



Primer on Climate Change: Directors' Duties and Disclosure Obligations

In support of the Principles for Effective Climate
Governance
2nd edition, July 2022

Executive Summary

The evolution of our understanding of climate change from an ethical or environmental issue to one that presents foreseeable financial and systemic risks (and opportunities) over short, medium and long-term investment horizons has significantly changed its relevance to the governance of both corporations and investors. This evolution means there are serious implications for the duties of directors and officers, and potential disclosure obligations for companies.

This second edition of the *Primer on Climate Change: Directors' Duties and Disclosure Obligations* provides an overview of contemporary evidence that climate change presents foreseeable, and in many cases material, financial and systemic risks that affect corporations and their investors. It then discusses:

- 1) general climate obligations in the jurisdictions where The Climate Governance Initiative is present through its global network of national Chapters;
- 2) how company law and directors' duties in these jurisdictions require directors to incorporate climate change into their strategies, legal oversight, and supervision of the companies entrusted to their care;
- 3) disclosure obligations; and
- 4) advice to directors.

While legal frameworks vary between jurisdictions, it is generally the case that directors act as fiduciaries of the company in discharging their functions, and owe duties of loyalty and care and diligence to the company.

The content of these duties varies as the factual context in which the directors act changes. A reasonable decision for a director fifty, ten or even five years ago might not look so reasonable today. Understanding these duties in the context of a changing external context is particularly relevant in the case of climate change, where the evidence of climate-related risks and opportunities is becoming ever more apparent, and changes in regulation are gathering momentum such that the likelihood of a disorderly and disruptive transition increases.

To discharge their duties, therefore, directors must integrate climate risks and opportunities into their governance roles.

Similarly, directors are generally subject to duties to disclose material risks facing the company to the company's investors. Climate risks are now understood by regulators and investors as being potentially material financial risks to a company, and therefore directors may need to consider whether they should be disclosed. Additionally, regulatory measures requiring disclosure of climate and other sustainability-related risks are increasingly being put in place by governments and regulators.

Litigation challenging companies' contributions to climate change is becoming a reality in many countries. Over 2,000 cases have been filed as of 31 May 2022, seeking to recoup some of the damage caused by climate change or the costs of adaptation, or to challenge governments' or corporations' actions or failure to act. Challenges to the actions—and inactions—of companies and their directors are starting to emerge, evidenced in stark form by the judgment in the Netherlands on 26 May 2021, ordering Royal Dutch Shell to reduce its CO₂ emissions by 45% from 2019 levels by the end of 2030.

Where directors fail to meet the standards of good governance, they may be exposed to litigation risks themselves. In the UK, an environmental NGO, ClientEarth, has begun the process to bring a claim against the board of Shell, alleging that the board has failed in its duties to act in the best interests of the company and to act with due care, skill and diligence by failing to develop and implement a climate strategy that aligns with the Paris Agreement goals, increasing its risk of stranded assets and having to make write-downs (due to both physical and transition risks).

We have produced this *Primer* for board directors so they can be informed and prudent advocates, encouraging their boards to integrate the issue of climate change issues in the development of their companies' corporate strategy, risk management oversight, governance and disclosure. This, alone, is the most effective thing directors can do to fulfil their obligations to their companies while steering well clear of any personal liability exposure from the potential increase of litigation.

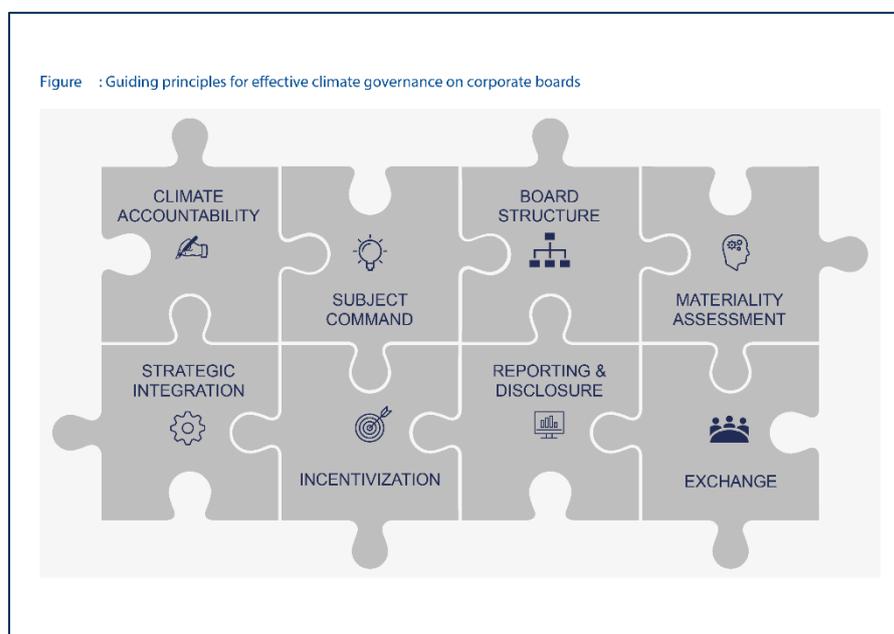
Foreword



Climate change poses an existential risk to humanity, the planet and the global economy on a scale never before seen. This is prompting governments and businesses around the world to take serious action to accelerate the transition to a new economic model that delivers on the commitments taken in the COP21 Paris Agreement signed in 2015. These unprecedented commitments were then further reinforced with the signing of the Glasgow Pact at COP26 in November 2021 following the release of the IPCC's Sixth Assessment Report, which warned of the need to lift ambition even further within the next decade. Doing so means recalibrating all economic activity to achieve net-zero greenhouse gas emissions by 2050 or earlier, with clear interim milestones in 2040 and 2030, consistent with an average temperature rise above the pre-industrial age of no more than 1.5°C.

This new economic model also requires a wholesale shift in how companies are governed: for board directors, it means placing the climate transition at the heart of corporate strategy, ensuring that board decision-making processes properly embed climate considerations, and that boards drive a marked cultural change across their organisations.

However, despite this growing awareness of the scale and urgency of the climate crisis, far too few directors possess the specific interdisciplinary skills necessary to effect this wholesale change of culture and behaviour. It is for this very reason that the [Climate Governance Initiative](#) (CGI) came into being: in 2019, the World Economic Forum unveiled the [Principles for Effective Climate Governance](#) (the CGI Principles), a comprehensive set of guidance principles that lay out best practice for boards and their directors in respect of the climate. To facilitate their promotion and implementation, local CGI "Chapters" have been set up around the world to serve as centres of expertise and venues for directors to exchange with each other as well as with a wide range of subject matter experts.



The first of these eight CGI Principles, entitled 'Climate accountability on boards', concerns an issue that has frequently stood in the way of board directors factoring climate concerns into their decisions: how their legal duties and obligations apply in the context of the now-universal recognition of the extreme threat that climate change poses to the global economy and therefore to individual businesses. Too often, boards are concerned that "*leaving profitable business on the table*", or acting according to "*how we wish the world to be, rather than how it is*" will place them in breach of their legal obligations

to shareholders, or worse, result in litigation or removal. This *Primer*, now in its second edition, tackles precisely this issue, and provides a succinct, easily accessible summary that non-lawyers who serve on boards can readily understand and act on. It will serve as a valuable resource to the global network of CGI Chapters, and enable directors around the world to act in a fully-informed manner on their legal obligations as they confront this historic challenge.

The Climate Governance Initiative currently has 22 active Chapters in Australia, Brazil, Brussels, Canada, Central America and the Caribbean, Chile, France, Germany, Greece, Italy, Ireland, Malaysia, Mexico, the Nordic region, New Zealand, Poland, Romania, Russia, Singapore, Switzerland, the United Kingdom and the United States. Additional Chapters in Europe, Africa, South-East Asia, the Middle East and Latin America are currently in formation, bringing the total to some 29 national and regional members by the end of 2022.

This Primer would not be possible without the deep expertise of the Commonwealth Climate and Law Initiative and our many contributing legal experts, or the support with the World Economic Forum, to which I extend our deepest thanks on behalf of the CGI Governing Board and Secretariat.

Karina Litvack

Chairman, Climate Governance Initiative

Foreword (CCLI and CGI Secretariat)



Since the publication of the first edition of the *Primer on Climate Change: Directors' Duties and Disclosure Obligations* in June 2021, there have been substantial developments in the way in which climate risks, impacts and opportunities are perceived by governments, regulators and debt and equity investors. These have been catalysed by landmark political events such as COP26, but also the increasingly stark impacts of climate change, with floods, fires and heat waves disrupting infrastructure, supply chains and communities.

We are pleased to issue this second edition to the *Primer*, which draws together regulatory developments and authoritative legal analyses on the way in which directors' duties are interpreted. We have worked with local legal experts in each jurisdiction to provide an overview of climate risk perception in each jurisdiction, as well as setting out what this means for directors in terms of their duties and disclosure obligations. We have also provided practical steps to help directors meet their legal responsibilities to their companies and mitigate the risk of potential personal liability.

We have provided updates to each jurisdiction covered in the June 2021 edition of the *Primer*, with the exception of Russia and Ukraine, due to the current geopolitical circumstances, and for which the 2021 sections remain unchanged. We have also included six additional jurisdictions (Egypt, Greece, Ireland, the Philippines, Romania and Turkey) in which new CGI Chapters have recently been established or are currently emerging.

We hope that the *Primer* continues to provide a valuable resource for directors when considering how best to steer their companies through the dynamic and radical uncertainty that climate change and the net-zero transition poses to companies.

Ellie Mulholland

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Table of contents

Executive Summary.....	2
Foreword.....	3
Acknowledgments.....	6
List of abbreviations.....	9
Climate Change as a Financial and Systemic Risk.....	12
Directors' Duties and Climate Change.....	17
Directors' Disclosure Obligations and Climate Change.....	18
Climate Litigation.....	21
Questions to Assist Directors.....	24
Jurisdictional Overviews.....	25
Australia.....	26
Brazil.....	31
Brazil (Portuguese).....	35
Canada.....	39
Canada (French).....	43
Chile.....	48
Chile (Spanish).....	51
Egypt.....	54
European Union.....	57
France.....	63
France (French).....	66
Germany.....	70
Greece.....	75
Hong Kong.....	80
India.....	84
Ireland.....	89
Italy.....	94
Japan.....	96
Malaysia.....	101
Mexico.....	109
Mexico (Spanish).....	115
New Zealand.....	122
Philippines.....	127
Romania.....	132
Russia.....	136
Singapore.....	138
South Africa.....	142
Switzerland.....	145
Switzerland (French).....	149
Switzerland (German).....	154
Turkey.....	159
Turkey (Turkish).....	163
United Kingdom.....	167
United States.....	171
Ukraine.....	176

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About the Climate Governance Initiative

The [Climate Governance Initiative](#) (CGI) mobilises boards of directors around the world to address climate change in their businesses. We do this by developing and supporting national associations that equip their members with the skills and knowledge needed to make climate a boardroom priority, building on the World Economic Forum's [Principles for Effective Climate Governance](#).

About the Commonwealth Climate and Law Initiative

The [Commonwealth Climate and Law Initiative](#) (CCLI) is a legal research and stakeholder engagement initiative founded by the University of Oxford's Smith School of Enterprise and the Environment, ClientEarth and Accounting for Sustainability (A4S). It is a U.K. non-profit organisation funded by environmental philanthropy and research grants.

The CCLI examines the legal basis for directors and trustees to consider, manage, and report on climate change and broader environmental risks, opportunities and impacts, and the circumstances in which there may be liability for failing to do so. It also works to advance knowledge on effective sustainable governance practice.

The CCLI commissions legal opinions from independent experts within a jurisdiction to build an authoritative evidence base on the requirements of company and trust law as it relates to the nature crises. The CCLI works with leading academics, law firms and civil society entities to carry out our own legal research and disseminate the findings. The CCLI's Canadian partner, the Canada Climate Law Initiative, convenes 60 experts to educate Canadian boards on climate change under the Canadian Climate Governance Experts project. They also provide an online knowledge hub for climate risk and sustainable finance resources.

Disclaimer

Any errors or omissions, including differences between linguistic translations, in this primer are the authors' own. The paper reflects the law as at July 2022.

This primer has been prepared for educational purposes only. This document is not, and is not intended to be, legal advice. The Climate Governance Initiative, the Commonwealth Climate and Law Initiative, their partner organisations and collaborators make no representations and provide no warranties in relation to any aspect of this publication, including regarding the liability of any individual person or entity or the advisability of investing in any particular company or investment fund or other vehicle. While we have obtained information believed to be reliable, we shall not be liable for any claims or losses of any nature in connection with information contained in this document, including but not limited to, lost profits or punitive or consequential damages.

The information contained in this Primer is of a general nature and it should not be relied upon as legal advice. Board directors should seek legal advice on the unique circumstances of their company and jurisdiction.

List of abbreviations

A4S	Accounting for Sustainability
AASB	Australian Accounting Standards Board
AFORES	Retirement Funds Administrators of Mexico (<i>Administradoras de Fondos Para el Retiro</i>)
AIFM	Alternative Investment Fund Manager
AktG	Stock Corporation Act
APRA	Australian Prudential Regulation Authority
AR6	Sixth Assessment Report of the IPCC
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
ATHEX	Athens Stock Exchange
AUASB	Auditing and Assurance Standards Board
AUM	Assets under management
BaFin	German Federal Financial Supervisory Authority
BCB	Central Bank of Brazil (<i>Banco Central do Brasil</i>)
BIVA	Mexico's <i>Bolsa Institucional de Valores</i> stock exchange
BNDES	Social and Economic Development Bank of Brazil (<i>Banco Nacional do Desenvolvimento Econômico e Social</i>)
BNM	Bank Negara Malaysia
BoJ	Bank of Japan
BRR	Business Responsibility Reporting
BRSA	Turkey's Banking Regulation and Supervision Agency
BRSR	Business Responsibility and Sustainability Report
BSE	Bucharest Stock Exchange
CAPSA	Canadian Association of Pension Supervisory Authorities
CBE	Central Bank of Egypt
CBES	Climate Biennial Exploratory Scenario
CBI	Central Bank of Ireland
CBRT	Central Bank of the Republic of Turkey
CCLI	Commonwealth Climate and Law Initiative
CDP	Carbon Disclosure Project
CEO	Chief Executive Officer
CGI	Climate Governance Initiative
CMB	Turkey's Capital Markets Board
CMF	Financial Markets Commission of Chile (<i>Comisión para el Mercado Financiero</i>)
CO	Swiss Code of Obligations
CO₂	Carbon Dioxide
COD	Proposal N.2021/0104 or Corporate Sustainability Reporting Directive Proposal, EU
COP21	2015 UNFCCC Climate Change Conference
COP26	2021 UNFCCC Climate Change Conference
CPG 229	Prudential Practice Guide CPG 229 Climate Change Financial Risks
CRE	Climate Reporting Entity
CRISA	Code for Responsible Investing in South Africa
CSA	Canadian Securities Administrators
CSR	German Council for Sustainable Development
CSRD	Corporate Sustainability Reporting Directive
CVM	Securities and Exchange Commission of Brazil (<i>Comissão de Valores Mobiliários</i>)
DCGK	German Corporate Governance Code (<i>Deutscher Corporate Governance Kodex</i>)
DDTrO	Swiss Ordinance of 3 December 2021 on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour
DPEF	French Extra-Financial Performance Report (<i>Déclaration de Performance Extra-Financière</i>)
EBA	European Banking Authority
ECB	European Central Bank
ECHR	European Convention on Human Rights
EFRAG	European Financial Reporting Advisory Group
EQA	Malaysian Environmental Quality Act 1974
ESG	Environmental, social, and corporate governance
ESRS	European sustainability reporting standards
EES	Economic, environmental and social
EESG	Economic, environmental, social and governance
EU	European Union
F4GBM Index	FTSE4Good Bursa Malaysia Index
FCA	Financial Conduct Authority
FDIC	Federal Deposit Insurance Corporation
FIEA	Japanese Financial Instruments and Exchange Act
FINMA	Swiss Financial Market Supervisory Authority
FMA	New Zealand's Financial Markets Authority

FMCA	New Zealand's Financial Markets Conduct Act 2013
FRA	Financial Regulatory Authority
FRC	Financial Reporting Council
FSA	Japan's Financial Services Agency, Romania's Financial Supervisory Authority
FSOC	The U.S. Financial Stability Oversight Council
FTE	Full-time Employee
FY	Financial Year
G7	Group of Seven, an inter-governmental political forum consisting of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States.
GFANZ	Glasgow Financial Alliance for Net Zero
GHG	greenhouse gas
GmbHG	German Act on Limited Liability Companies (<i>Gesetz betreffend die Gesellschaften mit eschränkter Haftung</i>)
GRI	Global Reporting Initiative
HCGC	Hellenic Corporate Governance Code
HCMC	Hellenic Capital Market Commission
HGB	German Commercial Code (<i>Handelsgesetzbuch</i>)
HKEX	Hong Kong Stock Exchange
HKMA	Hong Kong Monetary Authority
HLEG	UN High-Level Expert Group on Net-Zero Pledges
ICDR	Issue of Capital and Disclosure Requirements
IEA	International Energy Agency
IFRS	International Financial Reporting Standards
IFSCA	International Financial Services Centre Authority
IFSC	International Financial Services Centre
IIGCC	Institutional Investors Group on Climate Change
IIRC	International Council on Integrated Reporting
INDC	Intended National Determined Contribution
IORP	Institutions for Occupational Retirement Provision
IOSCO	International Organization of Securities Commissions
IPCC	Intergovernmental Panel on Climate Change
ISSB	International Sustainability Standards Board
ISE B3	Corporate Sustainability Index (<i>Índice de Sustentabilidade Empresarial</i>)
JC3	Joint Committee on Climate Change
KPI	Key performance indicator
MAS	Monetary Authority of Singapore
MCCG	Malaysian Code on Corporate Governance
MD&A	Management discussion and analysis
MESTECC	Ministry of Energy, Science, Technology, Environment and Climate Change
METI	Japan's Ministry of Economy, Trade and Industry
MEWA	Ministry of Environment and Water
NBR	National Bank of Romania
NCMO	Romania's National Committee for Macroprudential Oversight
NDC	Nationally Defined Contribution
NECP	Greece's National Energy and Climate Plan
NFRD	Non-Financial Reporting Directive
NGFS	Network of Central Banks and Supervisors for Greening the Financial System
NGO	Non-Governmental Organisation
NZE2050	The Net-Zero Emissions by 2050 scenario released by the IEA in May 2021
NZX	New Zealand's Exchange
OECD	Organisation for Economic Co-operation and Development
OMB	The U.S. Office of Management and Budget
OSFI	Office of the Superintendent of Financial Institutions
PA	South Africa's Prudential Authority
PACTE	French Action Plan for Business Growth and Transformation (<i>Plan d'Action pour la Croissance et la Transformation des Entreprises</i>)
PACTT	Prudential Authority Climate Think Tank
PLC	publicly-listed company
PRA	Bank of England Prudential Regulation Authority
RBA	Reserve Bank of Australia
RBI	Reserve Bank of India
RBNZ	Reserve Bank of New Zealand
REST	Retail Employees Superannuation Trust
RG	Regulatory Guide
SASB	Sustainability Accounting Standards Board
SC	Securities Commission Malaysia
SC Guidelines	Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries, Securities Commission Malaysia

SEBI	Securities & Exchange Board of India
SEBI LODR Regulations	SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, India
SEBI ICDR Regulations	SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018
SEC	U.S. Securities and Exchange Commission, Securities and Exchange Commission for the Philippines
SFB	Sustainable Finance Committee of German Federal Government
SFC	Hong Kong Securities and Future Commission
SFDR	Sustainable Finance Disclosure Regulation
SGX	Singapore Exchange
SME	Small and medium-sized enterprise
SNB	Swiss National Bank
SOC	Say on Climate
SREP	Supervisory Review and Evaluation Process, EU
SSE	United Nations Sustainable Stock Exchanges
STAGE	Hong Kong Sustainable and Green Exchange
TCC	Turkish Commercial Code
TCFD	Task Force on Climate-related Financial Disclosures
TEG	Technical expert group on sustainable finance, EU
TPR	UK's Pensions Regulator
TPT	Transition Plan Taskforce
TSO	Turkish Standards Institute
UBC	University of British Columbia
UCITS	Undertakings for the Collective Investment in Transferable Securities
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNGC	United Nations Global Compact
WEF	World Economic Forum
WMO	World Meteorological Organisation
XRB	New Zealand's External Reporting Board

Climate Change as a Financial and Systemic Risk

In November 2021, the 197 parties to the Paris Agreement met in Glasgow at the 26th Conference of the Parties (COP26) to the United Nations Framework Convention on Climate Change (UNFCCC). COP26 culminated with the parties reaffirming the goals of the Paris Agreement, in particular resolving to pursue efforts to limit global temperature rise to 1.5°C above pre-industrial levels, in the Glasgow Climate Pact.¹

The Intergovernmental Panel on Climate Change (IPCC) published its Sixth Assessment Report (AR6) in three tranches between August 2021 and April 2022, covering the physical science behind climate change and its impacts, the vulnerabilities of the global system to climate change and the required adaptations, and the actions needed to mitigate its worst impacts, including limiting global temperature rise to 1.5°C² – an increase which the World Meteorological Organisation (WMO) has predicted has a 50% chance of occurring in the next five years.³ Floods (such as that of the Rhine in February 2021), freezes (such as the Texas winter freeze in February 2021) and fires (such as those in British Columbia between June–October 2021) have caused disruption to supply chains,⁴ and analysis has found that increased damages climate-related physical risks have led to increased exposure for insurers.⁵

As the effects of climate change and the actions needed to address them increasingly materialise, the links between climate change and financial risk are becoming increasingly evident and inextricable. Our understanding of climate change has evolved from a purely “ethical issue” or “environmental externality” to an issue that poses foreseeable financial risks and opportunities for companies across short, medium and long-term horizons.

Indeed, the World Economic Forum’s 2022 report on global risks found that that ‘environmental risks are perceived to be the five most critical long-term threats to the world’, with climate action failure perceived to be a critical threat to the world within 2-5 years.⁶ The ‘top three most severe risks’ were ‘extreme weather’, ‘climate action failure’ and ‘biodiversity loss’.⁷

The scale and speed of climate change risks and opportunities in the transition to a zero-carbon economy received heightened attention in May 2021 with the long-anticipated release of the International Energy Agency (IEA)’s first-ever attempt to model a feasible pathway to net-zero GHG emissions by 2050 (NZE2050), and the implications of the NZE2050 scenario for companies in the industry sectors facing either accelerated decline or rapid growth are momentous. The NZE2050 scenario has formed the basis for a number of shareholder resolutions, court cases, and engagements with government bodies.

Companies operating in industries facing structural decline can expect heightened pressure from investors to stress-test their businesses against these new data, and to demonstrate their ability to

¹ UNFCCC, The Glasgow Climate Pact – Key Outcomes from COP26 <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26>>.

² IPCC, Sixth Assessment Report Working Group I: Climate Change 2021 – The Physical Science Basis (6 August 2021) <<https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/>>; IPCC, Sixth Assessment Report Working Group II: Climate Change 2021 – Impacts, Adaptation and Vulnerability (27 February 2022) <<https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/>>; IPCC, Sixth Assessment Report Working Group I: Climate Change 2021 – Mitigation of Climate Change (4 April 2022) <<https://www.ipcc.ch/report/sixth-assessment-report-working-group-3/>>; See also: Intergovernmental Panel on Climate Change (IPCC), *Global warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Geneva, World Meteorological Organization, 2018); IPCC, ‘Climate change widespread, rapid, and intensifying – IPCC’ (9 August 2021); The Nature Conservancy, ‘The Latest IPCC Report: What is it and why does it matter?’ (4 April 2022) www.nature.org/en-us/what-we-do/our-insights/perspectives/ipcc-report-climate-change/. United Nations Climate Change, ‘The Glasgow Climate Pact – Key Outcomes from COP26’, <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgowclimate-pact-key-outcomes-from-cop26>>. See also IPCC, *Global warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Geneva, World Meteorological Organization, 2018).

³ WMO, WMO update: 50:50 chance of global temperature temporarily reaching 1.5°C threshold in next five years (9 May 2022) <<https://public.wmo.int/en/media/press-release/wmo-update-5050-chance-of-global-temperature-temporarily-reaching-15C2%B0c-threshold>>.

⁴ Yale Environment 360, How Climate Change Is Disrupting the Global Supply Chain (10 March 2022) <[⁵ EIOPA, European Insurers’ Exposure to Physical Climate Change Risk \(20 May 2022\) <\[https://www.eiopa.europa.eu/document-library/discussion-paper/discussion-paper-physical-climate-change-risks_en\]\(https://www.eiopa.europa.eu/document-library/discussion-paper/discussion-paper-physical-climate-change-risks_en\)>.](https://e360.yale.edu/features/how-climate-change-is-disrupting-the-global-supply-chain#:~:text=Scientists%20say%20that%20such%20climate,and%20perhaps%20more%20%E2%80%94%20by%202100.></p></div><div data-bbox=)

⁶ World Economic Forum, *The Global risks Report 2022* (17th edn, 2022) 7 <<https://www.weforum.org/reports/global-risks-report-2022/>> .

⁷ *Ibid.*

remain resilient in the face of uncertainty regarding the pace of change, failing which access to capital will continue to suffer headwinds. For directors, this adds yet another factor they must consider in the boardroom when modelling risk and strategic options.

According to the 2017 recommendations of the [Task Force on Climate-related Financial Disclosures](#) (TCFD), climate change is one of the most significant and complex risks facing organisations.⁸ The TCFD recommendations have attracted the support of over 2,600 organisations, which demonstrates reflects the growing consensus among the business, financial and regulatory communities of the financial and systemic risks presented by climate change and of the necessity of embedding climate change in financial risk management, disclosure and supervisory practices.⁹



Figure 1: Climate-related financial risks to entities.
(Source: TCFD Final Recommendations (2017) p. 8)

In 2018, the Bank of England Prudential Regulation Authority explained that these financial risks have distinctive elements. The risks are far-reaching in breadth and magnitude across the economy, involve uncertain and extended time horizons, are foreseeable, and – crucially – the magnitude of future financial risks depends in large part on decisions taken today.¹⁰

Moving beyond company-specific financial risks, climate change is now recognised as a systemic risk. This was made clear in 2019 by [The Network of Central Banks and Supervisors for Greening the Financial System](#) (NGFS), a global coalition of over 110 central banks and supervisors, in its first comprehensive report, *A Call to Action*, which stated:

*Climate-related risks are a source of financial risk. It is therefore within the mandates of central banks and supervisors to ensure the financial system is resilient to these risks.*¹¹

⁸ TCFD, 'Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures' (June 2017), ii. <<https://www.fsb-tcfd.org/publications/final-recommendations-report/>>.

⁹ *Ibid*, 5-6; Mercer, 'Investing in a time of climate change' (2015): <<https://www.mercer.com.au/content/dam/mercer/attachments/asia-pacific/australia/investment/sustainable-growth/mercer-climate-change-study-2015.pdf>>; TCFD, 2021 Status Report: Task Force on Climate-related Financial Disclosures (14 October 2021) <<http://www.fsb-tcfd.org/press/fourth-tcfd-status-report-highlights-greatest-progress-to-date-on-tcfd-adoption/>>.

¹⁰ Bank of England Prudential Regulation Authority, *Transition in Thinking: The impact of climate change on the U.K. banking sector* (September 2018) <<https://www.bankofengland.co.uk/prudential-regulation/publication/2018/transition-in-thinking-the-impact-of-climate-change-on-the-uk-banking-sector>>.

¹¹ NGFS, 'A Call for Action: Climate Change as a Source of Financial Risk' (April 2019), 4 <https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs_first_comprehensive_report_-_17042019_0.pdf>.

According to the Banque de France and the Bank for International Settlements, known as the 'central bank of central banks', the radical uncertainty of climate change and society's responses to it mean that climate change poses 'green swan' systemic risks that could lead to a financial crisis.¹² Stress tests which cover climate-related risks are planned or have already been conducted by central banks around the world, including the European Central Bank, the Reserve Bank of New Zealand, De Nederlandsche Bank and the Bank of England, which published the findings of its Climate Biennial Exploratory Scenario in May 2022.¹³

From transition risk to financial stability risks



From transition risk to financial stability risks

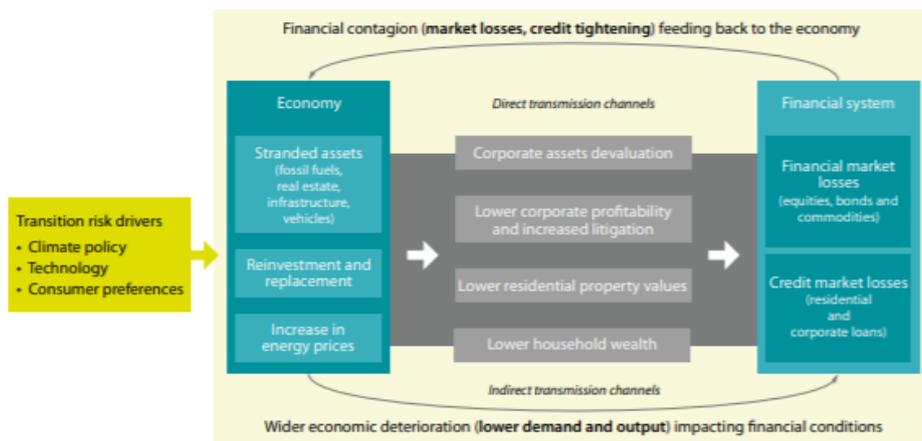


Figure 2: Climate-related systemic risks arising from transition risks.

(Source: NGFS Guide for Supervisors: Integrating climate-related and environmental risks into prudential supervision (2020) p. 13)

¹² Bank of International Settlements and Banque du France, The green swan - Central banking and financial stability in the age of climate change (January 2020) <<https://www.bis.org/publ/othp31.pdf>>.

¹³ Reserve Bank of New Zealand, *Climate Change Report 2021* (26 October 2021) <www.rbnz.govt.nz/financial-stability/climate-change/climate-change-report>; Green Central Banking, 'ECB launches climate risk stress test' (28 January 2022) <<https://greencentralbanking.com/2022/01/28/ecb-climate-risk-stress-test/>>; De Nederlandsche Bank, 'Stress test model', <www.dnb.nl/en/research/dnb-s-econometric-models/stress-test-model/>. See also Environmental Finance, 'Denmark's central bank to conduct climate stress test in 2020', <www.environmental-finance.com/content/news/denmarks-central-bank-to-conduct-climate-stress-test-in-2020.html>; Bank of England, Results of the 2021 Climate Biennial Exploratory Scenario (CBES) (24 May 2022) <<https://www.bankofengland.co.uk/stress-testing/2022/results-of-the-2021-climate-biennial-exploratory-scenario>>.

As a now widely-recognised financial and systemic risk, as well as a factor that is integral to value creation, climate change squarely engages directors' duties and disclosure obligations. In line with these developments, financial regulators have increasingly insisted on effective climate risk disclosure and governance.¹⁴

So, too, investors have set normative expectations of director conduct.¹⁵ A new coalition of financial institutions with over launched at COP26, the Glasgow Financial Alliance for Net Zero (GFANZ), has published guidance for its members on expectations for real-economy transition plans, portfolio alignment with achieving a net-zero by 2050 goal, and managing a phaseout of high-emission assets.¹⁶ The Institutional Investors Group on Climate Change (IIGCC), a membership body with over €51tn asset under management (AUM), has published policies and guidance for members on engaging with investee companies on climate matters;¹⁷ and the Net Zero Asset Managers initiative, a group of asset managers with more than US\$61.3tn AUM has published its initial targets for managing its assets in line with achieving net-zero by 2050 or sooner.¹⁸

Investors are also becoming increasingly vocal in communicating these expectations in their voting and stewardship activities. In 2021, shareholders at large oil and gas companies brought resolutions requesting that these companies set and report on climate targets,¹⁹ and, notably, investors voted to replace three of ExxonMobil's board members with alternative candidates with experience in the transition of oil and gas companies.²⁰ 2021 was not an exceptional year. This year, over 215 resolutions relating to climate change have been filed by shareholders, and the Follow This movement, comprised over 8,000 shareholders of oil and gas companies, has started a campaign for more extensive climate disclosures.²¹

Investors, regulators and governments are also increasingly asking companies to produce net-zero transition plans, setting out items including the company's ambition, the activities covered by the plan, targets and dates, proposed use of offsets, financial impacts, and plans to engage through their value chain.²² First-mover companies have already begun to produce climate transition plans, and investor groups including GFANZ have published guidance on what they expect investee companies to include in their business plans.²³ The U.K. government has stated that it will introduce regulations to require

¹⁴ See TCFD, 'Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures' (2017) 5-6: <<https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf>>; Mercer, 'Investing in a time of climate change' (2015): <<https://www.mercer.com.au/content/dam/mercer/attachments/asia-pacific/australia/investment/sustainable-growth/mercer-climate-change-study-2015.pdf>>;

¹⁵ See, e.g., BlackRock, Larry Fink's 2021 Letter to CEOs (January 2021) <<https://www.blackrock.com/corporate/investor-relations/2021-larry-fink-ceo-letter>>; BlackRock, Larry Fink's 2022 Letter to CEOs (January 2022) <<https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>>.

¹⁶ GFANZ, Publications <<https://www.gfanzero.com/publications/>>.

¹⁷ See, e.g., IIGCC, IIGCC Net Zero Stewardship Toolkit (21 April 2022) <<https://www.iigcc.org/resource/iigcc-net-zero-stewardship-toolkit/>>.

¹⁸ Net Zero Asset Managers initiative, Net Zero Asset Managers initiative publishes initial targets for 43 signatories as the number of asset managers committing to net-zero grows to 273 (31 May 2022) <<https://www.netzeroassetmanagers.org/net-zero-asset-managers-initiative-publishes-initial-targets-for-43-signatories-as-the-number-of-asset-managers-committing-to-net-zero-grows-to-273/>>.

¹⁹ Among shareholder resolutions proceeding to vote in the U.S. were resolutions proposing that:

- ConocoPhillips and Chevron set and report on emission reduction targets covering the greenhouse gas emissions of the company's operations as well as their energy products (Scope 1, 2 and 3) (with 59.3% and 60.7% of the vote, respectively);
- Chevron report on the implications of the International Energy Agency's October 2020 Net Zero 2050 scenario (failed with 47.8% of the vote);
- Phillips 66 set and report on GHG reductions targets as well as the alignment of its lobbying activities with the objectives of the Paris Agreement (passed with 80.28% of the vote);
- General Electric evaluate and disclose if and how the company has met the criteria of the 'Net Zero Indicator' produced by the Climate Action 100+ (passed with 97.97% of the vote);
- ExxonMobil evaluates and reports on the alignment of its lobbying activities with the objectives of the Paris Agreement, on the basis that "corporate lobbying that is inconsistent with the goals of the Paris Agreement presents regulatory, reputational and legal risks to investors" (passed with 63.8 % of the vote).

²⁰ ExxonMobil, ExxonMobil updates preliminary results on election of directors (2 June 2021) <https://corporate.exxonmobil.com/News/Newsroom/News-releases/2021/06/02_ExxonMobil-updates-preliminary-results-on-election-of-directors>.

²¹ Amena Saiyid, 'ExxonMobil board recommends "no vote" on reducing Scope 3 GHG emissions', *Clean Energy News* (11 April 2022) <<https://cleanenergynews.ihsmarket.com/research-analysis/exxonmobil-board-recommends-no-vote-on-reducing-scope-3-ghg-em.html>>; Climate Action 100+, 'As 2022 Proxy Season Begins, Record Numbers of Climate Resolutions and Agreements Bode Well for Action' (27 April 2022) <www.climateaction100.org/news/as-2022-proxy-season-begins-record-numbers-of-climate-resolutions-and-agreements-bode-well-for-action>.

²² See Transition Plan Taskforce, A Sector-Neutral Framework for private sector transition plans Call for Evidence (May 2022), Table 2 <<https://transitiontaskforce.net/call-for-evidence/>>.

²³ CDP, 'Are companies being transparent in their transition?': 2021 Climate Transition Plan disclosure (March 2022) <<https://www.cdp.net/en/guidance/guidance-for-companies/climate-transition-plans>>; GFANZ, Introductory Note on Expectations for Real-economy Transition Plans (June 2022) <<https://www.gfanzero.com/publications/>>; GFANZ, Recommendations and Guidance on Financial Institution Net-zero Transition Plans (June 2022) <<https://www.gfanzero.com/publications/>>.

asset managers, regulated asset owners and listed companies to publish net-zero transition plans on a 'comply or explain' basis from 2023, and has established the Transition Plan Taskforce (TPT) to develop guidance and standards for these plans.²⁴

Investors are also encouraging companies to increase the ambition of their net-zero targets, which moving towards increased standardisation between targets. Race to Zero, an a global campaign with support from businesses, cities, regions, investors, has published criteria for its members, which include a net-zero pledge, covering scope 1, 2 and material scope 3 emissions, made from the top level of the company.²⁵ Sustainability standards requiring disclosure of metrics and targets are steadily converging towards similar requirements, and in March 2022, the UN launched its High-Level Expert Group on Net-Zero Pledges (HLEG), which will address current standards for setting net-zero targets, verification of net-zero pledges and work on translating standards and criteria into international and national-level regulations.²⁶

²⁴ HM Treasury, Fact Sheet: Net Zero-aligned Financial Centre (November 2021) <<https://www.gov.uk/government/publications/fact-sheet-net-zero-aligned-financial-centre/fact-sheet-net-zero-aligned-financial-centre>>.

²⁵ Race to Zero, Starting Line and Leadership Practices 2.0 (June 2021) <<https://racetozero.unfccc.int/wp-content/uploads/2021/04/Race-to-Zero-Criteria-2.0.pdf>>.

²⁶ UN, Secretary-General Will Push Business, Investors, Cities to 'Walk the Talk' on Net-Zero Pledges, Launching Expert Group as Climate Crisis Worsens (31 March 2022) <<https://press.un.org/en/2020/sga2109.doc.htm>>.

Directors' Duties and Climate Change

Directors act as fiduciaries of the company in discharging their functions: overseeing corporate performance, strategy, and risk management; ensuring robust legal compliance systems are in effect in the company; approving significant transactions; and approving corporate reporting and disclosure.

Duty of loyalty and duty of care

As fiduciaries, directors owe two core duties to the company: **the duty of loyalty** and **the duty of care and diligence**. The precise nature and contours of these duties vary by jurisdiction. In common law jurisdictions, directors' fiduciary duties are articulated in statutes and in the case law, as developed over time by courts. In civil law jurisdictions, these duties are set out in statutory provisions that govern the conduct of directors.

While subject to variation across jurisdictions, the overarching concepts of loyalty and care in corporate governance are widespread. In general terms, the duty of loyalty requires that directors act honestly and in good faith in the best interests of the company, typically, but not exclusively, defined in financial terms. The duty of care requires that directors exercise reasonable care, skill, and diligence in the discharge of their stewardship functions, including by taking reasonable precautions against reasonably foreseeable harms.

What these duties require as a matter of good governance and prudent risk management is constantly evolving, in line with changes in the factual context in which directors act, knowledge of foreseeable risks, changes in regulations and market practices. A reasonable decision for a director fifty, ten or even five years ago might not look so reasonable today. Understanding these duties in the context of a changing external context is particularly relevant in the case of climate change, where the evidence of climate-related risks and opportunities is becoming ever more apparent, and changes in regulation are gathering momentum such that the likelihood of a disorderly and disruptive transition increases.

To discharge their duties, therefore, directors must integrate climate risks and opportunities into their governance roles.

The 'business judgment rule'

The courts in many jurisdictions will defer to directors' knowledge and expertise in making business decisions, and directors are unlikely to face liability as a result of simply a bad decision. This is known in some jurisdictions as the 'business judgment rule'. This may not protect directors in cases where they have failed to act in good faith (which could be done, for example, by completely failing to consider climate risks facing the company which the company has disclosed), but may operate to protect directors where they take actions to ensure the long-term success of the company which may not be the most profitable in the short-term.

Directors' Disclosure Obligations and Climate Change

Public companies in most jurisdictions have existing obligations under national laws to assess, manage, and report on financially-material climate risks.

Requirements for climate-related risks to be reported are becoming increasingly common

Mandatory climate-related disclosures are increasingly being introduced in jurisdictions around the world. In June 2021, the G7 issued a communique announcing its support for moving towards mandatory disclosures aligned with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD),¹ and regulators and governments have begun to introduce rules requiring certain companies to make TCFD-aligned disclosures.² The requirements differ between jurisdictions, but common themes include reporting on climate-related risks and opportunities, the mechanisms for identifying and managing these risks and opportunities, and metrics and targets for greenhouse gas emissions. For example, the Hong Kong and Singapore stock exchanges have introduced requirements in the listing rules for issuers to disclose climate-related financial risks on a 'comply or explain' basis,³ the U.K. and New Zealand governments have passed regulations requiring financial institutions (and, in the case of the UK, all large companies) to disclose climate-related risks;⁴ in the US, the Securities and Exchange Commission has proposed rules to enhance and standardise climate-related disclosures.⁵

International standards have also begun to be developed. The IFRS Foundation's International Sustainability Standards Board (ISSB) produced its first exposure drafts of standards in March 2022, which are designed to meet investors' information needs in assessing an issuer's enterprise value, enabling efficient allocation of resources through the capital market.⁶ These draft standards require disclosures which are generally aligned with the recommendations of the TCFD, including narrative disclosures on governance, strategy, risk management, and metrics and targets. If the ISSB standards become mandatory, as indicated by the G7 nations,⁷ disclosing on these aspects will effectively require reporting entities to put governance systems in place to identify and manage sustainability risks and opportunities generally, and in particular, climate change-related risks and opportunities. The European Financial Reporting Advisory Group (EFRAG) has published a set of exposure drafts of European sustainability reporting standards (ESRS), in line with the requirements of the upcoming Corporate Sustainability Reporting Directive (CSRD), which will increase the scope and quality of the existing EU sustainability reporting regulations.⁸

¹ HM Treasury, G7 Finance Ministers and Central Bank Governors Communiqué (5 June 2021) <<https://www.gov.uk/government/publications/g7-finance-ministers-meeting-june-2021-communiqué/g7-finance-ministers-and-central-bank-governors-communiqué>>.

² For example, in the UK, large companies and limited liability partnerships are required to disclose climate-related risks under the *Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022* and the *Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022*; in New Zealand, financial institutions are required to make climate-related disclosures under the *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021*; in Brazil, the Securities and Exchange Commission of Brazil has introduced rules requiring publicly-listed companies to disclose certain climate-related information; in Malaysia, financial institutions will be required to make climate-related disclosures in line with the principles set out in the Bank Negara Malaysia (BNM) Exposure Draft on Climate Risk Management and Scenario Analysis. See, for a general overview, TCFD, 2021 Status Report (October 2021) <<https://www.fsb-tcfid.org/publications/>>.

³ HKEX, 'Amendments to the Main Board Listing Rules: Update No.128' (2019) <<https://en-rules.hkex.com.hk/rulebook/update-no-128>>; SGX, Climate and Diversity: The Way Forward (15 December 2021) <https://api2.sgx.com/sites/default/files/2021-12/Response%20Paper%20on%20Climate%20and%20Diversity%20-%20The%20Way%20Forward_0.pdf>.

⁴ *The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022*; *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021*.

⁵ SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (21 March 2022) <<https://www.sec.gov/news/press-release/2022-46>>.

⁶ IFRS, Exposure Draft IFRS Sustainability Disclosure Standard: Basis for Conclusions on [Draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information (March 2022) <<https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/basis-for-conclusions-exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf>>; IFRS, Exposure Draft IFRS Sustainability Disclosure Standard: Basis for Conclusions on [Draft] IFRS S2 Climate-related Disclosures (March 2022) <<https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-basis-for-conclusions-climate-related-disclosures.pdf>>.

⁷ G7 Germany, G7 Finance Ministers and Central Bank Governors' Petersberg Communiqué (20 May 2022) <https://www.bundesfinanzministerium.de/Content/DE/Downloads/Internationales-Finanzmarkt/G7/g7-meeting-bonn-koenigswinter-communiqué-en.pdf?__blob=publicationFile&v=11>.

