disclosures.
- Have a clear understanding of how climate and sustainability material risks and their financial implications have been assessed and calculated. Such risks should be reviewed by external auditors, and included in Key Audit Matters where applicable.
- Ask questions of any delegated functions responsible for sustainability, as well as business functions generally, to check that any net-zero or other sustainability targets are reasonable, attainable and supported. Question whether assumptions underlying sustainability targets are defensible and in line with what climate science states is required to limit global average temperature increase to 1.5°C.
- Raise queries as to the verification of disclosed metrics and quantified emissions, and ensure that the methodologies for identifying and reporting emissions are reasonable and transparent. For value-chain emissions, consider whether contractual controls requiring suppliers to adopt similar standards would be appropriate.
- Consult counsel as to specific disclosure requirements and statutory protections for board members, to ensure that they fall within these (if any).

WHAT ABOUT CLIMATE-RELATED OPPORTUNITIES?

As well as disclosing risks, companies are often required to disclose climate- and/or sustainability-related opportunities. Disclosure of opportunities may provide a competitive advantage for companies which are operating in a more sustainable manner. Opportunities could include:

- New, high demand products and services;
- Increased asset values and lower costs arising from increased energy efficiencies;
- Greater access to capital, in particular in light of the high demand for sustainable investments and climate pledges by large investor groups.

As disclosure requirements increasingly come into effect – such as, for example, the incoming EU requirement for companies to disclose the proportion of their economic and investment activities (including future revenues) aligned with climate change mitigation and adaptation (under the Corporate Sustainability Reporting Directive) – the differences between companies' approach to sustainable business are likely to become increasingly transparent, and the opportunities to gain an advantage from capitalising on a more sustainable approach may increase.

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ANNEX

This annex summarises the disclosure rules regarding the climate and sustainability related financial and non-financial risks, in force and proposed, in the majority of jurisdictions in which the CGI has a Chapter. Please note that it does not include regulations requiring the disclosure purely of emissions or energy consumption where these are separate from risk disclosures. Where an EU jurisdiction has implemented EU disclosure rules only, and has not issued its own separate disclosure requirements or guidance, it has not been included in the Annex. Efforts have been made to ensure that the obligations are accurate as at September 2022, but please note that the summaries should not be taken as fully detailing the disclosure requirements, and professional help should be sought where necessary.

AUSTRALIA	
ASIC Guidance	
Date in force	Guidance (12 August 2019)
Companies in scope	Australian Securities and Investments Commission (ASIC)-regulated entities
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	TCFD
Summary of obligations	ASIC has published guidance on effective disclosures under continuous obligations and in prospectuses. The guidance states that prospectuses may need to contain climate-related risks. Entities may need to disclose climate risk when reporting given the systemic nature of climate risk. The TCFD recommendations are suggested as a possible framework.
Sources	ASIC, Regulatory Guide G228; ASIC, Regulatory Guide 247
ASX Corporate Governance Principles and Listing Rules	
Date in force	1 January 2020 (either on or after depending on commencement of financial year)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	TCFD
Summary of obligations	Any material environmental risks which an ASX-listed company has and "how it manages or intends to manage those risks" should be disclosed by that company. The recommendation "encourage[s] entities to consider" the recommendations of the TCFD when determining and disclosing such risks. Under ASX's listing rules, the adherence of a company to the recommendations must be stated and any explanation must be provided for any divergence (ASX's listing rules, rule 4.10.3). This provides an incentive to follow the recommendations.
Sources	Australian Securities Exchange (ASX) Corporate Governance Council, Corporate Governance Principles and Recommendations, pp. 1-3, recommendation 7.4
ASIC Focus Areas for 30 June 2022 Reporting	
Date in force	Guidance (1 June 2022)
Companies in scope	ASIC-regulated entities
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	TCFD
Summary of obligations	TCFD recommendations endorsed by ASIC in its 2022 recommendations. As such, entities have been specifically guided by the regulator to address these issues this year when reporting.
Sources	ASIC, 22-124MR

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AUSTRALIA (CONTINUED)	
ASIC Guidance	
Date in force	Guidance (28 June 2022)
Companies in scope	All reporting companies
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	ISSB
Summary of obligations	In order to ensure that they are reporting in line with the incoming requirements of the AASB, companies should prepare to produce financial statements in line with the ISSB standards as a minimum.
Sources	Australian Accounting Standards Board, 'Project insights: Developing sustainability-related financial reporting standards in Australia' (28 June 2022)

BRAZIL	
Securities and Exchange Commission Resolution and Rule	
Date in force	2 January 2023
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	TCFD/ISSB/GHG Protocol
Summary of obligations	Public corporations must disclose ESG information including how ESG risks are being managed and a statement on whether the disclosures align with the Sustainable Development Goals, the TCFD and other recommendations.
Sources	Securities and Exchange Commission of Brazil, Resolution 59 and Rule No. 480/09
Central Bank of Brazil Regulation	
Date in force	1 December 2022
Companies in scope	Regulated financial entities
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	A "Report on Social, Environmental and Climate-related Risks and Opportunities" must be provided by financial institutions. Based on TCFD recommendations.
Sources	Central Bank of Brazil, New regulations on social, environmental, and climate-related risk disclosures (15 September 2021)

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CANADA	
Canadian Securities Administration Proposed National Instrument	
Date in force	Proposal
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain/mandatory
International frameworks referenced	TCFD
Summary of obligations	Under the proposal, reporting issuers would be required to disclose emissions (Scope 1-3) unless they explain why they have not done so. Material performance and targets would also need to be disclosed. In addition, the proposal would require reporting issuers to make TCFD-aligned disclosures. In particular: (i) regardless of materiality, governance risks; (ii) material risks pertaining to strategy; (iii) processes for managing risks; and (iv) related metrics.
Sources	Canadian Securities Administrators, National Instrument 51-107 Proposal

CHILE	
Financial Market Commission Rule	
Date in force	2022 financial year for voluntary compliance
Companies in scope	Publicly-listed companies and regulated financial entities
'Comply or explain', voluntary, or mandatory?	Voluntary (becoming mandatory for large corporations from 31 December 2022, and for small corporations from 31 December 2023)
International frameworks referenced	TCFD/SASB/GRI
Summary of obligations	Entities must disclose in annual reports (i) ESG information based on, for example, the work of the Sustainability Accounting Standards Board and the Global Reporting Initiative; (ii) material climate-related risks inclusive of the TCFD's recommended risks; and (iii) sector-specific SASB sustainability information or provide an explanation for why they have not done so.
Sources	Financial Market Commission, General Rule No. 461

EGYPT	
Financial Regulatory Authority Decree	
Date in force	1 January 2022
Companies in scope	Regulated financial entities (excluding banks) and publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	ESG issues must be disclosed in the annual reports of financial institutions (excluding banks) and listed companies. Specific climate financial information relating to, for example, risk management and targets, will have to be disclosed if the entity's total equity or capital is greater than 500m Egyptian pounds. In order to comply with these requirements, entities are to complete two forms which have been provided by the Financial Regulatory Authority. From 1 January 2022, a report must also be produced by listed companies on a quarterly basis detailing the entity's processes in relation to these requirements.
Sources	Financial Regulatory Authority, Board of Directors Decree No. 107

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EUROPEAN UNION	
The Non-Financial Reporting Directive	
Date in force	2018 (entrance into force in Member States domestic legislation may vary)
Companies in scope	Non-financial corporations with 500+ employees and all insurers and banks
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	TCFD
Summary of obligations	The Non-Financial Reporting Directive (NFRD): Entities must disclose, in their management report or in a separate report, information on their corporate activity, including short, medium and long-term impacts of climate change on their business models, and their policies and processes to identify such risks. If the company determines that there is no impact, this must be disclosed and explained. The Commission has provided guidance detailing what the non-financial statement disclosures may cover in line with the TCFD recommendations.
Sources	Directive (EU) 2014/95 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. See also European Commission, Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information (2019)
`The Corporate Sustainability Reporting Directive Proposal	
Date in force	Proposal (1 January 2024 for companies already subject to the non-financial reporting directive, 1 January 2025 for large companies that are not presently subject to the non-financial reporting directive, 1 January 2026 for listed SMEs, small and non-complex credit institutions and captive insurance undertakings)
Companies in scope	All reporting entities (entrance into force is staggered)
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	EFRAG
Summary of obligations	The Corporate Sustainability Reporting Directive (CSRD): The Commission has proposed a directive which would require a larger range of entities to report on environmental issues in accordance with sustainability standards developed by the European Financial Reporting Advisory Group (EFRAG). The required information would need to be externally audited and cover, for example, sustainability opportunities and business plans relating to the Paris Agreement, as well as the percentage of the entity's economic and investment activities (including future revenues) aligned with the Taxonomy Regulation categories (see below).
Sources	Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting See also European Council, 'New rules on corporate sustainability reporting: provisional political agreement between the Council and the European Parliament' (21 June 2022)

EUROPEAN UNION (CONTINUED)	
The Sustainable Finance Disclosure Regulation	
Date in force	10 March 2021 (staggered implementation)
Companies in scope	Regulated financial entities
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	The Sustainable Finance Disclosure Regulation (SFRD) requires financial entities to publish sustainability information, including their policies on integrating sustainability factors into their investment decisions, and the impacts of financial products on the Taxonomy environmental objectives.
Sources	Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector
The Taxonomy Regulation	
Date in force	1 January 2022 (regulation activities and qualitative information for 2021), 1 January 2023 (non-financial entities for 2022) and 1 January 2024 (for 2023)
Companies in scope	-
'Comply or explain', voluntary, or mandatory?	-
International frameworks referenced	-
Summary of obligations	The Taxonomy Regulation does not require disclosures itself, but establishes a framework of environmental objectives (Climate change mitigation and adaptation; the sustainable use and protection of water and marine resources; the transition to a circular economy; pollution prevention and control; and the protection and restoration of biodiversity and ecosystems). Entities subject to other regulations (including the NFRD, SFDR, and the proposed CSRD) must disclose to what extent their economic and investment activities contribute substantially to and do no harm to these environmental objectives.
Sources	Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088
European Central Bank Guidance	
Date in force	Guidance (November 2020)
Companies in scope	EU banks
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	TCFD, ISSB
Summary of obligations	This guidance outlines the European Central Bank's expectations in relation to climate disclosures. These expectations include reporting material information in accordance with TCFD recommendations (as the reporting must follow the 2019 guidelines above) relating to climate risk management, the consideration of climate risk in the context of decision-making and stress testing, for example.
Sources	European Central Bank, Guide on climate-related and environmental risks (November 2020)