⁸ EFRAG, Public consultation on the first set of Draft ESRS <<https://www.efrag.org/lab3>>.

Investors are calling for climate-related risk disclosures

Investors are increasingly calling for specific climate-related financial disclosures in the financial filings, in line with the TCFD recommendations. The TCFD 2021 Status Report issued in October 2021 states that the TCFD reporting framework has been supported by “over 2,600 supporters globally, including 1,069 financial institutions, responsible for assets of \$194 trillion.”⁹

In 2021, BlackRock, an investor with \$8.67 trillion assets under management,¹⁰ called on investee companies to disclose a plan for how their business model will be compatible with a net-zero economy, to state how this plan is incorporated into the company's long-term strategy, and to confirm that it has been reviewed by the board of directors.¹¹ These disclosure requests are in addition to BlackRock's 2020 policies that ask its investee companies to report in alignment with the TCFD recommendations and the Sustainability Accounting Standards Board (SASB).¹² In January 2022, Larry Fink, BlackRock's CEO, restated the importance of climate risk to its investment and its request for investee companies to issue TCFD-aligned reports.¹³

Investors are also requesting that their investee companies produce financial statements which show how the climate risks and impacts which the company has identified will affect its finances, including by making adjustments to critical assumptions, including sensitivity analysis, and the implications on the company's dividend-paying capacity.¹⁴ The extent to which companies' CAPEX is aligned with their stated transition plans and net-zero goals is also under scrutiny from investors.¹⁵

Climate risk is a material risk

While jurisdictional specificities exist, corporate reporting and securities law frameworks generally require listed companies to disclose information that is materially relevant to their financial performance and prospects in narrative reports and financial statements.

A materiality requirement also covers disclosures in the financial statements. In November 2019, International Accounting Standards Board member Nick Anderson explained how climate risks fall within the existing principles-based requirements under International Financial Reporting Standards (IFRS):

Climate-related risks and other emerging risks are predominantly discussed outside the financial statements. However, as set out in [IFRS Practice Statement 2] Making Materiality Judgements, qualitative external factors, such as the industry in which the company operates, and investor expectations may make some risks 'material' and may warrant disclosures in financial statements, regardless of their numerical impact.¹⁶

In November 2020, the IFRS Foundation published guidance titled the *Effects of climate-related matters on financial statements*, which states that material climate-related financial information should be reported under IAS 1 Presentation of Financial Statements, IAS 2 Inventories, IAS 12 Income Taxes, IAS 16 Property, Plant and Equipment, IAS 38 Intangible Assets, IAS 36 Impairment of Assets, IAS 37 Provisions, Contingent Liabilities and Contingent Assets, IFRS 7 Financial Instruments: Disclosures, IFRS 9 Financial Instruments, and IFRS 13 Fair Value Measurement; and, in addition to this specific

⁹ TCFD, 2021 Status Report, (October 2021), 2 <<https://www.fsb.org/2021/10/2021-status-report-task-force-on-climate-related-financial-disclosures/>>.

¹⁰ As at January, 2021.

¹¹ BlackRock, Larry Fink's 2021 Letter to CEOs (January 2021) <<https://www.blackrock.com/corporate/investor-relations/2021-larry-fink-ceo-letter>>.

¹² *Ibid.*

¹³ BlackRock, Larry Fink's 2022 Letter to CEOs (January 2022) <<https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>>.

¹⁴ IIGCC, Investor Expectations for Paris-aligned Accounts (16 November 2020) <<https://www.iigcc.org/resource/investor-expectations-for-paris-aligned-accounts/>>; Sarasin & Partnership, Investor Expectations for Paris-Aligned Accounting (16 November 2020) <<https://sarasinandpartners.com/stewardship-post/investor-expectations-for-paris-aligned-accounting/>>.

¹⁵ See CA100+, Net Zero Company Benchmark: Structure and Methodologies <<https://www.climateaction100.org/net-zero-company-benchmark/methodology/>>

¹⁶ Nick Anderson, 'IFRS Standards and climate-related disclosures, In Brief' (November 2019), 3 <<https://www.ifrs.org/news-and-events/2019/11/nick-anderson-ifrs-standards-and-climate-related-disclosures/>>.

disclosure, that companies whose financial position or financial performance is particularly affected by climate-related matters must provide overarching disclosure.¹⁷

These climate-related disclosure standards have significant consequences for boards. Directors have obligations to approve or attest to the accuracy and completeness of disclosures made in financial filings. Directors on audit committees will likewise have additional responsibilities to engage in testing and overseeing the robustness of the climate scenario assumptions underpinning key aspects of the audit process.¹⁸

While some directors may be concerned about liability exposure from making disclosures in accordance with the TCFD reporting framework, a 2017 report by the CCLI explained how such concerns are misplaced:

It is true that under some disclosure regimes, directors may be primarily liable where they are involved in misleading disclosures by their company. In others, liability may be accessorial (i.e., to that of the company), or as an adjunct of the directors' duties to exercise due care and diligence in the best interests of their company. However, this concern about liability exposure both misunderstands the nature of the TCFD recommendations and potentially misrepresents the application of securities disclosure laws in many jurisdictions.¹⁹

Simply put, disclosure in accordance with the TCFD recommendations could in fact be used as a strategy to ensure compliance with directors' duties and disclosure obligations.

In short, disclosure of forward-looking risks associated with climate change – with adequate specificity and relevance, and with appropriate cautionary language around associated limitations or uncertainties – is the best (if not only) way to minimise liability exposure for misleading disclosure. Whilst appropriate analysis and disclosure will be company-specific, the TCFD recommendations represent an influential touchstone for the processes required to robustly assess climate risks (and opportunities), and to communicate them to the market in a true and fair manner.²⁰

¹⁷ IFRS, 'Effects of climate-related matters on financial statements', (20 November 2020), 1, <<https://cdn.ifrs.org/-/media/feature/supporting-implementation/documents/effects-of-climate-related-matters-on-financial-statements.pdf?la=en>>.

¹⁸ For audit committee guidance, see Janis Sarra, Canada Climate Law Initiative, *Audit Committees and Effective Climate Governance, A Guide for Boards of Directors* (December 2020) <<https://ccli.ubc.ca/wp-content/uploads/2021/04/Guide-for-Audit-Committees-on-Effective-Climate-Governance.pdf>> ; and *A Closer Look*, a Primer for audit committee members produced by Deloitte U.K. for Chapter Zero, the CGI's U.K. Chapter and made available to the global network of Chapters. The Primer is also available in Spanish through the CGI's Latin American Chapters.

¹⁹ Sarah Barker, Alexia Staker and Alice Garton, Commonwealth Climate and Law Initiative (CCLI), *Concerns Misplaced: Will compliance with the TCFD recommendations really expose companies and directors to liability risk?* (September 2017), 9 <<https://ccli.ouce.ox.ac.uk/wp-content/uploads/2017/10/CCLI-TCFD-Concerns-Misplaced-Report-Final-Briefing.pdf>>.

²⁰ *Ibid.*, 13.

Climate Litigation

As of 31 May 2022, over 2,000 climate change cases had been filed globally, with approximately a quarter of these being filed in the last two years.¹

While earlier waves of climate litigation were centred around the quantification of actions by polluters, many newer cases involve fiduciary duty or securities claims, and this is likely to continue as this field of litigation expands.²

Fiduciary duty claims against board members may be tested in court soon

Fiduciary duty and securities claims that have been brought to date clearly show the risks to companies, and their directors and officers, from failing to incorporate climate change into strategy, oversight, risk management and disclosure. It is important to note that the physical and transition risks that catalyse as legal risks transcend geographic boundaries, with the possibility to give rise to multiple legal actions across different jurisdictions.

A claim raising the fiduciary duty implications of climate risks on an asset level has already been brought. In 2018, a successful claim was brought against Polish power generation company Enea SA seeking the annulment of a board resolution consenting to the construction of the €1.2bn 1GW Ostrołęka C coal-fired power plant, on the basis that construction would harm the economic interests of the company by failing to consider the transition risks posed by climate change.³

Now, the relevance of climate risk to fiduciary duty on a strategy-wide level may be tested. In March 2022, a NGO ClientEarth wrote to the board of Shell plc, in its capacity as a shareholder of the company, alleging that Shell's directors have breached their duty to act in the best interests of the company by failing to develop and implement a climate strategy that aligns with the Paris Agreement goals, allegedly increasing its risk of stranded assets and having to make write-downs (due to both physical and transition risks).⁴ It appears ClientEarth will argue for a 'heightened duty' interpretation of directors' duties under the U.K. *Companies Act 2006*, citing a speech made by Lord Sales in 2019, while acting as a Justice of the U.K. Supreme Court:

As things stand, there is much force in the view that directors may, and increasingly, must take into account and accord significant weight to climate change in their decision-making ... Under certain circumstances, however, their companies' interests may be so implicated by climate change effects that their general fiduciary and due care obligations actually require them to cause their companies to take action to reduce their contribution to climate change activity.

Investors, corporate lawyers, the boards of high-emitting and financial companies, and other strategic litigants are watching developments closely.

Investors are also facing fiduciary claims

Investor fiduciaries have also faced challenges regarding their fiduciary duties. In Australia, the corporate trustee of A\$50 billion AUM pension fund Retail Employees Superannuation Trust (REST) was sued for breach of its duty of care for failing to integrate climate change considerations into its investment strategy.⁵ The case was settled in November 2020 on favourable terms to the plaintiff. REST issued a press release recognizing climate change as a material financial risk, and undertook to be net-

¹ Joana Setzer, Catherine Higham, Global trends in climate change litigation: 2022 snapshot (June 2022) <<https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>>.

² Joana Setzer, Catherine Higham, Global trends in climate change litigation: 2022 snapshot (June 2022) <<https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>>.

³ *ClientEarth v Enea*, District Court of Poznań [31 July 2019] <http://climatecasechart.com/non-us-case/clientearth-v-enea/>. The Court found in ClientEarth's favour on the first ground (the board resolution approving the power plant was legally invalid under Polish company law) so the judge did not need to formally determine the second ground (climate risk).

⁴ See ClientEarth, Redirecting Shell <<https://www.clientearth.org/redirecting-shell/#theclaim>>.

⁵ *McVeigh v REST* NSD1333/2018, Federal Court of Australia, <<http://climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/>>.

zero by 2050 and to ensure that its investment managers “*take active steps to consider, measure, and manage financial risks posed by climate change and other relevant ESG risks.*”⁶

A case with possible implications for both company and investor fiduciary duties was brought in October 2021. Beneficiaries of the U.K. University Superannuation Scheme (USS) pension fund filed a claim against the directors of the fund management company, claiming that by continuing to invest in fossil fuels, while acknowledging that climate change is a material financial risk to the returns of assets is a breach of fiduciary duties.⁷ This case was dismissed on procedural grounds.

While claims relating to breaches of fiduciary duty in respect of climate risks are becoming more common, conversely, boards may take comfort that no fiduciary duty claims challenging ‘pro-climate’ actions of boards are noted in the main climate litigation databases.

Greenwashing claims are developing

Claims around greenwashing, which can lead to personal liability for directors, are also on the rise. In August 2021, shareholder activist group, the Australasian Centre for Corporate Responsibility (ACCR) sued Santos alleging misrepresentations under consumer protection and corporation laws. Claims by Santos include that their natural gas is “*clean fuel*” that provides “*clean energy*” and that it has a “*credible and clear plan*” towards achieving “*net-zero*” emissions by 2040.⁸ The case is ongoing.

Greenwashing risks can increase the risks of a fiduciary claim. In the U.S., ExxonMobil and its officers have been sued for breach of fiduciary duty and securities fraud. The earliest of these claims, *Ramirez v ExxonMobil*, passed a key hurdle in 2018 when the case regarding the company’s liability and that of individual officers and directors was permitted to go forward.⁹ The court held that the plaintiffs’ allegations supported a strong inference that the defendants had actual awareness or knowledge that ExxonMobil had materially misrepresented the value of its assets (which the plaintiffs alleged the company and its individual officers Tillerson, Swiger, and Rosenthal knew would need to be written down as oil prices started to collapse in 2014, and as oil sands investments looked increasingly likely to become “*stranded assets.*”)¹⁰ In addition, there is an ongoing claim from 2019 against Exxon Mobil’s directors alleging that they have breached their fiduciary duties by allowing misleading disclosures about stranded assets.¹¹

Litigation against companies and governments can have significant impacts on business models

Litigation has also been brought which may significantly affect company’s business models. In May 2021, the District Court in The Hague ordered Royal Dutch Shell to cut its CO₂ emissions by 45% by the end of 2030, compared to 2019 levels.¹² That decision is being appealed.¹³ In coming to this decision, the court considered the impacts of Shell’s actions on the ECHR rights of the claimants, based on a successful claim against the Dutch government in 2020.¹⁴ The claimant, Milieudefensie, has now 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.¹⁵

⁶ See *Statement of REST*, available at <<https://equitygenerationlawyers.com/cases/mcveigh-v-rest/>>.

⁷ As the company had not suffered a financial loss as a result of the investments, the claimants were unable to bring a common law claim: *McGaughey v Universities Superannuation Scheme Limited* [2022] EWHC 1233 (Ch). The pleadings are available at <<http://climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/>>.

⁸ See ACCR, Australasian Centre for Corporate Responsibility files landmark case against Santos in Federal Court (26 August 2021) <<https://www.accr.org.au/news/australasian-centre-for-corporate-responsibility-files-landmark-case-against-santos-in-federal-court/>>.

⁹ *Ramirez v Exxon Mobil*, 334 F.Supp.3d 832, 839-841 (N.D.Tex.2018) (Memorandum Opinion and Order).

¹⁰ *Ibid.*

¹¹ Climatecasechart.com, In re Exxon Mobil Corp. Derivative Litigation (2019) <<http://climatecasechart.com/case/von-colditz-v-exxon-mobil-corp/>>

¹² The decision in English is available at: *Milieudefensie et al. v. Royal Dutch Shell PLC* C/09/571932 / HA ZA 19-379 (engelse versie), <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>>.

¹³ Shell, Shell confirms decision to appeal court ruling in Netherlands climate case (20 July 2021) <<https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html>>.

¹⁴ *Urgenda v Netherlands* 19/00135 (20 December 2019).

¹⁵ Reuters, Activists behind Shell climate verdict target 30 multinationals (13 January 2022) <<https://www.reuters.com/markets/commodities/activists-behind-shell-climate-verdict-target-30-multinationals-2022-01-13/>>.

Similarly, following the judgment in a German case against the government, which found that the German government's statutory targets for greenhouse gas reductions by 2030 were insufficient to avoid it having to take significant actions after 2030 in order to meet its reduction targets, a German NGO has brought claims against Volkswagen, BMW and Mercedes-Benz. The NGO alleges that these companies are violating citizens' fundamental right to climate protection and impinging on the rights and freedoms of future generations by not adhering to a 'fair' carbon budget, and has asked the court to order the companies to stop bringing internal combustion engine cars onto the market after 31 October 2030, unless they can prove that they will be greenhouse gas-neutral.¹⁶

Company directors may also be liable for climate damages litigation, whereby claimants seek damages as a result of the effects of climate change.

The case of *Luciano Lliuya v RWE AG*¹⁷ was brought in November 2015 by a Peruvian farmer against Germany's largest electricity producer and greenhouse gas emitter for harms arising from climate change, and how RWE's actions, despite being in a different jurisdiction, contributed to the risk and threat of flooding from melting mountain glaciers near his town of Huraz. The case is ongoing. A similar claim has recently been brought by four Indonesian fisherman against Swiss cement company Holcim, seeking proportional damages for the cost of flood protection measures and a reduction in CO₂ emissions.¹⁸

With climate litigation increasing and the first claims being brought against directors and officers, governance mechanisms to mitigate the risks of liability ought therefore to be prioritized by forward-thinking boards.¹⁹ This *Primer* is being published in order to help guide thinking about those governance mechanisms.

¹⁶ *Deutsche Umwelthilfe (DUH) v Bayerische Motoren Werke AG*: see Climate Change Laws of the World (https://climate-laws.org/geographies/germany/litigation_cases/deutsche-umwelthilfe-duh-v-bayerische-motoren-werke-ag-bmw), *DUH v Mercedes-Benz* (https://climate-laws.org/geographies/germany/litigation_cases/deutsche-umwelthilfe-duh-v-mercedes-benz-ag); *DUH v. Volkswagen AG* (https://climate-laws.org/geographies/germany/litigation_cases/kaiser-et-al-v-volkswagen-ag).

¹⁷ Climatecasechart.com, *Luciano Lliuya v. RWE AG (2015)* <<http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/>>

¹⁸ European Center for Constitutional and Human Rights, Groundbreaking climate case against Swiss cement company Holcim (12 July 2022) <<https://www.ecchr.eu/en/press-release/an-island-demands-justice/>>.

¹⁹ Comprehensive databases discussing climate litigation to date are available from the Sabin Centre at Columbia University, Climate Change Litigation Database, <<http://climatecasechart.com/>>, and from the Grantham Centre at the London School of Economics, <<https://climate-laws.org/>>.

Questions to Assist Directors

The actions required to fulfil directors' duties and disclosure obligations will depend on the laws of the jurisdiction and unique circumstances of the company and situation.

To assist directors, we offer some high-level questions:

- Does my board actively consider the foreseeable and material financial risks to the company associated with climate change (including those risks arising across our value chain) and the potential impacts on corporate risk management and strategy?
- Do I meaningfully engage with and scrutinise information and advice concerning climate-related risks presented to the board? Do I need to seek independent advice?
- If climate change is never on the board agenda or in management reports, do I ask why not?
- Does my board consider climate risks, both in relation to general strategic planning and risk management, and in relation to specific projects or acquisitions that require board oversight or approval?
- Has my company embedded robust procedures to ensure that foreseeable and financially material climate risks are identified, dynamically managed, and appropriately reported to the board and in the financial statements and external reporting?
- Has the board considered whether to set a net-zero target by 2050 or sooner? If so, how will we ensure the target based on robust and credible plan to navigate the financial risks and opportunities as my company and the global economy transitions to net-zero emissions? How is this information communicated to our investors?
- Is my company's capital expenditure aligned with our emissions reduction targets and/or a Paris-aligned 1.5°C scenario? If not, does management have a plan to do so?
- Have any of my company's peers been subject to climate-related shareholder proposals for which the company received criticism from influential investors or the proxy advisors, or lower than expected votes on director or auditor appointment which was publicly attributed to dissatisfaction on climate issues? Have any of my company's peers been subject to regulatory investigations or climate litigation?
- Do I have a sufficient level of knowledge on the physical, transition, liability, and systemic risks associated with climate change to fulfil my duties to govern the management of these risks? Does my board identify potential knowledge gaps among board members and organise appropriate training, and/or commission independent expert advice, to address them?

In each country section, experts offer their views about corporate governance practices and actions that boards can adopt to mitigate climate change risks, and to better identify opportunities.

Jurisdictional Overviews

This section summarises the law on directors' duties and disclosure obligations in respect of climate change across some important commercial jurisdictions around the world. In a growing number of jurisdictions, published legal opinions and regulatory guidance have clarified that financially material climate-related risks can and should be integrated into board strategy and risk management practices in order to fulfil directors' duties and form an increasingly central part of their disclosure responsibilities.

To read a specific jurisdictional overview, please click on the name of the country or jurisdiction on the map or navigate using the contents page above.



Australia



In Australia, regulator statements acknowledge the foreseeability of climate-related financial risks.

The Reserve Bank of Australia's (RBA) Deputy Governor described the physical and transition risks associated with climate change as "*likely to have first-order economic effects*".¹ The RBA's 2019 half-yearly Financial Stability Review devoted a section to climate change, and its October 2021 edition contained a focus on financial regulators' actions on climate-related risks.²

The Australian Securities and Investments Commission (ASIC) has similarly characterised climate change as a "*systemic risk that could have a material impact on the future financial position, performance or prospects of entities*".³

The Council of Financial Regulators has established a working group on the financial implications of climate change to help coordinate agencies' actions.⁴

The Australian Prudential Regulation Authority (APRA) has emphasised that climate risks should be managed like any other risk, in line with existing prudential risk management standards,⁵ as well as the new Prudential Practice Guide CPG 229 Climate Change Financial Risks (CPG 229).⁶ APRA and the RBA have announced that they will increase the incorporation of climate-related issues into their supervisory roles, including increasing the scrutiny of institutions' climate risk management and factoring this into ongoing stress tests.⁷ APRA has also carried out a climate vulnerability assessment of the five largest Australian banks, and has announced a voluntary assessment for other financial entities.⁸

Additionally, in October 2021, the Australian government published policy outlining its approach to reaching net-zero emissions by 2050, including a goal of reducing emissions by 26-28% by 2030 from 2005 levels, submitted as its Nationally Determined Contribution for COP26.⁹ With a change of federal government,

¹ Guy Debelle, 'Climate Change and the Economy,' Speech at the Public Forum hosted by the Centre for Policy Development, Sydney (March 2019) <<https://www.rba.gov.au/speeches/2019/sp-dg-2019-03-12.html>>.

² Reserve Bank of Australia, *Financial Stability Review* (October 2019) <<https://www.rba.gov.au/publications/fsr/2019/oct/box-c-financial-stability-risks-from-climate-change.html>>; Reserve Bank of Australia, *Financial Stability Review* (October 2021) <<https://www.rba.gov.au/publications/fsr/2021/oct/contents.html>>.

³ ASIC, 'RG 247 Effective disclosure in an operating and financial review' (August 2019) <<https://download.asic.gov.au/media/5230063/rg247-published-12-august-2019.pdf>>.

⁴ Reserve Bank of Australia, *Financial Stability Review* (October 2018) <<https://www.rba.gov.au/publications/fsr/2018/oct/regulatory-developments.html>>.

⁵ Summerhayes G, 'Australia's new horizon: Climate change challenges and prudential risk', Speech at the Insurance Council of Australia Annual Forum, Sydney (17 February 2017) and Summerhayes G, 'Financial exposure: the role of disclosure in addressing the climate data deficit', Speech at ClimateWise and University of Cambridge Institute for Sustainable Leadership, London, (22 February 2019); APRA, 'APRA releases guidance on managing the financial risks of climate change' (22 April 2021) APRA Website

<<https://www.apra.gov.au/news-and-publications/apra-releases-guidance-on-managing-financial-risks-of-climate-change>>.

⁶ APRA, *Prudential Practice Guide Prudential Practice Guide CPG 229 Climate Change Financial Risks* November 2021 (November 2021) <<https://www.apra.gov.au/sites/default/files/2021-11/Final%20Prudential%20Practice%20Guide%20CPG%20229%20Climate%20Change%20Financial%20Risks.pdf>>.

⁷ APRA, 'Information Paper: APRA's Supervision Priorities' (February 2021) APRA Website <<https://www.apra.gov.au/sites/default/files/2021-01/Information%20Paper%20-%20Supervision%20Priorities%202021.pdf>>; APRA, 'NGFS Pledge – Combined statement from APRA and the RBA' (4 November 2021) <<https://www.apra.gov.au/ngfs-pledge-%E2%80%93-combined-statement-from-apra-and-rba>>.

⁸ See APRA, APRA publishes new details on Climate Vulnerability Assessment (3 September 2021) <<https://www.apra.gov.au/news-and-publications/apra-publishes-new-details-on-climate-vulnerability-assessment>>; APRA, APRA releases letter on upcoming climate risk self-assessment survey (2 March 2022) <<https://www.apra.gov.au/news-and-publications/apra-releases-letter-on-upcoming-climate-risk-self-assessment-survey>>.

⁹ Australian Government, Australia's Long-term Emissions Reduction Plan (26 October 2021) <<https://www.industry.gov.au/sites/default/files/October%20>

Australia's NDC was updated in June 2022 to target a reduction in emissions of 43% by 2030 from a 2005 baseline, as part of a movement towards net-zero by 2050.¹⁰

In short, the position in Australia is clear: climate change is a financial risk that must be addressed by directors through governance and disclosure practices.

Directors' Duties and Climate Change

Australia is a common law jurisdiction. In Australia, directors' common law and equitable duties have been codified in the *Corporations Act 2001* (Cth).¹¹ However, the general law duties continue to apply concurrently.¹² Directors must exercise their powers and discharge their duties in "good faith in the best interests of the corporation", and for a "proper purpose". The general duty of due care and diligence requires directors to "exercise their powers and discharge their duties with the degree of due care and diligence that a reasonable person would exercise" in the relevant circumstances. A legal opinion commissioned by the AICD has confirmed that directors have considerable latitude in discharging their best interests duty, and that environmental and stakeholder perspectives are legitimate considerations.¹³

In October 2016, Australian barrister Noel Hutley SC released a seminal legal opinion on directors' statutory duty of care as it applies to climate change (the [Hutley opinion](#)). Hutley SC concluded that, as a matter of Australian law, "climate change risks would be regarded as foreseeable by courts, and relevant to a director's duty of care to the extent that those risks intersect with the interests of the company". Accordingly, Australian company

directors certainly can, and in some cases *should* be considering the impact of climate change risks on their company – and those directors who fail to do so now could conceivably be found liable for breaching their duty of care in the future.¹⁴

In June 2018, ASIC Commissioner John Price made public remarks foreshadowing that directorial liability could arise from a failure to consider risks related to climate change.¹⁵ In September 2018, ASIC recommended that:

*directors and senior managers of listed companies need to understand and continually reassess existing and emerging risks that may be applicable to the company's business, including climate risk.*¹⁶

In March 2019, Hutley SC updated his 2016 legal opinion, concluding that there had been a demonstrable shift since 2016 in the way in which Australian regulators, firms and the public perceive climate risk which "elevate[d] the standard of care that will be expected of a reasonable director" in discharging their duty of care.¹⁷

In November 2019, former Australian High Court judge and financial services royal commissioner Kenneth Hayne stated that it is incumbent on company directors, in discharging their duty to act in the company's best interests, to consider, address and report on climate-related risks:

[A] director acting in the best interests of the company must take account of, and the board must report publicly on,

[021/document/australias-long-term-emissions-reduction-plan.pdf](#)>; Australian Government, Australia's Nationally Determined Contribution 2021 (October 2021) <<https://unfccc.int/sites/default/files/NDC/2022-06/Australia%20Nationally%20Determined%20Contribution%20Update%20October%202021%20WEB.pdf>>.

¹⁰ Australian Labour Party, Powering Australia (December 2021) <<https://www.alp.org.au/policies/powering-australia>>.

¹¹ *Corporations Act 2001* (Cth) ss. 180-183.

¹² *Ibid.*, s. 185.

¹³ Brett Walker, Gerald Ng, Australian Institute Of Company Directors: The Content Of Directors' "Best Interest" Duty - Memorandum Of Advice (24 February 2022) <<https://www.aicd.com.au/content/dam/aicd/pdf/news-media/research/2022/AICD-walker-opinion-feb-2022.pdf>>.

¹⁴ Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Memorandum of Opinion' (October 2016), 2-3 <[https://cpd.org.au/wp-](https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf)

[content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf](#)>.

¹⁵ John Price, 'Climate Change', Speech at the Australian Securities and Investments Commission, Centre for Policy Development: Financing a Sustainable Economy, Sydney, (18 June 2018) <<https://asic.gov.au/about-asic/news-centre/speeches/climate-change/>>. ASIC Commissioners Sean Hughes (Canberra, 7 February 2019) and Cathie Armour (Sydney, 21 February 2019) also made public addresses concerning climate change risk.

¹⁶ ASIC, 'Report 593: Climate risk disclosure by Australia's listed companies' (September 2018), 12 <<https://download.asic.gov.au/media/4871341/rep593-published-20-september-2018.pdf>>.

¹⁷ Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties: Supplementary memorandum of opinion' (March 2019) <<https://cpd.org.au/2019/03/directors-duties-2019/>>.

*climate-related risks and issues relevant to the entity.*¹⁸

In April 2021, Hutley SC published a further update to the 2016 legal opinion, stating that:

*[i]t is no longer safe to assume that directors adequately discharge their duties simply by considering and disclosing climate-related trends and risks; in relevant sectors, directors of listed companies must also take reasonable steps to see that positive action is taken: to identify and manage risks, to design and implement strategies, to select and use appropriate standards, to make accurate assessments and disclosures, and to deliver on their company's public commitments and targets.*¹⁹

Counsel further opined that in relevant sectors, consideration of net-zero emissions targets are an “*appropriate and necessary*” step to discharge duties. In setting such targets, a company need not have all the answers about how the target will be achieved. However, an announcement of a net-zero target carries with it a representation that a company does have a genuine intention, formed on reasonable grounds at the time of making the commitment, to pursue strategies to achieve the target in good faith. Misalignment between that intention and operational strategy places the company, and its directors and officers, at risk of ‘greenwash’, and potentially liable for misleading and deceptive conduct in relation to a ‘future matter’ under the *Corporations Act, Australian Securities and Investments Commission Act 2001*, and the *Australian*

Consumer Law. This may, in turn, lead to ‘stepping stone’ liability for a breach of the directors’ duty of care. Indeed, Counsel’s view that “*there is reason to think that ‘greenwashing’ claims of the kind outlined in this memorandum will become an acute source of risk*”²⁰ has played out, with a claim lodged in 2021 against an oil and gas company,²¹ and a ‘books and records’ claim (an application by a shareholder seeking access to documents, in this case those demonstrating the implementation of an environmental policy) against a bank.²²

Directors’ Disclosure Obligations and Climate Change

The securities regulator ASIC has recommended that listed companies disclose meaningful and useful climate risk-related information to investors, and strongly encouraged listed companies with material exposure to climate change to consider reporting voluntarily under the TCFD framework.²³ The Australian Securities Exchange (ASX) Corporate Governance Council recommends that a listed entity should disclose (on a comply or explain basis) whether it has any material exposure to environmental risks and, in particular, climate-related risk, and if it does, how it manages or intends to manage those risks.²⁴

In August 2019, ASIC revised its regulatory guidance to incorporate climate-related disclosures. RG228 now refers to the types of climate change risk described by the TCFD as key risks that may need to be disclosed in

¹⁸ Kenneth Hayne, ‘What Kenneth Hayne says about climate change’ (9 December 2019) <<https://www.afr.com/politics/federal/what-kenneth-hayne-says-about-climate-change-20191206-p53hiw>>; James Fernyhough, ‘Hayne rebukes directors on climate risk failure’ (9 December 2019) <<https://www.afr.com/policy/energy-and-climate/hayne-rebukes-directors-on-climate-risk-failure-20191206-p53hnd>>; Ben Hayne, ‘No more room for excuses on climate’ (9 December 2019) <<https://www.afr.com/politics/federal/no-more-room-for-excuses-on-climate-20191208-p53hwk>>. Centre for Policy development, ‘Full text of Kenneth Hayne AC QC remarks to CPD climate roundtable’, Speech delivered to Centre for Policy Development Roundtable in Sydney, 21 November 2019 (9 December 2019) <<https://cpd.org.au/2019/12/full-text-of-kenneth-hayne-ac-qc-remarks-to-cpd-climate-roundtable/>>.

¹⁹ Noel Hutley and Sebastian Hartford Davis, ‘Climate Change and Directors’ Duties: Further Supplementary Memorandum of Opinion’ (23 April 2021) [4] <<https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>>. See further, MinterEllison, ‘New Hutley Opinion: What does it mean for directors?’, (28 April 2021)

<<https://www.minterellison.com/articles/new-hutley-opinion-what-does-it-mean-for-directors>>.

²⁰ Noel Hutley and Sebastian Hartford Davis, ‘Climate Change and Directors’ Duties: Further Supplementary Memorandum of Opinion’ (23 April 2021) [50] <<https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>>.

²¹ ACCR v Santos (NSD858/2021, Federal Court of Australia) <<http://climatecasechart.com/non-us-case/australasian-centre-for-corporate-responsibility-v-santos/>>.

²² Abrahams v Commonwealth Bank of Australia (NSD864/2021, Federal Court of Australia) <<http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-of-australia-2021/>>.

²³ ASIC, ‘Report 593: Climate risk disclosure by Australia’s listed companies’ (September 2018) 12 <<https://download.asic.gov.au/media/4871341/rep593-published-20-september-2018.pdf>>

²⁴ The ASX Corporate Governance Council ‘Corporate Governance Principles and Recommendations’ (4th Edition, February 2019) 27-28.

prospectuses.²⁵ RG47 highlights climate change as a “*systemic risk*” that could impact an entity’s financial prospects for future years and that may need to be disclosed in operating & financial reviews.²⁶ ASIC included climate-related risks, including national climate commitments and relevant information under the Task Force on Climate-related Financial Disclosure (TCFD) recommendations as part of their recommended focus areas for 2022 reporting.²⁷ In June 2022, it published specific guidance for financial institutions on sustainability-related labelling of products and services: Information Sheet 271 - *How to avoid greenwashing when offering or promoting sustainability-related products*.²⁸

In April 2019, the Australian Accounting Standards Board (AASB) and Auditing and Assurance Standards Board (AUASB) updated their joint bulletin on integrating climate risk into accounting estimate assumptions and making climate risk disclosures in the financial statements, squarely bringing climate risk within the scope of external audit and the audit committee role.²⁹ These developments are

relevant to the obligation on Australian directors to give a declaration that the financial statements and notes comply with the accounting standards and give a 'true and fair view' of position and performance.³⁰ In December 2021, the AASB and AUASB published a joint paper on the IFRS Foundation’s International Sustainability Standards Board (ISSB), stating that they would maintain close links with the ISSB in the development of the ISSB framework and standards.³¹ The AASB has since confirmed that it will use the ISSB standards as the baseline for the development of Australian sustainability reporting standards with modifications for Australian-specific matters and requirements, which may come to be the subject of regulation in the same manner as the Australian Accounting Standards.³²

²⁵ ASIC, Regulatory Guide G228 *Prospectuses: Effective disclosure for retail investors* <<https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-228-prospectuses-effective-disclosure-for-retail-investors/>>.

²⁶ ASIC, Regulatory Guide 247 *Effective disclosure in an operating and financial review* (August 2019) <<https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-247-effective-disclosure-in-an-operating-and-financial-review/>>.

²⁷ ASIC, 22-124MR ASIC highlights focus areas for 30 June 2022 reporting (1 June 2022) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-124mr-asic-highlights-focus-areas-for-30-june-2022-reporting/>>.

²⁸ ASIC Information Sheet 271, *How to avoid greenwashing when offering or promoting sustainability-related products* | ASIC - Australian Securities and Investments Commission (June 2022) <[https://asic.gov.au/regulatory-resources/financial-](https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/)

[services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/](https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/)>.

²⁹ Australian Accounting Standards Board and Australian Auditing and Assurance Standards Board, 'Climate-related and other emerging risks disclosures: assessing financial statement materiality using AASB/IASB Practice Statement 2' (April 2019) <https://www.aasb.gov.au/admin/file/content102/c3/AASB_AUASB_Joint_Bulletin_Finished.pdf>.

³⁰ *Corporations Act 2001* (Cth) ss. 295-297.

³¹ AASB and AUASB, Globally consistent reporting for sustainability-related information (December 2021) <https://aasb.gov.au/media/o1wfhori/aasb-auasb_sustainabilityreporting_12-21.pdf>.

³² AASB, Staff article: Developing sustainability-related financial reporting standards in Australia (28 June 2022) <https://aasb.gov.au/news/project-insights-developing-sustainability-related-financial-reporting-standards-in-australia/>.

Practical Implications for Directors

The steps required to discharge duties to govern and disclose climate risk depend on the unique circumstances of the company and governance situation.³² However, given that Australia's financial regulators have become increasingly emphatic regarding the need for companies and their directors to adopt climate risk and resilience measures in business practices and disclosure, and in particular the above-noted Hutley opinions, actions by ASIC and the AASB and AUASB, well-counselled boards will, taking into account the unique circumstances facing each company:³³

- a) maintain systems so that the board and management have the skills and education to remain abreast of material developments in this dynamic area, including access to expert advice where necessary and when not available internally;
- b) delegate climate risk identification and evaluation to a clearly-identified team in management that reports directly to the CEO and board;
- c) put on the agenda for the board, within a reasonable time, a process to start developing a climate transition roadmap to 2050 with transparent net-zero emissions targets (for relevant sectors) or other robust emissions reduction targets, with clear interim targets (set with regard to government targets and sectoral emission reduction pathways), and periodically thereafter report back to the board;
- d) where board sub-committees are used, delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- e) examine reporting and disclosure frameworks and guidance so that disclosures are meeting regulatory (and where relevant investor) expectations and oversee a communication and engagement plan so that there is accountability to stakeholders.

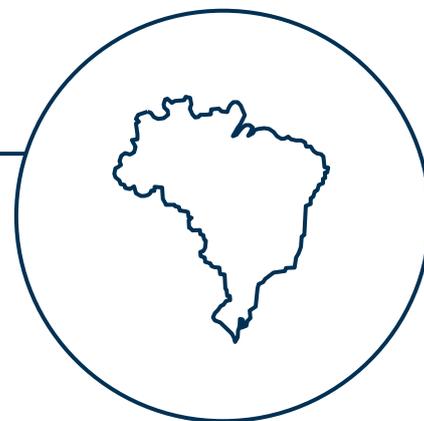
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³² Australian Institute of Company Directors, Climate risk governance guide (24 August 2021) <<https://www.aicd.com.au/risk-management/framework/climate/climate-risk-governance-guide.html>>.

³³ These include size and sector, the foreseeability and materiality of exposure to climate risks, and that the steps required to discharge duties will be proportionate to that exposure.



Brazil is a signatory to the United Nations Framework Convention on Climate Change International Climate Change Agreement (Paris Agreement), which was transformed into a federal law by means of *Federal Decree No.9.073/2017*. In December 2019, the Environmental Committee of the Federal Senate conducted an evaluation of the National Policy on Climate Change, to assess the main difficulties facing its enforcement and to identify the areas requiring amendment. This assessment resulted, among others, in *Constitutional Amendment Bill No. 233/2019*, which aims to include in the Brazilian Federal Constitution a provision stating that all economic activity in Brazil must be guided by the need to “*promote climate stability, by usage of mitigating measures to prevent climate change and adapt to its negative effects*”.

In October 2021, *Decree 10.846/2021 instituting the National Programme for Green Growth* was enacted, which establishes a ‘green growth’ programme aiming to improve sustainable development, create green jobs, promote the conservation of forests and biodiversity, and reduce greenhouse gas emissions with a view to facilitating a transition to a low carbon economy. Other related policies were enacted or are under discussion, such as the Federal Strategy to Encourage the Sustainable Use of Biogas and Biomethane (introduced by *Decree 11,003/2022*) and the proposal of guidelines for the intended National Hydrogen Program. Finally, the discussions regarding *Bill No. 2.148/2015* – which aims to create a regulated carbon market in Brazil – have recently intensified, and the perspective is that it might be approved soon.

Directors' Duties and Climate Change

Limited liability companies (*sociedades limitadas*) and corporations (*sociedades anônimas*) are the most common types of companies in Brazil and are legally formed as for-profit organizations. The Brazilian legal framework, in particular (i) the *Federal Constitution of 1988*, as amended (Brazilian Federal Constitution), (ii) *Law No.10.406, as of 10 January 2002*, as amended (Brazilian Civil Code),¹ and (iii) *Law No.6.404, as of 15 December 1976*, as amended (Brazilian Corporation Law), provide, at least indirectly, that companies must follow sustainability and climate-related principles alongside their corporate purpose.

The Brazilian legal system lays out a series of principles that guide the conduct of economic activity, such as the social function of ownership, the social function of contracts, environmental protection, and the reduction of regional and social inequities, as stated in the Brazilian Federal Constitution² and in the Brazilian Civil Code.³ Generally speaking, these principles apply to all entities comprising the Brazilian economy and, thus, it could be argued that all corporations and limited liability companies, including their directors and administrators, have an implicit duty to employ best efforts to, at least, minimize negative sustainability impacts, including climate change.

Moreover, Brazilian Corporation Law also focuses indirectly on sustainability matters, assigning fiduciary responsibility to managers and controlling shareholders. In this regard,

¹ Available in English at http://conteudo.cvm.gov.br/export/sites/cvm/subportal_ingle_s/menu/investors/anexos/Law-6.404-ing.pdf Retrieved on November 17, 2020.

² Article 170 of the Brazilian Federal Constitution. “*The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: [...] III – the social*

function of ownership; [...] VI – environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes; [...] VII – reduction of regional and social differences; [...]”.

³ Article 421 of the Brazilian Civil Code. “*The contractual freedom shall be exercised within the limits of the social function of the contract.*”

articles 116⁴ and 154⁵ of the Brazilian Corporation Law contain provisions regarding the need to harmonize the interest of each company in generating profits with its socio-environmental impacts.⁶ In this sense, Item VI of article 170 of the *Brazilian Federal Constitution* also states that all economic or financial activity conducted in Brazil must be guided by the principle of environmental protection.⁷

Additionally, Brazilian Environmental Policy imposes a series of procedures to prevent, mitigate and repair environmental damage, which must be observed by all companies. Although there are no specific duties for directors on climate change, if companies fail to observe these norms and contribute – even indirectly – to environmental damage, they may be liable in civil court for strict, joint and several liability for environmental degradation.

Furthermore, *Law No.9.605, of 12 February 1998*, which establishes the Brazilian environmental crimes and administrative sanctions, imposes criminal and administrative penalties on individuals and legal entities whose conduct and activities are damaging to the environment. Individuals (such as directors)⁸ or legal entities that commit a criminal offence against the environment may also be punished with sanctions that range from fines to imprisonment (individuals) or dissolution (legal entities). Administrative liability further includes the imposition of fines and, in worst-case scenarios, the total suspension of activities. It is important to note that, pursuant to *Law No.9.605*, shareholders may be held liable through the piercing of the corporate veil, which will be admitted whenever the corporate entity becomes an obstacle to the recovery of

environmental damages.

Therefore, despite the fact that most current laws and regulations do not directly require directors to consider climate change matters, when analysing the Brazilian legal framework, it is possible to argue that board directors and controlling shareholders, could, in some cases, potentially be in breach of their fiduciary duties in the event that they pursue goals that, in any manner, are contrary to the long-term interests of their community and society as a whole and, to this end, contrary to preventing climate change.

Besides legislation and regulations, sustainability-related matters have gained increasing prominence in the Brazilian financial and capital markets, as several Brazilian stakeholders have recently been taking initiatives or shown their concern for sustainability and environmental impact. For instance, the Social and Economic Development Bank (*Banco Nacional do Desenvolvimento Econômico e Social – BNDES*) has recently included the generation of positive sustainability impact in the qualification requirements of its tendering processes, and has also adopted a screening process to filter projects with negative sustainability impact out of its portfolio.

In addition, in 2020 the Central Bank of Brazil (*Banco Central do Brasil – BCB*) released its sustainability agenda for the coming years, which expressly includes (i) incorporation of climate risk scenarios into new and improved stress tests of the bank and (ii) increasing transparency based on TCFD recommendations.

⁴ A controlling shareholder shall use its controlling power in order to make the corporation accomplish its purpose and perform its social role, and shall have duties and responsibilities towards the other shareholders of the corporation, those who work for the corporation and the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed.

⁵ An officer shall use the powers conferred upon him by law and by the bylaws to achieve the corporation's corporate purposes and to support its best interests, including the requirements of the public at large and of the social role of the corporation.

⁶ Article 154, paragraph 4 of the Brazilian Corporation Law. In view of the corporation's social responsibilities, the administrative council or the board of directors may authorize the performance of reasonable gratuitous acts to benefit the employees or the community to which the corporation belongs.

⁷ On this subject, the Brazilian Federal Supreme Court rendered a decision stating that "economic activity must not be enacted in opposition to the principles established to enforce environmental protection." (Brazilian Federal Supreme Court,

Direct Action for the Declaration of Unconstitutionality No.3,540, Judge Rapporteur Justice Celso de Mello, judgement rendered on 09.01.2005, published on 2 March 2006). Pursuant to Article 927 of the Brazilian Code of Civil Procedure (*Federal Law No. 13,105, of 16 March 2015*), this a binding precedent that must be observed by the courts.