FRANCE (ALSO SEE EU)	
Code de Commerce	
Date in force	14 July 2017
Companies in scope	Parent companies with 5,000+ employees across their subsidiaries and head office, with the head office being based in a French jurisdiction, or with 10,000 or more employees across its subsidiaries and in the entity
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	-
Summary of obligations	Requires entities to establish and implement a 'duty of vigilance' plan to identify and prevent severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls. This duty extends to the entities' established suppliers/contractors. Companies must publish the duty of vigilance plan with its annual report.
Sources	Article L.225-105-4 Code de Commerce
French Climate Law	
Date in force	22 August 2021
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	-
Summary of obligations	French Climate Law (clarifying contents of NFRD statement): companies must disclose information including "the direct and indirect greenhouse gas emissions related to transport activities upstream and downstream of the activity and is accompanied by an action plan to reduce these emissions, in particular through the use of rail and waterway modes as well as biofuels with avirtuous energy and carbon balance and electromobility". Failing to do so entitles anyone with a legitimate interest to bring a court action which could result in a fine for the company. Entities with agriculture/forestry-related products must identify related risks in their annual plan under Article L.225-105-4, French Commercial Code (below).
Sources	Law No. 2021-1104 of 22 August 2021

HONG KONG	
HKEX Updates	
Date in force	December 2019
Companies in scope	Publicly-listed Companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	Business-relevant, potential or realised 'significant' climate factors must be disclosed. Guidance has been provided on reporting in line with TCFD recommendations by HKEX.
Sources	HKEX, 'Amendments to the Main Board Listing Rules: Update No.128' (2019); HKEX, 'Amendments to the GEM Listing Rules: Update No.64' (2019)

HONG KONG (CONTINUED)	
HKEX Main Board Listing Rules	
Date in force	1 July 2020
Companies in scope	Publicly-listed Companies
'Comply or explain', voluntary, or mandatory?	Mandatory / Comply or explain (depending on the information)
International frameworks referenced	-
Summary of obligations	Entities must produce an ESG report (either separately or as part of their annual report) each year. The report must cover the board's processes relating to ESG management, review in accordance with related targets, strategy and oversight. In addition, the entities must disclose information on ESG issues including greenhouse gas emissions, employment practices and supply chain management, or explain why it has not done so.
Sources	Rule 13.91; HKEX Main Board Listing Rules
Securities and Futures Commission Fund Manager Code of Conduct and Circular	
Date in force	20 August 2022
Companies in scope	Securities and Futures Commission (SFC)-authorised fund managers (additional expectation for those with assets worth HK$8 billion or more)
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	Requires entities to identify and disclose relevant and material climate-related risks, including its governance arrangement for oversight of climate-related risks, and how it takes climate-related risks into account in its investment and risk management processes. In addition, large funds should take reasonable steps to identify and disclose the scope 1 and 2 emissions associated with the funds' underlying investments, where data is available or can be reasonably estimated.
Sources	SFC, Fund Manager Code of Conduct 4th edition (20 August 2022); SFC, Circular to licensed corporations Management and disclosure of climate-related risks by fund managers (20 August 2021)
Hong Kong Monetary Authority Press Release and Supervisory Policy Manual	
Date in force	Proposal (2025)
Companies in scope	Regulated financial entities
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	HKMA has stated that entities will be required to make disclosures in accordance with TCFD recommendations. HKMA has also set out its expectation that entities should disclose climate risks by mid-2023.
Sources	HKMA, 'Cross-Agency Steering Group Launches its Strategic Plan to Strengthen Hong Kong's Financial Ecosystem to Support a Greener and More Sustainable Future' (17 December 2020). HKMA, 'Supervisory Policy Manual: Climate Risk Management' (20 July 2021)

HONG KONG (CONTINUED)	
Securities and Futures Commission Circular	
Date in force	Guidance (29 June 2021)
Companies in scope	SFC-authorised funds which incorporate ESG factors as their key investment focus
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	-
Summary of obligations	The SFC has issued a circular to ESG funds stating that they should disclose the ESG focus of the fund, their investment strategies, the proportion of allocated assets which are commensurate with that ESG focus and the associated risks.
Sources	SFC, 'Circular to management companies of SFC-authorised unit trusts and mutual funds – ESG funds' (29 June 2021)

INDIA	
SEBI (Issuance and Listing of Non-Convertible Securities) Regulations 2021	
Date in force	2021
Companies in scope	Regulated financial entitled issuing 'green debt securities'
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	-
Summary of obligations	Requires disclosures on sustainability for the issuance of securities with certain aims.
Sources	Reg. 2(q); SEBI (Issuance and Listing of Non-Convertible Securities) Regulations 2021
Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations 2021 and Securities and Exchange Board Circular	
Date in force	FY 2022-2023
Companies in scope	1,000 listed entities with highest market capitalisation
'Comply or explain', voluntary, or mandatory?	Mandatory (for 1,000 publicly-listed companies with highest market capitalisations)
International frameworks referenced	-
Summary of obligations	Business Responsibility and Sustainability Reporting (BRSR) in-scope entities must disclose an overview of their material business conduct and sustainability issues, including risks arising from climate change.
Sources	Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations 2021 Securities and Exchange Board of India, Circular on Business responsibility and sustainability reporting by listed entities, Annexure II: Guidance Note for Business Responsibility & Sustainability Reporting Format (10 May 2021)

IRELAND (ALSO SEE EU)	
Central Bank of Ireland Guidance	
Date in force	Guidance (February 2021)
Companies in scope	Regulated financial entities
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	-
Summary of obligations	The Central Bank of Ireland has published guidance identifying climate change risks as systemic risks on which regulated firms should report.
Sources	Central Bank of Ireland, Securities Markets Risk Outlook Report 2021: Conduct Risks in an Uncertain World (February 2021)

JAPAN	
Financial Instruments and Exchange Act and Financial Services Agency, Cabinet Ordinance	
Date in force	January 2019
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	-
Summary of obligations	Requires disclosure in annual reports of material risks. In 2019, the FSA published amendments to the Cabinet Ordinance on Disclosure of Corporate Affairs to include forward-looking risks, reflecting the structure of the TCFD recommendations (although these are not explicitly referenced).
Sources	Financial Instruments and Exchange Act (Act No. 25 of 1948, 金融商品取引法昭和23年法律第25号); Financial Services Agency, Cabinet Ordinance on Disclosure of Corporate Affairs, as revised in January 2019. Also note that all companies preparing annual securities reports may also be required to make climate-related disclosures, according to the FSA.
Tokyo Stock Exchange, Japan's Corporate Governance Code	
Date in force	11 June 2021
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	TCFD
Summary of obligations	The Corporate Governance Code recommends disclosure of climate-related risks in line with the TCFD recommendations: it states that "[c]ompanies should appropriately disclose their initiatives on sustainability when disclosing their management strategies. They should also provide information on investments in human capital and intellectual properties in an understandable and specific manner, while being conscious of the consistency with their own management strategies and issues. In particular, companies listed on the Prime Market should collect and analyze the necessary data on the impact of climate change-related risks and earning opportunities on their business activities and profits, and enhance the quality and quantity of disclosure based on the TCFD recommendations [...]".
Sources	Tokyo Stock Exchange, Japan's Corporate Governance Code (June 2021)

JAPAN (CONTINUED)	
Bank of Japan's Climate Change Strategy	
Date in force	Guidance (16 July 2021)
Companies in scope	Regulated financial entities
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	TCFD
Summary of obligations	Guidance from the Bank of Japan endorsing disclosures in accordance with TCFD recommendations and indicating support for entities disclosing environmental activities.
Sources	Bank of Japan, The Bank of Japan's Strategy on Climate Change (16 July 2021)

MALAYSIA	
Bursa Malaysia Securities Berhad, Main Market Listing Requirements	
Date in force	31 December 2016
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD, SDGs
Summary of obligations	The Bursa Malaysia Listing Requirements also require a Sustainability Statement in annual reports. The Sustainability Reporting Guide 2018 offers guidance on this requirement, including references to the TCFD framework and SDGs. In September 2022, Bursa Malaysia issued amendment to the Sustainability Statement requirements, including (i) introducing climate change-related disclosures in line with the TCFD Recommendations; (ii) enhancing disclosure of companies' quantitative information on material sustainability matters; and (iii) requiring a statement on whether the sustainability statement has been internally reviewed and independently assured.
Sources	Chapter 9 Bursa Malaysia Securities Berhad, Main Market Listing Requirements; Practice Note 9, Risk Management and Internal Control, Corporate Governance and Sustainability Statement; Amendments to Bursa Malaysia Securities Berhad Main Market Listing Requirements in relation to Enhanced Sustainability Reporting Framework ("Enhanced Sustainability Disclosures")
Securities Commission Malaysia, Malaysian Code on Corporate Governance and Bursa Malaysia Securities Berhad, Main Market Listing Requirements	
Date in force	28 April 2021
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Apply or explain an alternative
International frameworks referenced	-
Summary of obligations	The Malaysian Code on Corporate Governance requires companies to address sustainability and environmental risks and opportunities, including climate change. The Bursa Malaysia Listing Requirements require entities subject to how the Code is being followed.
Sources	Securities Commission Malaysia, Malaysian Code on Corporate Governance (28 April 2021). Chapters 9 and 15, Bursa Malaysia Securities Berhad, Main Market Listing Requirements

MALAYSIA (CONTINUED)	
Bursa Malaysia Consultation Paper	
Date in force	Proposal (anticipated for financial year following December 2023 or 2024)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	The proposed changes would require sustainability disclosures in accordance with TCFD recommendations, certain sector disclosures, and a disclosure on the extent to which the Sustainability Statement has been subject to external review.
Sources	Bursa Malaysia, Consultation Paper No. 1/2022: Review of the Sustainability Reporting Requirements under the Main Market and ACE Market Listing Requirements (23 March 2022)

NEW ZEALAND	
New Zealand Stock Exchange, Corporate Governance Code; Guidance Note on ESG Disclosures	
Date in force	January 2019
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	GRI, IIRC, UNGC
Summary of obligations	The New Zealand Corporate Governance Code encourages issuers to provide non-financial information, including information on ESG issues. The New Zealand Stock Exchange (NZX) has published a guidance note recommending that issuers disclose in accordance with one of the GRI, IIRC and UN Global Compact frameworks, and covering at least the relevance of ESG factors to the business.
Sources	Recommendation 4.3; New Zealand Stock Exchange, Corporate Governance Code; Guidance Note on ESG Disclosures
Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021	
Date in force	1 January 2023
Companies in scope	Publicly-listed companies and regulated financial entities
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	The External Reporting Board (XRB) will produce TCFD-aligned disclosure standards which entities must disclose in accordance with. This will involve producing climate statements on an annual basis. The XRB's standards are due by December 2022.
Sources	Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021

ANNEX

PHILIPPINES	
Securities and Exchange Commission Code of Corporate Governance for Publicly-Listed Companies and Sustainability Reporting Guidelines for Publicly-Listed Companies	
Date in force	20 November 2016 (with sustainability guidelines issued in February 2019)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	GRI, IIRC, UNGC, TCFD, SASB
Summary of obligations	Entities must report on sustainability matters under the Philippines Code of Governance for Publicly-Listed Companies in an annual sustainability report. The Philippines Securities and Exchange Commission has produced guidance on how companies should seek to disclose in line with common global reporting frameworks, as well as a template for the sustainability report.
Sources	Principle 10; Securities and Exchange Commission, Code of Corporate Governance for Publicly-Listed Companies (Circular No. 19, 20 November 2016); Securities and Exchange Commission, Memorandum Circular No. 4 of 2019: Sustainability Reporting Guidelines for Publicly-Listed Companies (15 February 2019). Such requirements may become mandatory- see Anne Ruth Dela Cruz, 'SEC to make sustainability reporting mandatory by 2023' (Business Mirror, 30 August 2021)

ROMANIA (ALSO SEE EU)	
Bucharest Stock Exchange Code of Corporate Governance	
Date in force	11 September 2015
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	-
Summary of obligations	The Bucharest Stock Exchange (BSE)'s Code of Corporate Governance requires the disclosure of information related to the occurrence of any environmental factor that could significantly affect the functioning or activity of a listed company. Therefore, Romanian companies listed on the stock exchange are obliged to insert within the reports submitted to the BSE a description of any climate risk-related information which can significantly affect the listed company in its business activities.
Sources	BVB, Code of Corporate Governance
Bucharest Stock Exchange ESG Reporting Guidelines	
Date in force	Guidance (April 2022)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	TCFD
Summary of obligations	Recommends ESG disclosures including in relation to the integration of sustainability generally and in the governance context, including the company's plans to ensure that its business model and strategy are compatible with the transition to a low-carbon economy and the goals of the Paris Agreement to limit global warming by 1.5°C.
Sources	BVB, ESG Reporting Guidelines (April 2022)

SINGAPORE	
Singapore Exchange Listing Rules	
Date in force	20 July 2016 (TCFD requirements introduced from 1 January 2022; these will be mandatory for certain industries from 2023 (food, forest products, financial, energy, and agriculture sectors) and 2024 (mandatory for transportation, buildings and materials sectors)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain / mandatory
International frameworks referenced	TCFD
Summary of obligations	Under the Singapore Exchange (SGX) Mainboard Rules, entities must produce sustainability reports on an annual basis or provide an explanation as to why they have not done so. The sustainability report must include material environmental, social and governance factors; climate-related disclosures consistent with the TCFD recommendations; policies, practices and performance; targets; the entity's sustainability reporting framework; and a Board statement and associated governance structure for sustainability practices.
Sources	Rules 711A and 711B; Singapore Exchange (SGX) Listing Rules
Monetary Authority of Singapore Guidance	
Date in force	Guidance (December 2020)
Companies in scope	Insurers, asset managers and banks
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	TCFD
Summary of obligations	The Monetary Authority of Singapore has published guidance setting out its expectations for banks, insurers, asset managers to disclose environmental risks It will be expected that entities will disclose environmental risks from June 2022 at the latest.
Sources	Monetary Authority of Singapore (MAS), 'Guidelines on Environmental Risk Management for Asset Managers' (8 December 2020); MAS, 'Guidelines on Environmental Risk Management for Insurers' (8 December 2020); MAS, 'Guidelines on Environmental Risk Management for Banks' (8 December 2020). In May 2022, MAS published Information Papers on the application of these Guidelines.

SOUTH AFRICA	
King IV Report and Johannesburg Stock Exchange Listing Requirements Service Issue 27	
Date in force	2016
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	-
Summary of obligations	The King IV Report requires value-linked issues to be reported and natural capital is identified as a factor which can produce value. Adherence to this Report must be disclosed by listed entities under the Listing Requirements.
Sources	Institute of Directors South Africa, King IV Report on Corporate Governance for South Africa (2016); Johannesburg Stock Exchange (JSE), Listings Requirements Service Issue 27 [8.63(a)]
Johannesburg Stock Exchange Guidance	
Date in force	Guidance (14 June 2021)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	-
Summary of obligations	The JSE has published guidance for listed companies, recommending that entities disclose information regarding governance, strategy, management and metrics, targets and performance in relation to sustainability-related risks (including climate).
Sources	JSE, JSE Sustainability Disclosure Guidance (June 2022)

ANNEX

SWITZERLAND	
Swiss Financial Market Supervisory Authority Circulars	
Date in force	1 July 2021
Companies in scope	Large publicly-listed companies and banks
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	Entities must provide TCFD-aligned disclosures when reporting.
Sources	Swiss Financial Market Supervisory Authority, Circular 16/1 Disclosure – banks [14.1], Annex 5; Swiss Financial Market Supervisory Authority, Circular 16/2 Disclosure – insurers [13]-[13.7]
Swiss Code of Obligations and Ordinance of 3 December 2021	
Date in force	1 January 2023 (anticipated), for reporting in 2024
Companies in scope	Swiss entities of public interest and controlled companies with a minimum of 500 full-time employees and either a revenue of CHF 40 million for two years or CHF 20 million worth of assets
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	-
Summary of obligations	Requires large Swiss Companies to provide an ESG report, although this is not applicable to entities which face similar requirements in other jurisdictions or are 'controlled'. The requirements are based on EU Directive 2014/95 (see above). Additional requirements are applicable to entities exposed to conflict mineral risks.
Sources	Article 964a-964c CO; Swiss Code of Obligations; Ordinance of 3 December 2021 on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour
Federal Council Ordinance Consultation	
Date in force	1 January 2023 (anticipated), for reporting in 2024
Companies in scope	Large companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	TCFD
Summary of obligations	If implemented, large entities in Switzerland will need to produce TCFD-aligned disclosures. Operates in conjunction with above Swiss Code of Obligations requirements. Failing to comply must result in criminal sanctions.
Sources	Federal Council, Federal Council initiates consultation on ordinance on climate reporting by large companies (30 March 2022)

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TURKEY	
Corporate Governance Communiqué No. II-17.1	
Date in force	October 2020
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	-
Summary of obligations	The Turkish Capital Markets Board has issued a Communiqué stating that entities should disclose information, including the identification of ESG risks and opportunities, and related policies, how the company's corporate strategy is in compliance with ESG policies, risks and opportunities, and the company's sustainability performance, goals and actions.
Sources	Corporate Governance Communiqué No. II-17.1

UNITED KINGDOM	
Financial Conduct Authority Policy Statements PS20/17 and PS21/23	
Date in force	1 January 2021 (1 January 2022 for standard-listed companies)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	TCFD
Summary of obligations	Premium listed companies (and, from 1 January 2022, standard-listed companies) must include a statement as to whether they have made TCFD-consistent disclosures in their annual reports, including their level of exposure to climate-related risks and opportunities and the scope and objectives of their climate-related strategy.
Sources	LR 9.8.6; Policy Statement PS20/17; LR 14.3.27; Policy Statement PS21/23
Financial Conduct Authority Policy Statement PS21/24	
Date in force	1 January 2022 (1 January 2023 for smaller firms)
Companies in scope	UK asset managers (with more than £5bn AUM in TCFD in-scope business), life insurers and FCA-regulated pension providers
'Comply or explain', voluntary, or mandatory?	Comply or explain
International frameworks referenced	TCFD
Summary of obligations	Asset managers, life insurers and FCA-regulated pension providers must produce a TCFD report covering how the firm takes into account climate-related matters in managing or advising on investments. Firms must also produce product-level disclosures, including scope 1, 2 and 3 greenhouse gas emissions, total carbon emissions, total carbon footprint, and weighted average carbon intensity; historical annual calculations of the metrics.
Sources	COLL 4.5.7; 4.5.8; 8.3.5A; 15.5; Policy Statement PS21/24