⁸ It is important to mention that in the case of the Samarco's dam collapse, board directors of Vale and BHP were included as defendants in a criminal proceeding regarding the accident. However, according to public information, the action was dismissed in respect of some of these directors because the judge considered that they did not have the power to influence the company's management, so could not be regarded as having committed the crimes themselves. Furthermore, there is also an administrative proceeding before the Brazilian Securities Commission (CMV) to investigate any violation of the fiduciary duty of some of the board directors of Vale due to the Brumadinho dam collapse. There is no public information available regarding this proceeding.

Directors' Disclosure Obligations and Climate Change

Brazilian Corporation Law charges the board directors and other bodies comprising limited liability companies and corporations with the duty to disclose, in general and whenever necessary, all information that may negatively affect the environment, among others. The duty to inform, in addition to best practices as defined by Brazilian soft law, create the conditions for investors, the market and supervisory bodies to conduct complex analyses of the actions taken by companies and their impacts on the environment and other sustainability issues.

In this regard, Rule No.480/09 of the Securities and Exchange Commission of Brazil (*Comissão de Valores Mobiliários – CVM*) establishes an obligation for publicly-held corporations to disclose in their filings (i) risk factors related to environmental matters, (ii) the effects of regulation on the company's environmental policy and compliance costs and (iii) information related to the company's environmental policy.

In December 2021, the CVM issued CVM Resolution 59, republished by CVM Resolution 87, which will come into effect on 2 January 2023. CVM Resolution 59 amends Rule No.480/09 to oblige publicly-held corporations to disclose, on a comply or explain basis, certain ESG information, including (i) the main aspects of their compliance with legal and regulatory obligations, (ii) key performance indicators on ESG metrics, (iii) description of the role of the administrative bodies in the assessment, management, and supervision of climate-related risks and opportunities, (iv) a statement of whether the company carries out greenhouse gas emissions inventories and the scope of the emissions inventoried, and (v) a statement of whether the disclosure on climate risks is consistent with TCFD recommendations, the SDGs, or other recommended sustainability-related financial disclosures.

Voluntary disclosure standards continue to provide frameworks for Brazilian companies' sustainability disclosures. The Corporate Sustainability Index (*Índice de Sustentabilidade Empresarial - ISE B3*), a voluntary initiative that classifies publicly-held corporations with regard to sustainability matters, also sets out a series of details that must be presented by the selected companies in relation to the environment, with a specific questionnaire on climate change. Among other information, companies are required to disclose an assessment of both their impact on the climate and their exposure to climate-related impacts, as well as their plans to manage and prevent such impacts.

Another voluntary initiative is the CDP Brazil Climate Resilience Index, created in March 2020 by the British NGO Carbon Disclosure Project (CDP). This index aims to establish a connection between companies' disclosure of environmental data and their financial performance. It serves as a reference for investors to assess the companies' transparency regarding the policies and actions adopted in relation to climate change, reinforcing the drivers seen in Brazilian capital markets for directors to take responsibility for their decisions regarding climate-related disclosures. In 2021, the questionnaire used underwent specific changes, such as the inclusion of a question regarding net-zero targets.

The BCB has recognised the risks posed by climate change to financial stability, and has set out its views and actions it is taking in its first report on Social, Environmental and Climate-related Risks and Opportunities.⁹ The BCB has also passed regulations requiring in-scope financial institutions to publish a Report on Social, Environmental and Climate-related Risks and Opportunities including information on governance of climate-, environmental- and social-related risks, the real and potential impacts of those risks, and the processes for managing those risks.¹⁰

⁹ Banco Central Do Brasi, Report on Social, Environmental and Climate-related Risks and Opportunities: Volume 1 (September 2021) <<https://www.bcb.gov.br/en/publications/report-risk-opportunity>>.

¹⁰ Banco Central Do Brasi, New regulations on social, environmental, and climate-related risk disclosures (15 September 2021) <https://www.bcb.gov.br/content/about/legislation_norms_docs/BCB_Disclosure-GRSAC-Report.pdf>.

Practical Implications for Directors

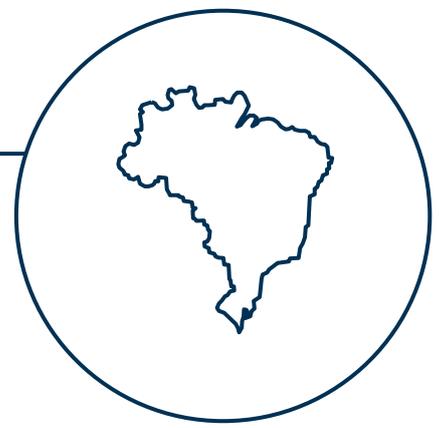
Given that Brazilian representatives and regulators have become increasingly emphatic in recommending – and soon regulating – the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, in particular the above-noted *Constitutional Amendment Bill No. 233/2019*, the Brazilian Civil Code, Brazilian Corporation Law, Brazilian Environmental Policy and the changes to CVM's Rule No. 480/09, together with related public and private financial institutions initiatives, well-counselled boards will:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to initiate the development of a climate transition roadmap to 2050 with transparent carbon neutrality or reduction science-based targets, with clear interim targets to 2040, 2030 and the current rolling multi-year strategic plan validated by internationally recognized organizations, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, in order to develop an external engagement and communications plan including qualitative and quantitative disclosures, to avoid publishing potentially misleading information.

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O Brasil é signatário do acordo internacional sobre Mudanças Climáticas da Convenção-Quadro das Nações Unidas sobre Mudança do Clima (Acordo de Paris), que foi incorporado ao ordenamento jurídico nacional em caráter de legislação federal por meio do Decreto Federal nº 9.073/2017. Em dezembro de 2019, a Comissão de Meio Ambiente do Senado Federal realizou uma avaliação da Política Nacional sobre Mudança do Clima para verificar as principais dificuldades enfrentadas para sua implementação, bem como para identificar os pontos que merecem alterações. Tal avaliação resultou, dentre outros, no Projeto de Emenda Constitucional nº 233/2019, que visa incluir na Constituição Federal brasileira uma disposição que estabelece que toda atividade econômica no Brasil deve ser orientada pela necessidade de "*manutenção da estabilidade climática, adotando ações de mitigação da mudança do clima e adaptação aos seus efeitos adversos*".

Em outubro de 2021, foi promulgado o Decreto nº 10.846/2021 instituindo o Programa Nacional de Crescimento Verde, que estabelece um programa de "crescimento Verde" com o objetivo de aprimorar o desenvolvimento sustentável, criar empregos verdes, promover a conservação de florestas e da biodiversidade, e reduzir as emissões de gases de efeito estufa de modo a facilitar a transição para uma economia de baixo carbono. Outras políticas relacionadas foram promulgadas ou estão em discussão, tais como a Estratégia Federal de Incentivo ao Uso Sustentável de Biogás e Biometano (introduzida pelo Decreto nº 11.003/2022) e a proposta de diretrizes para o pretendido Programa Nacional de Hidrogênio. No mais, as discussões sobre o Projeto de Lei nº 2.148/2015 - que visa criar um mercado de carbono regulado no Brasil - se intensificaram recentemente, e a perspectiva é que possa ser aprovado em breve.

O dever dos diretores e as mudanças climáticas

As sociedades limitadas e as sociedades anônimas são os tipos mais comuns de companhias no Brasil e são legalmente constituídas enquanto organizações de fins econômicos. O quadro legal brasileiro, em especial (i) a Constituição Federal de 1988, conforme alterações ("Constituição Federal"); (ii) a Lei nº 10.406, de 10 de janeiro de 2002, conforme alterações ("Código Civil")¹; e (iii) a Lei nº 6.404, de 15 de dezembro de 1976, conforme alterações ("Lei das Sociedades Anônimas") instituem, ainda que indiretamente, que as companhias devem seguir princípios de sustentabilidade e princípios relacionados ao clima em conjunto com seus propósitos corporativos.

O sistema jurídico brasileiro estabelece uma série de princípios que norteiam a condução da atividade econômica, tais como a função social da propriedade, a função social dos contratos, a proteção ambiental e a redução das desigualdades regionais e sociais, conforme estabelecido na Constituição Federal² e no Código Civil.³ De modo geral, tais princípios são aplicáveis a todas as entidades que compõem a economia brasileira; portanto, poderia ser argumentado que todas as sociedades anônimas e sociedades limitadas – incluindo seus diretores e administradores –, têm o dever implícito de empregar melhores esforços em, pelo menos, minimizar os impactos negativos aos aspectos de sustentabilidade, incluídos aqueles relacionados a mudanças climáticas.

Além disso, a Lei das Sociedades Anônimas também foca indiretamente em aspectos de sustentabilidade, atribuindo responsabilidade fiduciária a gerentes e acionistas controladores. Nesse sentido, os artigos

¹ Disponível em inglês: http://conteudo.cvm.gov.br/export/sites/cvm/subportal_inglês/menu/investors/anexos/Law-6.404-ing.pdf.

² Art. 170, Constituição Federal: "A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios: [...] III –

função social da propriedade; [...] VI – defesa do meio ambiente, inclusive mediante tratamento diferenciado conforme o impacto ambiental dos produtos e serviços e de seus processos de elaboração e prestação; [...] VII – redução das desigualdades regionais e sociais; [...]".

³ Art. 421, Código Civil: "A liberdade contratual será exercida nos limites da função social do contrato".

116⁴ e 154⁵ da Lei das Sociedades Anônimas contêm disposições sobre a necessidade de harmonizar o interesse de cada empresa em gerar lucros com seus impactos socioambientais.⁶ Da mesma forma, o inciso VI do artigo 170 da Constituição Federal também estabelece que toda atividade econômica ou financeira conduzida no Brasil deve ser guiada pelo princípio da proteção ambiental.⁷

A Política Nacional de Meio Ambiente, por sua vez, impõe uma série de procedimentos para prevenir, mitigar e reparar danos ambientais, que devem ser observados por todas as empresas. Embora não existam deveres específicos para os diretores sobre aspectos relacionados a mudanças climáticas, caso as empresas não cumpram as normas existentes e contribuam - ainda que indiretamente - para o dano ambiental, elas podem ser responsabilizadas no âmbito civil por responsabilidade objetiva e solidária pela degradação ambiental.

Ademais, a Lei nº 9.605, de 12 de fevereiro de 1998, que estabelece os crimes ambientais e sanções administrativas, impõe penalidades criminais e administrativas a pessoas físicas e jurídicas cuja conduta e atividades sejam danosas ao meio ambiente. Pessoas físicas (como diretores)⁸ ou pessoas jurídicas que cometam uma ofensa criminal contra o meio ambiente também podem ser punidas com sanções que variam desde multa até prisão (pessoas físicas) ou dissolução (pessoas jurídicas). A responsabilidade administrativa inclui ainda a aplicação de multas e, no pior cenário, a suspensão total das atividades. Importante observar que, nos termos da Lei nº 9.605, os acionistas poderão ser responsabilizados mediante a desconsideração da personalidade jurídica, que será admitida sempre que a pessoa jurídica se tornar um obstáculo à recuperação de danos ambientais.

Portanto, apesar de a maioria das leis e regulamentos atuais não exigir diretamente que os diretores considerem questões de mudanças climáticas, ao analisar o quadro legal brasileiro é possível argumentar que conselheiros e acionistas controladores podem, em alguns casos, estar potencialmente em descumprimento com seus deveres fiduciários caso persigam objetivos que, de qualquer forma, sejam contrários aos interesses de longo prazo de sua comunidade e da sociedade como um todo e, para tanto, contrários à prevenção das mudanças climáticas.

Além da legislação e regulação, as questões relacionadas à sustentabilidade têm ganhado proeminência nos mercados financeiros e de capitais brasileiros, visto que uma série de *stakeholders* brasileiros têm adotado iniciativas ou demonstrado sua preocupação com os impactos associados. Por exemplo, o Banco Nacional de Desenvolvimento Econômico e Social ("BNDES") recentemente incluiu a geração de impactos positivos de sustentabilidade nos requisitos de qualificação de seus processos licitatórios e também adotou um processo de triagem para excluir de seu portfólio projetos com resultados de impacto de sustentabilidade negativos.

Além disso, o Banco Central do Brasil ("BCB") publicou em 2020 sua agenda de sustentabilidade para os próximos anos, em que há a previsão expressa (i) da incorporação dos cenários de riscos climáticos em novos e mais aprimorados testes de estresse do banco; e (ii) do aumento de transparência com base nas recomendações da Força Tarefa sobre Divulgações Financeiras Relacionadas ao Clima (*Task Force on Climate Related Financial Disclosures* – "TCFD").

⁴ Um acionista controlador deve usar seu poder de controle para fazer com que a sociedade cumpra seu propósito e desempenhe seu papel social, e deve ter deveres e responsabilidades para com os outros acionistas da sociedade, aqueles que trabalham para a sociedade e a comunidade na qual ela opera, cujos direitos e interesses o acionista controlador deve respeitar lealmente e se atentar.

⁵ Um dirigente deve usar os poderes a ele conferidos por lei e pelos estatutos para atingir os objetivos corporativos da sociedade e para apoiar seus melhores interesses, incluindo as exigências do público em geral e do papel social da sociedade.

⁶ Art. 154, §4º, Lei das Sociedades Anônimas. Em vista das responsabilidades sociais da sociedade, a conselho de administração ou a diretoria podem autorizar a realização de atos gratuitos razoáveis em benefício dos funcionários ou da comunidade à qual a sociedade pertence.

⁷ Sobre este assunto, o Supremo Tribunal Federal brasileiro proferiu decisão declarando que "a atividade econômica não deve ser decretada em oposição aos princípios estabelecidos para garantir a proteção ambiental". (Supremo Tribunal

Federal, ADI 3.540, Juiz Relator Juiz Celso de Mello, sentença proferida em 09.01.2005, publicada em 2 de março de 2006). Nos termos do artigo 927 do Código de Processo Civil Brasileiro (Lei Federal nº 13.105, de 16 de março de 2015), este é um precedente vinculante que deve ser observado pelos tribunais.

⁸ É importante mencionar que, no caso do rompimento da barragem da Samarco, os diretores da Vale e da BHP foram incluídos como réus em um processo criminal referente ao acidente. No entanto, segundo informações públicas, a ação foi julgada improcedente em relação a alguns desses diretores porque o juiz considerou que eles não tinham o poder de influenciar a gestão da empresa e, portanto, não poderiam ser considerados como autores dos crimes. Além disso, há também um processo administrativo perante a Comissão de Valores Mobiliários para apurar qualquer violação do dever fiduciário de alguns conselheiros da Vale em razão do rompimento da barragem de Brumadinho. Não há informações públicas disponíveis sobre este processo.

Obrigações dos diretores de transparência e mudanças climáticas

A Lei Brasileira das Sociedades Anônimas atribui ao conselho de administração e outros órgãos que compõem as sociedades anônimas e sociedades limitadas o dever de divulgar, em geral e sempre que necessário, todas as informações que possam afetar negativamente o meio ambiente, dentre outras. O dever de informar, em adição às boas práticas, como definido pela *soft law* brasileira, cria condições para que os investidores, o mercado e os órgãos fiscalizadores conduzam análises mais complexas das ações tomadas pelas companhias e seus impactos no meio ambiente e outras questões de sustentabilidade.

Nesse contexto, a Instrução nº 480/2009 da Comissão de Valores Mobiliários (“CVM”) estabelece a obrigação para as companhias abertas de divulgar em seus registros (i) os fatores de risco relacionados a questões ambientais; (ii) os efeitos da regulação sobre a política ambiental da empresa e custos de *compliance*; e (iii) informações relacionadas à política ambiental da empresa.

Em dezembro de 2021, a CVM publicou a Resolução CVM nº 59 – republicada posteriormente por meio da Resolução CVM nº 87 –, que entrará em vigor em 2 de janeiro de 2023. Referida resolução altera a Resolução nº 480/2009 para obrigar as empresas de capital aberto a divulgar, com base na ideia de “pratique ou explique”, determinadas informações de Ambiental, Social e Governança (“ESG”, na sigla em inglês), incluindo (i) os principais aspectos de *compliance* frente as obrigações legais e regulatórias; (ii) indicadores-chave de desempenho sobre as métricas ESG; (iii) descrição sobre o papel dos órgãos administrativos na avaliação, gestão e supervisão dos riscos e oportunidades relacionados ao clima; (iv) uma declaração a respeito da realização de inventários de emissões de GEEs e os escopos inventariados; e (v) uma declaração a respeito da existência de compatibilidade entre a divulgação de riscos climáticos com as recomendações do TCFD, os Objetivos do Desenvolvimento Sustentável (“ODS”), ou outras divulgações financeiras relacionadas à sustentabilidade recomendadas.

Os *standards* de declarações voluntárias continuam a fornecer orientações para empresas brasileiras sobre transparência relacionada a questões de sustentabilidade. O Índice de Sustentabilidade Empresarial – ISE B3, iniciativa voluntária que classifica as empresas de capital aberto em matéria de sustentabilidade, também estabelece uma série de detalhes que devem ser apresentados pelas empresas selecionadas em relação ao meio ambiente, com um questionário específico para mudanças climáticas. Dentre outras informações, as empresas devem divulgar avaliações sobre seus impactos sobre o clima e sobre sua exposição aos impactos relacionados ao clima, bem como seus planos para gerenciar e prevenir tais impactos.

Outra iniciativa voluntária é o Índice CDP Brasil de Resiliência Climática, criado em março de 2020 pela Organização Não Governamental britânica *Carbon Disclosure Project* (“CDP”). Esse índice procura estabelecer uma relação entre os dados ambientais declarados pelas empresas e suas performances financeiras, bem como serve como uma referência para os investidores para avaliarem a transparência das empresas em relação às políticas e ações adotadas em relação às mudanças climáticas, reforçando os *drivers* vistos nos mercados de capitais brasileiros para que os diretores assumam a responsabilidade por suas decisões em relação às divulgações relacionadas ao clima. Em 2021, o questionário utilizado passou por mudanças específicas, como a inclusão de uma pergunta relativa às metas *net-zero*.

O BCB reconheceu os riscos decorrentes das mudanças climáticas à estabilidade financeira e apresentou suas metas e ações que vem adotando no seu primeiro Relatório de Riscos e Oportunidades Sociais, Ambientais e Climáticas.⁹ O BCB também aprovou regulações exigindo que certas instituições financeiras publiquem um Relatório de Riscos e Oportunidades Sociais, Ambientais e Climáticas, incluindo informações sobre governança de riscos climáticos, ambientais e sociais, os reais e potenciais impactos de tais riscos e os processos de gerenciamento destes.¹⁰

⁹ Banco Central Do Brasil, Report on Social, Environmental and Climate-related Risks and Opportunities: Volume 1 (September 2021) <<https://www.bcb.gov.br/en/publications/report-risk-opportunity>>.

¹⁰ Banco Central Do Brasil, New regulations on social, environmental, and climate-related risk disclosures, 15/09/2021. <https://www.bcb.gov.br/content/about/legislation_norms_docs/BCB_Disclosure-GRSAC-Report.pdf>.

Implicações práticas para os diretores

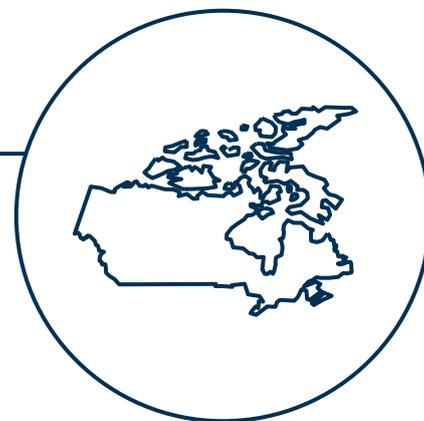
Dado que os representantes e reguladores brasileiros têm se tornado mais enfáticos ao recomendar – e tão logo regular – a necessidade das empresas e seus diretores de adotar medidas de resiliência climática em seus negócios e suas declarações, em particular o supracitado Projeto de Emenda Constitucional nº 233/2019, o Código Civil, a Lei de Sociedades Anônimas, a Política Nacional do Meio Ambiente e as mudanças na Instrução CVM nº 480/2009, junto de iniciativas de instituições financeiras públicas e privadas, conselhos de administração bem assessorados irão:

- a) Delegar a identificação e avaliação dos riscos climáticos para um time de gerenciamento bem identificado que relataria diretamente ao CEO e ao conselho;
- b) inserir na agenda para o conselho dentro de 3 ou 6 meses um processo para iniciar o desenvolvimento de um roteiro de transição climática até 2050 com metas transparentes baseadas na neutralidade de carbono ou na redução de emissões baseadas na ciência, com metas interinas claras até 2040, 2030 e o atual plano estratégico plurianual validado por organizações internacionalmente reconhecidas, para posterior reporte periódico ao conselho;
- c) delegar ao(s) comitê(s) apropriado(s) do conselho, tais como risco, auditoria, jurídico e de governança, cenários / estratégias, nomeações / remuneração, ou sustentabilidade / responsabilidade corporativa, a tarefa de traduzir a estratégia de longo prazo em um processo claro de tomada de decisão para cada aspecto que é relevante para cada comitê; e
- d) discutir com o conselho de transparência, a fim de desenvolver um plano externo de engajamento e comunicação, incluindo divulgações qualitativas e quantitativas, para evitar a publicação de informações eventualmente enganosas.

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The *Canadian Net-Zero Emissions Accountability Act*, in force June 2021, enshrines Canada's commitment to achieve net-zero emissions by 2050.¹ Building on Canada's 2020 climate plan² and the 2016 Pan-Canadian Framework,³ in 2022, Canada announced its 2030 Emissions Reduction Plan, which provides a roadmap to how Canada will meet its enhanced Paris Agreement target to reduce emissions by 40-45% from 2005 levels by 2030.⁴ Canada has also enacted carbon-pricing legislation, the *Greenhouse Gas Pollution Pricing Act*,⁵ which the Supreme Court of Canada upheld as constitutionally valid in 2021.⁶

Federal regulators have acknowledged the risks to the Canadian economy if Canada fails to address climate change. In May 2022, the Office of the Superintendent of Financial Institutions (OSFI) issued a draft Guideline on Climate Risk Management, introducing mandatory climate-related financial disclosures aligned with the Taskforce on Climate-related Financial Disclosures (TCFD) framework.⁷ It will require mandatory disclosure of climate-related risks for federally-regulated financial institutions commencing in 2024, aimed at incentivizing improvements in the quality of the institutions' governance and risk management practices related to climate, in turn promoting the safety and soundness of the financial system. The guideline was developed after a pilot program by the Bank of Canada and OSFI, which

examined scenario analysis and stress testing in respect of climate-related financial risks.⁸ OSFI also published a study in 2021 recognizing that climate-related transition risks can lead to reduced profitability, stranded assets, inability to make loan repayments and/or attract investments, and loss of market capitalization.⁹

The Canadian Securities Administrators (CSA), a coalition of all provincial and territorial securities regulators, issued draft National Instrument 51-107 Disclosure of Climate-related Matters,¹⁰ aligned with the TCFD framework. The CSA completed a consultation period on the draft national instrument and the final version is expected to be promulgated in late 2022.

In June 2022, the Canadian Association of Pension Supervisory Authorities (CAPSA) issued the draft "CAPSA Guideline, Environmental, Social and Governance Considerations in Pension Plan Management", which states that as part of their fiduciary duties, pension plan administrators should consider environmental, social and governance (ESG)

¹ *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22. See also Government of Canada, "Net-Zero Emissions by 2050"

<<https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050.html>>.

² Government of Canada, *A Healthy Environment and a Healthy Economy, Canada's strengthened climate plan to create jobs and support people, communities and the planet*, (2020), <<https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/healthy-environment-healthy-economy.html>>.

³ Government of Canada, *Pan-Canadian Framework on Clean Growth and Climate Change* (2016) <<https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html>>.

⁴ Government of Canada, "2030 Emissions Reduction Plan: Clean Air, Strong Economy" (2022) <<https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/emissions-reduction-2030.html>>.

⁵ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12.

⁶ Reference re *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

⁷ Office of the Superintendent of Financial Institutions (OSFI), draft Guideline B-15: Climate Risk Management, (26 May 2022) <https://www.osfi-bsif.gc.ca/Eng/osfi-bsif/med/Pages/b15-dft_nr.aspx>, expected to be finalized in late 2022.

⁸ Bank of Canada and OSFI, *Using Scenario Analysis to Assess Climate Transition Risk* (January 2022) <<https://www.bankofcanada.ca/wp-content/uploads/2021/11/BoC-OSFI-Using-Scenario-Analysis-to-Assess-Climate-Transition-Risk.pdf>>. OSFI, *Building Federally Regulated Financial Institution Awareness and Capability to Manage Climate-Related Financial Risks* (14 January 2022) <https://www.osfi-bsif.gc.ca/Eng/ff-if/in-ai/Pages/clrsk-mgm_let.aspx>.

⁹ OSFI, "Navigating Uncertainty in Climate Change, Promoting Preparedness and Resilience to Climate-related Risks, (January 2021), 9 <<https://www.osfi-bsif.gc.ca/Eng/Docs/clmtrsk.pdf>>.

¹⁰ Canadian Securities Administrators (CSA), draft National Instrument 51-107 Disclosure of Climate-related Matters, *51-107 - Consultation Climate-related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107 Disclosure of Climate-related Matters (osc.ca)* (hereafter NI 51-107).

characteristics, including climate risk, that may have material relevance to the financial risk-return profile of the pension fund's investments, and that pension plan administrators, as part of their standard of care, need to assess whether their plan governance, risk management and investment decision-making practices are sufficient to identify and respond to material climate and other ESG information in a manner proportionate to their plans and appropriate for their investment beliefs.¹¹

The federal government's 2022 budget included further policies and measures to accelerate the transition to a net-zero economy, including: putting in place a sales mandate to ensure that 20% of new light-duty vehicles are zero-emission by 2026, 60% by 2030 and 100% by 2035; and investing CAD\$250 million over four years to support clean electricity projects.¹²

In short, regulatory and government actions and policies on climate change risks and impacts indicate that these are material financial risks for companies.

Directors' Duties and Climate Change

The *Canada Business Corporations Act* and its sister corporation statutes in the provinces and territories codify and enhance directors' common law duties of loyalty and care. The corporate statutory duty of loyalty requires the directors and officers of a corporation to "*act honestly and in good faith with a view to the best interests of the corporation*".¹³ The Supreme Court of Canada has held that the duty of care requires the directors and officers to "*exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable*

circumstances".¹⁴ The court will defer to the reasonable business judgment of directors who have been duly diligent in their oversight of the company.¹⁵

In June 2020, corporate board governance expert Carol Hansell issued a [legal opinion](#) on directors' obligations to address climate change under Canadian law.¹⁶ The legal opinion identifies both directors' fiduciary duty of loyalty¹⁷ and their duty of care¹⁸ as requiring engagement and consideration of climate-related risk. In order to discharge their duty to act in the best interests of the company, directors must consider the long-term interests of the company and, to this end, any environmental risks.¹⁹ Directors' duty of care requires that they solicit reports and recommendations from management and external sources on climate-related risk as necessary and be satisfied that the company is addressing climate change risk appropriately.²⁰ Hansell's updated [legal opinion](#) in 2022 opines that the obligation of directors to consider the implications of climate change risk is grounded in the duties each director owes to the corporation, and in managing or overseeing the management of risk, directors must meet the objective standard of what a reasonably prudent person would do in comparable circumstances; they must require reports and recommendations from management and external sources as necessary and be satisfied that the corporation is addressing climate change risk appropriately.²¹

OSFI also issued a report that recognized that directors of federally-regulated financial institutions and trustees of federally-regulated pension funds have a fiduciary duty to identify and manage climate risks as part of their

¹¹ Canadian Association of Pension Supervisory Authorities, CAPSA Guideline Environmental, Social and Governance Considerations in Pension Plan Management, (9 June 2022), <<https://www.capsa-acor.org/>>.

¹² Government of Canada, 2022 Federal Budget, A Plan to Grow Our Economy and Make Life More Affordable (April 2022), 91-106 <<https://budget.gc.ca/2022/home-accueil-en.html>>.

¹³ *Canada Business Corporations Act*, note 24, s. 122(1) and its sister provincial and territorial corporations statutes.

¹⁴ *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461; *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at [39], [2008] 3 SCR 560; Janis Sarra, *Canada Climate Law Initiative Fiduciary Obligations in Business and Investment: Implications of Climate Change* (April 2018) <<https://ccli.ubc.ca/wp-content/uploads/2021/04/Fiduciary-Obligation-in-Business-and-Investment.pdf>>.

¹⁵ *Ibid.*

¹⁶ Carol Hansell, Hansell LLP, 'Legal Opinion: Putting Climate Change Risk on the Boardroom Table' (June 2020)

<<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>.

¹⁷ CBCA, s. 122(1)(a)

¹⁸ *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461.

¹⁹ Hansell LLP, 'Legal Opinion: Putting Climate Change Risk on the Boardroom Table' (June 2020), 16-17 <<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>.

²⁰ Hansell, 2020 at 13-15 <<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>. See also Janis Sarra, *Duty to Protect: Corporate Directors and Climate-Related Financial Risk* (January 2021) <<https://ccli.ubc.ca/wp-content/uploads/2021/04/Duty-to-Protect-Corporate-Directors-and-Climate-Related-Financial-Risk.pdf>>.

²¹ Carol Hansell Legal Opinion, *Climate Change Risk on the Boardroom Table*, (7 June 2022), <<https://www.hanselladvisory.com/publication/climate-change-risk-on-the-boardroom-table/>>.

prudential duties, and failure to do so may give rise to liability risks.²²

*effectively quantify these types of risks.*²⁸

Directors' Disclosure Obligations and Climate Change

Canadian securities regulators have advised that climate change risk is now widely recognised as a mainstream business issue and that companies must disclose material climate risks and how they are addressing them.²³ A CSA report states that despite the potential uncertainties and longer time horizon associated with climate change-related risks, boards and management should take appropriate steps to understand and assess the materiality of these risks to their business.²⁴

The CSA has given notice that the board and management should assess their expertise with respect to sector-specific climate-related risks, and augment that expertise, as necessary.²⁵ CSA Staff Notice 51-358 Reporting of Climate Change-related Risks states that the audit committee and the board should be provided with appropriate orientation and information to help members understand sector-specific climate-related issues.²⁶ It suggests that the board ask itself whether directors have been provided sufficient information, including management's materiality assessments in respect of the issuer's climate-related risks, to appropriately oversee and consider management's assessment of these risks.²⁷ CSA Staff Notice 51-358 states:

An assessment of materiality in relation to climate change-related risks may require issuers to adapt their existing approaches to risk assessments in order to better understand the potential impacts of climate change-related risks and their materiality. In some cases, this may involve adjusting their approaches to consider the longer time horizon associated with and how to

CSA proposed National Instrument 51-107 Climate Related Disclosures will apply to all reporting issuers.²⁹ The disclosure requirements relate to the four core elements of the TCFD recommendations: governance; strategy; risk management; and metrics and targets. With respect to governance, NI 51-107 will require reporting issuers to describe the board's oversight of climate-related risks and opportunities and management's role in assessing and managing climate-related risks and opportunities, irrespective of materiality.³⁰ With respect to strategy, reporting issuers will be required to describe, where such information is material: the climate-related risks and opportunities the issuer has identified over the short, medium, and long term, and the impact of climate-related risks and opportunities on the issuer's businesses, strategy, and financial planning.³¹ With respect to risk management, reporting issuers will be required to describe their processes for identifying, assessing and managing climate-related risks, and how processes for identifying, assessing, and managing climate-related risks are integrated into the issuer's overall risk management.³² Finally, with respect to metrics and targets, reporting issuers will be required to disclose the metrics used by the issuer to assess climate-related risks and opportunities in line with its strategy and risk management process where such information is material.

Pursuant to proposed NI 51-107, issuers are to disclose Scope 1, Scope 2, and Scope 3 greenhouse gas emissions on a comply or explain basis, although the CSA is considering whether to make Scope 1 emissions reporting mandatory.³³ Issuers will also be required to disclose the targets used by the issuer to manage climate-related risks and opportunities and performance against targets where such information is material.³⁴

²² OSFI, 'Navigating Uncertainty in Climate Change, Promoting Preparedness and Resilience to Climate-related Risks, (January 2021), 9 <<https://www.osfi-bsif.gc.ca/Eng/Docs/clmt-rsk.pdf>>.

²³ CSA Staff Notice 51-358 Reporting of Climate Change-related Risks (2019), <https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20190801_51-358_reporting-of-climate-change-related-risks.htm>. See also CSA Staff Notice 51-333 Environmental Reporting Guidance (SN 51-333).

²⁴ CSA Staff Notice 51-358, *ibid* at 4.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ *Ibid* at 8.

²⁹ Other than investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable security issuers and certain credit support issuers; NI 51-107.

³⁰ Proposed NI 51-107, at 7.

³¹ Proposed NI 51-107, at 7.

³² Proposed NI 51-107, at 7.

³³ Proposed NI 51-107, at 7.

³⁴ Proposed NI 51-107, at 8.

The Hansell opinion concluded that public companies' disclosure obligations under securities law extend to the disclosure of climate-related risks (and opportunities) and

that directors should be aware that their decisions regarding disclosure under securities law are not subject to protection of the business judgement rule.³⁵

Practical Implications for Directors

Given that Canada has adopted a stakeholder perspective on directors' obligations, both by statute and by opinions of the Supreme Court of Canada, given the CSA's assertion that material climate risks need to be disclosed under current law, and given all of the new proposed rules and guidelines, well-counselled boards will:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management that reports directly to the CEO and board, always keeping in mind that directors retain overall fiduciary responsibility for oversight of identification and management of climate-related risks and opportunities;³⁶
- b) put on the agenda for the board, as soon as possible, a process to initiate the development of a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030 and the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/ corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee;
- d) consider aligning executive compensation to meeting the company's targets and timetables in transitioning to net-zero emissions; and
- e) discuss with disclosure counsel, to develop an external engagement and communications plan and ensure rigorous securities disclosure.

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³⁵ Hansell LLP, 'Legal Opinion: Putting Climate Change Risk on the Boardroom Table' (June 2020) at 20, <<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>.

³⁶ Janis Sarra, with contributing authors Roopa Davé, Meghan Harris-Ngae, and Ravipal Bains, Canada Climate Law Initiative,

Audit Committees and Effective Climate Governance, A Guide for Boards of Directors, (December 2020) <<https://law-ccli-2019.sites.olt.ubc.ca/files/2020/12/CCLI-Guide-for-Audit-Committees-on-Effective-Climate-Governance.pdf>>.



La *Loi canadienne sur la responsabilité en matière de carboneutralité*, entrée en vigueur en juin 2021, entérine dans la loi canadienne l'engagement du gouvernement du Canada à atteindre la carboneutralité d'ici 2050.¹ Misant sur les mesures figurant dans le plan climatique renforcé du Canada² de 2020 et le Cadre pancanadien³ de 2016, le Canada a annoncé, en 2022, son Plan de réduction des émissions du Canada pour 2030 qui fournit une feuille de route décrivant la manière dont le Canada atteindra sa cible revue à la hausse au titre de l'Accord de Paris visant à réduire ses émissions de 40% à 45% sous les niveaux de 2005 d'ici 2030.⁴ Le Canada a aussi adopté une loi sur la tarification du carbone, la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*,⁵ que la Cour Suprême du Canada a considérée comme constitutionnellement valide en 2021.⁶

Les organismes de réglementation fédérale ont reconnu que l'échec du Canada à prendre des mesures pour lutter contre les changements climatiques représente un risque pour l'économie canadienne. En mai 2022, le Bureau du Surintendant des Institutions Financières (BSIF) a publié une version à l'étude de la ligne directrice Gestion des Risques Climatiques, instaurant des obligations d'informations en matière de changements climatiques conformément au cadre élaboré par le Groupe de travail international sur l'information financière relative aux changements climatiques (GIFCC).⁷ Elle exigera la divulgation

obligatoire des risques liés au climat pour les institutions financières sous réglementation fédérale à partir de 2024, afin d'encourager l'amélioration de la qualité des pratiques de gouvernance et de gestion des risques liés au climat des institutions, ce qui permettra de promouvoir la sécurité et la solidité du système financier. La ligne directrice a été élaborée à la suite d'un programme pilote de la Banque du Canada et du BSIF, qui a examiné l'analyse de scénarios et les simulations de crise en ce qui concerne les risques financiers liés au climat.⁸ Le BSIF a également publié en 2021 une étude reconnaissant que les risques de transition liés au climat peuvent entraîner une réduction de la rentabilité, des actifs échoués, l'incapacité de rembourser des prêts et/ou d'attirer des investissements, et la perte de capitalisation boursière.⁹

Les Autorités canadiennes en valeurs mobilières (ACVM), une coalition de tous les organismes provinciaux et territoriaux de réglementation des valeurs mobilières, ont publié le Projet de Règlement 51-107 sur l'information liée aux questions climatiques,¹⁰ aligné au cadre du GIFCC. Les ACVM ont

¹ *Loi canadienne sur la responsabilité en matière de carboneutralité*, L.C. 2021, ch. 22, voir aussi Gouvernement du Canada, "La carboneutralité d'ici 2050" <<https://www.canada.ca/fr/services/environnement/meteo/changesclimatiques/plan-climatique/carboneutralite-2050.html>>.

² Gouvernement du Canada, *Un environnement sain et une économie saine, Le plan climatique renforcé du Canada pour créer des emplois et soutenir la population, les communautés et la planète* (2020) <<https://www.canada.ca/fr/services/environnement/meteo/changesclimatiques/plan-climatique/survol-plan-climatique/environnement-sain-economie-saine.html>>.

³ Gouvernement du Canada, *Cadre pancanadien sur la croissance propre et les changements climatiques* (2016) <<https://www.canada.ca/fr/services/environnement/meteo/changesclimatiques/cadre-pancanadien.html>>.

⁴ Gouvernement du Canada, « Plan de réduction des émissions pour 2030: Un air pur, et une économie forte » (2022) <<https://www.canada.ca/fr/services/environnement/meteo/changesclimatiques/plan-climatique/survol-plan-climatique/reduction-emissions-2030.html>>.

⁵ *Loi sur la tarification de la pollution causée par les gaz à effet de serre*, L.C. 2018, ch. 12.

⁶ Renvois relatifs à la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*, 2021 CSC 11.

⁷ Bureau du Surintendant des Institutions Financières (BSIF), version à l'étude de la ligne directrice B-15 : Gestion des risques climatiques (26 mai 2022) <https://www.osfi-bsif.gc.ca/fr/osfi-bsif/med/Pages/b15-dft_nr.aspx>, qui devrait être finalisée fin 2022.

⁸ La Banque du Canada et le BSIF, *Utiliser l'analyse de scénarios pour évaluer les risques liés à la transition climatique* (janvier 2022) <<https://www.banqueducanada.ca/wp-content/uploads/2021/11/BdC-BSIF-Utiliser-lanalyse-de-scenarios-pour-evaluer-les-risques-lies-a-la-transition-climatique.pdf>>. BSIF, *Parfaire les connaissances et les capacités des institutions financières fédérales en matière de gestion des risques financiers liés au climat* (14 janvier 2022) <https://www.osfi-bsif.gc.ca/fr/fi-if/in-ai/Pages/clrsk-mgm_let.aspx>.

⁹ BSIF, *'Incertitude et changements climatiques : Déjouer le risque lié aux changements climatiques par la préparation et la résilience'* (janvier 2021), 9 <<https://www.osfi-bsif.gc.ca/Fra/Docs/clmt-rsk.pdf>>.

¹⁰ Les Autorités canadiennes en valeurs mobilières (ACVM), *Projet de Règlement 51-107 sur l'information liée aux questions climatiques, Consultation Faits nouveaux concernant l'information liée au changement climatique et Avis de consultation des ACVM Projet de Règlement 51-107 sur l'information liée aux questions climatiques* (ci-après Règlement 51-107).

terminé une période de consultation sur le projet d'instrument national et la version finale devrait être promulguée à la fin de 2022.

En juin 2022, l'Association canadienne des organismes de contrôle des régimes de retraite (ACOR) a publié le projet de "Ligne directrice de l'ACOR Considérations Environnementales, Sociales et de Gouvernance dans la Gestion des Régimes de Retraite", qui stipule que dans le cadre de leurs obligations fiduciaires, les administrateurs de régimes de retraite doivent tenir compte des caractéristiques environnementales, sociales et de gouvernance (ESG), y compris le risque climatique, qui peuvent avoir une incidence importante sur le profil risque-rendement financier des placements du fonds de retraite. Les administrateurs de régimes de retraite, dans le cadre de leur devoir de diligence, doivent évaluer si leurs pratiques de gouvernance, de gestion des risques et de prise de décision en matière d'investissement sont suffisantes pour identifier et répondre aux informations climatiques et autres informations ESG importantes d'une manière proportionnée à leurs régimes et appropriée à leurs convictions en matière d'investissement.¹¹

Le budget 2022 du gouvernement fédéral comprenait d'autres politiques et mesures visant à accélérer la transition vers une économie nette zéro, notamment : la mise en place d'un mandat de vente pour que 20 % des nouveaux véhicules légers soient zéro émission d'ici 2026, 60 % d'ici 2030 et 100 % d'ici 2035; et l'investissement de 250 millions de dollars canadiens sur quatre ans pour soutenir les projets d'électricité propre.¹²

En bref, les actions et les politiques réglementaires et gouvernementales concernant les risques et les impacts des changements climatiques indiquent qu'il s'agit

de risques financiers importants pour les entreprises.

Responsabilité des administrateurs et changement climatique

La *Loi canadienne sur les sociétés par actions* et les lois sur les sociétés sœurs dans les provinces et territoires codifient et renforcent les obligations de loyauté et de diligence des administrateurs en common law. L'obligation de loyauté imposée par la loi aux sociétés exige que les administrateurs et les dirigeants d'une société agissent "*avec intégrité et de bonne foi au mieux des intérêts de la société*".¹³ La Cour suprême du Canada a statué que les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir "*avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente*".¹⁴ Le tribunal s'en remettra à l'appréciation commerciale raisonnable des administrateurs qui ont été dûment diligents dans leur surveillance de la société.¹⁵

En juin 2020, Carol Hansell, experte en gouvernance de conseils d'administration, a publié un avis juridique sur les obligations des administrateurs en matière de changements climatiques en vertu du droit canadien.¹⁶ L'avis juridique identifie à la fois l'obligation fiduciaire de loyauté¹⁷ des administrateurs et leur devoir de diligence¹⁸ comme nécessitant un engagement et une prise en compte des risques liés au climat. Afin de s'acquitter de leur obligation d'agir au mieux des intérêts de la société, les administrateurs doivent tenir compte des intérêts à long terme de la société et, à cette fin, de tout risque environnemental.¹⁹ Le devoir de diligence des administrateurs exige qu'ils sollicitent des rapports et des recommandations de la direction et de sources externes sur le risque lié au climat, si

¹¹ L'Association canadienne des organismes de contrôle des régimes de retraite (ACOR), "Ligne directrice de l'ACOR Considérations Environnementales, Sociales et de Gouvernance dans la Gestion des Régimes de Retraite", (9 juin 2022) <<https://www.capsa-acor.org/Documents/View/1915>>.

¹² Gouvernement du Canada, Budget de 2022, Un plan pour faire croître notre économie et rendre la vie plus abordable (avril 2022), 91-106 <<https://budget.gc.ca/2022/home-accueil-fr.html>>.

¹³ Loi canadienne sur les sociétés par actions (L.R.C. (1985), ch. C-44), note 24, s. 122(1) et les statuts de ses sociétés sœurs provinciales et territoriales.

¹⁴ *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, 2004 CSC 68; [2004] 3 RCS 461; *BCE Inc. c. Détenteurs de débetures de 1976*, 2008 CSC 69 [39], [2008] 3 RCS 560; Janis Sarra, L'initiative canadienne de droit climatique, *Fiduciary*

Obligations in Business and Investment: Implications of Climate Change (avril 2018) <<https://ccli.ubc.ca/wp-content/uploads/2021/04/Fiduciary-Obligation-in-Business-and-Investment.pdf>>.

¹⁵ *Ibid.*

¹⁶ Carol Hansell, Hansell LLP, 'Legal Opinion: Putting Climate Change Risk on the Boardroom Table' (juin 2020) <<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>.

¹⁷ Loi canadienne sur les sociétés par actions, s. 122(1)(a).