UNITED KINGDOM (CONTINUED)	
The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022	
Date in force	6 April 2022
Companies in scope	Publicly-listed companies; banks; authorised insurance companies; high-turnover companies (with more than £500m turnover per year)
'Comply or explain', voluntary, or mandatory?	Mandatory (although companies can opt-out of specific disclosures if directors deem that it is not necessary for an understanding of the company's business, and explain why)
International frameworks referenced	-
Summary of obligations	In-scope companies must include, as part of their strategic report, climate-related information including: (i) descriptions of governance arrangements and processes for identifying, assessing and managing climate-related risks and opportunities; (ii) descriptions of principal climate-related risks and opportunities, and their actual and potential impacts on the company's business; (iii) scenario-analysis and the impacts on the company under different climate-related scenarios; and (iv) key targets, metrics and key performance indicators.
Sources	The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022

UNITED STATES	
Securities and Exchange Commission Guidance	
Date in force	2010
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Voluntary
International frameworks referenced	-
Summary of obligations	This guidance stated that all entities should consider climate matters and indicated how entities may incorporate climate risks into existing reporting obligations.
Sources	Securities and Exchange Commission (SEC), Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106; 34-61469; FR-82 (8 February 2010)
Securities and Exchange Commission Proposal	
Date in force	Proposal (FY 2023)
Companies in scope	Publicly-listed companies
'Comply or explain', voluntary, or mandatory?	Mandatory
International frameworks referenced	TCFD
Summary of obligations	The US SEC has issued proposed rules requiring in-scope companies to report climate change-related information, including oversight and management of climate-related risks and impacts and the process for identifying these, the impact of climate-related events on the line items of financial statements, attested greenhouse gas emissions data for scope 1 and 2 emissions (and if material, scope 3 emissions, which would not be subject to attestation), and climate-related targets, metrics and transition plans, if any.
Sources	SEC, Public Input Welcome on Climate Change Disclosures (15 March 2021); SEC, 'The Enhancement and Standardization of Climate-Related Disclosures for Investors' (21 March 2022)

CLIMATE CHANGE AND ESG-RELATED RISKS IN VALUE CHAINS: WHAT BOARD DIRECTORS NEED TO KNOW

The Commonwealth Climate and Law Initiative (CCLI) has partnered with the Climate Governance Initiative (CGI) to prepare this Quarterly Update for the CGI network. This is the third update of a series of quarterly learning materials on climate change as it relates to boards' duties and governance.

KEY POINTS ON VALUE CHAIN DUE DILIGENCE

- New legislation and existing guidance require and encourage companies to carry out due diligence over their value chains to identify and mitigate human rights, and in most cases, environmental issues.
- A 'value chain' is a broad concept. While the definition varies between legislation, it can encompass the company itself, its subsidiaries and direct and indirect suppliers, and the actions and processes used by these entities to bring a product to the end consumer and dispose of it.
- Most existing and proposed due diligence laws do not explicitly refer to climate change impacts, but relate to climate-adjacent issues such as deforestation, environmental damage and human rights, which may bring climate change impacts into scope.
- The proposed EU Corporate Sustainability Due Diligence Directive goes further, requiring in-scope companies to ensure that their business model and strategy are compatible with the transition to a sustainable economy and the limiting of global warming to 1.5°C in line with the Paris Agreement, and requiring board members to take climate change into account when acting in the best interests of the company.
- UK courts have signaled that they may take a broad approach to parent company liability, which may be persuasive in other common law jurisdictions and have implications for multinationals with UK-incorporated parents.
- Companies disclosing scope 3 emissions targets should consider what measures they can take to ensure these may be encouraged or enforced throughout their value chains.

WHAT IS A VALUE CHAIN?

The definition of a company's 'value chain' or 'supply chain' differs between relevant laws.

Generally, it includes the **activities used to produce the company's products or services and provide them to its customers**; in some cases, it includes the disposal of the product as well. **It is not limited to the activities by the company itself, but includes activities of other companies which are "established business relations"**.

A company's value chain can therefore encompass the actions of **the company itself, its subsidiaries and its direct and indirect suppliers**. A company's value chain can extend over **multiple jurisdictions and to entities outside its corporate group** – therefore, while legislation and litigation to date in this area have focused on European companies, these are likely to have knock-on effects for companies globally.

Additionally, the legislation passed and proposed to date is designed to have effect on **companies doing business in the jurisdiction in question** (rather than just companies incorporated in that jurisdiction).

EXISTING GUIDELINES AND LEGISLATION

OECD GUIDELINES

The Organisation for Economic Co-operation and Development (**OECD**) has issued guidelines on responsible business conduct, which cover due diligence on a company's 'business partners' (a broad definition of 'value chain'). The OECD has also issued specific guidelines on due diligence. Multinational companies are encouraged to identify, assess and mitigate actual and potential adverse impacts associated with their operations, products or services, disclose how those impacts are dealt with, and provide for remediation where appropriate.

These guidelines are not legally binding, but **constitute best practice** for multinational organisations. Many of the existing value chain due diligence laws have been based on or require adherence to the OECD guidelines.

The OECD guidelines are subject to a dispute resolution process through National Contact Points (**NCPs**). These are non-judicial organisations which mediate disputes relating to a company's adherence to the OECD guidelines. Complainants have used NCPs to bring non-judicial claims against companies in relation to climate impacts. For example, an NGO brought a complaint against three large Japanese financial entities financing Vietnamese coal power stations, alleging that required consultation had not been correctly carried out and that the projects' emissions intensity was unacceptably high in comparison with international standards (*Market Forces v. SMBC, MUFG and Mizuho*).

On 13 September 2022, the Japanese Government published the Guidelines on Respecting Human Rights in Responsible Supply Chains. The Guidelines do not directly reference the environment or climate change, but cover all internationally-recognised human rights (which can encompass climate change impacts – see below). As with the OECD Guidelines, complaints are to be resolved through Japan's NCP.

EXISTING LEGISLATION

Several jurisdictions have laws in force requiring companies to conduct ESG due diligence on their value chains.

The laws in force to date do not explicitly require due diligence on climate risks and impacts, but focus on human rights breaches and environmental harms such as deforestation. Climate-related claims brought so far have been under the French 'duty of vigilance' law, which refers broadly to human rights and environmental damage. In contrast, the German law and the proposed EU Corporate Sustainability Due Diligence Directive (**CSDDD**) refer to specific international human rights and environmental treaties, generally those referring to labour rights and biodiversity loss.

However, given the impacts of climate change on human rights and the environment more broadly, **companies should consider climate impacts as part of their value chain due diligence in order to avoid attracting litigation risk**.

The UN Human Rights Council has identified the impacts of climate change on human rights related to food, health and vulnerable people, and will set up a panel discussion on different themes related to climate change and human rights in 2023; it is possible that these impacts could lead to climate-related impacts being brought within the scope of legislation focused on human rights.

Board members should be alert to the evolving legal requirements surrounding human rights and due diligence, and ensure they seek periodic advice from in-house and outside counsel regarding potential legislative changes, litigation and judicial precedents that could alter the effective standard of practice.

Summaries of existing legislation can be found in **Annex I**, and a diagram showing proposed and existing laws can be found on page 4.

PROPOSED LEGISLATION AND WIDER IMPACTS

PROPOSED LEGISLATION

Several other laws relating to value chain due diligence have been proposed, or are pending enactment. These vary in scope, but generally incorporate climate impacts to a similar or greater extent.

Most notably, the EU Commission has proposed the CSDDD, which if enacted would introduce a duty for certain companies to conduct value chain due diligence to identify and mitigate human rights and environmental issues, as well as publicly communicate how they are fulfilling these obligations. Climate change issues are not explicitly within the scope of the proposed due diligence, but are incorporated into directors' duties by other provisions in the CSDDD.

The directive, as proposed, would have direct impacts on directors' duties, making directors of these companies responsible for putting in place and overseeing their companies' due diligence policies and related actions. The CSDDD also clarifies the scope of directors' duty to act in the best interest of their companies, stating that **directors must take into account the consequences of their decisions for sustainability matters, including climate change and human rights, in the short, medium and long term.** More information on directors' duties and climate change is available in our **Global Primer**.

Member States are also required to ensure that companies covered by the proposed Directive shall adopt a plan to ensure that their business model and strategy are compatible with the transition to a sustainable economy and the limiting of global warming to 1.5°C in line with the Paris Agreement.

Summaries of proposed legislation can be found in **Annex II**, and a diagram showing proposed and existing laws can be found on page 4.

VALUE CHAIN IMPACTS

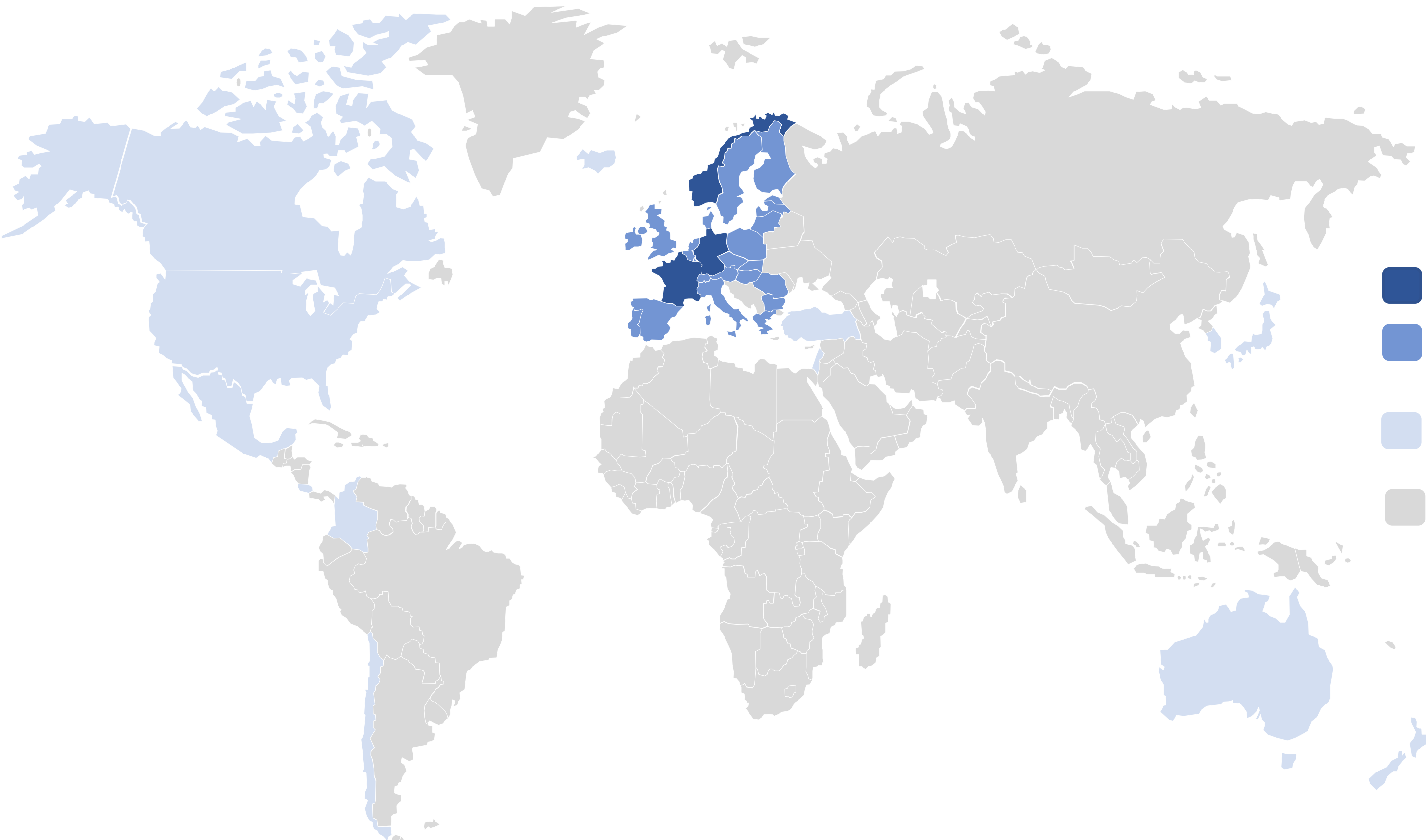
The laws, both as proposed and as currently in effect, have a number of extra-territorial effects, including:

- Application to companies which are **not incorporated** in the country, but which **do business** in that country. This means that a company incorporated outside the EU but which does business in the EU could be required to meet the requirements of the CSDDD.
- Requiring companies to conduct due diligence on **companies in their value chain, which can extend beyond national borders**. This applies to operations outside the jurisdictional reach of the legislation – for example, under the proposed CSDDD an EU company would have to conduct due diligence on operations of companies supplying to it around the globe.

  This may lead to companies within the value chain of companies which are subject to these laws being required to respond to requests for information, or complete self-declaration forms regarding their compliance with legislation, and put in place their own systems to acquire and verify relevant information.

  The proposed US Federal Supplier Climate Risks and Resilience Rule demonstrates a slightly different approach; rather than putting obligations on parent companies, it would require Federal contractors receiving more than US$50m in annual contracts to disclose their scope 1, 2 and some scope 3 emissions, as well as their climate risks and emissions reductions targets. This approach puts the onus on companies in the supply chains directly, but is likely to require similar types of information gathering and reporting to other supply chain due diligence legislation.

EXISTING AND PROPOSED LEGISLATION



Value chain due diligence law in effect

Value chain due diligence law proposed / to be fully enacted

OECD member country – guidelines constitute best practice

Guidelines/laws not directly in force. However, may come within value chain of a company in a jurisdiction in which legislation is in force. Investor expectations may still require value chain due diligence and compliance with human rights across value chain

OTHER EXPOSURES TO VALUE CHAIN ACTIONS

PARENT COMPANY LIABILITY

Generally, companies are not liable for actions of their subsidiaries. However, there are some exceptions to this rule.

Firstly, parent companies can, in rare cases, be held liable for the actions of their subsidiaries when the subsidiary is acting on behalf of the parent company to the extent that it is not carrying on its own business; or where the subsidiary is only being used to protect the parent company from liability.

Secondly, in some jurisdictions, a parent company can be held liable for the actions of its subsidiaries if it **controls, supervises or advises on the management of the subsidiaries' operations so that it would be fair, just and reasonable to find that the parent company owes a duty of care to parties affected by its subsidiaries' actions**. Two recent UK Supreme Court cases (*Okpabi v Shell* and *Vedanta v Lungowe*) have emphasised this point.

Courts are also taking novel approaches to interpreting and addressing group-wide harms. For example, in the well-publicised case of *Milieudefensie v Shell*, against the Shell group parent company Royal Dutch Shell (**RDS**) the court found that as a result of the CO_2 emissions of the Shell group (rather than RDS), certain Dutch citizens would suffer harm. As a result, the court ordered RDS to reduce the CO_2 emissions of its group by 45% by the end of 2030, relative to 2019 levels.

Board directors **should ensure that management has put in place appropriate policies to minimise the risk of harm occurring to third parties due to the actions of their subsidiaries.**

SCOPE 3 EMISSIONS DISCLOSURES

Scope 3 emissions are indirect greenhouse gas emissions that occur in a company's value chain, including both upstream and downstream emissions.

Companies may increasingly be required to report on their scope 3 emissions. For example, the UK listing rules require in-scope companies to state whether they have complied with the recommendations of the Task Force on Climate-related Financial Disclosures (**TCFD**), which in turn require reporting scope 3 emissions where material. The Swiss Financial Market Supervisory Authority also requires certain financial institutions to report in alignment with the TCFD recommendations. Further information on current and upcoming TCFD disclosures is available in the TCFD's 2022 status update.

Similarly, the US Securities and Exchange Commission (**SEC**)'s current proposal for climate information reporting would require scope 3 emissions disclosures if material, or if they were the subject of an emissions reduction target by the company.

While measuring and disclosing scope 3 emissions is likely to require estimates, as recognised by the TCFD, companies are increasingly doing so, as well as setting targets relating to scope 3 emissions. Generally, companies are likely to be protected from litigation risk where their scope 3 emissions estimates are reasonable and supported.

Since scope 3 emissions are produced by entities in companies' value chains, companies should consider how to improve information on their scope 3 emissions. Guidance by the World Economic Forum, Science Based Targets Initiative and the Carbon Disclosure Project discusses how corporate buyers can influence change at the required scale and speed through value chain engagement. Companies may wish to support their scope 3 targets by utilising **contractual mechanisms** in their supply chains. Companies which have done so include UK bank NatWest and telecommunications company Vodafone.

ILLUSTRATION OF VALUE CHAIN DUE DILIGENCE LEGISLATION

UK Furniture Trader Plc (**UKFT**) is a UK-incorporated publicly listed company. It buys furniture products from its French-incorporated subsidiary France Furniture Trader SARL (**FFT**) and from an independent company in Turkey Turkey Timber Importers Ltd (**TTI**).

FFT and TTI buy timber from Brazilian supplier Brazil Forestry SRL (**BF**).

UKFT sells products to consumers in the EU.

This diagram provides an illustration of how some value chain due diligence laws may operate in practice. It assumes that: UKFT meets all the relevant thresholds to be subject to the laws; that several laws which are still to be enacted or fully enacted have been; and makes assumptions about the content of enacting regulations.

UKFT's value chain includes **UKFT**, **FFT**, **TTI** and **BF**, and the actions of those companies.

UKFT will be subject to:

- **Environment Act 2021** – since **UKFT** purchases and sells timber products, it will be required to put in place a due diligence system to identify and assess risks that land ownership laws were not complied with in relation to the timber production. **UKFT** must therefore check that **BF** is legally sourcing timber.
- **UK tort law** – under UK tort law, **UKFT** can be liable for harms caused by its overseas subsidiaries (**FFT**) if **UKFT** has set policies applying to **FFT** in respect of the part of **FFT's** business which caused the harm (e.g. if **UKFT** put in place a policy for disposal of waste timber, and **FFT's** disposal of timber caused a fire, **UKFT** could be held liable).
- **EU Deforestation-free Directive** – **UKFT** sells timber products into the EU. **UKFT** will therefore be required to collect information and carry out risk assessments as to whether **BF's** timber comes from land which has been deforested since 31 December 2020. (Additionally, this Directive proposes due diligence regarding compliance with local laws, similarly to the UK Environment Act 2021).
- **EU CSDDD** – **UKFT** sells timber products into the EU. **UKFT** will therefore be required to conduct value chain due diligence – on activities by **FFT**, **TTI** and **BFS**, in relation to its sales to **EU consumers**, and in relation to the disposal of its products – to identify and mitigate human rights and environmental issues.
- **French Due Diligence Law** – **FFT** is a French company, and is subject to French laws. Therefore, as **FFT's** parent company, **UKFT** will therefore required to establish and publish a vigilance plan to identify and prevent severe violations of human rights, serious bodily injury and environmental damage resulting from the activities of **UKFT**, **FFT**, **TTI** and **BF**.

LITIGATION RISK AND ACTION

LITIGATION RISK

To date, litigation in relation to value chain due diligence legislation has been brought under the French due diligence law:

- A claim has been brought against energy company Total alleging that its mandatory report on risks (including human rights risks) since it did not consider climate change-related impacts on human rights (*Notre Affaire à Tous v Total*).
- A claim has also been brought against supermarket chain Casino regarding their alleged failure to report on human rights and environmental risks arising from deforestation in their value chain (*Envol Vert v Casino*).
- Most recently, three French NGOs have written to BNP Paribas threatening legal action, arguing that the 'duty of vigilance' requires identification and mitigation of climate-related risks arising from investment and financing, such as providing finance to fossil fuel companies.