¹⁸ *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, 2004 CSC 68; [2004] 3 RCS 461.

¹⁹ Carol Hansell, Hansell LLP, 'Legal Opinion: Putting Climate Change Risk on the Boardroom Table' (juin 2020), 16-17 <<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>.

nécessaire, et qu'ils soient convaincus que la société aborde le risque lié aux changements climatiques de manière appropriée.²⁰ L'avis juridique de Hansell, mis à jour en 2022, indique que l'obligation des administrateurs de prendre en compte les implications du risque lié aux changements climatiques est fondée sur les devoirs de chaque administrateur envers la société, et qu'en gérant ou en supervisant la gestion du risque, les administrateurs doivent respecter la norme objective de ce qu'une personne raisonnablement prudente ferait dans des circonstances comparables; ils doivent demander des rapports et des recommandations à la direction et à des sources externes si nécessaire et s'assurer que la société traite le risque lié aux changements climatiques de manière appropriée.²¹

Le BSIF a également publié un rapport dans lequel il reconnaît que les administrateurs des institutions financières fédérales et les fiduciaires des caisses de retraite fédérales ont l'obligation fiduciaire de déterminer et de gérer les risques climatiques dans le cadre de leurs obligations prudentielles, et que le fait de ne pas le faire peut entraîner des risques de responsabilité.²²

Obligation d'information des administrateurs et changement climatique

Les autorités canadiennes de réglementation des valeurs mobilières ont fait savoir que le risque lié aux changements climatiques est désormais largement reconnu comme un problème commercial courant et que les entreprises doivent divulguer les risques climatiques importants et la manière dont elles les abordent.²³ Un rapport des ACVM indique que malgré les incertitudes potentielles et l'horizon temporel plus long associés aux risques liés aux changements climatiques, les

conseils d'administration et la direction doivent prendre les mesures appropriées pour comprendre et évaluer l'importance de ces risques pour leur entreprise.²⁴

Les ACVM ont fait savoir que le conseil d'administration et la direction devraient évaluer leur expertise en ce qui concerne les risques liés au climat propres à un secteur et accroître cette expertise, au besoin.²⁵ L'avis 51-358 du personnel des ACVM - Déclaration des risques liés aux changements climatiques stipule que le comité de vérification et le conseil d'administration devraient recevoir une orientation et des informations appropriées pour aider les membres à comprendre les questions liées au climat propres au secteur.²⁶ Il suggère que le conseil se pose la question de savoir si les administrateurs ont reçu suffisamment d'information, y compris les évaluations de l'importance relative de la direction à l'égard des risques liés au climat de l'émetteur, pour superviser et examiner de façon appropriée l'évaluation de ces risques par la direction.²⁷ L'avis 51-358 du personnel des ACVM précise ce qui suit :

Pour apprécier l'importance relative à l'égard des risques liés au changement climatique, les émetteurs pourraient devoir adapter leurs approches actuelles d'évaluation des risques pour mieux saisir leurs répercussions potentielles ainsi que leur importance relative. Dans certains cas, ils pourraient devoir les ajuster afin de tenir compte de l'horizon temporel étendu de ce type de risques et de déterminer la manière efficace de les quantifier.²⁸

Le projet de Règlement 51-107 sur l'information relative au climat des ACVM s'appliquera à tous les émetteurs assujettis.²⁹ Les obligations

²⁰ Hansell, 2020 p. 13-15; <<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>. Voir aussi Janis Sarra, *Duty to Protect: Corporate Directors and Climate-Related Financial Risk* (janvier 2021) <<https://ccli.ubc.ca/wp-content/uploads/2021/04/Duty-to-Protect-Corporate-Directors-and-Climate-Related-Financial-Risk.pdf>>.

²¹ Carol Hansell Legal Opinion, *Climate Change Risk on the Boardroom Table*, (7 juin 2022), <<https://www.hanselladvisory.com/content/uploads/Climate-Change-Risk-on-the-Boardroom-Table-00094165xD4A96.pdf>>.

²² BSIF, 'Incertitude et changements climatiques : Déjouer le risque lié aux changements climatiques par la préparation et la résilience' (janvier 2021), 9 <<https://www.osfi-bsif.gc.ca/Fra/Docs/clmt-rsk.pdf>>.

²³ ACVM, Avis 51-358 du personnel des ACVM Information sur les risques liés au changement climatique (2019), <<https://lautorite.qc.ca/fileadmin/lautorite/reglementation/valeurs-mobilieres/0-avis-acvm-staff/2019/2019aout01-51-358-avis-acvm-fr.pdf>>. Voir aussi *Indications en matière d'information environnementale* (SN 51-333).

²⁴ Avis 51-358 du personnel des ACVM, *ibid* p. 4.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ *Ibid* p. 8.

²⁹ Autres que les fonds d'investissement, les émetteurs de titres adossés à des actifs, les émetteurs étrangers désignés, les émetteurs étrangers de la SEC, certains émetteurs de titres échangeables et certains émetteurs de soutien au crédit; Règlement 51-107.

d'information portent sur les quatre éléments fondamentaux des recommandations du GIFCC : la gouvernance, la stratégie, la gestion des risques et les mesures et objectifs. En ce qui concerne la gouvernance, le Règlement 51-107 exigera des émetteurs assujettis qu'ils décrivent la surveillance par le conseil d'administration des risques et des opportunités liés au climat et le rôle de la direction dans l'évaluation et la gestion des risques et des opportunités liés au climat, indépendamment de l'importance relative.³⁰ En ce qui concerne la stratégie, les émetteurs assujettis seront tenus de décrire, lorsque cette information est importante : les risques et les opportunités liés au climat que l'émetteur a identifié à court, moyen et long terme, et l'impact des risques et des opportunités liés au climat sur les activités, la stratégie et la planification financière de l'émetteur.³¹ En ce qui concerne la gestion des risques, les émetteurs assujettis devront décrire leurs processus d'identification, d'évaluation et de gestion des risques liés au climat, ainsi que la manière dont les processus d'identification, d'évaluation et de gestion des risques liés au climat sont intégrés dans la gestion globale des risques de l'émetteur.³² Enfin, en ce qui concerne les paramètres et les objectifs, les émetteurs assujettis seront tenus de divulguer

les paramètres utilisés par l'émetteur pour évaluer les risques et les opportunités liés au climat conformément à sa stratégie et à son processus de gestion des risques lorsque ces informations sont importantes.

En vertu du projet de Règlement 51-107, les émetteurs doivent déclarer les émissions de gaz à effet de serre des champs d'application 1, 2 et 3 selon le principe « se conformer ou s'expliquer », bien que les ACVM examinent la possibilité de rendre obligatoire la déclaration des émissions du champ d'application 1.³³ Les émetteurs seront également tenus de divulguer les objectifs qu'ils utilisent pour gérer les risques et les opportunités liés au climat et la performance par rapport aux objectifs lorsque cette information est importante.³⁴

L'avis Hansell a conclu que les obligations de divulgation des sociétés publiques en vertu de la législation sur les valeurs mobilières s'étendent à la divulgation des risques (et des opportunités) liés au climat et que les administrateurs doivent savoir que leurs décisions concernant la divulgation en vertu de la législation sur les valeurs mobilières ne sont pas protégées par la règle de l'appréciation commerciale.³⁵

³⁰ Projet de Règlement 51-107, p. 7.
³¹ Projet de Règlement 51-107, p. 7.
³² Projet de Règlement 51-107, p. 7.
³³ Projet de Règlement 51-107, p. 7.
³⁴ Projet de Règlement 51-107, p. 8.

³⁵ Hansell LLP, 'Legal Opinion: Putting Climate Change Risk on the Boardroom Table' (juin 2020), p. 20 <<https://www.hanselladvisory.com/content/uploads/Hansell-Climate-Change-Opinion.pdf>>.

Implications pratiques pour les administrateurs

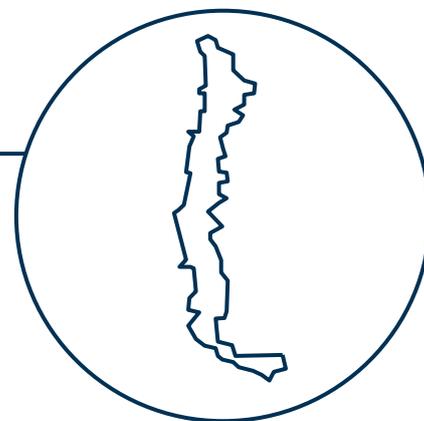
Étant donné que le Canada a adopté le point de vue des parties prenantes sur les obligations des administrateurs, tant par la loi que par les avis de la Cour suprême du Canada, étant donné l'affirmation des ACVM selon laquelle les risques climatiques importants doivent être divulgués en vertu de la loi actuelle, et étant donné toutes les nouvelles règles et directives proposées, les conseils d'administration bien conseillés:

- a) délégueront l'identification et l'évaluation des risques climatiques à une équipe de direction clairement identifiée qui rendra directement compte au PDG et au conseil d'administration, en gardant toujours à l'esprit que les administrateurs conservent la responsabilité fiduciaire globale de la surveillance de l'identification et de la gestion des risques et des opportunités liés au climat³⁶;
- b) inscriront à l'ordre du jour du conseil d'administration, dès que possible, un processus visant à lancer l'élaboration d'une feuille de route pour la transition climatique jusqu'en 2050, avec des objectifs transparents de neutralité ou de réduction des émissions de carbone, ainsi que des objectifs intermédiaires clairs pour 2040, 2030 et le plan stratégique pluriannuel actuel, et feront ensuite régulièrement rapport au conseil d'administration;
- c) délégueront au(x) comité(s) approprié(s) du conseil d'administration, tels que le comité des risques, le comité d'audit, le comité juridique et de gouvernance, le comité des scénarios/stratégie, le comité des nominations/rémunération ou le comité de durabilité/responsabilité d'entreprise la tâche de traduire la stratégie à long terme en un processus décisionnel clair pour chaque aspect pertinent pour chaque comité;
- d) envisagerons d'aligner la rémunération des cadres supérieurs sur l'atteinte des objectifs et des calendriers de la société pour la transition vers des émissions nettes nulles; et
- e) discuteront avec un avocat spécialisé en divulgation, afin d'élaborer un plan d'engagement et de communication externe et assureront une divulgation rigoureuse des valeurs mobilières.

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³⁶ Janis Sarra, avec la contribution de Roopa Davé, Meghan Harris-Ngae et Ravipal Bains, L'initiative canadienne de droit climatique, *Comités d'audit et gouvernance climatique efficace, Guide à l'intention des administrateurs d'entreprise*, (décembre 2020) <<https://ccli.ubc.ca/wp-content/uploads/2021/05/Comites-daudit-et-gouvernance-climatique-efficace-Guide-a%CC%80-lintention-des-conseils-dadministration.pdf>>.



The Financial Markets Commission (*Comisión para el Mercado Financiero*, or CMF) issued a strategy on 25 September 2020 to address climate change in the financial markets. The main objective of this strategy is to promote the disclosure of information related to climate change, as well as to promote the development of a green financial market and integrate climate risks into the risk assessments required of listed companies.

In this regard, the CMF recognized climate change as a financial risk that financial market participants must adequately manage. The work plan proposed by the CMF includes the following:

- The creation of a Climate Change Working Group within the CMF to develop a strategic climate change initiative.
- The participation of the CMF in the Green Finance Public-Private Board of the Ministry of Finance and in the work of the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors, and the Network of Central Banks and Financial Supervisors to Greening the Financial System (NGFS).
- A plan to boost information disclosure through regulatory changes.
- Development of a plan to promote a green financial marketplace.
- The integration of climate risks into risk assessments. In the short term, this involves defining an international best practice framework for climate risk assessment, monitoring and management (such as the Task Force on Climate-related Financial Disclosure (TCFD) Recommendations, which are expressly mentioned) based on the partnerships the CMF has built.

There are several ongoing developments which may affect the legal and commercial context in which Chilean companies carry out their business. Chile's goal of achieving carbon neutrality by 2050 forms part of the Climate Change Framework Law, which was enacted on 13 June 2022. The law contains guidelines for specific sectors on climate change adaptation and risk assessment based on the vulnerability of each sector.

Further, proposed provisions for the new Constitution – which will be submitted to a referendum on 4 September 2022 – include significant protections for the environment and climate, including a proposed requirement for the State to promote dialogue, co-operation and international solidarity to adapt, mitigate and confront the climate and ecological crises.¹ While these developments have not yet taken legal effect, they may have implications for how boards should best exercise their decision-making powers.

Directors' Duties and Climate Change

Law No. 18046, known as the Corporations Law, establishes certain fiduciary obligations for members of boards of directors to duly perform their management functions. Among these fiduciary duties, applicable to listed and non-listed entities, are the duty of care, loyalty, confidentiality, information, and accountability.

Chilean *General Environmental Law No. 19300* establishes a general legal statute for environmental damage in Chile in its article 51. In relation to the liability of directors and officers, Chile does not have a systematic

¹ See Convención Constitucional, Approved Standards, Oficio N° 563 (4 March 2022) <[https://www.chileconvencion.cl/wp-](https://www.chileconvencion.cl/wp-content/uploads/2022/03/Oficio-N%C2%B0563-que-informa-normas-aprobadas-de-la-Com.-sobre-Medio-Ambiente.pdf)

[content/uploads/2022/03/Oficio-N%C2%B0563-que-informa-normas-aprobadas-de-la-Com.-sobre-Medio-Ambiente.pdf](https://www.chileconvencion.cl/wp-content/uploads/2022/03/Oficio-N%C2%B0563-que-informa-normas-aprobadas-de-la-Com.-sobre-Medio-Ambiente.pdf)>.

framework regulating criminal liability for environmental damage.

However, Chile's regulation on securities and corporations does establish specific duties and levels of responsibility that directors must meet in acting as the governing body of a corporation. Firstly, *Law No. 18046* establishes the liability of the board of directors as judicial and extrajudicial representatives of a corporation, along with their civil, administrative and criminal liability for acts or omissions of the corporation acting as a legal entity. Additionally, article 133 extends such liability to officers, establishing their joint and several liabilities for any damages caused to the company, the shareholders or third parties, in breach of *Law No. 18046*, its Rules (contained in Ministry of Finance Supreme Decree No.702 of 2011) and the company by-laws.

Under the new General Rule No. 461, in-scope entities must now undertake integrated reporting of all relevant ESG factors in all sections of their annual report, including disclosures on the profile of the entity, risk management system, strategy and business model and corporate governance practices similar to those contained in the now repealed General Rule No. 385.

The integration of ESG factors in the annual report, in particular the focus on climate change-related risks (on which, see below is likely to gradually raise the level of diligence required for a director to discharge their duties to their company as General Rule No.461 comes into effect.

Directors' Disclosure Obligations and Climate Change

The CMF's General Rule No.30 requires that listed entities periodically publish an annual report covering the information required in the mentioned General Rule.

In November 2021, the CMF issued General Rule No.461, which amends General Rule No.30 (and replaces General Rule No.385 on corporate governance issues) to require listed entities, banks, insurance companies, general fund managers and stock exchanges to disclose ESG-related issues in their annual reports.² The CMF has explained that these issues are in line with international standards established by entities including the International Integrated Reporting Council (IIRC), the Global Reporting Initiative (GRI), the TCFD, the Sustainability Accounting Standards Board (SASB) and the International Organization of Securities Commissions (IOSCO).

General Rule No.461 requires in-scope entities to describe the systems put in place by the board to manage ESG risks, in particular the physical and transition risks arising from climate change (including, for example, consideration of the risks which may arise in a world with more than 2°C of warming); and to disclose the material risks and opportunities which the company may face, including the risks identified by the TCFD.³ Entities are also required, on a 'comply or explain' basis, to report on the SASB sustainability metrics relevant to their industries.⁴

In-scope entities may comply voluntarily with the requirement of General Rule No.461 from financial year 2022, and the requirements will become mandatory for large corporations from 31 December 2022, and for small corporations from 31 December 2023.

² See CMF, CMF issues regulation incorporating sustainability and corporate governance requirements in Annual Reports (12 November 2021) <<https://www.cmfchile.cl/portal/principal/613/w3-article-49809.html>>; CMF, CMF makes available to supervised parties frequently asked questions and answers on the sustainability

and corporate governance regulation recently issued (23 December 2021) <<https://www.cmfchile.cl/portal/principal/613/w3-article-50058.html>>.

³ General Rule No.461, r. 3.6.

⁴ General Rule No.461, r. 8.2.

Practical Implications for Directors

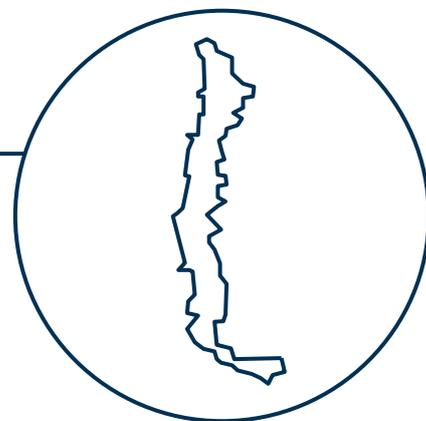
Given the increasing focus of the Chilean Government and securities and financial regulators on climate change and sustainability issues, including developments in integrated reporting obligations and potential legislation on national climate change goals, well-counselled directors of Chilean companies should:

- a) delegate the identification and evaluation of ESG factors, in particular climate change-related risks, to a clearly identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss disclosure obligations and best practice with counsel, in order to develop an external engagement and communications plan.

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La Comisión para el Mercado Financiero (CMF) publicó el 25 de septiembre de 2020 una estrategia para abordar el cambio climático en los mercados financieros. El principal objetivo de esta estrategia es promover la divulgación de información relacionada con el cambio climático, así como fomentar el desarrollo de un mercado financiero ecológico e integrar los riesgos climáticos en las evaluaciones de riesgo exigidas a las entidades bajo su supervisión.

En este sentido, la CMF reconoció que el cambio climático es un riesgo financiero que debe ser gestionado adecuadamente por los participantes en los mercados financieros. El plan de trabajo propuesto por la CMF incluye lo siguiente:

- La creación de un Grupo de Trabajo sobre el Cambio Climático dentro de la CMF para desarrollar una iniciativa estratégica del cambio climático.
- La participación de la CMF en la Mesa Público-Privada de Finanzas Verdes del Ministerio de Hacienda y en los trabajos de la Organización Internacional de Comisiones de Valores (IOSCO, por sus siglas en inglés), la Asociación Internacional de Supervisores de Seguros y la Red de Bancos Centrales y Supervisores Financieros para la Ecologización del Sistema Financiero (NGFS).
- Un plan para impulsar la divulgación de información mediante cambios normativos.
- Desarrollo de un plan para promover un mercado financiero ecológico.
- La integración de los riesgos climáticos a las evaluaciones de riesgo. A corto plazo, esto implica la definición de un marco internacional de mejores prácticas para la evaluación, el seguimiento y la gestión de los riesgos climáticos (como las Recomendaciones del Grupo de Trabajo sobre Divulgaciones Financieras relacionadas con el Clima (TCFD –por sus siglas en inglés –que se mencionan expresamente) basado en las asociaciones que el CMF ha creado.

Existen varios avances que pueden afectar al contexto legal y comercial en el que las empresas chilenas llevan a cabo sus negocios. El objetivo de Chile de alcanzar la neutralidad de carbono en 2050 forma parte de la Ley Marco de Cambio Climático, publicada el 13 de junio de 2022. La ley contiene directrices para sectores específicos sobre la adaptación al cambio climático y la evaluación de riesgos en función de la vulnerabilidad de cada sector.

Además, las disposiciones propuestas para la nueva Constitución - que será sometida a un referéndum el próximo 4 de septiembre de 2022 - incluyen importantes protecciones para el medio ambiente y el clima, incluida la propuesta de que el Estado promueva el diálogo, la cooperación y la solidaridad internacional para adaptarse, mitigar y afrontar las crisis climáticas y ecológicas. Aunque estos avances aún no han entrado en vigor, pueden tener implicancias en la forma en que los directorios deben ejercer mejor sus poderes de decisión.

Deberes de los Directores y Cambio Climático

La *Ley N° 18.046*, conocida como Ley de Sociedades Anónimas, establece ciertas obligaciones fiduciarias para que los miembros de directorios desempeñen debidamente sus funciones de gestión. Entre estos deberes fiduciarios aplicables a las entidades listadas en bolsa y no listadas, se encuentran el deber de diligencia, lealtad, confidencialidad, información y responsabilidad.

La *Ley N° 19.300* sobre Bases Generales del Medio Ambiente establece un estatuto jurídico general para el daño ambiental en Chile en su artículo 51. En relación con la responsabilidad de los directores y funcionarios, Chile no cuenta con un marco sistemático que regule la responsabilidad penal por daños ambientales.

Sin embargo, la regulación chilena sobre valores y sociedades anónimas establece deberes específicos y niveles de

responsabilidad que deben cumplir los directores al actuar como órgano de administración de una sociedad anónima. En primer lugar, la *Ley N° 18.046* establece la responsabilidad del directorio como representante judicial y extrajudicial de una sociedad anónima, así como su responsabilidad civil, administrativa y penal por los actos u omisiones de la sociedad como persona jurídica. Adicionalmente, el artículo 133 hace extensiva dicha responsabilidad a los administradores, estableciendo su responsabilidad solidaria por los daños y perjuicios causados a la sociedad, a los accionistas o a terceros, en incumplimiento de la Ley N° 18.046, su Reglamento (contenido en el Decreto Supremo N° 702 de 2011 del Ministerio de Hacienda) y los estatutos sociales.

En virtud de la nueva Norma de Carácter General N° 461 de la CMF (la NCG 461), las entidades incluidas en el ámbito de aplicación deben ahora informar de forma integrada todos los factores ASG relevantes en todas las secciones de su informe anual, incluyendo información sobre el perfil de la entidad, el sistema de gestión de riesgos, la estrategia y el modelo de negocio y las prácticas de gobierno corporativo, similares a las contenidas en la ya derogada Norma de Carácter General N° 385.

La integración de los factores ASG en el informe anual, en particular la atención prestada a los riesgos relacionados con el cambio climático (sobre los cuales, véase más adelante), es probable que aumente gradualmente el nivel de diligencia requerido para que un director cumpla con sus deberes para con su empresa a medida que entre en vigor la Norma General N° 461.

Obligación de Informar de los Directores y Cambio Climático

La Norma de Carácter General N° 30 de la CMF exige que las entidades transadas en bolsa publiquen periódicamente un informe anual que incluya la información requerida en la citada norma.

En noviembre del año 2021, la CMF publicó la NCG 461, la cual modificó la Norma de Carácter General N° 30 (y sustituye a la Norma de Carácter General N° 385 en relación con temas de gobierno corporativo) para exigir a las entidades, los bancos, las compañías de seguros, las gestoras de fondos generales y las bolsas de valores que informen los temas relacionados con los ASG en sus informes anuales. La CMF ha explicado que estos temas están en consonancia con las normas internacionales establecidas por entidades como el Consejo Internacional de Reportes Integrados (IIRC), la Iniciativa Global de Reporte (GRI), el TCFD, el Consejo de Normas Contables de Sostenibilidad (SASB) y la Organización Internacional de Comisiones de Valores (OICV).

La NCG 461 exige a las entidades fiscalizadas que describan los sistemas establecidos por el directorio para gestionar los riesgos ASG, en particular los riesgos físicos y de transición derivados del cambio climático (incluyendo, por ejemplo, la consideración de los riesgos que puedan surgir en un mundo con más de 2 °C de calentamiento); y que informen los riesgos y oportunidades materiales a los que puede enfrentarse la empresa, incluidos los riesgos identificados por el TCFD. Las entidades también están obligadas, sobre la base de "cumplir o explicar", a informar sobre las métricas de sostenibilidad de la SASB relevantes para sus sectores.

Las entidades afectadas por esta regulación pueden cumplir voluntariamente el requisito de la NCG 461 a partir del ejercicio 2022, y los requisitos serán obligatorios para las grandes empresas a partir del 31 de diciembre de 2022 y para las pequeñas empresas a partir del 31 de diciembre de 2023.

Implicaciones Prácticas para los Directores

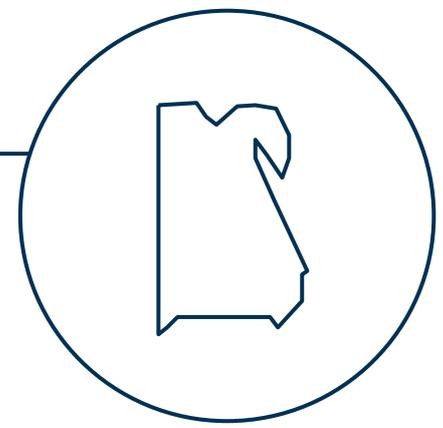
Dada la creciente atención del gobierno chileno y de los reguladores bursátiles y financieros a los temas relacionados con el cambio climático y la sostenibilidad, incluida la evolución de las obligaciones de presentación de informes integrados y los objetivos nacionales en materia de cambio climático, los directores de las empresas chilenas bien asesorados deberían:

- a) delegar la identificación y evaluación de los factores ASG, en particular los riesgos relacionados con el cambio climático, a un equipo claramente identificado en la dirección que informe directamente al gerente general y al directorio;
- b) incluir en la agenda del directorio, en un plazo de 3 a 6 meses, un proceso para empezar a desarrollar una hoja de ruta para la transición climática hasta 2050 con objetivos transparentes de neutralidad o reducción de carbono, con objetivos intermedios claros para 2040, 2030 y dentro del actual plan estratégico plurianual renovable, e informar periódicamente a partir de entonces al directorio;
- c) delegar al(los) comité(es) apropiado(s) del directorio, como el de riesgos y auditoría, de remuneración o al de sostenibilidad/responsabilidad corporativa, la tarea de traducir la estrategia a largo plazo en un proceso claro de toma de decisiones para cada aspecto que sea relevante para cada comisión; y
- d) discutir las obligaciones de informar y las mejores prácticas con el abogado, con el fin de desarrollar un plan de compromiso y comunicación externa.

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Given its geography and demography, Egypt has been particularly supportive of international actions taken to mitigate the effects of climate change. Since Egypt's ratification of the United Nations Framework Convention on Climate Change in 2005, Egypt has been continuously attempting to integrate the required policies to mitigate the effects of climate change on Egypt. The Egyptian Constitution, adopted in 2014, confirms the right of each citizen to a healthy environment and considers the protection of the environment a national duty. It also requires the State to take all necessary actions to protect the environment and to use it with caution to ensure the achievement of sustainable development and the rights of future generations therein. In light of this, Egypt Vision 2030 was announced in 2015 including a Sustainable Development Strategy and the National Climate Change Council was established to oversee the developments in this area. Further, the *Investment Law* was issued in 2017 requiring investments to be mindful of the society, environment and public health. In May 2022, a comprehensive National Climate Change Strategy 2050 was also issued.¹

In July 2021, the Financial Regulatory Authority (FRA), in charge of supervising non-bank financial institutions and markets, including the stock exchange, issued two decrees requiring listed companies and non-bank financial institutions – subject to a specific threshold – to make annual disclosures pertaining to social, environmental and governance issues.² During the same month, the Central Bank of Egypt (CBE) issued a paper for discussion regarding sustainable finance, as well as guiding principles for sustainable finance.³ The CBE requires banks to take all the necessary actions to implement those guiding principles. Some of those principles set out new standards for choosing projects for financing, which companies (shareholders and directors) will have to take into account.

Directors' Duties and Climate Change

While the *Egyptian Companies Law No. 159 of 1981* (the Companies Law) does not explicitly state that directors have a fiduciary duty towards the shareholders, the company, the employees, the environment or any other stakeholder, directors are considered agents acting on behalf of the shareholders in their management of the company. Such understanding is explicitly stated in section one of chapter two of the old commercial code⁴ issued by *Royal Decree No 1 of 1883*. This understanding was also confirmed by various court decisions and Council of State opinions and rulings. Accordingly, under Egyptian Law, directors are only required to act in accordance with their mandate as determined by the shareholders of the company.

In addition to the above, non-bank financial institutions are subject to Corporate Governance Rules issued by the FRA Decree No 100 of 2020 (Corporate Governance Rules), which provide further explanation on directors' role as stated in the current law but do not expand on the duties. The Corporate Governance Rules provide that the byelaws of the company must determine the competences of the board of directors and the obligations of its members in detail. Board members are required to dedicate sufficient time to fulfil their responsibilities and to observe the interests of the company and the shareholders.

Here, it must be noted that the Companies Law gives minority shareholders (those holding 5%

¹ Ministry of Environment, 'Egypt National Climate Change Strategy 2050' (May 2022) <<https://www.eeaa.gov.eg/portals/0/eeaaReports/N-CC/EgyptNSCC-2050-Summary-En.pdf>>.

² FRA Board of Directors decree number 107 issued on 5 July 2021 regarding the disclosure rules for companies working in non-banking financial services of environmental, social and governance related to sustainability and the financial effects of climate changes; and FRA Board of Directors decree number 108 issued on the same date regarding the disclosure rules for companies that issued securities listed on the Egyptian stock

exchange of environmental, social and governance related to sustainability and the financial effects of climate changes.

³ The guiding principles for finance include, among others, managing climate change risks.

⁴ See Article 34 of Royal Decree No 1 of 1883. This Royal Decree was revoked by *Law 17 of 1999* issuing the new Commercial Code; however, the chapter (titled "About Companies"), which contains the abovementioned article, survived the revocation of the old commercial code by virtue of an explicit provision of the new Commercial Code.

or more of the capital) the right to request the suspension of general assembly decisions that work in favour of certain shareholders to the exclusion of others. Accordingly, board decisions that are taken in light of such mandate from the shareholders will be automatically suspended following the suspension of the general assembly decision. It follows that directors are expected to observe the interests of the company (as defined by the shareholders' mandate to the board of directors) without prejudice to the interests of the minority shareholders.

In light of the above, directors will be required to observe the risks associated with climate change to the extent that they are required to do so by virtue of their mandate as determined by the company's shareholders. In other words, the shareholders will have to mandate the directors to observe the risks associated with climate change in the management of the company and the directors will have to ensure the executive management's compliance with this requirement. The extent to which the board of directors will be considered to have fulfilled its mandate is a matter that is determined by the relevant court.

Directors' Disclosure Obligations and Climate Change

As mentioned above, the FRA has issued a decree according to which it requires boards of directors of listed companies to disclose – in their annual reports – the company's environmental, social and governance practices. Further, if the issued capital of the company or its net shareholder equity exceeds 500m Egyptian pounds, then the board of directors will have to make certain climate-related financial disclosures.

The above disclosures are not expected to be in the form of narrative reports written by the companies. Rather, the FRA prepared two forms for the required disclosures and annexed them to the above-mentioned decrees. Each

form includes a set of questions that reflect the standards that are being evaluated. The company is then required to answer each question with 'Yes' or 'No', and to write a clarification or comment on its answer. For example, the company may comment that it is in the process of taking specific procedures to comply with this element and that it is expected to finalise these procedures within a specific period. In some circumstances, the FRA determines the information that is required to be clarified.

The environmental disclosures include questions related to environmental operations and supervision, carbon emissions, used energy sources, use of water and waste management. Social disclosures include questions related to gender diversity, wages, turnover rates of employees, non-discrimination, professional health and safety, children, forced labour, and labour rights. Governance related disclosures include diversity in the board of directors, anti-corruption measures, codes of ethics, and data privacy. As to climate-related financial disclosures, they include elements of governance, strategy, risk managements, metrics and targets. The FRA has annexed to the above decisions a third annex in which it defines many of the terms used in the two disclosure forms.

The FRA further requires listed companies, targeted by these two decisions, to submit to the FRA a quarterly report stating the procedures that the company has taken or will take in relation to the required disclosures starting from the first of January 2022. The first such disclosures are expected to be made with the board of directors' report prepared for the fiscal year ending in 2022 – that is in the year 2023.

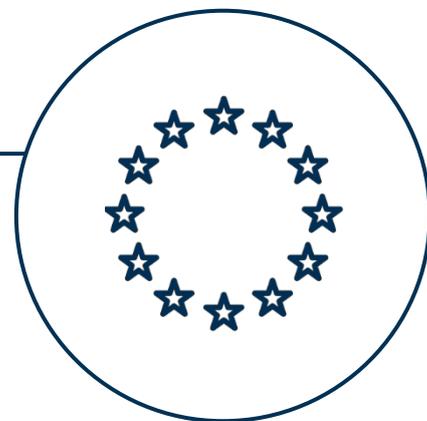
It must also be noted that this decision does not directly require listed companies to comply with certain standards; however, it requires them to disclose their policies and the extent to which they comply with the standards set out in the forms prepared by the FRA.

Practical Implications for Directors

In order to avoid breaching the FRA's decree referred to above, boards of directors will have to (a) immediately commence reporting quarterly to the FRA on the actions their companies started to undertake to prepare the required disclosures, and (b) prepare the required disclosures as part of their annual reports, the first being due for submission in 2023. Those annual reports are then required to be presented to the shareholders in the annual general assembly meeting and will be an opportunity for the directors and the shareholders to discuss the actions the company should take to mitigate climate risks.

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In 2018, the European Commission adopted an Action Plan on Sustainable Growth to identify future legislative steps on climate change.¹ The Commission drew renewed attention to the concept of the ‘carbon bubble’, stating that: “Between 60 and 80 percent of the coal, oil and gas reserves of publicly-listed companies are ‘unburnable’ if the world is to have a chance of keeping global warming well below 2°C and as closely as possible to 1.5°C, as agreed at the COP21 in Paris. [...] a very substantial source of global systemic risk [...] is currently embedded within EU and global financial markets”.²

The EU has made substantial progress in preparing and implementing climate change-related policy and legislation. In June 2021, *European Regulation (EU) 2021/1119* (the European Climate Law) entered into force, which includes a legally-binding objective for the EU to reach climate neutrality by 2050, a commitment to negative emissions after 2050, and a target of at least a 55% reduction of net emissions of greenhouse gases by 2030 compared to 1990.³ The EU has also a set of policies and legislation designed to meet these goals, including more stringent emissions standards for vehicles, a carbon border adjustment tax, and adjustments to the EU emissions trading scheme.⁴ While the specifics of how these policies may be implemented remains to be seen, they may have significant impacts on the legal and commercial contexts in which companies operate. As developments which are likely to take effect in the short and medium-term, they affect directors’ governance of their companies and disclosure of material risks (on which see below).

Directors’ Disclosure Obligations and Climate Change

With specific reference to corporate law, the Commission has addressed the climate change issue by imposing a disclosure obligation on large corporations (non-financial corporations with over 500 employees) and banks and insurance companies of any size. This was defined by *European Directive (EU) 2014/95*, also known as the Non-Financial Reporting Directive (the NFRD) – in force since 2018 – and required the publication, either in the management report or in a separate report, of information on the impact of corporate activity on, among other factors, “*environmental matters*”, i.e. the “*short-term, medium-term and long-term implications*” “*based on the expected impact of science-based climate change scenarios on corporate strategies and activities*”; this information is to be made available in the so-called ‘non-financial statement’. The NFRD does not formally require adoption of disclosure policies in the non-financial statement, but in cases where corporations do not adopt any such policies, their non-financial statement “*shall provide a clear and reasoned explanation for not doing so*”.⁵

Accordingly, boards of directors of all affected EU-based corporations must, in the first instance, analyse whether the short, medium and long-term implications of climate change could have any impacts on their corporate strategies and activities, and if so, evaluate such

¹ *Regulation (EU) 2018/1999 of the European Parliament and of the Council on the Governance of the Energy Union and Climate Action planning 2030 targets and a transition to a climate neutral economy of 11 December 2018*, L 328/1.

² Committee on Economic and Monetary Affairs of the European Parliament Draft Report, 2 February 2018.

³ *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for*

achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, L 243/1.

⁴ European Commission, European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions (14 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541>.

⁵ Article 1(1) inserting art. 19a(1), *EU Directive 2014/95*.

impacts. If it is determined that there is no impact, this must be disclosed in the non-financial statement, clarifying the precise reasoning underpinning this conclusion. If impacts have been identified and evaluated, they must be disclosed together with the measures adopted by directors to manage such impacts, unless they elect not to pursue any policy with reference to climate change – in which case a clear and reasoned explanation of such a decision must be reported as well. The information is organised around four pillars:

- the business model;
- policies and due diligence;
- the outcomes of such policies; and
- risks and their management.⁶

In June 2019, the types of climate-related information to be included in the non-financial statement were specified through non-binding Guidelines issued by the European Commission (the Guidelines).⁷ In particular, these clarify the scope of the climate information – which is not limited to the impact that climate change poses to the business (referred to as outside-in impacts) but rather includes the impacts of the business' activities on the climate as well (inside-out impacts), known as 'double materiality'. The Guidelines specifically integrate the recommendations of the Task Force on Climate-related Financial Disclosure (TCFD), and are inspired by the proposals of the Commission's Technical expert group on sustainable finance (TEG).⁸

The seven key principles set out in the Guidelines state that information shall be:

- material;
- fair;
- balanced and understandable;
- comprehensive but concise;
- strategic and forward-looking;
- stakeholder-oriented;
- consistent and coherent.

The Guidelines are aimed at fostering best practice in climate reporting and are very detailed, despite acknowledging the benefits of companies taking a flexible approach. They also encourage reporting of climate-related information to be integrated with other financial and non-financial information. Taking into account the TCFD recommendations, they identify typical climate-related risks and opportunities that should be considered across the whole value chain, both upstream (e.g. suppliers) and downstream (e.g. customers).

Directors' Duties and Climate Change

The NFRD does not expressly refer to directors' duty of skill and care in relation to climate change. However, in all European jurisdictions, directors are obliged to oversee the company in compliance with the duty of care and loyalty. The apparent silence of the NFRD in respect of directors' duties is in fact deceptive: by requiring disclosure on, among other factors, climate-related risks and opportunities, the NFRD effectively sets a clear and robust standard for how the board must govern climate change. It presumes an understanding of, and assessment by, the board of the impact of climate change on the company and likewise of the company on the climate.

In particular, the description of the business model – which is one of the four pillars of the reporting framework – assumes that the board of directors has developed a corporate strategy that takes account of climate change, among other factors, in the short, medium and long term. This is a time horizon that is notably longer than the one boards usually consider in strategic planning, and to the extent it takes full account of all risks and opportunities, it has significant implications for financial planning, in terms of both capital expenditures and revenues. The core issue is whether the company's business is resilient in different

⁶ *Ibid.*

⁷ European Commission Communication, 'Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information', 2019/C 209/1 (20 June 2019) <https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf>.

⁸ In January 2019, the European Commission set up a Technical expert group on sustainable finance (TEG) to assist it in

developing, in line with the Commission's legislative proposals of May 2018: an EU classification system – the so-called EU taxonomy – to determine whether an economic activity is environmentally sustainable; an EU Green Bond Standard; methodologies for EU climate benchmarks and disclosures for benchmarks; and guidance to improve corporate disclosure of climate-related information.

climate change scenarios (ranging from 1.5°C average increase over pre-industrial temperatures to business-as-usual, given the high degree of uncertainty surrounding regulatory policy, technology and physical impacts), and it falls to the board of directors to make these determinations.

In addition, the disclosure requirement on policies and due diligence processes – the second pillar of the reporting framework – calls for the board of directors, within its duty of oversight, to institute effective internal controls as regards climate factors. The same duty of oversight likewise applies with respect to the third pillar of the reporting framework: disclosure of the metrics and targets that underpin the climate strategy, which the board must define and the delivery of which it must oversee.

The fourth pillar of the reporting framework is disclosure and management of top risks: the board of directors is ultimately responsible for the company's risk management processes, and in order to properly consider climate-related risks, is expected to assess them over the short, medium and long-term. The board is expected to identify and fully disclose material risks and opportunities, in line with the recommendations of the TCFD, which are echoed in the European Commission Guidelines of 2019. Even though these Guidelines are not binding, they represent the most up-to-date climate reporting standard available. It follows, therefore, that, in order to fulfil their duty of skill and care – which, in all Member States, includes the duty to be fully informed – directors must properly understand and consider climate-related risks and the processes to manage them.

Due to its very nature, climate-related information forces directors to reason in terms of medium and long-term horizons, because the impacts of climate change extend over long periods and cannot be fully understood and assessed by focusing on the typical three- to four-year business planning cycle. This holds even when a jurisdiction does not explicitly contemplate the long term in the provisions addressing directors' duties. Because of the disclosure requirements under the NFRD, effective climate governance means boards are

naturally compelled to adopt a long-term perspective in managing the company.

Therefore, although billed as disclosure legislation, the NFRD effectively has an enormous impact on the manner in which the duty of skill and care are to be interpreted and acted upon: disclosure on climate implies a robust process for identifying and managing risks and opportunities, and thus carries with it the implied directors' duty properly to manage these risks and embed these opportunities when defining the medium and long-term strategy of the company.

It is therefore through the backdoor of disclosure that climate change has penetrated the management of big European corporations across all industries. As for enforcement, under the NFRD, Member States hold responsibility for determining and enforcing sanctions for non-compliance with disclosure requirements, and regulations vary from one Member State to another. For example, in the U.K. and Germany, it is a criminal offence for directors not to prepare or publish the statement of non-financial information, and not to disclose the actions taken in relation to each area (i.e. including climate change) without giving a justification. In Italy, the sanction is an administrative monetary penalty applied to those who verify the non-financial statement. In France, the only consequence for non-compliance is that any interested party may send a request to a judge for summary proceedings asking for the information to be provided; if the application is granted, the directors are liable to pay the penalty and procedural costs.

Statutory audit boards and audit firms provide an additional lever to drive the effectiveness of climate-related disclosure, insofar as they are required to check whether the non-financial statement or separate report have been provided, although as of yet, their oversight does not extend to its actual contents. However, Member States also have the option of requiring that the information contained in the climate disclosure statement be verified by an independent assurance services provider.

Obviously, under general principles of law and procedures of each Member State, in addition to the specified sanctions, directors' civil liability

for damages applies in cases of material misstatements or breach of the duty of skill and care. Since the legislation is very recent, there is no case law yet to gauge its practical application.

Another relevant development is *Proposal N.2021/0104* (COD): Corporate Sustainability Reporting Directive (CSRD), in respect of which the Council and the European Parliament have reached a provisional political agreement, meaning it is now very likely to enter into law.⁹ In order to enable the transformation of the EU into a modern, resource-efficient and competitive economy with zero net emissions by 2050, as envisioned in the European Green Deal and the 2020 Work Programme (and since entered into law by the European Climate Law), the European Commission proposed a revision of *European Directive (EU) 2014/95*: the Corporate Sustainability Reporting Directive Proposal (the CSRD Proposal). Proposed on 21 April 2021, the CSRD Proposal aims to align sustainability reporting requirements with the *Sustainable Finance Disclosure Regulation* and the *Taxonomy Regulation*.¹⁰ The CSRD Proposal addresses the following:

- it extends the scope of reporting requirements to additional companies, including all large companies and listed companies (listed micro-companies are given until 1 January 2026);
- it requires full assurance of sustainability information by external auditors;
- it specifies in more detail the information that companies should report, and requires them to report in line with mandatory EU sustainability reporting standards; and
- it requires all information to be published as part of companies' management reports, and disclosed in digital, machine-readable format.

In addition, reporting should address:

- the resilience of the business model and strategy to sustainability-related factors;
- opportunities related to sustainability;
- plans to align the business model and strategy with the transition to a sustainable economy, defined as limiting the rise in global average temperature to 1.5°C above pre-industrial levels, in line with the Paris Agreement;
- stakeholder engagement practices and their implications for the business model and strategy;
- implementation of the strategy as it relates to sustainability;
- sustainability-related targets and progress achieved against them;
- the role of functional areas and business units, as well as of the board, whether one-tier or two-tier as per local practice in different Member States, with regard to sustainability;
- principal actual or potential impacts related to the company's broader value chain, and any action taken and results achieved to prevent, mitigate or remediate negative impacts; and
- indicators to measure and report on the above.