This may indicate that **similar claims could be brought under other value chain legislation**.

In addition, board members should be alert to the risk of litigation as a result of the actions of their subsidiaries, or as discussed in a previous **update**, the risk of litigation for misleading investors in relation to scope 3 emissions disclosures.

WHAT SHOULD BOARD MEMBERS DO?

In order to ensure that their company's legal obligations are met, and reduce litigation risk, board members should:

- Enquire from in-house or external legal teams as to applicable value chain due diligence requirements for their entire business (including externally to the corporate group).
- Ensure that management has a system in place to identify environmental and human rights risks within the company's value chain. Ensure that systems are put in place to mitigate such risks and impacts and ensure legal compliance, such as contractual controls.
- Consider measures to ensure that disclosures and other public statements made by the company which relate to issues within the company's value chain are supported and reasonable.
- Ensure that group-wide policies about minimising the human rights or environmental impacts of business activities are free from errors which may lead to harm to third parties.

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Important note

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ANNEX I – LEGISLATION IN FORCE

These annexes set out current and proposed, or not yet in force, value chain due diligence legislation relating to climate and sustainability issues. Companies should be aware that other legislation, not directly related to climate, may also require due diligence; such as the conflicts minerals regulations.

France - Due Diligence Law (Law no. 2017-399 of March 27, 2017 relating to the duty of care of parent companies and ordering companies)	
Impact(s) in scope	**Human rights, environmental harm, bodily harm**
Due diligence requirement	**Identify and mitigate risks in value chain** Companies are required to establish and publish a plan to identify and prevent severe violations of human rights, serious bodily injury and environmental damage resulting from their own direct activities, including from the activities of the companies they control, as well as indirectly from the activities of the subcontractors and suppliers with which they have an established commercial relationship.
Application	French companies with > 5,000 employees (direct and indirect) International companies with > 10,000 employees (direct and indirect) From March 2017
Germany – Act on Corporate Due Diligence Obligations in Supply Chains	
Impact(s) in scope	**Human rights, environmental harm** In-scope human rights impacts are focused on labour. Similarly, environmental harms relate to the production or unsafe disposal of hazardous wastes. However, the Act prohibits any unlawful taking of land, forest or waters, which may include illegal deforestation. It also prohibits causing air pollution which harms the health of a person; it is possible that, interpreted broadly, this could include greenhouse gas emissions.
Due diligence requirement	**Identify and mitigate risks in supply chains** Companies are required to establish a risk management system to identify and mitigate risks of impacts to human rights or the environment, designate a responsible person, set out preventative measures, take remedial action and implement due diligence obligations in respect of indirect suppliers.
Application	German and international companies with >3,000 employees in Germany (decreasing to >1,000 employees in Germany from 1 January 2024) From 1 January 2023
Norway – Transparency Act 2022	
Impact(s) in scope	**Human rights (labour)** The definition of 'human rights' in the act is defined by reference to a non-exhaustive list of international treaties; while those referenced explicitly, and the purpose of the Act, are focused on labour conditions, commentators have suggested that environmental and climate impacts may be included in later amendments to the Act.
Due diligence requirement	**Identify and mitigate risks in supply chain** Companies are required to carry out due diligence in accordance with OECD Guidelines; this includes identifying and assessing actual and potential adverse impacts on in-scope human rights and decent working conditions, and taking measures to mitigate such impacts.
Application	Norwegian companies and international companies with >NOK70m in revenue; >NOK35m net assets; or >50 employees From 1 July 2022

ANNEX II - PROPOSED LEGISLATION (1)

Austria – Motion – Supply Chain Due Diligence	
Impact(s) in scope	**Human rights, labour rights, environmental harm, climate impacts** The motion refers to UN Guiding Principles on Business and Human Rights, the OECD Guidelines, and relevant environmental and climate standards (as yet undefined).
Due diligence requirement	**Identify and mitigate risks in value chain** It is proposed that in-scope companies: carry out due diligence at least annually; publish a progress report annually; conduct risk analysis; and conduct follow-up measures to stop and prevent adverse impacts in its entire global supply chain, own operations, subsidiaries, and subcontractors.
Application	Austrian and international companies doing business in Austria, which meet as yet unspecified criteria.
Belgium – Proposal on Duty of Vigilance	
Impact(s) in scope	**Human rights, labour rights, environmental harm**
Due diligence requirement	**Identify and mitigate risks in value chain** The duty of vigilance requires companies to provide mechanisms that allow, on an ongoing basis, identify, prevent, stop, minimize, and to remedy any potential and/or actual violation, human rights, labor rights and standards environmental issues throughout their supply chains, value; this obligation also applies to their subsidiaries.
Application	Belgian and international companies doing business in Belgium, which meet as yet unspecified criteria.
Finland – Proposed legislation on human rights due diligence (See government memorandum dated 12 April 2022)	
Impact(s) in scope	**Human rights, environmental harm** Proposed in-scope human rights impacts are focused on labour. Similarly, proposed environmental harms relate to the production or unsafe disposal of hazardous wastes.
Due diligence requirement	**Identify and mitigate risks in value chain** In-scope companies are proposed to be required to identify, prevent and mitigate adverse human rights and environmental impacts across their value chain.
Application	To be determined.
EU - Proposal for a regulation on deforestation-free products (adopted by Parliament)	
Impact(s) in scope	Focuses on certain **commodities** (cattle, cocoa, coffee, oil palm, soya and wood) and their supply chains. It is proposed that pigmeat, sheep and goats, poultry, maize and rubber, as well as charcoal and printed paper products are also included. It is proposed that these commodities are to be prohibited from being sold in the EU unless they are deforestation-free (i.e., they have not been produced using land which has been deforested since 31 December 2020, or, in the case of timber, has not led to forest degradation), and have been produced in compliance with local laws.
Due diligence requirement	Companies dealing with those commodities are required to collect information and carry out risk assessments regarding whether the relevant commodities meet those requirements.
Application	Companies dealing in specified commodities.

ANNEX II - PROPOSED LEGISLATION (2)

EU - Corporate Sustainability Due Diligence Directive	
Impact(s) in scope	**Human rights, environmental harms** These are defined by reference to a set of international conventions, and are broad in scope.
Due diligence requirement	**Identify and mitigate risks in value chain** In-scope companies must conduct value chain due diligence to identify and mitigate human rights and environmental issues, as well as publicly communicate how they are fulfilling these obligations. Climate change issues are not currently explicitly within the scope of the proposed due diligence, but are incorporated into directors' duties by other provisions in the CSDDD.
Application	EU companies, and international companies doing business in the EU, with over 500 employees and EUR150m turnover EU companies, and international companies doing business in the EU, with over 250 employees and EUR40m turnover in the textiles, agriculture, forestry (and related industries), and mineral extraction and processing industries.
Netherlands - Bill on Responsible and Sustainable International Business Conduct to the Dutch House of Representatives	
Impact(s) in scope	**Human rights, labour rights, environmental harm, climate impacts** The motion refers to UN Guiding Principles on Business and Human Rights, the OECD Guidelines, and relevant environmental and climate standards (as yet undefined).
Due diligence requirement	**Identify and mitigate risks in value chain** The Bill proposes that in-scope companies must carry out due diligence in their value chain, and those that know or reasonably suspect that the activities of their supply chains may have adverse impacts on human rights or the environment must take actions to mitigate and prevent those impacts. Entities must also produce a plan to mitigate adverse climate impacts, including objectives of reducing greenhouse gas emissions by 55% by 2030.
Application	Dutch companies, and international companies doing business in the Netherlands, with over 250 employees and EUR40m turnover
UK - Environment Act 2021 (Schedule 17) (Note: The relevant provisions, including the list of in-scope commodities, require enactment through regulations, which as at December 2022, have not yet been passed.)	
Impact(s) in scope	**Deforestation** Organisations are prohibited from using 'forest risk commodities' which includes commodities produced by a plant, animal or other living organisms, which are not produced in accordance with local laws.
Due diligence requirement	**Legal compliance in supply chain** Organisations using these commodities will be required to put in place a supply chain due diligence system to identify information about that commodity, and assess and mitigate the risk that relevant local laws were not complied with in relation to that commodity.
Application	UK and international companies which meet as yet unspecified criteria.

Climate Governance Initiative

Commonwealth Climate and Law Initiative

BIODIVERSITY AS A MATERIAL FINANCIAL RISK: WHAT BOARD DIRECTORS NEED TO KNOW

The Commonwealth Climate and Law Initiative (CCLI) has partnered with the Climate Governance Initiative (CGI) to prepare this Quarterly Update for the CGI network. This is the fourth update of a series of quarterly learning materials on climate change as it relates to boards' duties and governance.

This update draws out the key points of the CCLI report: Biodiversity Risk: Legal Implications for Companies and their Directors, where further details on this subject can be found.

BIODIVERSITY - WHY SHOULD DIRECTORS CARE?

Biodiversity - the variability among living organisms - is being lost at a rate 100 to 1,000 times higher than that of the past million years. This poses **significant risk to economic activities and financial assets**, which depend on biodiversity. It may also create **opportunities for businesses to be part of the transition to a 'nature-positive' economy**.

It is imperative that boards understand all of the indirect, but very real, **implications of biodiversity loss for their business**. For example, compromised access to key feedstocks, exposure to chronic or extreme environmental damage, customer boycotts and moratoria, punitive trade and regulatory constraints, litigation, pressure from investors or premature termination of permits.

Failure to consider biodiversity risks and opportunities in governance and disclosure may constitute a **breach of directors' duties.**

Following a short refresher on the relevance of biodiversity and the applicable elements of directors' duties, the final page includes **questions for boards** to engage with management.