In addition, the European Commission will adopt sustainability reporting standards regarding: climate change mitigation and adaptation, water and marine resources, resource use and the circular economy, pollution, and biodiversity and ecosystems. In case of infringements of these provisions, Member States are required, at a minimum, to provide for the following administrative measures and sanctions: a public statement identifying the wrongdoer; an order requiring the wrongdoer to cease the conduct and to desist from its repetition; and administrative pecuniary sanctions. These provisions are

⁹ European Council, New rules on corporate sustainability reporting: provisional political agreement between the Council and the European Parliament (21 June 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/06/21/new-rules-on-sustainability-disclosure-provisional-agreement-between-council-and-european-parliament/>>.

¹⁰ *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; 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.*

expected to enter into force in 2023, following final approval by the European Parliament.

An additional significant development is the February 2022 proposal for a Directive on Corporate Sustainability Due Diligence (the Due Diligence Directive), which introduces a duty for certain companies to conduct supply chain due diligence on human rights and environmental issues.¹¹ The new obligations will apply to EU companies with more than 500 employees and more than €150 million in turnover, and non-EU companies with turnover of more than €150 million generated in the EU. Smaller companies, with over 250 employees and over €40 million in turnover, in specific industries will need to comply at a later stage. These companies will be required to integrate due diligence into their policies, identify actual or potential adverse environmental and human rights impacts, and prevent, mitigate or minimise these, as well as publicly communicate how they are fulfilling these obligations.¹²

Under the proposed Due Diligence Directive, Member States are to provide for measures to make directors of these companies responsible for putting in place and overseeing their companies' due diligence policies and related actions.¹³ The Due Diligence Directive also envisages Member States clarifying the scope of directors' duty to act in the best interest of their companies, stating that for the companies covered by the proposed Directive, 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.¹⁴ 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.¹⁵ While these developments remain a proposal at present,

they will, if passed, explicitly incorporate a company's impact on the climate into the duties of its directors.

Additional provisions for banks: In addition to the foregoing, directors of European banks (regardless of size) shall consider the [Guide on climate-related and environmental risks](#) issued by the European Central Bank in November 2020, which sets out thirteen supervisory expectations relating to risk management and disclosure of climate risks. These all fall within the board's duty of oversight, and consist of:

- understanding the impact of climate-related risk on the business over the short, medium and long term, in order to make informed strategic and business decisions;
- integrating climate risk when developing and implementing the bank's strategy;
- considering climate risk in the context of the overall business strategy and objectives, and embedding it within the risk management framework;
- ensuring the bank's setting of risk appetite framework properly accounts for climate risk;
- ensuring responsibility for climate risk is properly allocated to management within the organizational structure;
- incorporating aggregate climate risk data within internal reporting process so as properly as to reflect the bank's exposure;
- identifying, quantifying and integrating climate risk within the overall capital adequacy framework;
- embedding climate risk assessment within the bank's credit risk management process at all relevant stages (from credit-granting to portfolio-monitoring);
- integrating climate risk in the assessment of business continuity, reputation and liability;
- ongoing monitoring of the effect of climate risk on the bank's market

¹¹ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

¹² European Commission, Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains (23 February 2022)

https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

¹³ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, art. 26.

¹⁴ *Ibid*, art. 25.

¹⁵ *Ibid*, art. 15.

positions and future investments, and incorporating climate risk into stress-testing methodology;

- evaluating, and where appropriate revisiting, the bank's stress testing methodology to ensure that climate risk is included in baseline and adverse scenarios;
- assessing whether climate risk could cause net cash outflows or depletion of liquidity buffers; and
- publishing meaningful and material information and key metrics in accordance with the above-referenced

European Commission Guidelines of 2019 and therefore aligning with TCFD Recommendations.

In 2022, the ECB carried out a full supervisory review of banks' climate practices under the SREP (Supervisory Review and Evaluation Process), with a view to taking concrete remedial measures where needed. The ECB concluded that banks do not fully meet the ECB's expectations on disclosure of climate and environmental risks, with significant gaps remaining in disclosures.¹⁶

Practical Implications for Directors

Given the European Commission's adoption of world-leading climate disclosure regulations for non-financial companies, and additional very detailed and advanced regulations governing the management of climate risk by banks, well-counselled boards will:

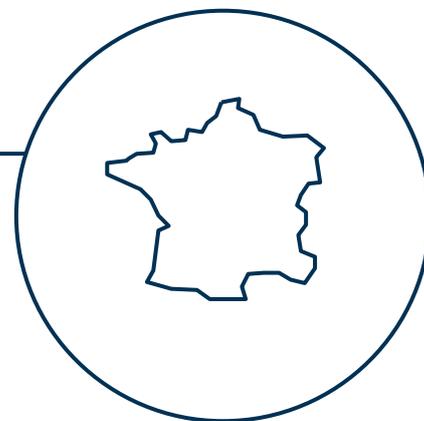
- a) allocate identification of climate risks and opportunities and their evaluation to a clearly-identified team in management that reports directly to the board;
- b) considering in particular the legal and policy developments in relation to EU climate goals, and the potential direction of travel of these developments, put on the agenda for the board to review, within 3 or 6 months, a process to initiate the development of a climate transition roadmap to 2050, with transparent carbon neutrality targets, clear interim targets to 2040, 2030 and near-term within the current rolling multi-medium and long-term targets, and at least annually thereafter report back to the board;
- c) ensure that all relevant departments, such as legal and compliance, risk management, scenario-planning, strategy, audit, procurement, human resources, government relations, investor relations, stakeholder relations, reach a clear understanding of their functional contribution to the design and delivery of the company's climate transition plan, coordinate their efforts under the leadership of the CEO, and are jointly accountable to the board;
- d) allocate to the appropriate committee(s) of the board, such as risk, audit, governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee before its final approval by the board as a whole; and
- e) discuss with disclosure counsel, in order to develop an external engagement and communications plan.

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¹⁶ European Central Bank, Supervisory assessment of institutions' climate related and environmental risks disclosures (14 March 2022)

<https://www.bankingsupervision.europa.eu/press/pr/date/2022/html/ssm.pr220314~37303fd463.en.html>.



This section is to be read in conjunction with the above EU section, and focuses specifically on rules under French law regarding directors' duties and obligations as they pertain to climate change.

There are an increasing number of cases before the French authorities demonstrating rising awareness of climate change. More and more judicial actions are being initiated against the French government or French corporations in this area. An illustration of this is the so-called 'case of the century' (*Affaire du siècle*), where the Paris Administrative Court found the French government liable for ecological damage due to its inability to comply with its commitments to meet certain targets for reducing greenhouse gas emissions, and ordered the state to take actions to cut carbon emissions and repair ecological damage by 31 December 2022.¹ Further, several actions have been initiated, mainly by associations and NGOs, against French corporations for alleged breach of their *devoir de vigilance* (see below) under French law; the claimants aim to obtain from French courts an injunction to compel such corporations either to put in place or to enhance their vigilance plan (*plan de vigilance*) in order to meet the greenhouse gas emissions target set by the government under the Paris Agreement.

French law has developed several mechanisms (obligations and incentives) to ensure that companies take environmental issues, including climate change, into greater consideration when conducting their business and interacting with third parties. French companies are subject to a wide range of international and domestic legal norms related to climate change. The following summary focuses on the main legal provisions applicable to French companies and/or their board directors.

Directors' Duties and Climate Change

Requirement to take into account social and environmental factors: Since the enactment of the *PACTE Law* in May 2019,² the French Civil

Code specifies that all French companies should be managed in the interest of the corporation, taking into consideration the social and environmental issues associated with their activities.³ Failure to comply with this provision does not render the company's acts or deliberations void. However, although we are not aware of any judicial decisions rendered on this basis at the time of drafting, failure to take social and environmental issues into consideration may trigger a liability on the part of directors, under the terms of general civil liability. In addition, an inadequate understanding of social and environmental risk factors may also constitute a valid reason to remove a director.

Corporate purpose (*raison d'être*): The *PACTE Law* also created the possibility for any company to specify a corporate purpose, or *raison d'être*, in its articles of association. French law defines the *raison d'être* as follows: "the principles adopted by the company and for the respect of which it intends to dedicate resources in the conduct of its business".⁴ In essence, the *raison d'être* is characterised by the expression of a public interest purpose that transcends the sole pursuit of short-term profits.

Furthermore, the French Commercial Code specifically requires the board of directors and the management board of a limited company (*société anonyme*) to take into consideration "the company's corporate purpose, if any."⁵ These provisions define the obligations of directors in terms of serving the long-term interests of the company. As such, a corporate purpose can serve as a framework for strategic decision-making.

¹ Paris Administrative Court, 3 February 2021, nos. 1904967, 1904968, 1904972, 1904976/4-1; Paris Administrative Court, 14 October 2021, nos. 1904967, 1904968, 1904972, 1904976/4-1.

² Law of 22 May 2019 related to the growth and transformation of businesses, i.e., the so-called *PACTE Law*.

³ Article 1833 of the French Civil Code, as amended.

⁴ *Ibid*, art. 1835.

⁵ Articles L.225-35 §1 and L.225-64 §1 of the French Commercial Code, as amended.

Directors' Disclosure Obligations and Climate Change

Non-financial reporting: As laid out in the EU section above, the EU Non-Financial Reporting Directive, in force since 2018, defines a series of reporting requirements that have been translated into French law.⁶ Specific non-financial reporting obligations apply to (i) French listed companies with more than 500 employees and more than EUR 40 million of net turnover or a total balance sheet of EUR 20 million, and (ii) non-listed French companies with more than 500 employees and more than EUR 100 million of net turnover or a total balance sheet of EUR 100 million. Companies must include a statement of non-financial performance (*Déclaration de Performance Extra-Financière* or DPEF) in the management report. This statement must include a presentation of the company's business model, an analysis of the main risks associated with the company's activities, a description of the policies and mitigation measures taken in response to such risks, and the results of these measures, including performance indicators.⁷ The DPEF must also describe how the company takes into consideration the social and environmental impacts of its activity. More specifically, it must include information related to the company's contribution to the causes of climate change, through both its operations and the use of the goods and services it provides.⁸ The DPEF must be made available to the public and easily accessible on the company's website within eight months from the end of the financial year and for a period of five years.⁹

In August 2021, the French Climate and Resilience Law¹⁰ entered into force, which contains further details on what the DPEF must cover in respect of climate change, stating that the information which companies must disclose “includes 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 a

*virtuous energy and carbon balance and electromobility.”*¹¹

If the management report does not include this DPEF, any person having a legitimate interest may request that the French Courts enjoin the board of directors or management board (as applicable) to provide such information, and subject it to a daily fine, if deemed appropriate. If the judge grants such a request, the said fine and costs of the proceedings must be borne by the directors or members of the management board, individually or jointly as the case may be.¹²

In May 2021, new disclosure obligations regarding the governance system of financial market participants were published¹³ as the French implementation of article 3 of the Sustainable Finance Disclosure Regulation (SFDR). They cover the following: (i) knowledge, skills and experience of the entity's governance bodies, including administrative, supervisory and management bodies (e.g. board of directors), and oversight of the integration of ESG criteria within the investment policy and strategy of the entity and its controlled entities (e.g. level of oversight and associated process, reporting of results, skills); (ii) inclusion of sustainability criteria in the remuneration policy, and disclosure of the criteria linking remuneration with key performance indicators; and (iii) integration of sustainability criteria in the articles of association (a.k.a. bylaws) of the board of directors or supervisory board.

Corporate duty of vigilance: The French corporate duty of vigilance (*devoir de vigilance*)¹⁴ entails a legally-binding obligation for French parent companies to identify and prevent adverse human rights and environmental impacts 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. This duty only applies to the largest companies in France (i.e. any company established in France with at least 5,000 employees within the company's head

⁶ *Ibid*, art. L.225-102-1.

⁷ *Ibid*, art. R.225-105.

⁸ *Ibid*, art. L.225-102-1, III §2.

⁹ *Ibid*, art. R.225-105-1.

¹⁰ Law No. 2021-1104 of August 22, 2021 on combating climate change and strengthening resilience to its effects.

¹¹ Article L.225-102-1, III of the French Commercial Code, as amended by article 138 of the French Climate and Resilience Law.

¹² *Ibid*, art. L.225-102-1, VI §2.

¹³ Decree no. 2021-663 of 27 May 2021 adopted in application to article L.533-22-1 of the French Monetary and Financial Code.

¹⁴ Article L.225-105-4 of the French Commercial Code.

office and its direct and indirect subsidiaries, whose head offices are located on French territory; or that employs at least 10,000 people within the company and its direct and indirect subsidiaries, whose head offices are located on French territory or abroad). Such companies must assess and address the risks of serious harm to people and the planet under an annual *plan de vigilance*. Such risks should include, where appropriate, the risks associated with climate change. The French Climate and Resilience Law has introduced an additional requirement for companies that produce or

market products resulting from agricultural or forestry activities, requiring them, as of 1 January 2024, to include in their *plan de vigilance* reasonable vigilance measures to identify the risks and prevent deforestation associated with the production and transport to France of imported goods and services.¹⁵ Courts may impose injunctions to compel compliance with such legal reporting obligations. In addition, the company's tortious liability could be sought where its failure to adopt an appropriate *plan de vigilance* has caused harm.

Practical Implications for Directors

Despite the absence as of yet of any case law that precisely defines the scope of directors' duties or helps directors determine the scope and extent of the above-mentioned obligations, the recent changes in legislation clearly indicate that French directors will have to play an increasingly important role in taking environmental issues into account. This role particularly concerns the company's contribution to climate change. In this regard, our practical recommendations are as follows:

- a) Review and, where required, adapt governance to ensure appropriate leadership at board level in relation to climate-related risks, including any adverse impacts the company may have through its activities and products, and any legal risks the company may face in this respect;
- b) Designate the department(s) that is/are responsible for monitoring, and providing ongoing advice in relation to, the ever-expanding body of laws and regulations related to climate risk management in France and abroad;
- c) Delegate climate risk identification and evaluation to a clearly-identified management team that reports directly to the CEO and board, and is responsible for bringing together all key functions, including the legal and/or compliance function, enterprise risk management, strategic planning, audit, remuneration, human resources, investor relations, stakeholder relations, etc.;
- d) Review and, where required, adapt climate-related risk management policies and processes across the company's supply chain and distribution network, including affiliates, third parties, and, more generally, stakeholders, on the basis of a solid risk assessment. In this regard, broaden and deepen the company's due diligence framework for third-party intermediaries to address climate-related risk factors;
- e) Review and, where required, adapt reporting on climate-related risk factors and the measures taken to address these risks, in line with the French Commercial Code. Introduce internal assurance processes in relation to reporting; and
- f) Hold discussions with a PR advisor, in order to develop an external engagement and communications plan.

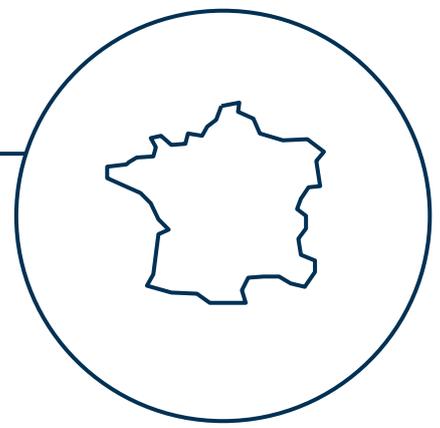
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¹⁵ *Ibid*, art. L. 225-102-4.

France (French)



Cette section - qui doit être lue en combinaison avec la section UE ci-dessus - porte spécifiquement sur les règles de droit français applicables aux devoirs et obligations d'un administrateur en matière de changement climatique.

Le nombre croissant de litiges portés devant les autorités françaises révèle une prise de conscience en matière de changement climatique. De plus en plus d'actions en justice sont intentées à l'encontre de l'Etat français ou de sociétés françaises. L'affaire communément appelée *l'Affaire du Siècle* en est une des illustrations : le Tribunal administratif de Paris a jugé l'Etat français responsable du préjudice écologique causé par le non-respect des objectifs fixés en matière de réduction des émissions de gaz à effet de serre, et ordonné à l'Etat d'adopter des mesures pour réduire les émissions de carbone et réparer le préjudice écologique d'ici le 31 décembre 2022.¹ En outre, plusieurs actions ont été intentées, principalement par des associations et ONG, à l'encontre de sociétés françaises au titre d'un manquement à leur devoir de vigilance (voir ci-après) ; les demandeurs visent à obtenir devant les juridictions françaises des injonctions destinées à contraindre ces sociétés à mettre en place ou renforcer leur plan de vigilance afin de respecter l'objectif en matière d'émissions de gaz à effet de serre fixé par le Gouvernement français dans le cadre de l'accord de Paris.

La loi française a développé plusieurs mécanismes (obligations et incitations) afin que les questions environnementales, en ce compris le changement climatique, soient davantage prises en compte par les entreprises dans la conduite de leurs affaires ou dans leurs interactions avec les tiers. Les sociétés françaises sont assujetties à une grande variété de normes juridiques nationales et internationales relatives au changement climatique. La synthèse suivante se concentre sur les principales dispositions légales applicables aux sociétés françaises et/ou à leurs conseils d'administration.

Responsabilité des administrateurs et changement climatique

Obligation de prendre en compte les facteurs sociaux et environnementaux: depuis l'adoption de la loi PACTE en mai 2019,² le Code civil français précise que toutes les sociétés doivent être gérées dans l'intérêt de la société, prenant en considération les questions sociales et environnementales associées à leurs activités.³ Le manquement à cette disposition ne rend pas nuls les actes ou délibérations de la société. Toutefois, bien que nous n'ayons pas connaissance de décisions judiciaires rendues sur ce fondement au jour de la rédaction du présent document, le fait de ne pas prendre en considération les questions sociales et environnementales pourrait engager la responsabilité des administrateurs, sur le fondement de la responsabilité civile. En outre, une compréhension insuffisante des facteurs de risque sociaux et environnementaux peut également constituer une raison valable pour révoquer un administrateur.

Raison d'être: la loi PACTE a également créé la possibilité pour toute société de stipuler une raison d'être dans ses statuts. La loi française définit la raison d'être de la manière suivante : *"principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité"*.⁴ En substance, la raison d'être est caractérisée par un objectif d'intérêt public transcendant la seule recherche des profits à court terme.

Par ailleurs, le Code de commerce français exige plus particulièrement du conseil d'administration et du directoire d'une société anonyme qu'ils prennent en considération *"s'il y a lieu, la raison d'être"*.⁵ Ces dispositions

¹ Tribunal administratif de Paris, 3 février 2021, n° 1904967, 1904968, 1904972, 1904976/4-1; Tribunal administratif de Paris, 14 octobre 2021, n° 1904967, 1904968, 1904972, 1904976/4-1.

² Loi du 22 mai 2019 relative à la croissance et à la transformation des entreprises, appelée loi PACTE.

³ Article 1833 du Code civil, tel qu'amendé.

⁴ *Ibid*, art. 1835.

⁵ Articles L. 225-35 §1 et L. 225-64 §1 du Code de commerce, tel qu'amendé.

définissent les obligations des administrateurs pour assurer les intérêts de la société sur le long terme. Ainsi, la raison d'être peut servir de cadre à la prise de décisions stratégiques.

Obligations d'information des administrateurs et Changement climatique

Reporting extra-financier: comme indiqué dans la section relative au droit de l'UE, la directive européenne sur le reporting extra-financier, en vigueur depuis 2018 et transposée en droit français, définit une série d'exigences de reporting. Des obligations spécifiques de reporting extra-financier s'appliquent aux (i) sociétés françaises cotées employant plus de 500 personnes dès lors que le total de leur bilan est supérieur à 20 millions d'euros ou le montant net de leur chiffre d'affaires supérieur à 40 millions d'euros ainsi qu'aux(ii) sociétés françaises non cotées, employant plus de 500 personnes et dont le bilan total est supérieur à 100 millions d'euros, ou leur chiffre d'affaires net supérieur à 100 millions d'euros.

Cette déclaration doit inclure une présentation de son modèle d'affaires, une analyse des principaux risques RSE relatifs aux activités de la société, une description des politiques et mesures de prévention et remédiation de ces risques, et le résultat de ces mesures, incluant des indicateurs de performance.⁶ La DPEF doit également décrire la manière dont la société prend en considération les impacts sociaux et environnementaux de ses activités. Plus spécifiquement, elle doit inclure les informations relatives à la contribution de la société aux causes du changement climatique, tant par ses activités que par l'utilisation des biens et services qu'elle fournit.⁷ La DPEF doit être mise à la disposition du public et être facilement accessible sur le site internet de la société dans les huit mois suivant la clôture de l'exercice et pendant une période de cinq ans.⁸

La loi française Climat et Résilience⁹ est entrée en vigueur en août 2021. Elle apporte des précisions sur les aspects que la DPEF doit

couvrir en matière de changement climatique, stipulant que les informations que les sociétés sont tenues de communiquer "*comprennent les postes d'émissions directes et indirectes de gaz à effet de serre liées aux activités de transport amont et aval de l'activité et sont accompagnées d'un plan d'action visant à réduire ces émissions, notamment par le recours aux modes ferroviaire et fluvial ainsi qu'aux biocarburants dont le bilan énergétique et carbone est vertueux et à l'électromobilité*".¹⁰

Si le rapport de gestion n'inclut pas ce DPEF, toute personne ayant un intérêt légitime peut demander aux tribunaux français d'enjoindre au conseil d'administration ou au directoire (selon le cas), le cas échéant sous astreinte, de fournir ces informations.. Si le juge fait droit à cette demande, ladite astreinte et les frais de procédure sont supportés par les administrateurs ou les membres du directoire, individuellement ou conjointement selon le cas.¹¹

En mai 2021, de nouvelles obligations d'information concernant le système de gouvernance des acteurs de marchés financiers ont été publiées¹² pour l'application française de l'article 3 du règlement sur la publication d'informations en matière de développement durable dans le secteur des services financiers (SFDR). Elles couvrent les points suivants : (i) les connaissances, les compétences et l'expérience des organes de gouvernance de l'entité, y compris les organes d'administration, de supervision et de gestion (par exemple, le conseil d'administration), et la surveillance de l'intégration des critères RSE dans la politique et la stratégie d'investissement de l'entité et des entités qu'elle contrôle (par ex. niveau de surveillance et processus associé, communication des résultats, compétences) ; (ii) inclusion de critères de développement durable dans la politique de rémunération, et communication sur les critères d'adossement de la politique de rémunération à des indicateurs de performance ; et (iii) intégration de critères environnementaux, sociaux et de qualité de gouvernance dans le règlement

⁶ *Ibid*, art. R. 225-105.

⁷ *Ibid*, art. L. 225-102-1, III §2.

⁸ *Ibid*, art. R. 225-105-1.

⁹ Loi n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets.

¹⁰ Article L. 225-102-1, III du Code de commerce, tel qu'amendé par l'article 138 de la loi Climat et Résilience.

¹¹ *Ibid*, art. L. 225-102-1, VI §2.

¹² Décret n° 2021-663 du 27 mai 2021 adopté en application de l'article L. 533-22-1 du Code Monétaire et Financier.

interne du conseil d'administration ou du conseil de surveillance.

Devoir de vigilance des entreprises: Le devoir de vigilance des entreprises françaises¹³ constitue une obligation juridiquement contraignante pour les sociétés mères françaises d'identifier et de prévenir les impacts négatifs sur les droits de l'homme et l'environnement résultant de leurs propres activités directes, y compris des activités des sociétés qu'elles contrôlent, ainsi qu'indirectement, des activités des sous-traitants et fournisseurs avec lesquels elles ont une relation commerciale établie. Cette obligation ne s'applique qu'aux plus grandes entreprises en France (c'est-à-dire toute entreprise établie en France qui emploie au moins 5 000 salariés au sein de sa société tête de groupe et de ses filiales directes et indirectes, dont le siège social est situé sur le territoire français ; ou qui emploie au moins 10 000 personnes au sein de l'entreprise et de ses filiales directes et indirectes, dont le siège social

est situé sur le territoire français ou à l'étranger). Ces entreprises doivent évaluer et traiter les risques d'atteinte grave aux personnes et à la planète dans le cadre d'un plan de vigilance annuel. Ces risques doivent inclure, le cas échéant, les risques liés au changement climatique. La loi Climat et Résilience a introduit une exigence supplémentaire pour les entreprises qui produisent ou commercialisent des produits issus d'activités agricoles ou forestières, en leur imposant, à compter du 1^{er} janvier 2024, d'inclure dans leur plan de vigilance des mesures de vigilance raisonnable pour identifier les risques et prévenir la déforestation associée à la production et au transport en France de biens et services importés.¹⁴ Les tribunaux peuvent imposer des injonctions pour imposer le respect de ces obligations légales de *reporting*. En outre, la responsabilité délictuelle de la société pourrait être recherchée lorsque son incapacité à adopter un plan de vigilance approprié a causé un préjudice.

Implications pratiques pour les administrateurs

En dépit de l'absence à ce jour de toute jurisprudence définissant précisément l'étendue des devoirs des administrateurs ou les aidant à déterminer la portée et l'étendue des obligations susmentionnées, les récents changements législatifs indiquent clairement que les administrateurs français devront jouer un rôle de plus en plus important dans la prise en compte des questions environnementales. Ce rôle concerne notamment la contribution de l'entreprise au changement climatique. A cet égard, nos recommandations pratiques sont les suivantes:

- a) Revoir et, le cas échéant, adapter la gouvernance afin d'assurer un leadership approprié au niveau du conseil d'administration ou conseil de surveillance en ce qui concerne les risques liés au climat, y compris les impacts négatifs que l'entreprise peut avoir par ses activités et ses produits, et les risques juridiques auxquels l'entreprise peut être confrontée à cet égard;
- b) Désigner le(s) service(s) chargé(s) de suivre et fournir des avis sur un corpus législatif et réglementaire en matière de gestion des risques climatiques qui ne cesse de s'étoffer en France et à l'étranger;
- c) Déléguer l'identification et l'évaluation des risques climatiques à une équipe de direction clairement identifiée rendant directement compte au PDG et au conseil d'administration ou conseil de surveillance, et chargée d'assurer le fonctionnement de toutes les fonctions clés, y compris la fonction juridique et/ou de conformité, la gestion des risques de l'entreprise, la planification stratégique, l'audit, la rémunération, les ressources humaines, les relations avec les investisseurs, les parties prenantes, etc.;

¹³ Article L. 225-105-4 du Code de commerce.

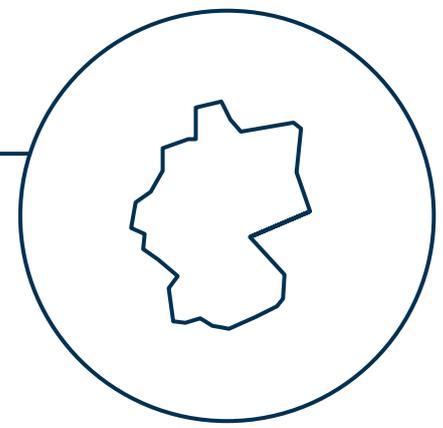
¹⁴ *Ibid*, art. L. 225-102-4.

- d) Examiner et, si nécessaire, adapter les politiques et processus de gestion des risques liés au climat dans l'ensemble de la chaîne d'approvisionnement et du réseau de distribution de l'entreprise, y compris les sociétés affiliées, les tiers et, plus généralement, les parties prenantes, sur la base d'une évaluation des risques solide. À cet égard, élargir et approfondir le cadre de diligence de l'entreprise pour les intermédiaires tiers afin de tenir compte des facteurs de risque liés au climat ;
- e) Examiner et, le cas échéant, adapter les rapports sur les facteurs de risque liés au climat et les mesures prises pour y faire face, conformément au Code de commerce français. Introduire des processus d'assurance interne en relation avec le *reporting* ; et
- f) S'entretenir avec un conseiller en relations publiques, afin d'élaborer un plan d'engagement et de communication externe.

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This section is to be read in conjunction with the above EU section, and focuses specifically on rules under German law regarding directors' duties and obligations as they pertain to climate change.

The German Federal Financial Supervisory Authority (BaFin)¹ requires regulated entities to manage climate risks and to integrate them into their risk management frameworks. With a guidance notice published in December 2019, updated in January 2020, BaFin has provided its supervised companies, in particular banks, insurance companies, pension funds and capital management companies, with non-binding good practice guidelines on how to deal with sustainability risks and, in particular, climate risks.²

With an interim report of 5 March 2020, the Sustainable Finance Committee (SFB) of the German Federal Government has, *inter alia*, proposed to expand the application of non-financial disclosures under *Directive 2014/95/EU* (the Non-Financial Reporting Directive, or NFRD).³ Further, according to the SFB, listed companies shall be required to apply the TCFD recommendations on climate reporting from 2022 onwards. The SFB's final report was published in March 2022 and presents 31 recommendations on how the German economy can be transformed with a sustainable financial system, including on policy, reporting obligations, knowledge building and financial products.⁴

On 27 June 2022, the new version of the German Corporate Governance Code (DCGK) was published and entered into force.⁵ The responsible Commission previously adopted the new version on 28 April 2022.⁶ The DCGK has, in a previous version, already established an explicit expectation that companies and their management need to be aware of their role in and responsibility vis-à-vis society. In fact, social and environmental factors are considered to be relevant for business success.⁷ This is a clear commitment to sustainability principles.

The new version of the DCGK states that the board must take into account the social and environmental factors which influence the performance of the company, and the company's impacts on people and the environment. Under the new DCGK, a company's management board must systemically identify and assess social and environmental risks and opportunities for the company, and ensure that the company's strategy gives appropriate consideration to social and environmental matters. The supervisory board is required to give supervision and advice on sustainability issues in particular, and should comprise members with sufficient skills and expertise in sustainability matters, which should be disclosed in a qualification matrix in the company's Corporate Governance Statement.

¹ BaFin, 'BaFin's Sustainable Finance Conference: Financial markets and climate change' (June 2019) <https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2019/fa_bj_1905_Tagung_nachhaltige_Finanzwirtschaft_en.html>.

² BaFin, *Guidance Notice on Dealing with Sustainability Risks* (January 2020) <https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/dl_mb_Nachhaltigkeitsrisiken_en.pdf?sessionid=CAFA36097D7125E6241B7D08B04596ED.2_cid500?__blob=publicationFile&v=5>.

³ Sustainable Finance-Committee of the German Federal Government, *Interim Report: The Significance Of Sustainable Finance To The Great Transformation* (2020) <https://sustainable-finance-beirat.de/wp-content/uploads/2020/03/200306_SFB-Zwischenbericht_EN.pdf>.

⁴ Sustainable Finance Committee, *Shifting the Trillions: A sustainable financial system for the great transformation* (March 2022) <https://sustainable-finance-beirat.de/wp-content/uploads/2021/03/210319_SustainableFinanceCommitteeRecommendations.pdf>.

⁵ Regierungskommission Deutscher Corporate Governance Kodex, *German Corporate Governance Code* (27 June 2022) <<https://dcgk.de/en/press/details/new-code-published-in-the-federal-gazette.html>>.

⁶ Regierungskommission Deutscher Corporate Governance Kodex, *German Corporate Governance Code* (28 April 2022) <https://www.dcgk.de/files/dcgk/usercontent/en/download/code/220627_German_Corporate_Governance_Code_2022.pdf>.

⁷ *Ibid.*

The new DCGK also requires one member of the audit committee to have expertise in auditing, and another to have expertise in accounting, which should include sustainability reporting and its auditing and assurance. The chair of the audit committee is required to have expertise in either accounting or auditing (and therefore, sustainability reporting to the relevant degree).

Moreover, the German Federal Government (*Bundesregierung*) – in a world first for a government – has set out binding national climate targets in a Climate Protection Act that entered into force on 18 December 2019. The Climate Protection Act provides for a gradual reduction in greenhouse gas emissions compared with 1990 levels, with at least a 55 percent reduction target by the year 2030. In the long term, the Federal Government is pursuing the goal of greenhouse gas neutrality by 2050. This goal is also clearly stated in the Act.⁸ In August 2021, following a ruling by the German Constitutional Court,⁹ the Climate Action Law was strengthened, including introducing a more ambitious greenhouse gas reduction target of 65 percent by the year 2030, and 88 percent by the year 2040.¹⁰

Directors' Duties and Climate Change

Germany is a civil law jurisdiction. Directors' duties are codified in the Act on Limited Liability Companies (GmbHG) and the Stock Corporation Act (AktG), and fleshed out further in case law. The AktG provides for a dual board system with different duties and responsibilities for management and supervisory board members. Whereas the management board is responsible for the day-to-day business and the company's strategic direction, the supervisory board is focused on controlling and monitoring the management board's decisions. Notwithstanding these different functions,

pursuant to sections 93, 116 AktG, all board members owe the company a duty of care, duty of loyalty and duty of confidentiality, and must exercise their duties “*for the benefit of the company*”.¹¹ The duty of care requires the directors to “*exercise the diligence of a prudent and conscientious manager*”.¹² Notwithstanding the wide scope of directors' duties under German law, according to the codified business judgement rule, a management board member does not breach his or her duties if, when making a business decision, the management board member could reasonably assume, on the basis of appropriate information, that he/she was acting in the best interests of the company.¹³ The same rule applies, in principle, to supervisory board members. Accordingly, there is no breach of duty if the supervisory board member, when making a business decision, could reasonably assume that he/she was acting in the best interests of the company on the basis of appropriate information. In addition, it is the supervisory board members duty to diligently supervise and challenge the decisions made and proposed by the management board.

Applying these standards to directors' duties regarding the risks resulting from climate change, BaFin has summarised in its guidance notice for regulated companies that the management board is responsible for the business and risk strategy, its implementation within the company, and its communication. Thus, as a first step, management board members are expected to understand climate risks and their potential impact on the company's business. Further, management board members are responsible for fostering an effective risk culture and institutionalising processes and systems to control and oversee the impacts and implications of climate risks, applying a short, medium and long-term perspective.¹⁴ This also applies accordingly to the supervisory board. In addition, although the NFRD and its implementation in German law are

⁸ Gesetz zur Einführung eines Bundes-Klimaschutzgesetzes und zur Änderung weiterer Vorschriften Vom 12. Dezember 2019 (the Climate Protection Act). <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl119s2513.pdf%27%5D_1605199445200>.

⁹ BVerfG, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 -, Rn. 1-270 <http://www.bverfg.de/e/1rs20210324_1bvr265618.html>.

¹⁰ Gesetz zur Einführung eines Bundes-Klimaschutzgesetzes und zur Änderung weiterer Vorschriften vom 12. Dezember 2019, berücksichtigt die Änderung(en) des Gesetzes durch Artikel 1

des Gesetzes vom 17 August 2021 (BGBl. I S. 3905) (the Climate Protection Act) (as amended). <https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html>.

¹¹ Sections 93 para.1, 116 para.1 AktG.

¹² *Ibid.*

¹³ *Ibid.*, s. 93 para.1.

¹⁴ BaFin, *Guidance Notice on Dealing with Sustainability Risks* (January 2020) <https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/dl_mb_Nachhaltigkeitsrisiken_en.pdf;jsessionid=CAFA36097D7125E6241B7D08B04596ED.2_cid500?__blob=publicationFile&v=5>.

silent on directors' duties, the disclosure obligations at least implicitly oblige the management board members to develop an understanding, and assess the impacts, of climate change on the business, incorporate the results in the entity's strategic plans and scrutinise and challenge the company's resilience to climate-related risks.

In Germany, there is currently a widely-observed litigation matter before the Higher Regional Court of Hamm (file No. I-5 U 15/17) based on a complaint brought by a Peruvian farmer against German energy provider RWE alleging damage due to the consequences of climate change caused by the defendant. The farmer is demanding that the defendant pay 0.47 percent of the cost of protective measures for his house and village. The farmer accuses the German company of being co-responsible for climate change through the greenhouse gas emissions it produces. The claimant believes that the consequences will cause a glacier in the Andes to melt, with meltwater threatening his house and village. In an oral hearing in November 2017, the judges considered a claim for compensation to be sufficiently pleaded as to move into the next procedural stage of evidence taking. This case is currently in the evidentiary phase. If, following trial, the Court were to determine that the defendant is liable to the claimant and if such decision was upheld by the German Federal Court of Justice on further appeal, the decision could have very far-reaching consequences for high-emission companies in Germany, as it could establish a route for claimants affected by climate change around the world to bring claims against German companies for their contributions to climate change.

Directors' Disclosure Obligations and Climate Change

The German government has implemented the NFRD, which provides for disclosure obligations in a non-financial statement.¹⁵ These disclosures regard, *inter alia*, the implications of climate change for the company, including

potential damage caused by the company to society through its emissions, and those experienced by the company due to physical impacts, regulatory change, technological disruption etc.; and they require the company to disclose its strategy to address them by means of the CSR Directive Implementation Act of March 2017.¹⁶ Pursuant to the new regulations in sections 289b subsequent of the Commercial Code (HGB), companies with more than 500 employees are obliged to include a non-financial statement in their management report. Within this non-financial statement, the company must address at least the following aspects: environmental issues (including greenhouse gas emissions, water consumption, air pollution, use of renewable and non-renewable energy), employee concerns, social concerns, human rights and its efforts to combat corruption and bribery.¹⁷ Further, with regard to these aspects, the non-financial statement must provide information necessary for an understanding of the company's development and performance, its position and the effect of its activities on the aspects referred to above.¹⁸ If the company does not adopt any measures to address one or more of these aspects, it must explain and justify this clearly in the non-financial statement.¹⁹ Although the implementation of the NFRD generally involves a disclosure obligation for directors regarding climate change risks and impacts, as an explicit exception, the company may, in the non-financial statement, omit any information on future developments or matters under negotiation if the directors, in their exercise of sound business judgment, determine that the information is likely to cause significant damage to the company.²⁰

Under the HGB, breaches of the disclosure obligations concerning the non-financial statement are sanctioned in different ways. Misrepresentation or non-disclosure of the company's relations are subject to criminal punishment, including potential prison sentences of up to three years for board members.²¹ Moreover, omitting or incompletely preparing a non-financial statement constitutes an administrative offence, resulting in possible

¹⁵ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0095&from=EN>>.

¹⁶ Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten (CSR-Richtlinie-Umsetzungsgesetz) vom 11 April 2017.

¹⁷ Section 289c para. 2 HGB.

¹⁸ *Ibid*, s. 289c.

¹⁹ *Ibid*, s. 289c para. 4.

²⁰ *Ibid*, s. 289e para. 1.

²¹ *Ibid*, s. 331.

finances of up to EUR 10 million.²² In the event of errors in the non-financial statement, the management board members are also considered to be in violation of their obligations under section 93 AktG, which may result in liability for damages towards the company.

As an additional ramification, the implementation of the NFRD has led to an amendment in the definition of the supervisory board's responsibilities, insofar as it gives supervisory board members the option of instructing an external party to conduct a content review of the non-financial statement.²³

In addition to reporting obligations under the NFRD, German companies may become subject to additional sustainability-reporting and governance requirements under: the proposed Corporate Sustainability Reporting Directive (CSRD), which extends the scope of reporting requirements under the NFRD, specifies in more detail the information which companies should report, and requires full assurance of sustainability information;²⁴ and the proposed Directive on Corporate Sustainability Due Diligence (the Due Diligence Directive), which introduces a duty for certain companies to conduct supply chain due diligence on human rights and environmental issues.²⁵ Please refer to the EU section for more information.

Practical Implications for Directors

Given that German regulators have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and in particular the above-noted BaFin guidance to its supervised companies; the German Federal Government's GHG emissions reductions targets, and revisions to the EU's non-financial reporting directive, well-counselled boards will:

a) Revisit existing and build future business models

Directors and supervisory board members should conduct strategy discussions and manage the necessary transformation of business models, reflecting also geopolitical risks. On the way to net-zero, directors should in particular assess the carbon footprint under Scopes 1 to 3 under the Greenhouse Gas Protocol. Beyond that, it is necessary for the management and supervisory boards to adequately consider both the risks and opportunities of all relevant ESG aspects.

Further, directors should put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board.

In addition, directors should delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee.

b) Comply with disclosure requirements

Directors and supervisory board members need to gain an understanding of, and directors need to manage legal issues related to relevant (new) non-financial reporting standards. The supervisory board, in turn, has to monitor the directors's strategy and decisions as part of its supervisory function. This requires sufficient knowledge of the underlying regulation and legal issues and risks.

²² *Ibid.*, s. 334.

²³ Section 111 para.1 AktG.

²⁴ 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, COM/2021/189 final.

²⁵ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

Further, directors need to discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

c) **Review supply chains**

Directors should review supply chains to identify potential risks of business disruption due to the impacts of climate change and other business and geopolitical factors. New due diligence obligations will need to be fulfilled under recent and incoming regulation in Germany and Europe. Again, the supervisory board has to monitor proper fulfilment of directors' responsibilities.

d) **Implement compliance measures**

Directors should implement compliance measures and apply best crisis management practices in the event of a breach, including communication with regulators and third parties. Directors must consider legal requirements and recommendations regarding climate risks for all new projects and activities. Due diligence frameworks and policies and procedures related to employees, assets, operations and transactions must be developed and reviewed. Directors need to be trained on legal issues related to climate risks.

Directors should delegate climate risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board.

Supervisory board must supervise proper fulfilment of the directors' responsibilities.

e) **Examine insurance coverage**

Directors should review insurance coverage issues in relation to climate-related risks.

f) **Monitor the regulatory and legal environment**

Directors and the supervisory board should monitor the regulatory and legal environment and respond to any changes.

g) **Avoid reputational damage**

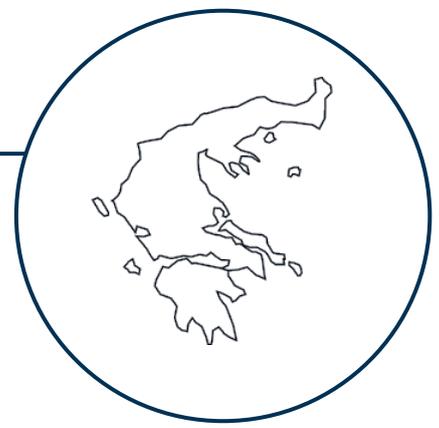
Directors must communicate an ESG strategy, take steps to review it and avoid reputation damage, in particular through greenwashing. Past communication also needs to be scrutinised.

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Greece



This section is to be read in conjunction with the above EU section and focuses specifically on rules under Greek law regarding directors' duties and obligations as they pertain to climate change.

At government level, Greece has made substantial progress and has established specific policies and targets to foster climate resilience to climate change.

In December 2019, the Greek Government adopted the National Energy and Climate Plan (NECP). The NECP is a strategic plan which sets out a detailed roadmap regarding the attainment of specific energy and climate objectives by 2030 and describes specific priorities and policy measures in respect of a wide range economic activities for the achievement of the targets, and therefore it is a reference text for the forthcoming decade. There is a specific goal of reducing greenhouse gas (GHG) emissions by 56% by 2030, compared to 2005 levels. In addition, the share of renewable energy in gross final energy consumption is set to stand at 35% by 2030.

In addition, in May 2022, Greece adopted a national climate law which aims at creating a coherent framework for the improvement of the adaptability and climate-resilience of Greece and the gradual transition of the country to climate neutrality by 2050 in the most environmentally sustainable, socially fair and cost-efficient way. For the achievement of the target of climate neutrality by 2050, the climate law sets as intermediary targets for the years 2030 and 2040 the reduction of greenhouse gas (GHG) emissions caused by human activity by at least 55% and 80% respectively, compared to 1990 levels, taking also into account the targets of the NECP. For the achievement of the above goals, the national climate law provides for the adoption of climate adaptation strategy at a national and regional level for a period of ten and seven years respectively, as well as for specific measures and policies, including the phase-out of lignite's share in power generation by 2028, the promotion of the use of zero carbon and electric vehicles in the public and private sector and the

reduction of CO₂ emissions from residential and public buildings and companies.

The NECP is currently under revision so as to comply (as the national climate law does) with the ambitious EU climate targets of reduction of CO₂ emissions by 55% by 2030 (European Green Deal, European Climate Law, Fit for 55 package) and the phase out of EU's dependency on fossil fuels well before 2030 set out in the Repower EU plan.

Greek regulators, especially in the financial sector, are also becoming increasingly focused on the importance and necessity for companies to apply climate resilience policies and measures in the interest of their sustainability and competitiveness. In 2019 the Athens Stock Exchange (ATHEX) produced voluntary guidance on incorporating ESG information, including climate risks. While voluntary, ATHEX states that compliance with the guidance is likely to meet regulatory requirements under the *Non-Financial Reporting Directive 2014/95/EU* and may increase access to capital. The Hellenic Corporate Governance Code (HCGC) recommends that listed companies rely on the ATHEX guidance in relation to their non-financial disclosures. In addition, in November 2021, the Bank of Greece announced its eight-point plan for climate change. The Bank committed to following a climate change action plan, applying sustainable and responsible investment principles to its portfolios, assessing climate risk in the financial system, and using the recommendations of the Network for Greening the Financial System (NGFS).

At the corporate level, Greek law has introduced the concept of sustainability, including climate related risks, in the governance of listed companies. This has not yet taken the form of an obligation for the

management boards, but rather as an issue left at the discretion of the boards to decide whether the adoption of a policy addressing climate change risks is appropriate for the business activity of the company. However, the fact that Greece has adopted an ambitious strategy towards the climate neutrality with the adoption of binding climate targets (see the national climate law) presumes an understanding by the boards of climate-related risks and assessment of their impact on the business of the company (and vice versa of the company's business to the climate) and is expected to increasingly affect the governance culture of directors.

Directors' Duties and Climate Change

Directors' duties are set out in the Greek *corporate law 4548/2018* (Corporate Law).¹ Pursuant to articles 96 and 97 of the Corporate Law, all board members have a duty of care, loyalty, diligence and confidentiality towards the company and must exercise their duties for the benefit of the company. Directors are liable to the company for any damage of the company due to an act or omission which constitutes breach of their duties.² The standard for the assessment of directors' liability is the diligence of the "*prudent businessman*". Based on the business judgement rule, no liability exists for acts or omissions which are based on a lawful resolution of the general meeting, or which concern a reasonable business decision which was adopted in good faith, based on adequate information and exclusively for the promotion of the corporate interest. The court may also rule that no liability exists for acts of board members which are based on an opinion of an independent body or commission which operates in the company. Although the duty of care of directors is towards the company, if the company fails to proceed with an action against the board members, the shareholders could proceed themselves to seek compensation in

tort for the indirect damage they have suffered. Furthermore, shareholders may be entitled to file an action in tort against the board members for any direct damage they have suffered. In addition, the legal representatives of a company are jointly and severally liable with the company to compensate any person that suffers damage because of such action.

Interpreting the duty of care of board members under the standards and requirements of the EU and national climate change strategy, management board directors are expected to be skilled to understand and assess the impact of climate risks to the company's business (and vice versa of the company's business to the climate) and to implement policies and measures to foster company's resilience against climate related risks.

Climate change, which falls within the bounds of sustainability issues, is explicitly associated with the governance of listed companies in the Greek *corporate governance law 4706/2020* (Corporate Governance Law),³ although not in the form of an obligation. Article 14 of the Corporate Governance Law provides that listed companies shall include in their internal regulation the sustainable development policy pursued by the company, where required.

According to the HCGC, sustainability is determined by reference to the impact of the company's activities on the environment and the wider community and is measured on the basis of non-financial factors related, among others, to the environment, which are economically essential for the company and the collective interests of key stakeholders (employees, customers, suppliers, local communities and other important stakeholders). Pursuant to the best practices of HCGC, board directors must: determine in the annual report the non-financial issues concerning the long-term sustainability of the company that are essential for the company, the shareholders and the stakeholders and how the

¹ Law 4548/2018 Reformation of the legal framework of the *societes anonymes companies* (Government Gazette A 104/13.6.2018).

² Article 102 of Law 4548/2018.

³ Law 4706/2020 (Government Gazette A' 136/17.07.2020).

company must apply them; bind and monitor the executive administration on matters relating to new technologies and environmental issues; ensure that mechanisms are in place for the knowledge and understanding of the interests of the stakeholders and monitor their effectiveness; and disclose to shareholders information on the management and performance of the company on sustainable (ESG) issues. HCGC recommends that listed companies should use indicators of the ESG 2019 Reporting Guide of the Athens Stock Exchange or internationally recognized initiatives, such as the GRI, the SASB organization, the CDP or the UNGC.

Another area where climate related risks, as part of the concept of sustainability, are considered is the remuneration policy of the executive members of listed companies. HCGC recommends that the board directors shall examine and link the remuneration of executive members with indicators on ESG issues and sustainable development that could give long-term value to the company.

Pursuant to article 150 of the Corporate Law, non-financial indicators related to the company's business activity, including information about climate related issues, may also be included in the management report to the extent required for the understanding of the development, the performance or the position of the company. Again, the use of non-financial indicators about climate change issues is left at the discretion of the management board. Very small joint-stock companies (other than listed companies, insurance companies and banks in relation to which please see below) are exempted from the obligation to include non-financial information in their management report.

Pursuant to article 152 of Corporate Law, companies must also include in their management report a corporate governance statement which pursuant to HCGC's

recommendation shall include, among others, information on the sustainable development policy (including climate change issues) followed by the company, such as description of key elements of the policy adopted and implemented with a view to promoting the corporate interest and competitiveness of the company, reference to the essential non-financial issues relating to the long-term sustainability of the company, reference to the standards used by the company for the disclosure of such non-financial information.

Breach of the provisions of articles 150 and 152 of the Greek Corporate Law may entail imprisonment of the board member for up to three years or imposition of fine from €5.000 - €50.000.

Directors' Disclosure Obligations and Climate Change

Greece has implemented the *Non-Financial Reporting Directive 2014/95/EU* in the Corporate Law. According to article 151, listed companies, banks and insurance companies⁴ with over 500 employees includes in their management report a non-financial statement, in relation at least, to environmental, social and employment issues, human rights, anti-corruption and anti-bribery, to the extent required for the understanding of the development, the performance, the status and impact of their activities. This statement must include a brief description of the business model, a description of policies, the results of those policies, the main climate related risks and the company's activities, including, where to the extent appropriate, business relations, products or services that may have negative results and mitigating actions, as well as non-financial performance indicators. If the company does not adopt any policies to address the above issues, the non-financial statement must include a clear and justified explanation for the lack of any such policies

⁴ Defined as large public interest corporations in Appendix A of Law 4308/2014 *Greek Accounting Standards* (Government Gazette A' 251/24.11.2014).

(comply or explain). The non-financial statement must also include, where appropriate, references and additional explanations regarding the amounts stated in the annual financial statements. As an exception, the company may omit to include in the non-financial statement any information about upcoming developments or issues under negotiation if, subject to the reasoned opinion of the board members, such information would cause significant damage to the company and provided that such omission does not impede the correct and balanced understanding of the impacts of the company's activities. In relation to the non-financial disclosures, companies may rely to national or EU or international standards and, in this case, must clarify the standards they relied upon. The non-financial

disclosure obligation is subject to external auditors' control. In case of incompleteness or errors in the non-financial statement the Hellenic Capital Market Commission (HCMC) may issue a reprimand or impose a fine up to €3.000.000 to the board members.

Although the *Non-Financial Reporting Directive 2014/95/EU* makes no reference to directors' duties, it indirectly obliges the management board members to develop a governance culture which takes into account and assesses the impact of climate related issues to the business of the company and adopts appropriate measures and policies to address climate risks in the short-, medium- and long-term interest of the company's interest and competitiveness.

Practical Implications for Directors

Despite the absence of specific commitments and obligations of directors at corporate level in relation to climate change and environmental issues, the existing EU and national legal framework on climate change and non – financial disclosures as well as the forthcoming developments proposed by the EU for a Corporate Sustainability Reporting Directive (revision of EU *Directive 2014/95*) and for a Directive on Corporate Sustainability Due Diligence (introducing a duty for certain companies to conduct supply chain due diligence on human rights and environmental issues) visibly indicate that board directors of Greek companies must contribute to the company's resilience to climate change. Our practical recommendations are as follows:

- a) Ensure that management board is skilled, and, where required, train the management board to understand climate-related risks and how they may affect the business of the company across the company's supply chain, including products, clients and in general stakeholders;
- b) allocate identification of climate risks and opportunities and their evaluation to a specific management team that reports directly to the board;
- c) designate to a department the monitoring of the legal and policy developments in relation to EU climate goals, and the potential direction of these developments and put on the agenda for the board to review, within 3 or 6 months, a process to initiate the development of a climate transition roadmap to 2050, with transparent carbon neutrality targets, clear interim targets to 2040, 2030 and near-term within the current rolling multi-medium and long-term targets, and at least annually thereafter report back to the board;
- d) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term climate change strategy into a clear decision-making process for each aspect that is relevant to each committee;
- e) Review and, where required, adopt and create a governance policy to ensure appropriate management and handling of climate-related risks and associated defamation risks;

- f) Ensure compliance with the Corporate Law and the Corporate Governance Law on climate related issues.
- g) Discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

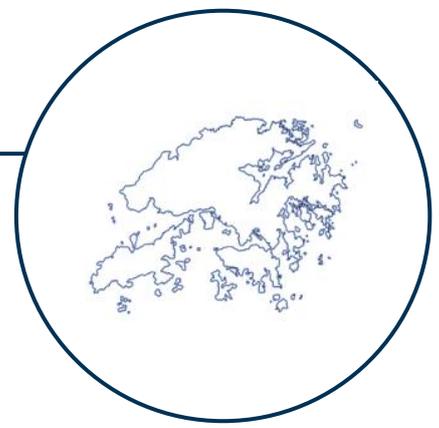
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Hong Kong



In October 2021, the Government of Hong Kong published its Climate Action Plan 2050. The plan affirms, *inter alia*, its target of achieving carbon neutrality by 2050, states a new target of reducing carbon emissions by 2035 by half relative to 2005 levels, and outlines the Government's strategies for decarbonisation and budgets for mitigation and adaptation.¹ The proposed policies may have substantial impacts on the operations of Hong Kong corporations, in particular those which are in, or are closely connected to, high emission sectors.

Hong Kong regulators recognise the foreseeability of climate-related financial risks and are proactively addressing them.² In December 2020, the Hong Kong Monetary Authority (HKMA), a member of the NGFS, announced that reporting in accordance with TCFD recommendations will be mandatory for companies in the banking, asset management, insurance and pension fund sectors by 2025.³ Additionally, the HKMA recently issued a circular regarding best practices by major international banks in managing climate risks, as well as several other publications regarding green and sustainable finance and the pricing in of climate transition risks by banks.⁴ The Hong Kong Securities and Future Commission (SFC) and the HKMA also co-chair Hong Kong's Green and Sustainable Finance Cross-Agency Steering Group. The Steering Group includes several government agencies and aims, amongst other things, to coordinate the management of climate and environmental risks to the financial sector and to accelerate the growth of green and sustainable finance.

In November 2020, the Chief Executive of the HKMA acknowledged that “[c]limate risk is one of the biggest threats to our planet and future generations” and that regulators must determine how the financial sector can “play its part in tackling this risk”.⁵ In February 2021, speaking about the international climate finance agenda, the CEO of the Hong Kong Securities and Future Commission, warned that:

*International organisations, national authorities and the private sector now have no real option other than to participate. If they do not, they risk being left behind as investments shift in favour those businesses which can properly describe how they are managing the strategic risks resulting from climate change.*⁶

¹ Hong Kong Special Administrative Region, 'Hong Kong's Climate Action Plan 2050' (October 2021) <https://www.climate-ready.gov.hk/files/pdf/CAP2050_booklet_en.pdf> 38, 59-63.

² Alexander Stock SC and Jennifer Fan, *Legal Opinion on Directors' Duties and Disclosure Obligations under Hong Kong Law in the Context of Climate Change Risks and Considerations* (19 October 2021) <<https://ccli.ubc.ca/wp-content/uploads/2021/10/Hong-Kong-Directors-obligations-and-climate-change.pdf>>

³ 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 Dec 2020) <<https://www.hkma.gov.hk/eng/news-and-media/press-releases/2020/12/20201217-4/>>.

⁴ See HKMA, 'Range of practices for management of climate risks' (7 July 2020) <<https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200707e1a1.pdf>>; HKMA, 'White Paper on Green and Sustainable Banking' (30

June 2020) <<https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200630e1.pdf>>; HKMA, 'Common Assessment Framework on Green and Sustainable Banking' (31 December 2019) <<https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2020/20200513e1a1.pdf>>; HKMA, 'Effect of Climate-related Risk on the Pricing of Bank Loans: Evidence From Syndicated Loan Markets in Asia Pacific' (13 August 2021) <<https://www.hkma.gov.hk/media/eng/publication-and-research/research/research-memorandums/2021/RM06-2021.pdf>>.

⁵ Eddie Yue, 'Managing climate risks in Hong Kong' (9 November 2020) [3] <<https://www.bis.org/review/r201109b.htm>>.

⁶ Ashley Alder, 'Climate change and finance: What's next for the global regulators? Climate Risk and Green Finance Regulatory Forum 2021' (11 February 2021) 5 <https://www.sfc.hk/-/media/EN/files/ER/PDF/CEO_Speech_Climate-Risk-and-Green-Finance-Regulatory-Forum-2021.pdf>.

Directors' Duties and Climate Change

Hong Kong is a common law jurisdiction. Directors' duties in Hong Kong are informed by a combination of statute (principally the *Companies Ordinance* (Cap 622)) and common law. Directors owe fiduciary duties to the company including the duty to act *bona fide* in the best interests of the company, the duty to avoid unauthorised conflicts of interest and unauthorised receipt of profits, and the duty to act for proper purposes. However, these duties have not been codified; only the common law duty to exercise reasonable care, skill and diligence has been. Section 465 of the *Companies Ordinance* provides that a director of a company must “*exercise reasonable care, skill and diligence*”.

A 2021 legal opinion from Alexander Stock SC and Jennifer Fan of Temple Chambers found that, to the degree that climate risks intersect with and affect the best interests of a company, directors are both “*entitled*” and “*obliged*” to take these into account when discarding their obligations.⁷ With respect to climate change, the two most salient directors' duties are the duty to act *bona fide* in the best interests of the company and the duty to exercise reasonable care, skill and diligence. In Hong Kong, the best interests of the company are broadly understood as being commensurate with the financial interests of the members as a whole.⁸ As such, under the law of Hong Kong, directors are entitled to consider climate risks in their decision-making processes to the extent that they have, or are likely to have, an impact upon the financial interests of the company's members. In fact, directors who fail to consider climate risks may fall short of their duty to act in the best interests of the company given the prominence and foreseeability of climate-related financial risks. Notably, a failure to consider could encompass situations where climate risks were considered but not given adequate weight or considered on the basis of inadequate or incorrect information.

Furthermore, in a jurisdiction such as Hong Kong where financial regulators have undertaken concerted and coordinated efforts to improve climate risk literacy and governance, the objective standard expected of directors in addressing climate risks could foreseeably be higher than in other jurisdictions.

Under the law of Hong Kong, the duty of care, skill and diligence comprises an objective and subjective element. The standard of reasonable care, skill and diligence expected is based on what could reasonably be expected of a person carrying out the functions of a director,⁹ as well as the subjective knowledge, skill and experience the impugned director actually has.¹⁰ Importantly, the subjective characteristics of the director in question can only raise the expected standard.¹¹

The duty of care, skill and diligence owed by directors under the law of Hong Kong is relevant to climate risks in several respects. These include:

- the establishment and maintenance of risk management processes;
- due diligence and informed decision making;
- supervision of management and committees;
- assessment of financial statements; and
- disclosure of material information in accordance with the Hong Kong Stock Exchange Listing Rules.

Consequently, directors who dismiss, or unduly diminish the significance of climate risks, foreseeably face personal liability on several fronts under the law of Hong Kong.¹²

Directors' Disclosure Obligations and Climate Change

Part XIVA of the *Securities and Futures Ordinance* (Cap 571) provides that listed corporations, and therefore their directors, have an obligation of continuous disclosure

⁷ Alexander Stock SC and Jennifer Fan, *Legal Opinion on Directors' Duties and Disclosure Obligations under Hong Kong Law in the Context of Climate Change Risks and Considerations* (19 October 2021) <<https://ccli.ubc.ca/wp-content/uploads/2021/10/Hong-Kong-Directors-obligations-and-climate-change.pdf>>; Ernest Lim, Commonwealth Climate and Law Initiative, *Directors' Liability and Climate Risk: White Paper on Hong Kong* (10 December 2021) <<https://ccli.ubc.ca/resource/directors-liability-and-climate-risk-white-paper-on-hong-kong/>>.

⁸ *Greenhalgh v Arderne Cinemas Ltd* [1950] 2 All ER 1120, 1126; Stefan HC Lo and Charles Z Qu, *Law of Companies in Hong Kong* (Sweet & Maxwell, 3rd edn, 2018) [8.030].

⁹ *Companies Ordinance* (Cap 622), s. 465(2)(a).

¹⁰ *Ibid.*, s. 465(2)(b).

¹¹ *Re D'Jan of London Ltd, Copp v D'Jan* [1994] 1 BCLC 561, 563.

¹² Ernest Lim, *Directors' Liability and Climate Risk: White Paper on Hong Kong* (CCLI, 10 December 2021) <<https://ccli.ubc.ca/resource/directors-liability-and-climate-risk-white-paper-on-hong-kong/>>.

regarding information which is likely to materially influence the price of their shares in certain circumstances. Similarly, the Hong Kong Stock Exchange's (HKEX) Main Board Listing Rules require disclosure of information regarding profit forecasts, among other matters. Relevantly, such disclosure could foreseeably be precipitated by a climate-related financial risk being realised.

Under rule 13.24B (1), if an event occurs during the profit forecast period which makes the assumptions underlying the profit forecast materially different, the issuer must announce this information. Furthermore, rule 13.24B (2) provides that if there are activities outside the issuer's ordinary course of business that materially contributes to or reduces the profit stated in the profit forecast, the issuer must announce this information. In addition, rule 13.91 requires companies to furnish an annual ESG report on a comply or explain basis. In the report, it is mandatory to disclose, amongst other matters:

- the board's oversight of ESG issues;
- the board's ESG management approach and strategy, including the process used to evaluate, prioritise and manage material ESG-related issues; and
- how the board reviews progress made against ESG-related goals and targets with an explanation of how they relate to the companies' operations.

The HKEX is also pressing for greater awareness and disclosure of climate-related financial risks as well as increased uptake of sustainable finance practices. In December 2019, the HKEX introduced new ESG requirements, requiring that issuers must, amongst other things, disclose 'significant' climate-related issues which have, or may have, an impact on the company.¹³ In December

2020, HKEX launched the Sustainable and Green Exchange (STAGE), the first of its kind in Asia. The STAGE is an online portal designed to provide greater information, access, and transparency on a wide range of sustainable green and social investment products.

In addition, financial institutions and funds will be subject to increased climate disclosure obligations. As noted above, the HKMA will also require directors in the banking, asset management, insurance, and pension fund sectors to ensure that their companies provide TCFD-aligned disclosures by 2025.¹⁴ More recently, however, the HKMA has issued guidance on how authorised financial institutions are to manage climate-related risks, and has stated that it expects such institutions to prepare climate-related disclosures no later than mid-2023.¹⁵ Asset managers in particular are likely to face more onerous disclosure obligations.

The SFC has issued a circular to management companies of SFC-authorized unit trusts on the disclosures which ESG funds should make, including a description of the ESG focus of the fund and its investment strategy.¹⁶ In addition, in August 2021, the SFC issued upcoming amendments to the Fund Manager Code of Conduct, which require fund managers to consider climate risks (defined as physical, transition and liability risks) in their investment and risk management processes, and managers of at least HK\$8 billion in assets to make a reasonable effort to report their investees' and funds' Scope 1 and 2 greenhouse gas emissions from November 2022.¹⁷ Therefore, both ESG-focused funds and other funds will be required to disclose ESG-related information (including, where relevant, information relating to climate change).

¹³ HKEX, 'Amendments to the Main Board Listing Rules: Update No.128' (2019) <<https://en-rules.hkex.com.hk/rulebook/update-no-128>>; HKEX, 'Amendments to the GEM Listing Rules: Update No.64' (2019) <<https://en-rules.hkex.com.hk/rulebook/update-no-64>>; HKEX, 'Guidance on Climate Disclosures: Reporting on TCFD recommendations' (November 2021) <https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Environmental-Social-and-Governance/Exchanges-guidance-materials-on-ESG/guidance_climate_disclosures.pdf?la=en>.

¹⁴ 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) <<https://www.hkma.gov.hk/eng/news-and-media/press-releases/2020/12/20201217-4/>>.

¹⁵ HKMA, 'Supervisory Policy Manual: Climate Risk Management' (20 July 2021) <https://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/GS-1_for_consultation_20Jul2021.pdf>.

¹⁶ Securities and Futures Commission, 'Circular to management companies of SFC-authorized unit trusts and mutual funds – ESG funds' (29 June 2021) <<https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/products/product-authorization/doc?refNo=21EC27>>.

¹⁷ SFC, 'Circular to licensed corporations: Management and disclosure of climate-related risks by fund managers' (20 August 2021) <<https://apps.sfc.hk/edistributionWeb/gateway/EN/circular/intermediaries/supervision/doc?refNo=21EC31>>.

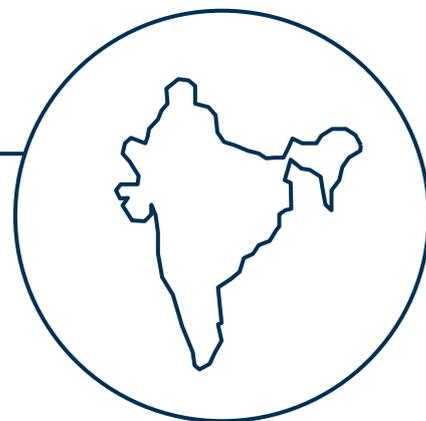
Practical Implications for Directors

Given that Hong Kong's regulators have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and in particular the above-noted facts that the HKMA will be making TCFD disclosure mandatory for its supervised entities by 2025; the involvement of HFMA and SFC in the Green and Sustainable Finance Cross-Agency Steering Group, and new ESG requirements by the HKEX, with specific attention to climate, well-counselled boards should:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

Contributors: CCLI





In November 2021, Prime Minister Modi stated that India would achieve net-zero emissions by 2070, and announced a number of interim steps including increasing the capacity of its non-fossil fuel energy generation, reducing its carbon emissions and reducing its carbon intensity, by 2030.¹ This may indicate the direction of government policies in the future, and the context in which Indian corporates operate.

Indian financial regulators are becoming increasingly attuned to the magnitude and breadth of climate-related financial risks. In its 2018-2019 'Report on Trend and Progress of Banking in India', the Reserve Bank of India (RBI) highlighted that climate change poses several risks to the financial system and opined on the opportunities presented by the 'green finance ecosystem'.² Further, RBI has also published articles on the effect of climate change on food price inflation and on the opportunities for green finance in India.³ Recent statements by RBI board members have highlighted climate change as a financial risk, to be discussed in a forthcoming RBI Discussion Paper.⁴

In April 2021, the RBI joined the Network of Central Banks and Supervisors for Greening the Finance System (NGFS) as a member to learn from and contribute to the global efforts on green finance.⁵

In May 2021, the Securities and Exchange Board of India (SEBI) amended the corporate disclosure rules that apply to listed companies to require the top 1,000 listed companies (by market capitalization) to report on business responsibility and sustainability issues, including climate change risks.⁶ The guidance note for such reporting draws from India's National Guidelines on Responsible Business Conduct, Global Reporting Initiative (GRI) Sustainability Reporting Standards and various Indian laws.⁷ Following this, in December 2021, the Chairman of SEBI noted an increased interest in sustainable investing, and a need to regulate ESG-ratings providers, on which SEBI has recently sought views from the public.⁸ The

¹ Ministry of External Affairs, National Statement by Prime Minister Shri Narendra Modi at COP26 Summit in Glasgow (2 November 2021) <<https://www.mea.gov.in/Speeches-Statements.htm?dtl/34466/National+Statement+by+Prime+Minister+Shri+Narendra+Modi+at+COP26+Summit+in+Glasgow>>.

² Reserve Bank of India, '2018-2019 Report on Trend and Progress of Banking in India' (2019) 17 <<https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0RTP241219FL760D9F69321B47988DE44D68D9217A7E.PDF>>.

³ Archana Dilip and Sujata Kundu, 'Climate Change: Macroeconomic Impact and Policy Options for Mitigating Risks' (RBI Bulletin 2020) <<https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/1CLIMATECHANGE7C6AD14719E43DAA7FA84C1F8F1CFED.PDF>>; Shri M Rajeshwar Rao, 'Heed to Heal – Climate Change is the Emerging Financial Risk' (CAFRA Virtual Conference on Green and Sustainable Finance, Keynote Address, 16 September 2021) <<https://rbidocs.rbi.org.in/rdocs/Speeches/PDFs/SUSTAINABLEFINANCE622D9A6802414A49ADEF0301C2E74BB1.PDF>>; Saurabh Ghosh et al., 'Green Finance in India: Progress and Challenges' (RBI Bulletin 2021), <https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/04AR_2101202185D9B6905ADD465CB7DD280B88266F77.PDF>.

⁴ Shri M Rajeshwar Rao, 'Heed to Heal – Climate Change is the Emerging Financial Risk' (CAFRA Virtual Conference on Green and Sustainable Finance, Keynote Address, 16 September 2021) <<https://rbidocs.rbi.org.in/rdocs/Speeches/PDFs/SUSTAINABLEFINANCE622D9A6802414A49ADEF0301C2E74BB1.PDF>>; Shaktikanta Das, Governor's Statement (18 April 2022) <https://rbi.org.in/scripts/BS_ViewBulletin.aspx?id=20931>.

⁵ RBI, 'RBI Joins Network for Greening the Financial System' (29 April 2021) <https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=51496>.

⁶ SEBI (Listing Obligations and Disclosure Requirements) (Second Amendment) Regulations, 2021. See also Securities and Exchange Board of India, Circular on Business responsibility and sustainability reporting by listed entities (10 May 2021) <https://www.sebi.gov.in/sebi_data/meetingfiles/apr-2021/1619067265752_1.pdf>.

⁷ SEBI, Guidance Note for Business Responsibility and Sustainability Reporting Format (10 May 2021) <https://www.sebi.gov.in/sebi_data/commondocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure2_p.PDF>; Ministry of Corporate Affairs, National Guidelines on Responsible Business Conduct (10 December 2018) <https://www.mca.gov.in/Ministry/pdf/NationalGuideline_1503_2019.pdf>.

⁸ Shri Ajay Tyagi, 'Reflections on Evolution of ESG Norms, Investments and Regulation' (Speech at the inauguration of Arun Duggal ESG Centre for Research and Innovation, IIM Ahmedabad, 3 December 2021) <https://www.sebi.gov.in/reports-and-statistics/publications/jan-2022/sebi-bulletin-january-2022_55591.html>; SEBI, Consultation Paper on Environmental, Social and Governance (ESG) Rating Providers for Securities Markets (24 January 2022) <https://www.sebi.gov.in/reports-and-statistics/reports/jan-2022/consultation-paper-on-environmental-social-and-governance-esg-rating-providers-for-securities-markets_55516.html>.

consultation paper makes reference to the work of the International Organisation of Securities Commissions (IOSCO) in this regard and draws from global thinking urging for the regulation of ESG ratings.⁹

In July 2021, the International Financial Services Centre Authority (IFSCA), which is the unified regulator for International Financial Services Centres (IFSCs), issued regulations (IFSCA Regulations) pertaining to the issuance and listing of securities, including ESG debt securities in the nature of 'green', 'sustainability' or 'sustainability-linked' debt securities. The IFSCA Regulations also provide *inter alia* for external review to ascertain that ESG debt securities are aligned with specified international frameworks.¹⁰ In March 2022, IFSCA also sought comments on a draft 'IFSCA Guidance Framework on Sustainable and Sustainability linked lending by financial institutions in IFSCs' which directs registered IFSC Banking Units and Finance Companies/Finance Units (undertaking lending activities from IFSCs) to develop board-approved policies on green/ social/ sustainable/ sustainability-linked lending.¹¹

Additionally, in March 2020, the Insurance Regulatory and Development Authority of India co-hosted a roundtable with the OECD and Asian Development Bank that, amongst other matters, considered the implications of climate change for insurance business models and the role of pension funds in advancing sustainable finance.¹²

Directors' Duties and Climate Change

Indian directors' duties are largely codified in section 166 of the *Companies Act*. The most relevant duties in the context of climate change are, broadly speaking, the duties of trust and loyalty and the duty of competence.¹³ The duties of trust and loyalty include the duty to act in good faith in the best interests of the company and its stakeholders, as well as the duty to avoid conflicts of interest. Regarding the duty to act in good faith and best interests, section 166(2) of the *Companies Act* provides:

A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

Accordingly, in discharging this duty, directors must balance various stakeholder interests under a pluralistic corporate governance paradigm. Often, the interests of these stakeholders conflate to some degree when a long-term perspective is adopted, thereby simplifying the balancing act directors must undertake.

In the context of climate risk, it is notable that the provision requires directors to act "*for the protection of the environment*". Recently, the Supreme Court clarified the broad meaning of the term 'environment' under section 166(2) of the *Companies Act*, and demonstrated that there is no hierarchy between the duties owed to the company and the other stakeholders under section 166(2).¹⁴ Therefore, consideration of matters such as climate risk and environmental protection is not optional for directors of Indian companies. Rather, it is an obligation which, if ignored, may create

⁹ IOSCO, 'ESG Ratings and Data Product Providers' (2021) <<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD690.pdf>>.

¹⁰ IFSCA (Issuance and Listing of Securities) Regulations, 2021, Chapter X <<https://ifsc.gov.in/Viewer/Index/202>>.

¹¹ IFSCA Press Release, 'Invitation for public comments on draft 'IFSCA Guidance framework on Sustainable and Sustainability linked lending by financial institutions in IFSCs'' (2 March 2022) <<https://www.ifsc.gov.in/Document/Legal/draft-press-release-final-lending-framework02032022083249.pdf>>.

¹² ADBI Institute, 'OECD-ADBI-IRDAI Roundtable on Insurance and Retirement Saving in Asia' (2020) <<https://www.adb.org/news/events/insurance-and-retirement-saving-asia>>.

¹³ *Companies Act 2013*, ss. 166(2), (3) and (4). For a detailed analysis of climate risk and directors' liability in India, see

Shyam Divan SC, Ria Singhsawhney and Sugandha Yadav, *Directors' obligations to consider climate change-related risk in India* (7 September 2021) <https://ccli.ubc.ca/wp-content/uploads/2021/09/CCLI_Legal_Opinion_India_Directors_Duties.pdf>; and Umakanth Varottil, *Directors' Liability and Climate Risk: White Paper on India* (4 October 2021) <<https://ccli.ubc.ca/wp-content/uploads/2021/10/Directors-Liability-and-Climate-Risk-White-Paper-on-India.pdf>>.

¹⁴ *M.K. Ranjitsinh v. Union of India*, (2021) SCC Online SC 326, as discussed in Shyam Divan SC, Ria Singhsawhney and Sugandha Yadav, *Directors' obligations to consider climate change-related risk in India* (7 September 2021) <https://ccli.ubc.ca/wp-content/uploads/2021/09/CCLI_Legal_Opinion_India_Directors_Duties.pdf> at [19] – [21].

significant liability risk. However, this liability risk can be reduced if directors undertake a detailed assessment of climate risk facing their company, consider expert advice where appropriate, determine strategies to address the risks, implement those strategies, and consistently review the risks and the efficacy of such strategies.

Regarding the duty of competence, section 166(3) of the *Companies Act* stipulates that directors of a company shall exercise their “duties with due and reasonable care, skill and diligence and shall exercise independent judgment”. As such, Indian directors must inform themselves sufficiently about the business of the company and its associated risks. They must also employ adequate monitoring and oversight over the management of the company. Importantly, the duty of competence is assessed objectively. Hence, an honest failure on the part of directors to account for climate risk cannot be raised as an excuse against a breach of the duty. Therefore, the duty of competence will in many cases require Indian directors to investigate and engage with climate risks. Prudent engagement will likely involve integrated risk frameworks, comprehensive disclosures and considered responses from boards.

In addition to the duty of competence in section 166(3) of the *Companies Act*, the *SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015* (SEBI LODR Regulations) also impose several duties on directors which include adequately framing, implementing and monitoring systems of risk management.¹⁵ These regulations require the board of directors of listed companies to specify a risk management framework and large listed companies to also establish a risk management committee.¹⁶ It is also specified that the risks to be identified by such a committee include sustainability risks, especially those pertaining to ESG.¹⁷ These regulations add further content to the duty of competence and raise the

expected standard of risk management, and a *fortiori* climate risk management.

Directors' Disclosure Obligations and Climate Change

Indian companies may be required to make climate risk disclosures both in relation to securities issuances and their ongoing disclosure obligations.

Regarding the issuing of shares, the *SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018* (SEBI ICDR Regulations) mandate disclosure of several types of corporate information which are likely to relate to climate risk. For example, the SEBI ICDR Regulations mandate disclosure of management's discussion and analysis of the financial condition of the company, alongside a discussion of various factors (including infrequent events or known trends or uncertainties) which may have a material adverse impact upon the company's revenue or profit.¹⁸ The SEBI ICDR Regulations also require that a company's prospectus contain the company's material internal and external risk factors,¹⁹ with climate risk likely being a foreseeable factor for many companies. SEBI, in its framework for issuance and listing of non-convertible securities, has also specified certain conditions for the issuance of 'green debt securities' which pertain to debts linked to specific end-uses, including renewable and sustainable energy, clean transportation, and climate change adaptation. These include making disclosures on the proposed environmental sustainability objectives and the environmental impact of the financed project.²⁰

As well as disclosure with respect to share issuances, disclosure of climate risks is relevant to annual reports, continuous disclosure obligations and Business Responsibility and Sustainability Reporting (BRSR) requirements. Notably, the annual reports of Indian companies must contain a discussion regarding the

¹⁵ SEBI LODR Regulations, reg. 4(2)(f).

¹⁶ *Ibid*, reg. 4(2)(f)(ii) and 21.

¹⁷ *Ibid*, Schedule II, Part D, C, (1)(a).

¹⁸ SEBI ICDR Regulations, Schedule VI-A, Para. 11(B)(1)(C)(iv).

¹⁹ *Ibid*, Schedule VI-A, Para. (5)(B).

²⁰ SEBI (Issuance and Listing of Non-Convertible Securities) Regulations, 2021, reg. 2(q), <[https://www.sebi.gov.in/legal/regulations/apr-2022/securities-and-exchange-board-of-india-issue-and-listing-of-non-convertible-securities-regulations-2021-last-](https://www.sebi.gov.in/legal/regulations/apr-2022/securities-and-exchange-board-of-india-issue-and-listing-of-non-convertible-securities-regulations-2021-last-amended-on-april-11-2022-58126.html)

<https://www.sebi.gov.in/legal/circulars/apr-2022/updated-operational-circular-for-issue-and-listing-of-non-convertible-securities-secured-debt-instruments-security-receipts-municipal-debt-securities-and-commercial-paper-modifications-in-cha-58060.html>> and Updated Operational Circular for Issue and Listing of Non-convertible Securities, Securitised Debt Instruments, Security Receipts, Municipal Debt Securities and Commercial Paper (April 13, 2022), Chapter IX, <<https://www.sebi.gov.in/legal/circulars/apr-2022/updated-operational-circular-for-issue-and-listing-of-non-convertible-securities-secured-debt-instruments-security-receipts-municipal-debt-securities-and-commercial-paper-modifications-in-cha-58060.html>>.

company's risk management policy and the means by which the company identifies and addresses risks that pose an existential threat to the company.²¹ Furthermore, the report must address the company's approach to energy conservation,²² and more particularly, use of alternative forms of energy and investments made in company energy conservation initiatives.²³ The BRSR framework published in May 2021, which came into effect for reporting for FY 2022-2023, places great emphasis on disclosure of sustainability issues. In-scope listed companies under the BRSR framework are required to disclose an overview of their business conduct and sustainability issues, which includes material climate change-related

risk, in their BRSR reports.²⁴ Particularly, companies are required to disclose details of energy consumption, scope 1 and scope 2 greenhouse gas emissions, emission reducing projects, environmental clearances and impact assessments, renewable energy usage and details of any business continuity and disaster management plans.²⁵

Indian companies also have continuous disclosure obligations with respect to material information to ensure the market is properly informed.²⁶ The definition of material information expressly includes information arising from the impacts of climatic events, such as flooding and fires.²⁷

²¹ Companies Act 2013, s. 134(3)(n).

²² *Ibid*, s. 134(3)(m).

²³ Companies (Accounts) Rules, 2014, rule 8.

²⁴ 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) <https://www.sebi.gov.in/sebi_data/commndocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure2_p.PDF>.

²⁵ 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) <https://www.sebi.gov.in/sebi_data/commndocs/may-2021/Business%20responsibility%20and%20sustainability%20reporting%20by%20listed%20entitiesAnnexure2_p.PDF>.

²⁶ SEBI LODR Regulations, Schedule III, Part A.

²⁷ SEBI LODR Regulations, Schedule III, Part A, para. B(6).

Practical Implications for Directors

Given that regulators in India have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and in particular the above-noted recognition of climate risk by the Reserve Bank of India, and SEBI's consultation on expanded climate disclosure and its current BRSR requirements, well-counselled boards will:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board as a matter of priority a process to start developing a climate transition roadmap to 2070 with transparent carbon neutrality or reduction targets, with clear interim targets and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee;
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting; and
- e) Use the BRSR assessment and disclosure process as a climate consciousness check and have goals mapped to any shortfalls identified and/ or "*leadership indicators*" as provided in the BRSR framework.

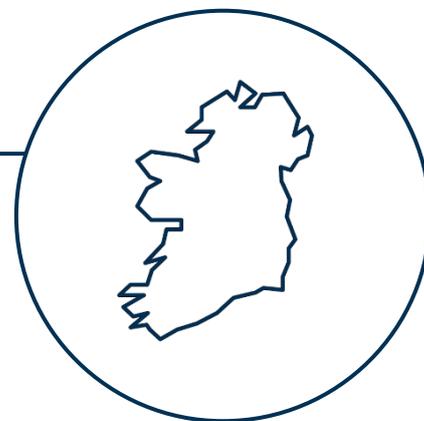
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Ireland



Ireland is a member state of the European Union. This section is to be read in conjunction with the above EU section. Ireland is a common law jurisdiction and directors' duties derive from both case law and statute.

Summary

There are currently no Irish statutory provisions which expressly require directors generally to take account of climate-related risks or opportunities in the discharge of their fiduciary duties. However, to the extent that climate-related matters affect the company's interests, directors must consider such matters as they discharge their duties.

While there is no specific Irish case-law requiring directors to consider climate matters in discharging their duties, climate related litigation has been successfully brought against the Irish government over failures to comply with climate legislation.¹

Under EU law and relevant Irish implementing law there are specific climate-related disclosures required of certain large companies and corporate financial services firms, which are made by the directors currently on a comply or explain basis. Impending EU legislation is set to materially increase these disclosure requirements and to require companies to adapt their operations in response to climate and wider ESG considerations.

Accordingly, the nature and extent of the integration of climate-related considerations by directors in the discharge of their duties depends on the sector and business in which the company operates. For example, a company in the financial services sector may primarily focus on climate-related financial risk disclosure while a food and beverage manufacturer may be more concerned with the implications of policies on carbon emissions reduction.

Directors of Irish companies should note that:

- companies operating in certain sectors will be required to comply with particular climate-related legislation which is specifically relevant to their operations;
- relevant incoming and proposed EU legislation will, once it comes into force in Ireland, increase the breadth and scope of specific climate-related considerations for directors;
- in discharging their duties, directors should carefully evaluate the extent to which climate-related issues should be integrated into their governance roles.

¹ *Friends of the Irish Environment CLG v. Government of Ireland* [2020] IESC 49.

Irish government policy and legislation on climate

The Irish government has identified climate change mitigation and adaptation as major policy priorities as evidenced in Ireland's *Climate Action Plan*,² *National Development Plan*³ and *National Adaptation Framework*.⁴ These developments, while not directly applicable to directors, are likely to change the commercial, physical and social context in which companies operate, giving rise to risks and opportunities. Ireland has a track record in enacting legislation supporting transition to a low carbon economy; for example, enacting the *Fossil Fuel Divestment Act 2018*, making Ireland one of the first countries in the world to withdraw public money from investment in fossil fuels.⁵

Ireland enacted a net-zero emissions target in law through the *Climate Action and Low Carbon Development (Amendment) Act 2021*, which includes a goal of net-zero greenhouse gas emissions by 2050, and a 51% reduction by the end of 2030. The Irish government's policy indicates how it intends to meet this target, including increased investment and sector-specific targets for agriculture, transport, electrification and buildings, progressively increasing carbon taxes under the *Finance Act 2020*⁶ and implementing a just transition framework. This may give rise to opportunities for companies seeking to tap into new markets, but also risks for companies in high-emission sectors, or adjacent to such sectors.

The Irish government's Ireland for Finance strategy includes an action to increase the number of Irish firms adopting the voluntary reporting framework of the Task Force on Climate-related Financial Disclosures (TCFD). At the end of 2021, over 30 Irish based firms had adopted TCFD including leading Irish semi-

state bodies and large Irish financial and non-financial companies.

Directors' Duties and Climate Change

Directors of Irish companies are subject to fiduciary duties as set out in the *Companies Act 2014*. These include the duties to act in good faith in what the directors considers to be the interests of the company and to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person (having both the knowledge and experience which may reasonably be expected of a person in the director's position, and the knowledge and experience which that director actually has). These statutory duties are interpreted with regard to both common law and equitable principles.

A breach of a director's fiduciary duties can result in personal liability for the director to account to the company for any gains and/or indemnify the company for losses or damages arising from the breach.⁷ In the performance of their duties (which are owed to the company alone) directors are to have regard to the interests of the company's shareholders and employees.⁸ To the extent that climate-related matters affect the company's interests, directors must consider such matters as they discharge their duties.

Further, companies listed on the Irish stock exchange, Euronext Dublin, are required to comply with the U.K. Corporate Governance Code,⁹ as well as requirements under the Irish Corporate Governance Annex of the Euronext Listing Rules,¹⁰ on a 'comply or explain' basis. These state boards should assess the basis on which a company generates and preserves value over the long-term, and how opportunities and risks to the future success of the company

² Government of Ireland, Climate Action Plan 2021 (November 2021) <<https://www.gov.ie/en/publication/6223e-climate-action-plan-2021/>>.

³ Government of Ireland, National Development Plan 2021 – 2030 (4 October 2021) <<https://www.gov.ie/en/publication/774e2-national-development-plan-2021-2030/>>.

⁴ Government of Ireland, National Adaptation Framework (8 February 2021) <<https://www.gov.ie/en/publication/fbe331-national-adaptation-framework/>>.

⁵ Department of Finance, 'Ireland Strategic Investment Fund's sale of interests in global fossil fuel companies leads the way in green thinking – Donohoe and D'Arcy' (4 January 2019) , National Adaptation Framework (8 February 2021) <<https://www.gov.ie/en/press-release/f07fcb->

[foss/#:~:text=The%20Act%20provides%20for%20the,a%20%E2%80%9Cpracticable"%20timeframe>](https://www.gov.ie/en/press-release/f07fcb-foss/#:~:text=The%20Act%20provides%20for%20the,a%20%E2%80%9Cpracticable).

⁶ Government of Ireland, Climate Action Plan 2021 (November 2021) <Government of Ireland, Climate Action Plan 2021 (November 2021) <<https://www.gov.ie/en/publication/6223e-climate-action-plan-2021/>>.

⁷ *Companies Act 2014*, s. 228.

⁸ *Ibid*, s. 224.

⁹ Financial Reporting Council, The U.K. Corporate Governance Code (July 2018) <<https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code>>.

¹⁰ Euronext Regulated Markets, Euronext Listing Rules Appendix 4: The Irish Corporate Governance Annex <<https://www.euronext.com/en/regulation/euronext-regulated-markets>>.

have been considered and addressed.¹¹ Principle A of the Corporate Governance Code sets out that the role of the board of a successful company "... is to promote the long-term sustainable success of the company generating value for shareholders and contributing to wider society." Principle C further states that "[t]he board should also establish a framework of prudent and effective controls, which enable risk to be assessed and managed."