This update explores:

- The relationship between biodiversity and companies.
- How ecosystem services support many sectors of the economy.
- The indirect nature of many companies' interface with biodiversity through value chains.
- Changes to the standards of materiality used in assessing biodiversity risks and opportunities.
- Market, social, regulatory and legal context that influences biodiversity risk and opportunity assessment.
- Examples of how directors could breach their duties if they fail to consider biodiversity risks and opportunities appropriately
- Biodiversity litigation risk.

HOW BIODIVERSITY LOSS AFFECTS COMPANIES

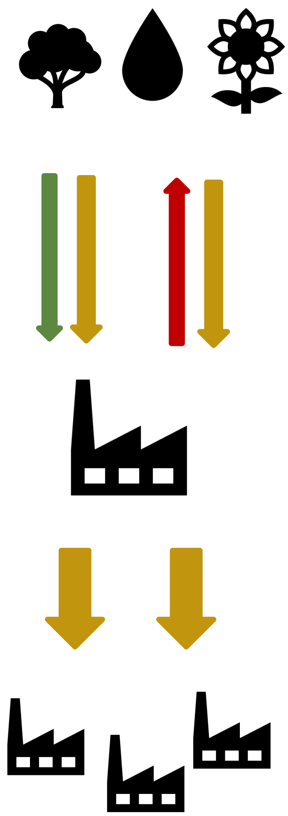
There is international consensus on the financial and systemic materiality of biodiversity risk, including statements by the Network for Greening the Financial System, the UN Principles for Responsible Investment, the Taskforce on Nature-related Financial Disclosures (**TNFD**), the World Economic Forum (**WEF**), the Organisation for Economic Co-operation and Development, governments and national banks (see page 14 of the CCLI report for details on central banks).

Biodiversity underpins '**ecosystem services**', such as replenishing stocks of renewable natural resources, pollination and water purification.

Companies **depend on** ecosystem services to produce their goods and services.

This gives rise to **risks and opportunities** to the company. Loss of ecosystem services, the ability to utilise those services, or the ability to protect and improve those services can affect business, including through loss or creation of income streams and brand and reputational consequences.

These **risks and opportunities** can flow through supply chains and across multiple sectors, impacting companies which are not directly dependent on ecosystem services.



Companies can also be responsible for significant **impacts** on biodiversity.

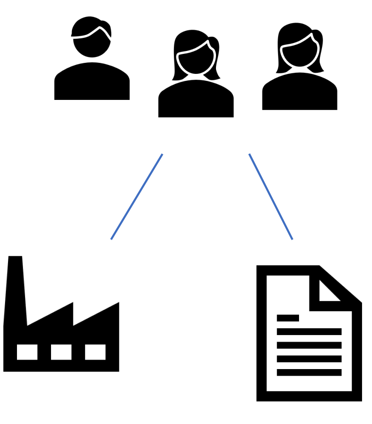
These can be negative impacts that drive biodiversity loss, or 'nature positive' impacts that protect and restore biodiversity.

This also gives rise to **risks and opportunities** to the company.

These can be:

direct (where the impact affects an ecosystem service on which the company depends or improves the company's prospects through better ecosystem services); or

indirect (where the impact does not directly affect the company, but gives rise to reputational risk or opportunity, or legal risk).



Boards are required to consider material risks and opportunities as part of their **duties** to their company. These duties sit in the context of increasing discussion of the transition to a 'nature-positive' economy (see page 5).

Disclosure of material **risks and opportunities** facing the company (a.k.a. *"outside-in"* impacts) is required.

Under some disclosure frameworks, companies may be required to disclose both *"outside-in"* and *"inside-out"* impacts i.e. both:

- **risks or opportunities** that are financially material to the company within a standard financial planning horizon; and
- **impacts of** the company on biodiversity, even where such impacts do not translate into risks or opportunities that will directly affect the company's financials within such a standard time period.

BIODIVERSITY AND ECOSYSTEM SERVICES

The functioning of the global economy and the actors within it depend on the services supplied by healthy ecosystems, known as **'ecosystem services'.**

According to the World Economic Forum, **US$44 trillion** of economic value (over half of global GDP) is moderately or highly dependent on ecosystem services. **Biodiversity underpins ecosystem services**.

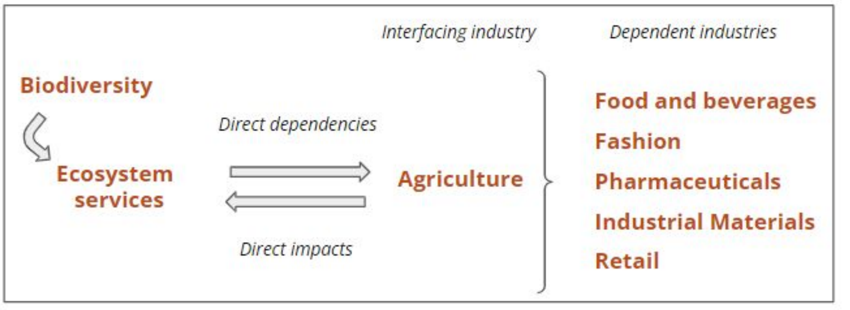
Ecosystem services can be categorised as provisioning, regulating or cultural services. See below for examples of some sectors that they directly underpin.

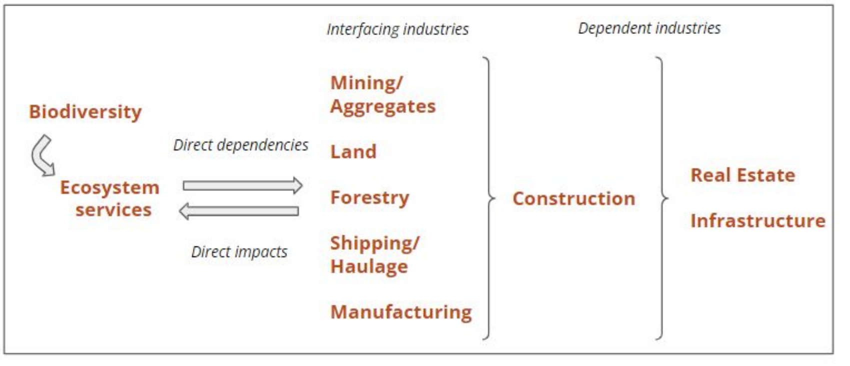
Ecosystem service	*Relevant sector (non-exhaustive examples)*
Provisioning ecosystem services provide materials and energy for products.	
Water supply	Food and beverages, agriculture, paper, construction and mining
Genetic material	Agriculture, forestry and pharmaceuticals
Biomass provisioning	Energy
Other provisioning services (food, fibre… etc.)	Fashion, retail, fisheries, aviation, automobile, industrials, forestry and pharmaceuticals
Regulating ecosystem services regulate and maintain ecosystem processes, supporting industries which rely on the stability of those services	
Pollination	Agriculture, fashion, food and beverages
Soil and sediment retention	Agriculture, fashion, food and beverages
Water flow regulation	Construction and real estate
Solid waste remediation, soil quality regulation	Agriculture, construction, real estate, mining
Water purification	Food and beverages, agriculture and healthcare
Flood mitigation	Construction and real estate
Air filtration	Construction, real estate and healthcare
Nursery population and habitat maintenance	Fisheries and tourism
Local climate regulation	Agriculture, food and beverages, fashion and tourism
Biological control	Agriculture, food and beverages, fashion and healthcare
Global climate regulation, rainfall pattern regulation and storm mitigation	Agriculture, construction, real estate, oil and gas and insurance
Cultural ecosystem services provide non-material benefits, e.g. spiritual, recreation, well-being	
Recreation-related or visual amenity services	Tourism and entertainment
Education, scientific and research services	Education and science
Spiritual, artistic, symbolic and cultural services	Education, cultural, media, tourism

COMPANIES' DEPENDENCIES AND IMPACTS ON BIODIVERSITY

Many companies have **direct or indirect dependencies** on biodiversity through their use of ecosystem services or through their value chain. Companies can be responsible for significant **impacts** on biodiversity, including including by their: use of land and sea space; use of organisms (e.g. for raw materials); contributions to climate change; pollution; and by contributing to the invasion of alien species ([the 5 main **drivers of biodiversity loss**]).

These dependencies and risks are not limited to companies which are directly using ecosystem services, but can have broad impacts through value chains.





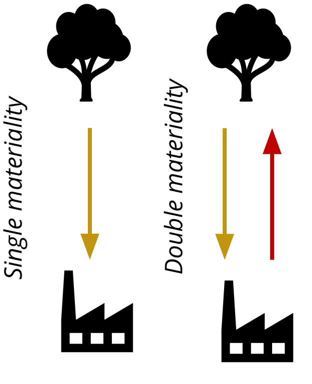
ASSESSMENT AND DISCLOSURE OF BIODIVERSITY RISKS AND OPPORTUNITIES

Companies' **dependencies** on biodiversity can create **risks to and opportunities for** the company, for example where biodiversity loss may affect the supply of goods or income generation.

A company's **impacts** on biodiversity can create **risks and opportunities**, either by affecting ecosystem services on which the company depends or by negatively affecting other parties, creating potential reputational and/or legal risks.

Generally, companies are required to disclose **risks to** their business **that meet the classic definition of financial materiality**. However, under emerging and existing disclosure frameworks, this may be changing.

The traditional approach to materiality, known as 'single materiality', considers the **risks posed to** a company (i.e. *"outside-in"*) within a planning horizon that is considered material to financial valuations.



Some disclosure frameworks adopt a 'double materiality approach', as adopted by the EU Non-Financial Reporting Directive and the proposed TNFD framework. 'Double materiality' requires companies to disclose both **risks posed to** and **impacts caused by** the company.

Therefore, companies' biodiversity **impacts** that do not create any foreseeable and material risks or opportunities **to the company** could still fall within directors' governance and disclosure practices. This is an open question that will require directors to use business judgement.

DIRECTORS' DUTIES OF LOYALTY AND CARE - CONTEXT

Generally, directors' duties require acting with **care and loyalty** toward their companies. Though expressed differently across jurisdictions, these duties are exercised in strategic planning, oversight of foreseeable and material risks, and attesting to the accuracy of disclosure and financial reporting. The law commonly **assesses the standard of directors' care and loyalty by reference to the evolving market, social, regulatory and legal context.** The term 'nature positive' is gaining traction. **Recent developments** indicate that discharging directors' duties may entail consideration of biodiversity:

- **Proposed** and enacted **environmental due diligence legislation** around the world is likely to cascade information requests through value chains. This has major implications not just for directly affected companies incorporated or operating in the territories where such legislation is passed but through its cascading effect, for companies outside those territories. It may also influence **global best practice**. See Quarterly Update 3: Value Chain Due Diligence.
- **Courts** are considering **biodiversity-related cases** against companies. See page 7 below.
- The **Global Biodiversity Framework** (sometimes referred to as the 'Paris Agreement for Nature') adopted at the fifteenth conference of the parties to the UN Convention on Biological Diversity in December 2022 (**COP15**) **includes indicative targets relevant to companies**, which could, if translated into government policy or legislation, create risks for companies. In **Target 15** governments committed to implement measures to ensure that **large and transnational businesses and financial institutions assess and disclose their risks, dependencies and impacts on biodiversity** along value chains and portfolios.
- The anticipated frameworks of the Taskforce on Nature-related Financial Disclosures (**TNFD**) and the International Sustainability Standards Board (**ISSB**) may lead to companies being obliged to make **biodiversity risk disclosures in non-financial statements**. The International Accounting Standards Board (**IASB**) has indicated companies should also disclose material emerging environmental risks (e.g. biodiversity risks) in **financial statements.**
- Existing law requires the disclosure of 'material' information (i.e. information which would affect an investor's decision to invest); therefore, investors' attention to biodiversity may affect duties of disclosing companies. Investor frameworks indicate **a growing appetite by the world's biggest investors for managing biodiversity risk**, which signals that **investors deem biodiversity issues to be material**. For example, the UN Principles for Responsible Investment, the Finance for Biodiversity Pledge and Nature Action 100. If disclosure of biodiversity risk becomes market practice, it could raise the general standards of care and loyalty not only for directors of disclosing companies but for directors of companies in jurisdictions or sectors where their peers are reporting, by broadening the scope of what is considered 'reasonable' for a director in similar positions.
- In addition to biodiversity risk disclosure requirements, investors may request companies to set **science-based targets for nature** or disclose **biodiversity-related lobbying** activities.
- Developments in natural assets, impact investing and natural capital accounting are bringing **biodiversity into the financial mainstream, recognising its intrinsic value**. This indicates a general direction of travel rather than any imminent new requirements for companies.
- Legal recognition of the **'rights of nature'**, in which natural entities are granted legal status similar to a company or person, presents an emerging legal risk with **future potential to accelerate biodiversity litigation against companies**. This risk is limited to companies operating (including through value chains or subsidiaries) in specific areas where such rights are relevant (areas within over 30 countries defined through local constitutions, statutes or court decisions), who will need to assess whether company activities might breach such rights.

DIRECTORS' DUTIES OF LOYALTY AND CARE - POTENTIAL BREACH

Directors could face the **risk of liability** for failures to consider biodiversity risks, opportunities and impacts, where this breaches the duties of care and loyalty.

Biodiversity risk does not just include physical risks and opportunities (e.g. in raw materials supply chain) and legal risks (e.g. liability for the company's impacts) but also includes transition risks posed by policy, regulatory, investor and customer responses to biodiversity loss (e.g. import bans or anti-deforestation laws).

The standard to be met by directors will depend on their company's jurisdiction and operational context. Biodiversity risks and opportunities may be of higher relevance in jurisdictions with:

- robust frameworks for directors' duties;
- nature-related disclosure obligations soon to be introduced;
- high awareness of wholesale and retail buyers who may elect to avoid products known to be associated with negative biodiversity impacts;
- significant biodiversity or climate-related litigation (see page 6 below); or
- regulators or national banks actively considering biodiversity risks. For example, studies by central banks in the Netherlands, Malaysia, France and Brazil have found their national financial sectors to have high levels of exposure to dependence on biodiversity.

Illustrative examples of developments in Australia, Canada, India, South Africa and the UK can be found in the CCLI report. These type of developments can be found in many jurisdictions globally.

In industries with higher biodiversity risk and opportunity exposure, consideration of biodiversity may already be included within directors' legal duties. Companies in, or linked by value chain to, the agricultural, construction or food sectors may have higher risk and opportunity exposure.

It is possible that a director **may breach their duties** by failing to act in good faith or with reasonable prudence in considering biodiversity risks and opportunities, including by failing to:

- consider and govern for foreseeable and material biodiversity risks, for example in **strategy and oversight**, or in the **approval of specific projects or acquisitions**, especially where the company operates in a high-risk sector;
- consider in good faith, or by wilfully disregarding, a material biodiversity risk in **strategic decision-making** where that risk was evident;
- adequately embed biodiversity risk into **management processes,** or failing to **monitor operations**, resulting in a failure to keep informed of risks or problems;
- critically evaluate or obtain **independent review of advice** in relation to biodiversity risk;
- **consider opportunities** for the company to adapt in a timely manner to the transition to a **'nature-positive' economy**, including opportunities to create value from biodiversity or new business models;
- **act in accordance with their assessment of risk**, if that decision was one which no reasonable director would have made; or
- **prevent** the company **from making misleading disclosures** in relation to dependencies, impacts, risks or opportunities.

LITIGATION RISK

There are multiple examples of cases around the world against governments that indicate increasing appetite of litigants for biodiversity claims. This includes the US, Turkey, France, Ecuador, Australia, Argentina, Colombia, China, Costa Rica, Tanzania and the Philippines.

Biodiversity-related litigation is being brought against **companies**. Claims brought to date generally relate to disclosure obligations, or duties to manage subsidiaries or value chain partners:

- In Australia a potential claim against ANZ Bank may soon be filed on the grounds that the Corporations Act requires its directors' report to disclose that biodiversity loss represents a material risk.
- In the US, investors have filed a securities class action against wood pellet company Enviva and its directors, including allegations that Enviva misrepresented the environmental sustainability of its wood pellets and its sourcing practices are negatively impacting forest biodiversity.
- A 2021 case against the French supermarket chain Casino alleged that Casino's yearly due diligence plans failed to detail the environmental and human rights harms caused by the supply of cattle from deforested areas to Casino's Brazilian subsidiary.
- Cases in the UK, the Netherlands and Canada indicate that courts will not preliminarily strike out claims against parent companies for conduct of foreign subsidiaries. In the UK this includes claims by victims of environmental harms located in Zambia, Nigeria and Brazil. Although substantive judgments in these cases are pending and some of these cases deal with alleged human rights abuses, the same legal principles could allow for lawsuits against parent companies for the impacts of their subsidiaries in biodiversity-rich regions.

While no biodiversity-related cases have yet been filed alleging breaches of directors' duties, cases filed against directors for mismanagement of climate risk indicate the potential for similar biodiversity claims. For example, a shareholder has brought a derivative action against Shell's board of directors in the UK over alleged mismanagement of material and foreseeable climate risk.

While market context and evolving best practices suggest that the law permits or requires directors to contemplate biodiversity risks and opportunities in fulfilling their duties, failure may not often lead to liability. In certain jurisdictions, there may not be enough evidence to provide liability; in others, there may be difficulties for potential claimants to meet the bar to establish a claim. However, the increasing number of climate-related cases against companies and directors across the world suggest strong potential for similar cases to emerge in relation to biodiversity loss.

Avoidance of liability is a minimum bar, and directors will want to avoid or mitigate reputational issues by aiming for prudent governance informed by best practice. In order to discharge their duties, directors can ensure that risk management processes assess foreseeable biodiversity dependencies and impacts of the company for materiality and measure those that are material. Directors can then include material dependencies, impacts, risk and opportunities within strategy, disclosure and decision-making.

WHAT SHOULD BOARD MEMBERS ASK?

Company directors can use this checklist to help them ensure that they are meeting their duties to the company:

- **To what extent** are biodiversity risks and impacts embedded into my company's **risk management processes**?
- Do I have the appropriate **skills and information** to assess how biodiversity issues could affect my company and my ability to discharge my governance and disclosure obligations? [1]
- What training or information would help the board, executive and management teams **build our capacity**?
- To what extent will this involve **external consultants** and **who will be responsible internally** for reviewing and implementing the advice received?
- Can we follow other companies' practices or join networks to **learn from peers**?
- Is the management team **assessing** the company's **foreseeable biodiversity dependencies and impacts**?
- Is the management team **measuring** the company's **material dependencies and impacts on biodiversity** and **disclosing** them in corporate reports? If not, do we have a plan for them to do this?
- Who in my company is responsible for **following** the development of the **TNFD and ISSB guidance** and building the company's capacity to implement them once final?
- Has, or could, my company set **science-based targets for nature**?
- Does my company have a **strategic biodiversity plan,** based on identified dependencies and impacts specific to the company?
- Does this plan:
  - define the company's **vision, measurable goals, objectives and strategies** to address biodiversity risk; and
  - ensure that the company's **external activities**, including membership of professional associations and voluntary initiatives, align with its goals.

[1] Climate related resources can be applied to biodiversity to help assess this. See 'The climate risk reporting journey: a corporate governance primer' and 'How to Set Up Effective Climate Governance on Corporate Boards'.

https://climate-governance.org/

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