While at the time of writing there is no Irish case law on directors' duties in the context of climate change, established principles of Irish company law require directors to demonstrate informed stewardship as they discharge their duties. This requires them to sufficiently apprise themselves of key matters in respect of the company and its operations, including risks and impacts arising from climate change and other sustainability issues. This requirement will be increasingly important as forthcoming EU directives discussed in the EU section above come into force and require directors to make additional sustainability disclosures, including in respect of the environment. In the absence of binding local precedent, Irish courts can consider the cases of other common law jurisdictions in particular those of the higher courts in England and Wales for guidance where relevant, so directors of Irish companies may wish to familiarise themselves with material developments in case law in such jurisdictions.

A number of Irish acts and regulations, such as the *Waste Management Act 1996* (as amended), provide for specific requirements that apply to companies which operate in climate-sensitive sectors.

Directors' Disclosure Obligations and Climate Change

Irish companies are required to disclose information on non-financial issues under the *European Directive (EU) 2014/95* (the Non-Financial Reporting Directive or NFRD). The NFRD requires EU-based non-financial corporations with over 500 employees and banks and insurance companies of any size, to

disclose the impact of the company on environmental matters, including climate change. The NFRD is dealt with in more detail in the EU section above. The NFRD was transposed into Irish law by the *European Union (Disclosure of Non-Financial and Diversity Information) Regulations 2017* which requires 'applicable companies' to make certain climate related disclosures in a director's report in respect of each financial year, on a comply or explain basis. As discussed in the EU section above, the NFRD's reporting requirements will be broadened by the Corporate Sustainability Reporting Directive.

Under Article 8(1) of *Regulation (EU) 2020/852*¹² (the Taxonomy Regulation), entities required to disclose under NFRD must disclose information to the public on how and to what extent their activities are associated with environmentally sustainable economic activities. This includes economic activities with substantial contribution to climate change mitigation and adaptation. Other companies, for example SMEs, may decide to disclose this information for the purpose of getting access to sustainable financing or for other business-related reasons.

The aim of the disclosure under the EU Taxonomy is to avoid greenwashing in the market and increase the potential for green finance by increasing transparency about companies' environmental performance.

There are specific rules published specifying the content and presentation of the information to be disclosed under the EU Taxonomy by financial and non-financial companies and accompanying methodology to comply with the disclosure obligation. There is a staggered timeline for implementation of the disclosure requirement: As of 1 January 2022 for the reporting period 2021, qualitative information and information on taxonomy-eligible activities in relation to total activities must be disclosed. Non-financial undertakings must fully comply with this disclosure requirement from 1 January 2023 for the financial year 2022, and financial undertakings from 1 January 2024 for the financial year 2023.

Companies which are listed on Euronext Dublin are required to disclose information on the

¹¹ UK Corporate Governance Code, Provision 1.

¹² *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.

principal risks and uncertainties facing their business as part of their management report.¹³ Therefore, to the extent that climate change risks are deemed to be a principal risk to the company, they should be disclosed.

Financial sector regulation

The Central Bank of Ireland (CBI) has recognised climate change as a material financial risk in both its capacity as the central bank and as the financial regulator, has set out clear supervisory expectations of regulated firms regarding climate change in a 'Dear CEO' letter of 3 November 2021¹⁴ and has set up a Climate Risk and Sustainable Finance Forum to build capacity and share best practices to advance the financial sector's response to climate change.¹⁵ Climate change risks are among the systemic risks to the financial system identified by the CBI.¹⁶ In a securities regulation context, the CBI has identified climate change risk as a threat to the securities market, stating that firms should pay close attention to such risks and ensure that they are clearly understood and communicated to the market.¹⁷ The CBI has also recognised potential risks to a successful climate transition through

'greenwashing' by issuers of financial products which are marketed as sustainable.¹⁸ The CBI has also indicated that senior executive functions will be prescribed for effectively managing a regulated financial firm's approach to identifying, assessing and managing climate-related and environmental risks.¹⁹

In a disclosure context, *Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector*²⁰ (SFDR) places significant and technical disclosure requirements on financial market participants such as insurance undertakings, investment firms, IORPs, AIFMs, UCITS management companies and credit institutions providing portfolio management at entity and at product level. These include disclosures on environmental - including climate-related - risks, adverse impacts, objectives and promotion of environmental characteristics. There is a staggered implementation timeline for these requirements which began on 10 March 2021.

Additional specific climate-related provisions for banks can be read in the EU section above.

¹³ Rule 9, Central Bank (Investment Market Conduct) Rules 2019.

¹⁴ Central Bank of Ireland, 'Central Bank sets out supervisory expectations of regulated firms regarding climate change, and reaffirms own commitment to take action' (3 November 2021) <<https://www.centralbank.ie/news/article/press-release-central-bank-sets-out-supervisory-expectations-of-regulated-firms-regarding-climate-change-and-reaffirms-own-commitment-to-take-action-03-november-2021>>.

¹⁵ Central Bank of Ireland, 'Central Bank of Ireland hosts inaugural meeting of the Climate Forum and publishes Sustainable Investment Charter' (30 June 2022) <<https://www.centralbank.ie/news/article/central-bank-of-ireland-hosts-inaugural-meeting-of-the-climate-forum-and-publishes-sustainable-investment-charter-30-june-2022>>.

¹⁶ See Central Bank of Ireland, Financial Stability Review 2021 I (June 2021) <<https://www.centralbank.ie/publication/financial-stability-review/financial-stability-review-2021-i>>; Central Bank of Ireland, Financial Stability Review 2021 II (November 2021) <<https://www.centralbank.ie/publication/financial-stability-review/financial-stability-review-2021-ii>>; Central Bank of Ireland, Financial Stability Review 2022 I (June 2022)

<<https://www.centralbank.ie/publication/financial-stability-review/financial-stability-review-2022-i>>; Central Bank of Ireland, Press Release: Climate change a key focus for the Central Bank (13 May 2021) <<https://www.centralbank.ie/news-media/press-releases/climate-change-a-key-focus-for-the-central-bank-13-may-2021>>.

¹⁷ Central Bank of Ireland, Securities Markets Risk Outlook Report 2021: Conduct Risks in an Uncertain World (February 2021) <<https://www.centralbank.ie/regulation/industry-market-sectors/securities-markets/risk-outlook-reports>>.

¹⁸ *Ibid.*

¹⁹ Central Bank of Ireland, 'Individual accountability – a maturing of financial regulation - Speech by Gerry Cross, Director of Financial Regulation: Policy and Risk, at Arthur Cox Client Seminar' (24 June 2022) <<https://www.centralbank.ie/news/article/speech-gerry-cross-at-arthur-cox-seminar-23-may-2022>>.

²⁰ *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.*

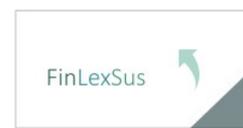
Practical Implications for Directors

The focus on climate-related financial risk by the CBI and the evolution of climate risk and opportunity in Irish government policy, at EU level and in the wider commercial environment will increasingly mean that directors should consider climate change-related risks and opportunities and consider their effect on their company's business model to properly fulfil their legal duties to act in the best interests of their companies.

In order to ensure high standards of governance, well-counselled boards may wish to:

- a) develop a strategy for assessing climate-related risks and opportunities relevant to the sector in which their business operates, the nature of the company's business operations and the size and scale of the business which may include scenario analysis;
- b) assess whether there is sufficient skills and knowledge at board level to properly develop that strategy, implement it and challenge during its execution;
- c) consider delegating climate risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board;
- d) put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent and science-based carbon neutrality or reduction targets, with clear interim targets to 2030 in line with government policy and periodically thereafter report back to the board;
- e) consider delegating to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee;
- f) identify any climate-related disclosure requirements for the company and develop a strategy to comply with those requirements while appropriately managing any potential risk of greenwashing;
- g) identify any voluntary climate-related initiatives joined or commitments made by the company and ensure appropriate strategy, governance, transparency and accountability is in place within the company to measure, monitor and manage targets and deliverables;
- h) consider whether executive and board remuneration should be linked to the achievement of measurable sustainability targets, which, in the case of environmental targets, should be time-bound and science-based;
- i) be aware of forthcoming EU legislation which, upon coming into force in Ireland, may impact upon their duties in respect of climate and broader sustainability issues, most notably the proposed Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive which are covered in more detail in the EU section above; and
- j) for directors of regulated financial entities, identify relevant climate-related supervisory focus issues for the company and any supervisory, regulatory or disclosure deadlines applicable to the company.

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This section should be read in conjunction with the previous European Union section.

In addition to new requirements under EU law, there have been recent developments in Italian law. In 2022, the Constitutional Affairs Committee approved amendments to Articles 9 and 41 of the Italian Constitution introducing the principle of protection of “*environment, biodiversity and of ecosystems, also in the interest of new generations*” and a general prohibition for entrepreneurial activities to be carried out in a manner that could hinder “*health and environment*”.¹

There has also been an increasing focus on sustainable finance. In January 2022, Banca D’Italia set up a Climate Change and Sustainability Committee, which will contribute to defining the bank’s sustainable finance strategy, and has also become a member of the Steering Committee of the Network for Greening the Financial System.²

Directors’ Duties and Climate Change

Italy is a civil law jurisdiction. Directors’ duties are codified in the *Civil Code* (section 2392 ff.) - dated 1942, later amended in 2003 - according to which directors owe a duty to the company to manage its affairs with care, evaluated according to a subjective and objective standard. With the exception of creditors, consideration of whose interests arises when the company’s assets are no longer sufficient to satisfy creditor claims, the *Code* does not explicitly refer to any duties regarding obligations to stakeholders. Another relevant provision is article 2381 of the *Civil Code*, according to which the board of directors is responsible for ensuring that the company’s internal organization, administration and accounting are “*adequate*”; this responsibility includes, among others, the duty to ensure that the enterprise risk management system functions effectively.

Viewed alongside *European Directive No. 2014/95/EU* (the Non-Financial Reporting

Directive),³ the Italian *Code*’s two above-noted provisions, combined with the Directive’s comprehensive disclosure requirements, create a clear obligation for boards of “*large*”⁴ Italian corporations to adopt a governance approach that is focused on the long-term and thus includes climate change. In other words, by compelling disclosure that is long term-focused, boards are obliged to take appropriate actions to support these long-term disclosures, e.g. by identifying and managing climate risks and opportunities, embedding them in long-term corporate strategy, ensuring alignment with individual investment decisions, and correctly valuing company assets. It follows that under Italian law, directors’ civil liability for damages may arise in cases of misstatements, overvaluation of company assets, and breaches of their duty of care for failing to identify and/or manage climate-related risks or to consider climate-related opportunities in setting the strategy.

¹ *Legge Costituzionale 11 febbraio 2022, n. 1* Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell’ambiente. (22G00019) (*GU Serie Generale n.44 del 22-02-2022*);

² Banca D’Italia, ‘The Bank of Italy steps up its action on climate risks and sustainable finance’ (9 February 2022)

³ <https://www.bancaditalia.it/media/notizia/the-bank-of-italy-steps-up-its-action-on-climate-risks-and-sustainable-finance/?dotcache=refresh>

⁴ See EU section above.

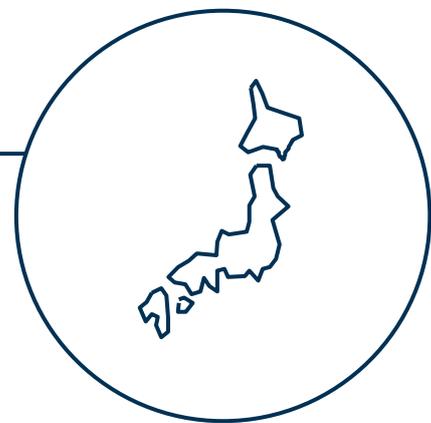
⁴ Defined as non-financials with over 500 employees and banks and insurance companies of any size – see EU section above.

In addition to the *Civil Code*, the Corporate Governance Code – which, though not hard law, defines a set of voluntary ‘comply or explain’ recommendations – was amended in 2020 to include an explicit reference to “*sustainable success*”. Article 1 of the Corporate Governance Code provides that “[t]he board of directors leads the company by pursuing its *sustainable success*”, sets corporate strategy in accordance with this principle, and oversees its implementation. The concept of “*sustainable success*” is defined as “*the objective that guides the actions of the board of directors and*

creates long-term value for the benefit of shareholders, taking account of the interests of other relevant stakeholders”. This echoes section 172 of the U.K. *Companies Act 2006* and is consistent with the concept of ‘enlightened shareholder value’. That being said, the voluntary nature of the Corporate Governance Code means that breaches of this principle do not give rise to any enforceable legal liability against company directors.

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Climate change has been recognised as a material issue affecting the sustainability of almost all companies. Japan's *Climate Change Adaptation Act* and its *Act on Promotion of Global Warming Countermeasures*, read together, create regulatory expectations that all sectors of Japanese society must make efforts to control climate change through mitigation and adaptation.¹

Climate change risks are increasingly being acknowledged by Japanese regulators. The Bank of Japan (BoJ), as Japan's primary prudential regulator, has acknowledged that climate change poses a systemic risk to the Japanese financial system.² The BoJ has announced its *Strategy on Climate Change*, which includes the launch of a fund-provisioning measure, which will allow financial institutions that disclose information on their efforts to address climate change to receive support from the BoJ; encouraging financial institutions to enhance their Task Force on Climate-related Financial Disclosure (TCFD)-aligned disclosures and to promote investments in climate-related financial products.³ Japan's Ministry of the Environment Climate Change Policy Division has reported that climate-related risks can result from reassessment of the value of a large range of assets with a large volume of GHG emissions during the process of adjustment towards a lower-carbon economy, and has advised companies to engage in scenario analysis to assess the resilience of their business in the face of global warming.⁴

Directors' Duties and Climate Change

Japan is a civil law jurisdiction, and the legal basis for the scope of directors' and officers' duties is set out in statute under the *Companies Act of Japan* and the *Civil Code*. Directors in Japan have three primary duties:

- a duty of loyalty,⁵ including a requirement to act in the company's best interests, which a growing number of lawyers and regulators believe includes its long-term sustainability;
- a duty to comply with all laws, regulations, ordinances, resolutions of shareholders' meeting and the company articles.⁶ For directors of large companies,⁷ it includes a requirement to develop systems related to management of the risk of loss to the company and any of its subsidiaries⁸ and to establish a proper internal control system to ensure that the execution of their duties complies with the relevant laws, regulations and articles of association.⁹ In such companies, a director's duty of care will not be effectively performed without a proper internal control system;¹⁰ and
- a duty of care, to the standard of a prudent manager,¹¹ which informs the

¹ Article 2(1), *Act on Promotion of Global Warming Countermeasures* (Act No 117 of 1998, as amended, 地球温暖化対策の推進に関する法律平成10年法律第117号).

² Bank of Japan, Bank of Japan joins the Network for Greening the Financial System (NGFS) (28 November 2019), <https://www.boj.or.jp/en/announcements/release_2019/rel19_1128a.htm/>.

³ Bank of Japan, The Bank of Japan's Strategy on Climate Change (16 July 2021) <https://www.boj.or.jp/en/announcements/release_2021/rel21_0716b.pdf>.

⁴ The Ministry of the Environment, Government of Japan Climate Change Policy Division, Practical Guide for Scenario Analysis in line with the TCFD recommendations, 2nd edition (March 2020), 1-5, <http://www.env.go.jp/policy/policy/tcfd/TCFDguide_2nd_EN.pdf>.

⁵ Article 355 of the *Companies Act of Japan*.

⁶ *Ibid.*

⁷ Large company is a defined term under Article 2(vi) of the *Companies Act of Japan*.

⁸ *Regulation for Enforcement of the Companies Act*, article 100(ii), 会社法施行規則平成18年2月7日法務省令第12号 Ministry of Justice Order No 12 of February 7, 2006.

⁹ *Companies Act of Japan*, art. 348,362,399-13 and 416.

¹⁰ *Regulation for Enforcement of the Companies Act*, arts. 98, 100(ii), 110-4 and 112; 会社法施行規則平成18年2月7日法務省令第12号 Ministry of Justice Order No 12 of February 7, 2006.

¹¹ *Civil Code of Japan* (Act No 89 of 1896, as amended, 民法明治29年法律第89号) art. 644; *Companies Act of Japan* (Act No.2005, as amended, 会社法平成17年法律第86号) arts. 330, 355. For an English translation of Japanese Laws, see Japanese Law Translation run by the Ministry of Justice, Japan at <<http://www.japaneselawtranslation.go.jp/?re=02>>. As has been suggested by the Japanese Supreme Court, the duty of care is judged to be the objective standard of what a reasonably prudent person would do in comparable circumstances (see

duty of loyalty and the duty to comply with all applicable laws and regulations. If a director has met this standard, it may be a defence to personal liability for an alleged breach of the duty of care.¹² Likewise, if there are no “*significantly unreasonable aspects*” involved in the decision (known as the ‘business judgment rule’), directors will not have breached their duty of care.¹³

Directors who neglect their duties are jointly and severally liable to the company for any resulting damages; and where directors are grossly negligent or knowingly fail to perform their duties, such directors are also liable to third parties or shareholders for the resulting damages.¹⁴

Directors could breach their duty to ensure the company is obeying laws and regulations by failing to consider the *Climate Change Adaptation Act*. This duty requires that businesses endeavour to adapt to climate change in accordance with the content of their business activities, and to cooperate with governments at all levels. It therefore follows that directors have a duty to endeavour to ensure their companies take robust action to adapt to climate change. In the future, any strengthening of statutes that would require companies to set targets towards decarbonization or that require companies to disclose governance, strategy, risk management, and metrics in line with an international framework would add those duties to other duties of directors.

A failure to monitor climate change risks and climate change-related regulations could give rise to a breach of the directors’ duty of care in their oversight and management of the company if a board were to fail to set up an appropriate risk management system.¹⁵ In order to comply with their duty of care in relation to the duty of oversight, directors need to ensure

that such a risk management system is proper and sufficiently capable of fulfilling the responsibilities to monitor and manage the company’s business, given the likelihood and magnitude of climate risks to the company. Since the financial risks of climate change are so broadly acknowledged by governments, scientists, financial institutions, companies, investors, and civil society, it is no longer a defence for directors to say that they were unaware of the risks.

As well as potentially breaching their duty of care in respect of the duty of oversight of risks and compliance, directors could potentially breach their general duty to act with due care in the best interests of the company in failing to address climate-related risks and opportunities.¹⁶ Examples of breach of the duty of care could include failure to make relevant enquiries to management regarding physical and transition risks to the business due to climate change; or failure to seek outside expertise where the directors do not possess the knowledge or expertise to devise a strategy to address climate risk. Other examples might include failure to robustly assess the assumptions underlying revenue/cost projections for climate-related disruption, and failure to ensure assets and supply chains are resilient to foreseeable physical climate risks.

Additionally, regulators are encouraging the disclosure of climate-related risks (see below). The responsibility that corporate directors therefore have to ensure adequate disclosure, combined with the expectations contained in the *Climate Change Adaptation Act* and the *Act on Promotion of Global Warming Countermeasures*, put directors in the position of having to stand by the quality of the practices that these disclosures reveal, in effect creating a clear obligation to address climate-related risks and opportunities to an adequate

Dan W Puchniak and Masafumi Nakahigashi, ‘Case No.21: Corporate Law – Business Judgment Rule – Derivative Action – Supreme Court, 15 July 2010’ in Moritz Bälz et al. (eds.), *Business Law in Japan – Cases and Comments* (Kluwer Law International 2012) at 223.

¹² *Companies Act of Japan*, examples of where having taken due care is a defence include article 52 (2)(ii), article 120 (4), and article 213 (2)(ii).

¹³ Supreme Court 15 July 2010 – Case No 2009 ju 183, Apamanshop Case, 1332 Hanrei Taimuzu 501.

¹⁴ Katsuyuki Yamaguchi, Kaoru Tatsumi, and Mamiko Komura, ‘Corporate governance and directors’ duties in Japan: overview’ (1 November 2016),

<https://www.nishimura.com/sites/default/files/tractate_pdf/ja/43281.pdf>.

¹⁵ For example, under articles 423(1), 348(4), 362(5), 399-13(2), and 416(2) of the *Companies Act of Japan* and articles 98, 100, 110-2, and 114 of the *Regulation for Enforcement of the Companies Act*.

¹⁶ See Yoshihiro Yamada, Janis Sarra and Masafumi Nakahigashi, Commonwealth Climate and Law Initiative, *Directors’ Duties Regarding Climate Change in Japan* (February 2021) <<https://law-ccli-2019.sites.olt.ubc.ca/files/2021/02/Directors-Duties-Regarding-Climate-Change-in-Japan.pdf>>.

standard. Heightened disclosure creates a *de facto* expectation of a higher standard of care.

The duty of care for publicly-listed companies is reinforced by the Japanese Corporate Governance Code. The Corporate Governance Code recommends that publicly-listed companies address ESG and other sustainability issues proactively to create value for all stakeholders over the mid- to long-term. It was revised in June 2021 to include a recommendation for Japanese companies to further promote positive and proactive responses to sustainability issues in light of the increasing number of organisations supporting the TCFD recommendations, and to require boards to develop a basic policy for the company's sustainability initiatives to increase corporate value over the mid- to long-term.¹⁷ The Code, while non-binding, therefore offers strong normative guidance for directors to effectively manage material climate-related financial risks and opportunities. The impact of soft law such as the Corporate Governance Code has the potential to be instrumental in shifting climate governance, as the principles adopted by companies form part of their fundamental rules of operation. Companies listed on the Prime Market of the Tokyo Stock Exchange will be required, on a 'comply or explain' basis, to collect and analyze data on the impact of climate change-related risks and earning opportunities on their business activities and profits, and to enhance the quality and quantity of disclosure in accordance with the TCFD recommendations or an equivalent framework.¹⁸ The prime market includes 68 banks.¹⁹

Directors' Disclosure Obligations and Climate Change

The duty to disclose is contained in the *Financial Instruments and Exchange Act* (FIEA).²⁰ The FIEA requires disclosure (on a continuous and periodic basis²¹) of material business risks. These risks are often reported as 'non-financial information' in annual reports. Additionally, in January 2019, Japan's Financial Services Agency (FSA) issued a Cabinet Office Ordinance on Disclosure of Corporate Affairs, which expands the FIEA requirement to include material 'forward-looking' risk. While this ordinance does not refer explicitly to climate change, the requirements align closely to the TCFD framework. Therefore, insofar as climate change is now universally regarded as posing a material business risk, it follows that the FIEA requires disclosure of risks and forward-looking risks arising from climate change. This requirement is particularly compelling given the guidance and regulatory developments relating to climate-related disclosures discussed below. Finally, if directors detect any fact likely to cause substantial detriment to the stock company, they must immediately report such fact to the shareholders or to the company auditors.²²

Directors have overall responsibility for ensuring that a company's financial disclosures are accurate, and so may be primarily liable for misleading disclosures made to the market.²³ Both companies and directors may be subject to sanctions under financial services legislation for failure to comply with disclosure requirements. Unlike general directors' duties, disclosure pursuant to financial services law is not subject to the business judgment rule; therefore, a court will not consider whether a decision to make or omit a disclosure was

¹⁷ Tokyo Stock Exchange, 'Japan's Corporate Governance Code Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term' (as revised 11 June 2021) at 9, 19 <<https://www.jpx.co.jp/english/news/1020/b5b4pj0000046kxj-att/b5b4pj0000046i07.pdf>>. For a discussion of early corporate law, prior to the modernization of company law, see Janis Sarra and Masafumi Nakahigashi, 'Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Culture and Norms' (2002) 24 Law & Policy 4 at 299-354.

¹⁸ Joanna Treacy, K&L Gates, 'ESG Regulatory Developments in The UK, Japan, and Hong Kong' (14 January 2022) 12(14) National Law Review, <<https://www.natlawreview.com/article/esg-regulatory-developments-uk-japan-and-hong-kong>>.

¹⁹ See Japan Exchange Group, Tokyo Stock Exchange, 'Listed Company Search', <<https://www2.jpx.co.jp/tseHpFront/JJK020030Action.do>>.

²⁰ *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), <<https://www.fsa.go.jp/en/policy/fiel/>>.

²¹ Planning and Coordination Bureau, Financial Services Agency, 'Points to Note Regarding Article 27-36 of the Financial Instruments and Exchange Act (Fair Disclosure Rule Guidelines)' (April 2018), translation at <https://www.fsa.go.jp/en/laws_regulations/disclosure/201802_06-2.pdf>.

²² *Companies Act of Japan*, art. 357(1).

²³ Janis Sarra, Audit Committees and Effective Climate Governance, A Guide for Boards of Directors (CCLI, December 2020) <<https://law-ccli-2019.sites.olt.ubc.ca/files/2020/12/CCLI-Guide-for-Audit-Committees-on-Effective-Climate-Governance.pdf>>.

“*significantly unreasonable*” but will focus on whether the disclosure was required by law

There have also been several recent regulatory and guidance developments aimed at enhancing the disclosure of climate-related risks, including:

- In 2019, a TCFD Consortium was launched to encourage effective TCFD disclosures, supported by the Ministry of the Environment and the Ministry of Economy, Trade and Industry.²⁴
- In March 2020, the Ministry of the Environment issued practical guidance on scenario analysis in line with TCFD recommendations. The TCFD Consortium undertakes revision work with the Ministry. In July 2020, the TCFD Consortium announced the *Guidance on Climate-related Financial Disclosures 2.0* (TCFD Guidance 2.0).²⁵
- The Japan Exchange Group, Inc and Tokyo Stock Exchange Inc have also strongly endorsed ESG disclosure, including disclosure of climate-related risks, with the publication of a ‘Practical Handbook for ESG Disclosure’ in March 2020.²⁶
- In 2021, the FSA indicated a movement towards mandating climate-related financial disclosures for companies listed on the Prime Market in its *Strategy on Sustainable Finance*.²⁷ Based on the revision of the Corporate Governance Code in June 2021, the FSA encourages listed companies to disclose their initiatives on sustainability. The FSA has agreed to move toward mandatory disclosure

based on TCFD framework, in line with domestic regulatory frameworks.

- On June 25, 2021, the Minister for Financial Services, Taro Aso, consulted the Financial System Council at FSA with respect to making the disclosure system enhance constructive dialogue between investors and companies.²⁸ The Financial System Council set up the FSA Disclosure Working Group, which is considering how listed companies and other companies that submit securities reports should appropriately disclose their sustainability-related initiatives to make Japanese capital markets more attractive in the global context. Japan’s Ministry of Economy, Trade and Industry (METI) and FSA reported that TCFD-aligned disclosures will become mandatory in the Prime Market of the Tokyo Stock Exchange effective April 2022. Companies listed on the Prime Market segment are to enhance the quality and quantity of disclosure based on the TCFD or an equivalent framework. In addition, after fiscal 2023, the FSA will expand the disclosure requirements to cover all companies that submit annual securities reports.²⁹
- In its *Strategy on Climate Change*, the Bank of Japan announced that it will require financial institutions to make disclosures on results and targets on green loans and investments alongside the steps they are taking to meet the TCFD disclosure requirements.³⁰
- The Ministry of the Environment announced in October 2021 that the

²⁴ TCFD Consortium, ‘About Us’ <<https://tcf-consortium.jp/en>>.

²⁵ TCFD Consortium, ‘The TCFD Consortium announces the release of “Guidance on Climate-related Financial Disclosures 2.0 (TCFD Guidance 2.0)”’ (June 2020) <https://tcf-consortium.jp/en/news_detail/20081201>.

²⁶ Japan Exchange Group Inc., Practical Handbook for ESG Disclosure (31 March 2020) <<https://www.jpx.co.jp/english/corporate/sustainability/esg-investment/handbook/index.html>>.

²⁷ Japanese Financial Services Agency, The JFSA’s Strategy on Sustainable Finance (July 2021-June 2022) (31 August 2021) <<https://www.fsa.go.jp/inter/etc/20211104/01.pdf>>. While the FSA has not yet mandated such disclosures, as its strategy states, it has issued a consultation on draft ‘Supervisory Guidance on Climate-related Risk Management and Client Engagement’ regarding financial institution’s climate risk management.

²⁸ Minister for Financial Services, Taro Aso, Consultation paper to Financial System Council (25 June 2021) (document in Japanese) <https://www.fsa.go.jp/singqi/singi_kinyu/soukai/siryou/202106_25/5.pdf>.

²⁹ Regulation Asia, ‘Japan’s FSA to Mandate Climate Disclosures from April 2022’, *ESG Investor* (11 October 2021) <<https://www.esginvestor.net/japans-fsa-to-mandate-climate-disclosures-from-april-2022/>>; *Nihon Keizai Shimbun* (Japanese News Paper), ‘Haisyuturyo Sonshitu Eikyo,4000-Sya ni Kaijigimu, Kinyu-Cho Kikohendomeguri’ (morning edn., 6 October 2021) 2 (article in Japanese; the translated title is ‘FSA will introduce mandatory disclosure on climate change issues, which influence 4000 companies’).

³⁰ Bank of Japan, The Bank of Japan’s Strategy on Climate Change (16 July 2021) <https://www.boj.or.jp/en/announcements/release_2021/rel21_0716b.pdf>.

Cabinet has approved the *Climate Change Adaptation Plan*, based on the *Climate Change Adaptation Act*, which describes measures to be taken for climate change adaptation, including science-based goals, target periods, strategy and the management and evaluation of the progress, including specific sector-based guidance.³¹

- The Japan TCFD Consortium has issued the Green Investment Guidance 2.0, with amendments that include transition finance, carbon neutrality, carbon pricing, and climate risk

management for investors and other stakeholders.³²

- Finally, disclosing information beyond that which is required by law is encouraged by the Japanese Corporate Governance Code.³³ In particular, the Corporate Governance Code requires companies listed on the Japanese Prime Market to disclose their initiatives on sustainability, to collect and analyse necessary data on climate-related risks, and to enhance the quality and quantity of their disclosures based on the TCFD recommendations.³⁴

Practical Implications for Directors

Given that Japan's government and regulators have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, well-counselled boards will:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management that reports directly to the CEO and board;
- b) put on the agenda for the board, within 3 or 6 months, a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/ remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel the most effective means of developing an external engagement and communications plan and how best to engage in effective oversight of rigorous disclosure and accounting.

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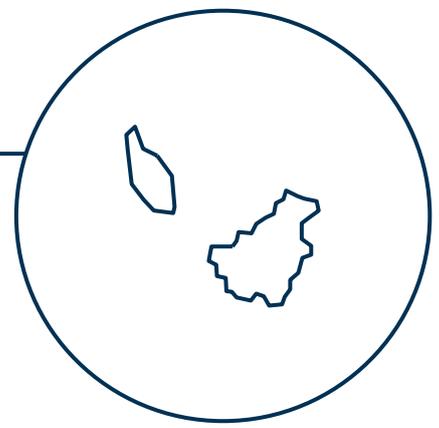
³¹ Ministry of the Environment, The Cabinet's Approval of the Climate Change Adaptation Plan and the Results of the Call for Public Comments on the Plan (22 October 2021) <<https://www.env.go.jp/en/headline/2560.html>>.

³² TCFD Consortium, 'The TCFD Consortium announces the release of "Guidance for Utilizing Climate-related Information to Promote Green Investment 2.0 (Green Investment Guidance 2.0)"' (5 October 2021) <https://tcf-consortium.jp/en/news_detail/21100501>.

³³ Tokyo Stock Exchange, 'Japan's Corporate Governance Code Seeking Sustainable Corporate Growth and Increased

Corporate Value over the Mid- to Long-Term' (as revised 11 June 2021) at 3, <<https://www.jpx.co.jp/english/news/1020/b5b4pj0000046kxj-att/b5b4pj0000046i07.pdf>>.

³⁴ Tokyo Stock Exchange, 'Japan's Corporate Governance Code Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term' (as revised 11 June 2021) at 14-15, <<https://www.jpx.co.jp/english/news/1020/b5b4pj0000046kxj-att/b5b4pj0000046i07.pdf>>.



Malaysia does not currently have a specific law requiring a reduction in greenhouse gas emissions. However, the Ministry of Energy, Science, Technology, Environment and Climate Change (MESTECC) has since 16 May 2019 entered into a four (4)-year collaboration with the U.K. to engage in a scoping review to ascertain whether a Climate Change Act is required and engage in knowledge-sharing with the U.K. on the latter's experiences in adopting its own *Climate Change Act* in 2008.¹ It has further been reported that the Ministry of Environment and Water (formerly MESTECC under the previous administration) completed the climate change legal framework in December 2021, which shall form the basis for a Climate Change Bill which is to include the formation of a climate change committee to ensure climate change adaptation in the face of floods, climate change mitigation and compliance mechanisms with existing laws.²

The Malaysian government has launched the Twelfth Malaysia Plan,³ which was approved by the Senate on 21 October 2021⁴ and sets out the national development strategy for 2021-2025, including a reiteration of the goal to reduce GHG emissions by up to 45% to GDP by 2030 relative to 2005 under Malaysia's Nationally Defined Contribution⁵ and a feasibility study on carbon pricing, such as carbon tax and an emissions trading scheme.⁶

Regulators have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices. Furthermore, a Joint Committee on Climate Change (JC3) was formed on 27 September 2019 by both the Central Bank of Malaysia (Bank Negara Malaysia or BNM) and the Securities Commission Malaysia (SC) with the intention of pursuing collaborative actions for building climate resilience in Malaysia whilst being guided by three (3) principal mandates, one of which is to build capacity through sharing of knowledge, expertise and best practices in assessing and managing climate-related risks.⁷

In 2020, the JC3 had carried out a review of disclosure practices of selected financial institutions against recommendations of the Task Force on Climate-related Financial Disclosures (TCFD),⁸ and its priorities for 2021 included developing guidance documents on risk management and scenario analysis, supporting the voluntary implementation of climate-related disclosures that are aligned with TCFD recommendations, broadening

¹ See Kenneth Tee, 'Yeo: At least 24 months for Climate Change Act to be tabled if necessary', *Malay Mail* (16 May 2019) <<https://www.malaymail.com/news/malaysia/2019/05/16/yeo-at-least-24-months-for-climate-change-act-to-be-tabled-if-necessary/1753644>>. See also Joseph Kaos Jr., 'Malaysia hopes to learn from Britain to come up with Climate Change Act, says Yeo', *The Star* (16 May 2019) <<https://www.thestar.com.my/news/nation/2019/05/16/malaysia-hopes-to-learn-from-britain-to-come-up-with-climate-change-act-says-yeo>>. Furthermore, it had also been reported that the four focus areas during the collaboration shall be "institutional framework in terms of mitigation and adaptations, capacity building, legal framework scoping studies for a Climate Change Act and Malaysia's Carbon Calculator": Kenneth Tee, 'Yeo: At least 24 months for Climate Change Act to be tabled if necessary', *Malay Mail* (16 May 2019) <<https://www.malaymail.com/news/malaysia/2019/05/16/yeo-at-least-24-months-for-climate-change-act-to-be-tabled-if-necessary/1753644>>.

² Bernama, 'Climate Change Bill legal framework completed, says Minister', *Malay Mail* (20 January 2022) <<https://www.malaymail.com/news/malaysia/2022/01/20/climate-change-bill-legal-framework-completed-says-minister/2036533>>.

³ Malaysian Government, Economic Planning Unit, Twelfth Malaysia Plan 2021-2025 (September 2021) <<https://rmke12.epu.gov.my/en>>.

⁴ Bernama, 'Dewan Negara approves 12MP motion' (22 October 2021), *The Star* <<https://www.thestar.com.my/news/nation/2021/10/22/dewan-negara-approves-12mp-motion>>.

⁵ These goals include reducing GHG emissions intensity by up to 45% by 2030 relative to 2005. See Malaysian Government, Malaysia's Update of its first Nationally Determined Contribution (July 2021) <<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Malaysia%20First/Malaysia%20NDC%20Updated%20Submission%20to%20UNFCCC%20July%202021%20final.pdf>>.

⁶ Malaysian Government, Economic Planning Unit, Twelfth Malaysia Plan 2021-2025 (September 2021), p. 298 <<https://rmke12.epu.gov.my/en>>.

⁷ BNM, 'Inaugural Meeting of Joint Committee on Climate Change' (27 September 2019) <<https://www.bnm.gov.my/-/inaugural-meeting-of-joint-committee-on-climate-change>>.

⁸ TCFD, 'Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures' (June 2017), ii <<https://www.fsb-tcfd.org/publications/final-recommendations-report/>>.

engagements with relevant stakeholders to identify and address enabling conditions for the structuring of green financial products and solutions, and deepening technical capacity-building programmes with a particular focus on climate-related disclosures, climate risk management and climate scenario analysis.⁹

On 30 April 2021, the BNM issued the Climate Change and Principle-based Taxonomy guidance document (BNM Taxonomy Guidance Document),^{10,11} prepared in collaboration with the Risk Management sub-committee¹² of the JC3 (defined below), in which it acknowledged that climate change has significant impacts on the society, economy and financial system.¹³ Specifically, BNM noted that this impact would manifest in three (3) dimensions of risk, namely physical risk (damaged property, reduced productivity and disrupted trade), transition risk (changes in legislative and regulatory framework, shift in consumer and investor behaviour) and liability risk (legal risk and claims on damages and losses).¹⁴

The BNM Taxonomy Guidance Document provides that it is imperative that financial institutions integrate climate change considerations in all aspects of their business

strategies,¹⁵ and also recognises that financial institutions play a pivotal role in accelerating their customers' transition towards more sustainable practices in their business operations.¹⁶ Furthermore, the BNM Taxonomy Guidance Document provides that a consistent and systematic classification of economic activities can facilitate and promote the channelling of financial flows to activities that support climate change and environmental objectives, and further classifies¹⁷ economic activities into three (3) broad categories of "Climate Supporting", "Transitioning", and "Watchlist" which are structured around five (5) guiding principles:¹⁸ (i) "climate change mitigation"; (ii) "climate change adaptation"; (iii) "no significant harm to the environment"; (iv) "remedial measures to transition"; and (v) "prohibited activities".¹⁹

On 27 December 2021, BNM published an exposure draft on climate risk management and scenario analysis for financial institutions (the BNM Climate Risk Exposure Draft), which was slated to come into effect on 1 June 2022,²⁰ but is now expected to be finalised in the second half of 2022.²¹ The BNM Climate Risk Exposure Draft includes proposed requirements that: (i) the board and senior management of financial

⁹ BNM and SC, 'Joint Statement by Bank Negara Malaysia and Securities Commission Malaysia: Towards Greening the Financial Sector' (25 February 2021) <<https://www.bnm.gov.my/-/joint-statement-bnm-sc-greening-the-financial-sector>>.

¹⁰ BNM, Climate Change and Principle-based Taxonomy (30 April 2021) <<https://www.bnm.gov.my/documents/20124/938039/Climate+Change+and+Principle-based+Taxonomy.pdf>>. BNM had issued a discussion paper earlier on the BNM Taxonomy Guidance Document on 27 December 2019 for which it received written feedback from respondents, including financial institutions, asset management companies, rating agencies and non-governmental organisations, during the consultation period. See BNM, 'Climate Change and Principle-based Taxonomy' (30 April 2021) <<https://www.bnm.gov.my/-/climate-change-principle-based-taxonomy>>.

¹¹ Paragraph 4.4 of the BNM Taxonomy Guidance Document provides that it complements the Value-based Intermediation Financing and Investment Impact Assessment Framework Guidance Document (VBIAF Guidance Document) issued by BNM on 1 November 2019. It further provides that the VBIAF Guidance Document lays the foundation for ESG considerations in the provision of financial services to generate a positive and sustainable impact on the economy, community and environment, and that while the VBIAF is premised on Shariah tenets, the framework has universal application for financial institutions seeking to reflect ESG considerations in their governance, business strategy and operations, reporting and risk management systems. See the VBIAF Guidance Document at BNM, 'Value-based Intermediation Financing and Investment Impact Assessment Framework: Guidance Document' (1 November 2019) <https://www.bnm.gov.my/documents/20124/761679/VBIAF_Financial+guidance+1.11.2019.pdf/97938f34-3796-216c-14a0-54002c377e3b?t=1590725447991>.

¹² The committee comprises of the following entities: Bank Islam Malaysia Berhad, Bank Pertanian Malaysia Berhad (Agrobank), CIMB Bank Berhad, Etiqa Insurance and Takaful, Hong Leong Bank Berhad, Institutional Investors Council Malaysia, Malayan Banking Berhad, Nomura Asset Management Malaysia Sdn. Bhd., the SC, Standard Chartered Bank Malaysia Berhad and Zurich Insurance and Takaful. See the Preface & Acknowledgement section on page 2 of the BNM Taxonomy Guidance Document.

¹³ Paragraph 1.1, page 4 of the BNM Taxonomy Guidance Document.

¹⁴ *Ibid*, para. 5.1, p. 7.

¹⁵ *Ibid*, para. 1.5, pp. 4-5.

¹⁶ *Ibid*, para. 1.6, p. 5.

¹⁷ See Section 9 on pages 23 and 24 of the BNM Taxonomy Guidance Document for further elaboration on these categories of classifications.

¹⁸ See Section 7, Part C on pages 12 to 21 of the BNM Taxonomy Guidance Document for further elaboration on these guiding principles.

¹⁹ *Ibid*, para. 9.1, p. 23.

²⁰ BNM, Climate Risk Management and Scenario Analysis Exposure Draft (27 December 2021) <https://www.bnm.gov.my/documents/20124/938039/ED_Climate_Risk.pdf>, feedback to which was being received by BNM up to 31 March 2022. At the time of writing, we note the BNM Climate Risk Exposure Draft is no longer available on the official website of BNM, presumably to undergo further revisions following receipt of the aforementioned feedback.

²¹ BNM, Joint Statement by BNM and Securities Commission Malaysia: Accelerating the Financial Sector's Response to Climate Risk (27 April 2022) <<https://www.bnm.gov.my/-/jc3-7th-meeting>>.

institutions should have overall responsibility and effective oversight over climate change-related risks to safeguard the financial institution's resilience against climate change, including appointing a dedicated Chief Sustainability Officer to oversee the effective management of climate-related risks or expanding the current responsibilities of an existing senior management officer for this purpose; (ii) the board and management should ensure that they have a sound understanding of climate-related risks to inform the financial institution's business and risk management strategies; (iii) climate-related risks should be incorporated and embedded into, amongst others, the financial institution's business strategies and risk appetite frameworks; (iv) financial institutions to continuously develop data capabilities, tools and methodologies to effectively aggregate and report material climate-related risks; (v) financial institutions to actively monitor and escalate material and potential climate-related risks in a timely manner; (vi) financial institutions to understand the transmission and impact of climate-related risks on existing risk types such as credit and liquidity risks and ensure their risk managements systems account for material climate-related risks; (vii) financial institutions should conduct scenario analysis to determine the resilience of their business strategies to material climate-related risks; and (viii) financial institutions should disclose climate-related risks. The BNM Climate Risk Exposure Draft, when it comes into effect, shall have application at the entity level (including overseas branch operations) and consolidated level (including both financial and non-financial subsidiaries) of financial institutions.²²

In December 2021, the JC3 announced that a TCFD-aligned application guide for disclosures on climate-related risks by financial institutions shall be issued for public consultation in January 2022 (TCFD Climate Disclosures Application Guide).^{23,24} Furthermore, its members supported a proposal for financial institutions to make mandatory TCFD-aligned climate-related financial risk disclosures from 2024, and feedback for this proposal will be welcomed as part of its consultation on the

TCFD Climate Disclosures Application Guide and BNM Climate Risk Exposure Draft. Accordingly, the BNM Climate Risk Exposure Draft proposes for financial institutions to be required to make annual climate-related disclosures that are aligned with the recommendations of the TCFD by 31 December 2024, to be published together with the annual financial reports for financial years beginning on or after 1 January 2024. Furthermore, financial institutions are required to separately address specific areas in the annual disclosures, including governance around climate-related risks and opportunities and actual and potential impact of climate-related risks and opportunities on business, strategy and financial planning. The appendices to the Climate Risk Exposure Draft provide the description of the disclosures aligned to the "Basic" and "Stretch" recommendations outlined in the TCFD Climate Disclosures Application Guide.

Directors in the financial industry are therefore expressly encouraged to consider the impact of climate change in their decision-making processes; this is reflected by the proposed requirements in the BNM Climate Risk Exposure Draft. More importantly, the BNM Taxonomy Guidance Document and the BNM Climate Risk Exposure Draft will definitely have an effect on the profile of industries that financial institutions are prepared to lend to, and will see a trickle-down effect to the wider economy by encouraging (and later, effectively compelling) a shift in funding and investments towards businesses with satisfactory environmental and sustainability practices and governance. Directors of non-financial companies would therefore also do well to incorporate such practices in their companies' daily operations.

²² See paras. 7.1 and 7.2 of the BNM Climate Risk Exposure Draft.

²³ We note at the time of writing that the exposure draft for the TCFD Climate Disclosures Application Guide has yet to be published.

²⁴ BNM, 'Joint Statement by Bank Negara Malaysia and Securities Commission Malaysia Advancing the Financial Sector's Response to Climate Risk' (10 December 2021) <<https://www.bnm.gov.my/-/bnm-sc-6th-jc3-meeting-en>>.

Directors' Duties and Climate Change

Malaysia is a common law jurisdiction and the *Companies Act 2016* (CA 2016) codifies the fiduciary duty²⁵ of loyalty of a director, established under common law. The CA 2016 sets out certain general duties of directors. Section 213 of the CA 2016 provides that a director has a duty to exercise his²⁶ powers, at all times, for a proper purpose and in good faith in the best interest of the company,²⁷ and also to exercise reasonable care, skill and diligence with the knowledge, skill and experience that may reasonably be expected of a director having the same responsibilities and any additional knowledge, skill and experience that the director in fact has.²⁸

In determining whether a director has acted in good faith and in the best interest of the company, the Malaysian courts adopt both a subjective and objective test²⁹ – the subjective element is determined based on an assessment of the state of mind of the director,³⁰ whilst the objective element is determined by whether an honest and intelligent man in the position of the director could reasonably have believed the transaction was for the benefit of the company.³¹

Whilst there have yet to be any Malaysian court decisions expressly linking the exercise of these duties with climate-related considerations, decisions of courts in other common law jurisdictions will be persuasive authority in Malaysia, particularly where claims have been brought by shareholders and members of the public against the directors of

a company for failing to factor in climate change considerations in business decisions.

The SC has issued Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries dated 30 July 2020 (revised 12 April 2021) (SC Guidelines), which reiterate the duties under the CA 2016 for a director of a corporation to exercise his powers for a proper purpose and in good faith in the best interest of the corporation in which he sits as a board member.³² The SC Guidelines further provide under Chapter 5 on group governance (which took effect on 1 January 2021³³) that a listed corporation and its directors must establish and ensure that the group-wide framework on corporate governance include, amongst others, managing material sustainability risks.³⁴

The Malaysian Code on Corporate Governance (updated as at 28 April 2021) (MCCG) issued by the SC has long been a tool for promoting good corporate governance practices in publicly-listed companies (PLCs).³⁵ Non-listed entities are also encouraged to adopt the MCCG in their practices.³⁶ The MCCG provides that effective board leadership and oversight require the integration of sustainability considerations in corporate strategy, governance and decision-making, as sustainability and its underlying ESG issues become increasingly material to the ability of companies to create durable and sustainable value and maintain confidence of their stakeholders.³⁷ Furthermore, boards should, in discharging their responsibilities, ensure that the strategic plan of the company supports long-term value creation and includes strategies on the economic, environmental and social considerations underpinning

²⁵ Nallini Pathmanathan J explained in paragraph 219 of the High Court decision of *Petra Perdana Bhd v Tengku Dato' Ibrahim Petra Bin Tengku Indra Petra & Ors* [2014] 11 MLJ 1 that the essence of a fiduciary duty involves acting *bona fide* in the interests of the company. See also the High Court decision of *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64 at page 77 in citing the dicta of the Australian decision of *Australian Growth Resources Corp Pty Ltd v Van Reesema* (1988) 13 ACLR 261.

²⁶ In this section, references to "he", "his", "him" and "man" are intended as referring to persons of all genders.

²⁷ Section 213(1) of the CA 2016.

²⁸ *Ibid*, s. 213(2).

²⁹ See paragraph 166 of the Federal Court decision of *Tengku Dato' Ibrahim Petra Bin Tengku Indra Petra v Petra Perdana Bhd and Another Appeal* [2018] 2 MLJ 177 per Azahar Mohamed FCJ.

³⁰ *Ibid*, in discussing what constitutes the subjective element of the test.

³¹ This objective element is also known as the "Charterbridge Principle", which was elaborated by Azahar Mohamed FCJ in

paras. 172 and 173 of *Tengku Dato' Ibrahim Petra Bin Tengku Indra Petra v Petra Perdana Bhd and Another Appeal* [2018] 2 MLJ 177 and Zainun Ali JCA in the Court of Appeal decision of *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and Other Appeals* [2012] 3 MLJ 616 at paras.239 and 240.

³² Securities Commission Malaysia, 'Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries' SC-GL/4-2020 (12 April 2021), 4 <<https://www.sc.com.my/api/documentms/download.ashx?id=e5c77f58-2055-4d1c-82f2-79f552a67682>>.

³³ Page 2 of the covering pages to the SC Guidelines.

³⁴ Paragraph 5.02, Chapter 5 on page 7 of the SC Guidelines.

³⁵ Securities Commission Malaysia, 'Malaysian Code on Corporate Governance', (28 April 2021), 2 <<https://www.sc.com.my/api/documentms/download.ashx?id=239e5ea1-a258-4db8-a9e2-41c215bdb776>>.

³⁶ *Ibid*, para. 2.8, p. 4.

³⁷ *Ibid*, Introductory paragraphs, Section I: Board Responsibilities, Principle A: Board Leadership and Effectiveness, p. 15.

sustainability.³⁸ The Corporate Governance Guide 2017 (3rd edition) issued by Bursa Malaysia Berhad³⁹ (Bursa Malaysia) further elaborates on this latter point by explaining that stakeholders are now more aware of the impact that businesses have on the economy, environment and society, and therefore relevant economic, environmental and social considerations should be embedded in the company's business strategies and operations.⁴⁰

In light of the above, it is imperative that directors evaluate and incorporate climate risks and considerations in their board decisions, as it can be anticipated that the Malaysian courts would likely step in to align the law with modern circumstances by expressly endorsing climate change as a key consideration for determining if a director was carrying out his duties under statute and common law to act in the best interest of the company.

If directors do not proactively take into account and mitigate against climate-related risks and information in their board decisions and in the operations of the companies of which they are directors, they risk exposing themselves to statutory liability and common law actions which can manifest as tangible risks to the company.⁴¹

Furthermore, directors can be found personally liable under the *Environmental Quality Act 1974* (EQA 1974) for allowing practices by its companies that are harmful towards the environment, unless such director can prove that the offence was committed without his consent or connivance, and that he had exercised all such diligence to prevent the commission of the offence.⁴² In specific relation to climate change, the EQA 1974 and certain regulations made under it generally prohibit the

emission of environmentally hazardous substances into different areas of the environment above prescribed limits. For example, the *Environmental Quality (Prohibition on the Use of Chlorofluorocarbons and Other Gases as Propellants and Blowing Agents) Order 1993* was introduced under the EQA 1974 pursuant to Malaysia's ratification of the Montreal Protocol⁴³ to prohibit the use of controlled substances such as chlorofluorocarbons, one of the primary greenhouse gases contributing to climate change.

³⁸ *Ibid*, para. G1.1, Section I: Board Responsibilities, Principle A: Board Leadership and Effectiveness, p. 17.

³⁹ Bursa Malaysia is a listed exchange holding company with several subsidiaries, including Bursa Malaysia Securities Berhad, and is under the purview of the SC and Ministry of Finance. It is the operator and regulator of Bursa Malaysia, the Malaysian stock exchange.

⁴⁰ Bursa Malaysia, 'Pull-Out I: Guidance on Board Leadership and Effectiveness of the Corporate Governance Guide 2017 (3rd edition)' (2017), 16 <https://bursa-malaysia.s3.amazonaws.com/reports/Consolidated_CG_Guide_3.PDF>. Given that the MCCG has been revised on 28 April 2021, we anticipate that the Corporate Governance Guide 2017 (3rd ed.) may be subsequently revised. However, such revised version has not yet been published at the time of writing.

⁴¹ See Tan Sri Zarinah Anwar and To' Puan Janet Looi, Legal Opinion on Directors' Duties and Disclosure Obligations under Malaysian Law in the context of Climate Change Risks and Considerations (22 July 2022) <<https://commonwealthclimatelaw.org/legal-opinion-on-directors-duties-and-disclosure-obligations-under-malaysian-law-in-the-context-of-climate-change-risks-and-considerations/>>.

⁴² Section 43 of the EQA 1974.

⁴³ Department of Environment Malaysia, 'Malaysia HCFC Phase-Out Management Plan (HPMP Stage-2)' (2017-22), 11-12 <https://www.doe.gov.my/portalv1/wp-content/uploads/2017/12/Buku-HPMP-Stage-2_Part1.pdf>.

Directors' Disclosure Obligations and Climate Change

There are a number of disclosure requirements and initiatives specific to PLCs that need to be considered by the directors of those entities.

Chapter 15 of the Main Market Listing Requirements⁴⁴ (updated as at 1 June 2020) issued by Bursa Malaysia Securities Berhad⁴⁵ (Bursa Malaysia Securities) imposes a requirement on PLCs to ensure that their directors provide an overview of the application of the principles set out under the MCCG in the annual report of the PLCs.⁴⁶ Furthermore, the PLCs would need to disclose the application of each of the “*practices*” set out under the MCCG, i.e. action items that PLCs are expected to adopt to achieve a specific outcome, during the financial year, to Bursa Malaysia Securities in the prescribed format and announce the same together with the announcement of its annual report.⁴⁷ As mentioned in the preceding section, the MCCG provides that directors should ensure that the strategic plan of the company include environmental considerations.

Furthermore, Chapter 9 of the Main Market Listing Requirements (updated as of 1 March 2021) issued by Bursa Malaysia Securities provides that a PLC needs to include a narrative

statement of its management of material economic, environmental and social risks and opportunities (Sustainability Statement), in the manner as prescribed by Bursa Malaysia Securities, in its annual report.⁴⁸ The Sustainability Reporting Guide 2018 (2nd edition) issued by Bursa Malaysia Securities provides further elucidation on the manner of preparation and information to be included in the Sustainability Statement.⁴⁹

In its 2020 Sustainability Report, Bursa Malaysia stated that it became an official supporter of the recommendations of the TCFD in 2018.⁵⁰ Furthermore, it had in 2020 joined the United Nations Sustainable Stock Exchanges Initiative Advisory Group on Climate Disclosure, a new workstream launched in 2020 that aims to support exchanges in developing best practice guidance for issuers on climate-related disclosures,⁵¹ and also organised a Sustainability Thematic Workshop on Climate Change: Practical Steps in Measuring and Managing Greenhouse Gas (GHG) Emissions’, aimed at providing guidance to PLCs on measuring and managing GHG emissions using widely-recognised frameworks and standards.⁵² Bursa Malaysia has also previously launched the FTSE4Good Bursa Malaysia Index (F4GBM Index) on 22 December 2014.⁵³ To be included in the index, companies need to meet a variety of ESG inclusion criteria.⁵⁴ The PLCs included

⁴⁴ To note that in the Federal Court judgment of *Bursa Malaysia Securities Berhad v Mohd Afrizan bin Husain Federal Court of Malaysia Civil Appeal No.: 02(f)-39-07/2021(W)*, the question of law concerning the interpretation of the Main Market Listing Requirements had been considered, and it was held that there is both a statutory and independent contractual relationship between Bursa Malaysia Securities and the PLCs, including its directors. Please see the summary of the judgment provided by Skrine Advocates & Solicitors at Nimalan Devaraja and Ann Tiang Wen En, ‘Federal Court: Bursa Securities has discretion to maintain listing of Wound-Up Company – Liquidators must ensure compliance with Listing Requirements while Company remains listed’ (Skrine Advocates & Solicitors, 13 January 2022) <<https://www.skrine.com/insights/alerts/january-2022/federal-court-bursa-securities-has-discretion-to-m>>. Furthermore, it had also been reported that the High Court had cited the aforementioned decision of the Federal Court in dismissing Serba Dinamik Holdings Berhad’s (Serba Dinamik’s) application to seek an injunction on Bursa Malaysia Securities to prohibit the same from forcing Serba Dinamik to release the fact-finding update by Ernst & Young Consulting Sdn. Bhd., given the undertaking that Serba Dinamik has with regards to contractual obligations with Bursa Malaysia Securities: see Hafiz Yatim, ‘High Court strikes out Serba Dinamik’s bid to stop Bursa Malaysia from compelling company to release fact-finding update’, *The Edge Markets* (10 February 2022) <<https://www.theedgemarkets.com/article/high-court-dismisses-injunction-application-serba-dinamik-stop-release-factfinding-update>>.

⁴⁵ Bursa Malaysia Securities is a wholly-owned subsidiary of Bursa Malaysia and provides, operates and maintains the securities exchange.

⁴⁶ Paragraph 15.25(1) of the Main Market Listing Requirements.

⁴⁷ Paragraph 15.25(2) of the Main Market Listing Requirements.

⁴⁸ Item 29, Part A, Appendix 9C of the Main Market Listing Requirements, pursuant to Paragraph 9.25 of the Main Market Listing Requirements. Paragraph 9.25(1) of the Main Market Listing Requirements provides that a PLC must set out the items under Part A of Appendix 9C in its annual report unless the following conditions are met: (a) the information has been previously announced or disclosed to shareholders pursuant to the Main Market Listing Requirements, or remains substantially unchanged from year to year; (b) the PLC publishes such information on its website and (c) the PLC discloses in the annual report, the address of its website and the place on its website where the information can be accessed.

⁴⁹ Bursa Malaysia Securities, ‘Sustainability Reporting Guide 2018’ (2nd edition) (2018) <[https://bursa-malaysia.s3.amazonaws.com/reports/Bursa%20Malaysia%20Sustainability%20Reporting%20Guide%20\(2nd-Edition\).pdf](https://bursa-malaysia.s3.amazonaws.com/reports/Bursa%20Malaysia%20Sustainability%20Reporting%20Guide%20(2nd-Edition).pdf)>.

⁵⁰ Bursa Malaysia, ‘Bursa Malaysia 2020 Sustainability Report’ (2020), 4,7,43 <https://www.bursamalaysia.com/sites/5d809dcf39fba22790cad230/assets/60409d0b39fba231285dd4c8/Interactive_PDF_BURSA_SR2020_Final_R1.pdf>.

⁵¹ *Ibid*, 2 8, 37, 44 and 40.

⁵² *Ibid* 22, 44 and 80.

⁵³ See Bursa Malaysia, ‘Bursa Malaysia announces launch of Environmental, Social and Governance Index (22 December 2014) <https://www.bursamalaysia.com/about_bursa/media_centre/bursa-malaysia-announces-launch-of-environmental-social-and-governance-index>.

⁵⁴ For further details of the criteria, see Section 6, page 12 of the FTSE4 Bursa Malaysia Index Ground Rules v2.0 (December

in the F4GBM Index are listed publicly on the official website of Bursa Malaysia⁵⁵ and are able to increase their profile and exposure,⁵⁶ whilst attracting investors who want to incorporate ESG elements into their investment decisions.⁵⁷ Assessments are based on publicly-available data sources and therefore PLCs are encouraged to ensure that high quality data and information are provided publicly on their practices.⁵⁸

On 23 March 2022, Bursa Malaysia issued a consultation paper on the proposed amendments to the Main Market Listing Requirements and ACE Market Listing Requirements to (i) require disclosure of prescribed sustainability matters⁵⁹ and indicators that are deemed material for listed

issuers across all sectors; (ii) introduce climate change related disclosures in line with the recommendations of the TCFD; (iii) require disclosure of prescribed sustainability matters and indicators that are deemed material for listed issuers in specified sectors; (iv) introduce enhanced disclosure requirements of the companies' quantitative information on material sustainability matters; and (v) require a statement on whether the Sustainability Statement (as defined above) has been internally reviewed and independently assured, and if so, the scope covered by the review or assurance.⁶⁰ These requirements are proposed to be effective for Sustainability Statements issued either for the financial year ending on or after 31 December 2023 or on or after 31 December 2024.⁶¹

2020) issued by the London Stock Exchange Group plc: see Bursa Malaysia and FTSE Russell, FTSE4Good Bursa Malaysia Index Ground Rules v2.3 (April 2022) <https://research.ftserussell.com/products/downloads/FTSE4Good_Bursa_Malaysia_Index_Ground_Rules.pdf?_ga=2.240168385.376282776.1604501061-1755973650.1601360556>, to be read together with Section 6, pages 13-16 of the FTSE4 Good Index Series Ground Rules v4.2 (March 2021) issued by the London Stock Exchange Group plc: see FTSE Russell, FTSE4Good Index Series Ground Rules v4.6 (June 2022) <https://research.ftserussell.com/products/downloads/FTSE4Good_Index_Series_Ground_Rules.pdf?_ga=2.6678256.376282776.1604501061-1755973650.1601360556>.

⁵⁵ Bursa Malaysia, 'ESG Ratings of PLCs Assessed by FTSE Russell# in Accordance with FTSE Russell ESG Ratings Methodology', <https://www.bursamalaysia.com/sites/5d809dcf39fba22790cad230/assets/5f30cfff5b711a0bfc0d8a01/ESG_Ratings_of_PLCs_assessed_by_FTSE_Russell_n_Index_Constituents_June2020.pdf>.

⁵⁶ *Ibid.* See also Bursa Malaysia, 'FTSE4Good Bursa Malaysia ESG Scores on Malaysian Public Listed Companies Now Available on Bursa Malaysia Website' (14 August 2020) <[https://www.bursamalaysia.com/about_bursa/media_centre/fts4good-esg-scores-on-malaysian-public-listed-companies-now-](https://www.bursamalaysia.com/about_bursa/media_centre/fts4good-esg-scores-on-malaysian-public-listed-companies-now-available-on-bursa-malaysia-website)

[available-on-bursa-malaysia-website](https://www.bursamalaysia.com/about_bursa/media_centre/fts4good-esg-scores-on-malaysian-public-listed-companies-now-available-on-bursa-malaysia-website)> and Bursa Malaysia, 'FTSE4Good Bursa Malaysia Index' (16 March 2018) <<https://bursasustain.bursamalaysia.com/droplet-details/resources/fts4good-bursa-malaysia-index>>.

⁵⁷ *Ibid.*

⁵⁸ See Bursa Malaysia, 'FTSE4Good Bursa Malaysia Index' (16 March 2018) <<https://bursasustain.bursamalaysia.com/droplet-details/resources/fts4good-bursa-malaysia-index>>.

⁵⁹ We note that para. 6.2 of Practice Note 9 of the Main Market Listing Requirements defines "sustainability matters" as economic, environmental and social (EES) risks and opportunities.

⁶⁰ 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) <https://www.bursamalaysia.com/regulation/public_consultation>, feedback to which is being received up to 18 May 2022.

⁶¹ The proposals under (i) (for sustainability matters on anti-corruption, community / society, diversity, energy management, health and safety, labour practices and standards, supply chain management, data privacy and security and water), (iv) and (v) shall be effective for financial statements ending on or after 31 December 2023, whilst the proposals under (i) (for sustainability matters on emission management), (ii) and (iii) shall be effective for financial statements ending on or after 31 December 2024.

Practical considerations for directors

Given the increasing focus of Malaysian capital market and financial regulators on climate change and sustainability issues, including an increased emphasis on climate-related risk management; the potential for increased mandatory obligations on climate-related disclosures; and the potential for legislation requiring nationwide reductions in greenhouse gases, well-counselled directors of Malaysian companies should:

- a) delegate climate risk identification and evaluation to a clearly identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 to 6 months a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets for 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios / strategy, nominations / remuneration, or sustainability / corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss disclosure obligations and best practice with appropriate counsel and subject experts, in order to develop an external engagement and communications plan.

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Bar Council Environment & Climate Change Committee



Mexico



“Climate change and environmental degradation constitutes a challenge at national and global levels and is a source of financial risk.”

Climate-related risks are a source of financial risk. Therefore it is within the mandate of central banks and supervisory bodies to ensure that the financial system is resilient to these risks.

Banco de México considers it is imperative to promote, throughout the financial sector, the best assessment of climate, environmental and social risks and opportunities.”

Alejandro Díaz de León, Governor of Banco de México
Mexico City, 19 November 2021
XLIX IMEF National Convention

“The focus of the economic recovery should be on reducing social gaps and climate change.

We need to move towards sustainable finance in order to mobilize resources to address climate change risks and achieve sustainable development goals.

We would like Mexico to begin to mobilize capital in the medium and long term to move more quickly towards a green growth path, for banks to disseminate information on risks associated with climate change but also to evaluate the impact of climate change on their projects and portfolios.”

Gabriel Yorio, Undersecretary of Treasury and Public Credit of The United Mexican States
Mexico City, 20 November 2020
XLVIII° Convention of the Mexican Institute of Finance Executives

Banco de México (Banxico) is a founding member of the Network of Central Banks and Supervisors for Greening of the Financial System.¹ In 2020, Banxico proposed the creation of the Sustainable Finance Committee within the Financial System Stability Council in Mexico (the Committee), which is chaired by the Ministry of Finance.² The Committee is tasked with matters such as improving climate disclosures and creating a taxonomy for sustainable finance.

Banxico is also leading on an ESG disclosure and risk capacity-building and financial education programme aimed at financial institutions and financial market participants with the Committee, producing a framework for climate-related macro-financial risks, and has created the Directorate of Analysis and Policies of Environmental and Social Risk, which can work with a range of parties to create sustainability regulations, alongside various

other mandated activities. The effect of the activities of the Committee include, among others: (i) new regulation for financial and non-financial entities; (ii) development of a sustainable financial taxonomy that favours sustainable development in the activities and services carried out in the financial system; (iii) the integration of climate and ESG risk factors in supervisory and financial market activities, (iv) improvements in the amount and quality of disclosures and reporting by non-financial and financial institutions, (v) and the enabling of conditions to increase sustainable capital mobilization.³

¹ Some of the companies that are supporters of the Task Force on Climate-Related Financial Disclosure and are active promoters of disclosure of climate risks are: Afore XXI Banorte, Cemex, BIVA, Citibanamex, Citibanamex Afore, Freshillo, Orbia and Funo. Raquel Rosas and Gabriela Niño, 'Official Launch of the TCFD Mexico Consortium' (17 December 2021) <<https://iki-alliance.mx/en/lanzamiento-oficial-del-consorcio-tcf-d-mexico/>>.

² Banco de México, 2021: Año de la Independencia (4 November 2021) <www.banxico.org.mx/financial-system/d/%7B80FDF3B4-F5C1-E88F-442E-EF77C6A7BE59%7D.pdf>.

³ Banco de México, 2021: Año de la Independencia (4 November 2021) <www.banxico.org.mx/financial-system/d/%7B80FDF3B4-F5C1-E88F-442E-EF77C6A7BE59%7D.pdf>.

Directors' Duties and Climate Change

Directors' duties and liabilities are regulated by different legal frameworks depending on whether a company is private, listed, or prudentially regulated, such as financial institutions.

A. Private companies

The *Companies Law (Ley General de Sociedades Mercantiles)* regulates corporate governance in private non-regulated companies, setting forth the role, duties, obligations, authority and liability of their directors.

Directors' liabilities pursuant to the *Companies Law* are threefold. Directors are liable for any breach of: (i) their obligations under the company by-laws; (ii) their obligations under applicable laws and regulation; and (iii) the obligations inherently stemming from their position as directors of the company.

Directors not only have a responsibility to comply with objective duties established in the by-laws of the company and applicable laws and regulation, but also have a fiduciary duty to comply with all those obligations inherent to their responsibility to manage the company.

Pursuant to article 142 of the *Companies Law*, directors are "*mandatarios*" of the company. Under the concept of *mandato*, an agency relationship entailing particular responsibilities between the directors and the shareholders is established.

The legal concept of a *mandatario* in commercial law is regulated by the Third Title of the *Commercial Code* under the concept of "*comisión mercantil*". Pursuant to articles 286 and 287 of the *Commercial Code*, a *comisionista* must follow the instructions of its principal; in the event that there are no express instructions, the *comisionista* must consult with the principal, and if that is not possible, the *comisionista* "... shall act prudently, taking care of the business as if it were his own." The duties of a director entail a personal responsibility and demand utmost due care.

Pursuant to article 157 of the *Companies Law*, directors "*have the responsibilities inherent to their mandate*". Shareholders are the principals of the directors, who give them the mandate of managing the company. Therefore, the board of directors is ultimately accountable to the shareholders, and only shareholders and the

company are entitled to demand compensation for damages caused by breaches of directors to their duties.

Mexican Courts have issued persuasive (non-binding) precedents (*tesis aislada*) that provide guidance on what may be interpreted to be the obligations inherently stemming from the position of directors. The precedents provide a test to confirm if the directors have complied with their fiduciary duties. Accordingly, it shall be deemed that directors are in compliance with their fiduciary duties: (i) if they are following and complying with the instructions expressly given to them; (ii) if they have no express instructions, then they shall act based on proper advice and consultations; and (iii) in case there are no express instructions and it is not possible for them to act under proper advice and consultations, then they must act prudently and with utmost due care, considering the business purpose of the company. Considering that the directors are the legal representatives of the company, and their authority is established in the bylaws, the directors' authority is limited by the business purpose of the company.

The precedents further clarify that if this test is not met and there is a causal link between the conduct of the director and a damage to, or loss of profit by, the company, then it shall be deemed that the director is liable for the damages caused as a consequence of his/her actions or omissions in breach of his/her fiduciary duties.

In view of these precedents and the development of a doctrine on the scope of the fiduciary duties of directors and in particular, those duties of diligence and care, it follows that directors are liable for any damage caused to the company by their actions or inactions; provided, however, that directors are released from liability if (i) they received express instructions by the shareholders, and either: (ii) they acted based on proper advice and after having made the appropriate consultations on the manner in which they must take actions, or (iii) they acted prudently and with utmost due care.

Mexican law does not establish objective parameters with regard to the scope of fiduciary duties. The scope of the directors' fiduciary duties, for example, in terms of having a long-term or medium-term perspective, is relative and would depend on the industry or business in question and the specific risks the business is subject to.

There are certain industries and regions in Mexico that are highly susceptible to the physical effects of climate change. These physical effects of climate change are notorious facts, since they are widely known and documented, for example, in publications of Banxico and other authoritative sources;⁴ therefore, no director could reasonably claim that he/she was unaware of this risk. Based on Mexican precedents, notorious facts are those that by human knowledge are considered certain and indisputable, whether they pertain to history, science, nature, related to current public life or circumstances in a certain place that are well known. It therefore follows that any such risks shall be deemed material for both short-term and long-term decisions, and that directors will be held responsible for giving them due consideration in their oversight of risk management and strategic planning.

Considering that scientific research and evidence are clear on the irreversible effects of these physical risks and the necessity to reduce transition and liability risks on climate-related changes, it is our opinion that directors who do not explicitly take into account the risks and opportunities resulting from the effects that climate change will have on the operations, finances, credit, market, liquidity, profitability and reputation of their companies are in breach of their fiduciary duties, and may be held liable accordingly.

The liability of directors is contingent on the business suffering the negative effects of climate change and damages or losses caused therefrom. The fact that these negative effects have not been materialized might preclude directors from taking immediate action or being sensitive to their fiduciary duty in the long-term; however, directors' lack of awareness of the urgent need to take immediate and ambitious action does not exempt them from having such liability, because such need is now a notorious fact, inasmuch as information regarding climate change risks is now ubiquitous.

To illustrate the foregoing, we could consider the following cases of physical risks in Mexico.

1. Hurricanes, droughts, landslides, extreme temperatures, torrential rains,

floods and fires have increased in Mexico, including:

- a. The overflowing of the Tula River.
- b. The loss of the Ayoloco glacier of the Iztaccihuatl volcano.
- c. Floods in the State of Mexico, Jalisco and Chihuahua in 2021.
- d. Drought of dams in a large part of the country, such as Lake Cuitzeo in Michoacán.
- e. Fires consumed 617,142 hectares in 2021, which is almost double the previous year's figure.
- f. Fires consumed 7,000 hectares of forest in Coahuila and Nuevo León.
- g. The Atlantic tropical cyclone season broke a record with a total of 30 hurricanes.

These cases, the likelihood and impact of which were increased by climate change, had an impact on multiple sectors in Mexico, affecting their operations, finances, and profitability. Directors have had to take actions to compensate the effects of these events, even if they did not acknowledge that such events were caused by climate change. The lack of interest and recognition of these events as a consequence of global warming could make the directors liable for their omissions in identifying and implementing measures to reduce transition risks.

2. Rising sea levels are likely to have an impact on the tourism sector in certain coastal areas in the Southeast of Mexico by 2050 at the latest. In these cases, the directors of, for example, companies developing hotel infrastructure must take into account the effects of global warming and the rise in sea levels to make decisions in the medium and long term. If the directors do not consider such an important risk in their decision-making

⁴ See, e.g. Bank of Mexico, Climate and Environmental Risks and Opportunities in Mexico's Financial System: From Diagnosis to Action (February 2020) <[https://www.banxico.org.mx/sistema-](https://www.banxico.org.mx/sistema-financiero/d/%7B3A8C7F15-9FE1-9A2A-DCF7-6C6D11A0E1DB%7D.pdf)

[financiero/d/%7B3A8C7F15-9FE1-9A2A-DCF7-6C6D11A0E1DB%7D.pdf](https://www.banxico.org.mx/sistema-financiero/d/%7B3A8C7F15-9FE1-9A2A-DCF7-6C6D11A0E1DB%7D.pdf)>.

process, the shareholders may hold them accountable for the damages to the business caused by the sea level rises resulting from the omission in taking actions to prevent any such effects.

As noted, the liability would not be triggered until such time as the business suffered damages or losses and there were a causal link between the acts or omissions of the directors and the damages or losses. To the extent that the direct and indirect effects of climate change were to start to manifest in the operations, finance and profitability of business, directors would be liable if they failed to meet the test above and there were a causal link between the conduct (act or omission) of the director and damages or loss of profit suffered by the company.

B. Non-listed companies

The *Companies Law* does not explain what must be understood by “*acting prudently and with utmost due care*”; however, inasmuch as the *Stock Market Law (Ley del Mercado de Valores)* does clarify the meaning of the terms ‘duty of diligence’ and ‘duty of care’ for directors of listed companies, these are implied duties for directors of private companies, and may be reasonable to construe such definitions as setting a valid standard for what shall be their duties of directors under the *Companies Law* as set forth above and in the judicial precedents.

C. Listed companies

Corporate governance of listed companies is mainly regulated by the *Stock Market Law*.

The *Stock Market Law* expressly regulates the duties of diligence and loyalty borne by directors of publicly-traded companies, and as explained above, the scope of the duty of diligence and duty of loyalty may be used to construe the scope and extent of the obligation of directors to act prudently and with utmost due care, as express duties of directors.

Pursuant to the *Stock Market Law*:

- (i) the duty of diligence requires acting in good faith and in the best interests of the company; being duly qualified, prepared and informed regarding all aspects that are relevant to the correct

operation of the company; and using the resources and organisation of the business to achieve the greatest possible efficiency in its operation and management of financial risks; and

- (ii) the duty of loyalty refers to putting the interests of the company first at all times, including but not limited to the inherent obligation to keep company information confidential, and to make decisions devoid of conflicts of interest.

D. Regulated companies

Corporate governance of regulated entities, such as financial institutions, is subject to specific regulation contained in the law applicable to the respective entity.

General fiduciary duties are also applicable to regulated companies in relation to their specific regulations.

As at the time of writing, there is no explicit regulation regarding the obligations of financial entities or their directors to address environmental risks, with the notable exception of private pension funds (*Administradoras de Fondos Para el Retiro - AFORES*) being subject to a requirement to assess the ESG factors of their investments as of January 2022.

E. Extra-Contractual Duties

The fiduciary duties that have been described above are in all cases contractual duties, as they derive from the contractual relationship between the shareholders and the directors, and therefore, only the shareholders are entitled to demand compensation if directors breach their duties causing financial damage to the company.

Mexican law also considers extra-contractual liability that may be attributed to the directors for a breach of the law or of good practices (*buenas costumbres*), based on article 1910 of the *Federal Civil Code*. Moreover, the Mexican Constitution provides the general obligation of the private sector to act with “*social responsibility*”, as it states in article 25 that “*The public, social and private sectors shall concur, with social responsibility, to the national economic development ...*”

From the environmental perspective, Mexico has legislation that imposes sanctions on companies for damaging the environment, either by action or omission of their board of directors. Article 24 of the *Environmental Responsibility Federal Law (Ley Federal de Responsabilidad Ambiental)* states that companies are liable for the environmental damage caused by their managers, officers, directors and employees, and any staff with control over the operations of the company if they omit or act within their authority in representing the company, or when they order or agree on actions that damage the environment.

Irrespective of their contractual obligations under the by-laws of the companies in which they serve as directors, directors shall, in all cases, act in accordance with good practices and assume their social responsibility.

As of this writing, there are no judicial precedents or guidance on what shall be deemed good practices or assuming one's social responsibility.

Directors' Disclosure Obligations and Climate Change

The *Companies Law* establishes that directors must present an annual financial report to shareholders, including financial statements and information describing the financial state of the company.⁵ There is no explicit obligation to disclose information about potential climate risks; however, such an obligation may be

inferred as part of the fiduciary duty of diligence, and to the extent that the risks of climate change are reasonably considered, as they increasingly are, to be material to the business and purpose of the company.

In the case of listed companies, pursuant to the *Stock Market Law*, directors must disclose material information or events to the general public. The legislation does not expressly establish the obligation to disclose climate-related risks, but they must be disclosed to the extent that they are considered material events. The omission of any disclosure of material events, or the making of material misstatements, may give rise to financial sanctions.

In recent years, the Mexican stock markets and a significant number of listed companies have been active in promoting the disclosure of ESG information and adherence to recommendations of the [Task Force on Climate-related Financial Disclosures \(TCFD\)](#) and the [Sustainability Accounting Standards Board \(SASB\)](#) standards.⁶ In December 2021, the TCFD Mexico Consortium was launched.⁷ The Consortium works in support of the integration and disclosure of climate-related financial risks, and along with the then Governor of Banco de México Alejandro Díaz de León, noted the importance of adopting the TCFD recommendations.

At the time of writing, ESG disclosure and adherence to the TCFD recommendations, SASB standards, or any other climate or ESG disclosure standard are voluntary.

⁵ Pursuant to article 172 of the Companies Law, at least the following information must be presented to shareholders every year: an explanation of the general state of the company main policies implemented and key projects; an explanation of the accounting standards used to prepare the financial information; the updated finances of the company; a report on the changes of the general finances and assets of the company; and any note or clarification regarding the information provided.

⁶ Some of the companies that are supporters of the Task Force on Climate-Related Financial Disclosure and are active promoters of disclosure of climate risks are: Afore XXI Banorte, Cemex, BIVA, Citibanamex, Citibanamex Afore, Fresnillo, Orbia and Funo.

⁷ Raquel Rosas and Gabriela Niño, 'Official Launch of the TCFD Mexico Consortium' (17 December 2021) <<https://iki-alliance.mx/en/lanzamiento-oficial-del-consorcio-tcdf-mexico/>>.

Practical Implications for Directors

Notwithstanding the slow pace at which Mexican regulators have been issuing and implementing regulation regarding the adoption of climate resilience measures in business practices and disclosures, companies must act based on their own analysis of risk and scenarios to adopt climate resilience measures and disclosures to prevent potential financial damages. In this sense, well-counselled boards will:

- a) expressly acknowledge and define the responsibility of the board to identify climate risk and opportunities and appoint a clearly-identified team in management tasked with reporting directly to the CEO and board;
- b) include in the agenda of the board the development of a climate transition roadmap to 2050 with transparent carbon neutrality and reduction targets, with clear interim targets to 2030 and 2040, and a current rolling multi-year strategic plan, with periodic reporting to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, in order to develop an external engagement and communications plan.

As a practical consideration, on 3 November 2021 the International Reporting Standards Foundation (IFRS) Trustees, created the International Sustainability Standard Board (ISSB) to help the demand of an increasing calling of global investment portfolios, for high quality, transparent, reliable and comparable reporting by companies on climate and other ESG matters. Directors must take into consideration that these reporting standards will most likely shape international practice on sustainability-related disclosure standards, considering that they will provide investors and other capital market participants with information about companies' sustainability-related risks and opportunities.⁸

The Securities Exchange Commission (SEC) proposed new guidelines in March 2022, to improve and standardize climate-related disclosures in order to meet investor needs. Many issuers are actively attempting to address investor demand for this information, but current disclosure methods are fragmented and uneven. The proposed rules will make it easier for issuers to disclose these risks more homogeneously, which will benefit both investors and issuers.

As of this date, there is no specific date as to when these rules will enter into force, but it is assumed that the proposed rules will be adopted with an effective date in December 2022.

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⁸ IFRS, 'About the International Sustainability Standards Board' (accessed 18 May 2022) <<https://www.ifrs.org/groups/international-sustainability-standards-board/>>.



“El cambio climático y la degradación ambiental representan retos importantes y crecientes a nivel nacional y global y conllevan riesgos, pero también oportunidades para el sistema financiero.

Los diversos eventos climáticos catastróficos, agudos o crónicos y la degradación de los ecosistemas afectan la productividad, [por lo que] los bancos centrales y los organismos supervisores deben incentivar y procurar que el sistema financiero sea cada vez más consciente y resiliente ante estos riesgos.

Los bancos centrales y los organismos supervisores deben incentivar y procurar que el sistema financiero sea cada vez más consciente y resiliente ante estos riesgos.”

Alejandro Díaz de León, Gobernador del Banco de México
Ciudad de México, 19 de noviembre de 2021
XLIX Convención Nacional del IMEF

“queremos impulsar una agenda donde establezcamos criterios para la movilización de capital con criterios sustentables, no sólo verdes, sino también, enfocados a cerrar brechas sociales”.

Debemos avanzar hacia las finanzas sostenibles para movilizar recursos que permitan enfrentar los riesgos del cambio climático y alcanzar los objetivos de desarrollo sostenible.

“Quisiéramos que en el mediano y largo plazo México empiece a movilizar capital para movernos más rápido a una senda de crecimiento verde, que los bancos hagan una divulgación de información sobre riesgos asociados a cambio climático pero que también evalúen el impacto de cambio climático en sus proyectos y cartera”

Gabriel Yorio, Subsecretario de Hacienda y Crédito Público de los Estados Unidos Mexicanos
Ciudad de México, 20 de noviembre de 2020
XLVIII° Convención del Instituto Mexicano de Ejecutivos de Finanzas

El Banco de México ([Banxico](#)) es miembro fundador de la Red de Bancos Centrales y Supervisores para Enverdecer el Sistema Financiero.¹ En 2020, Banxico propuso la creación del Comité de Finanzas Sostenibles dentro del Consejo de Estabilidad del Sistema Financiero en México, el cual es presidido por la Secretaría de Hacienda y Crédito Público.² El Comité se encarga de asuntos como la optimización de las divulgaciones climáticas y la creación de una taxonomía para las finanzas sostenibles. Banxico también preside un programa de capacitación y educación financiera en materia de divulgación y riesgos ASG dirigido a las instituciones financieras y a los participantes en los mercados financieros, elaborando un marco para los riesgos macro-

financieros relacionados con el cambio climático, y ha creado la Dirección de Análisis y Políticas de Riesgos Ambientales y Sociales, que trabaja con diversas entidades para crear normativas de sostenibilidad, además de otras actividades que le han sido encomendadas. Los efectos de las actividades del Comité incluyen, entre otros: (i) desarrollar una nueva regulación para las entidades financieras y no financieras; (ii) el desarrollo de una taxonomía financiera sostenible que favorezca el desarrollo sostenible en las actividades y servicios realizados en el sistema financiero; (iii) la integración de los factores de riesgo climático y de ASG en las actividades de supervisión y de los mercados financieros, (iv) la mejora de la cantidad y la calidad de las divulgaciones e

¹ Algunas de las empresas que apoyan al Grupo de Trabajo sobre Divulgación Financiera Relacionada con el Medio ambiente y son promotoras activas de la divulgación de los riesgos climáticos son: Afore XXI Banorte, Cemex, BIVA, Citibanamex, Citibanamex Afore, Fresnillo, Orbia y Funo. CONFIRMAR QUE ESTA ACTUALIZADA ESTA LISTA. Raquel Rosas y Gabriela Niño, 'Lanzamiento oficial del Consorcio

TCFD México' (17 de diciembre de 2021) <<https://iki-alliance.mx/en/lanzamiento-oficial-del-consorcio-tcdf-mexico/>>.

² Banco de México, 2021: Año de la Independencia (4 de noviembre de 2021) <www.banxico.org.mx/financial-system/d/%7B80FDF3B4-F5C1-E88F-442E-EF77C6A7BE59%7D.pdf>.

administrador es responsable por los daños que cause.

En virtud de estos precedentes y del desarrollo de una doctrina sobre el alcance de los deberes fiduciarios de los administradores y, en particular, de los deberes de diligencia y cuidado, se desprende que los administradores son responsables de los daños causados a la sociedad por sus acciones u omisiones; no obstante lo anterior, los administradores están exentos de responsabilidad si (i) recibieron instrucciones expresas de los accionistas, (ii) si actuaron con base en un asesoramiento adecuado y después de haber realizado las consultas pertinentes sobre la forma en la que deben actuar, o (iii) si actuaron con prudencia y con el máximo cuidado.

La legislación mexicana no establece parámetros objetivos en cuanto al alcance de los deberes fiduciarios. El alcance de los deberes fiduciarios de los administradores, por ejemplo, en lo que respecta a tener una perspectiva de largo o mediano plazo, es relativo, y dependería de la industria o negocio en cuestión y de los riesgos específicos a los que está sujeto el negocio.

Hay ciertas industrias y regiones en México que son altamente susceptibles a los efectos físicos del cambio climático. Estos efectos físicos al cambio climático son hechos notorios, ya que son ampliamente conocidos y documentados, por ejemplo, en publicaciones de Banxico y otras fuentes autorizadas; por lo tanto, ningún directivo podría alegar razonablemente que desconocía este riesgo. Con base en los precedentes mexicanos, los hechos notorios son aquellos que por el conocimiento humano se consideran ciertos e indiscutibles, ya sea que pertenezcan a la historia, a la ciencia, a la naturaleza, que estén relacionados con la vida pública actual o con circunstancias de un lugar determinado que sean bien conocidas. Por lo tanto, se desprende que tales riesgos se considerarán importantes para las decisiones tanto a corto como a largo plazo, y que los administradores serán responsables de darles la debida consideración en su supervisión de la gestión de riesgos y la planificación estratégica.

Teniendo en cuenta que las investigaciones científicas y evidencia es clara respecto a los efectos irreversibles de estos riesgos físicos y a la necesidad de reducir los riesgos de transición y por la responsabilidad que deviene de los cambios relacionados con el medio ambiente, consideramos que los

administradores que no tengan en cuenta los riesgos y las oportunidades resultantes de los efectos que tendrá el cambio climático en las operaciones, las finanzas, el crédito, el mercado, la liquidez, la rentabilidad y la reputación de sus empresas están incumpliendo sus deberes fiduciarios, y pueden ser considerados responsables de los daños y pérdidas ocasionados.

La responsabilidad de los administradores está condicionada a que la empresa sufra los efectos negativos del cambio climático y los daños o pérdidas ocasionados por el mismo. El hecho de que estos efectos negativos no se hayan materializado podría impedir que los administradores tomen medidas inmediatas o sean conscientes de su deber fiduciario a largo plazo; sin embargo, la falta de conciencia de los administradores sobre la necesidad urgente de tomar medidas inmediatas y ambiciosas no les exime de su responsabilidad, al ser un hecho notorio considerando que la información sobre el cambio climático es de todos conocida.

Para ilustrar lo anterior, podemos considerar los siguientes casos:

1. Los huracanes, las sequías, los deslizamientos de tierra, las temperaturas extremas, las lluvias torrenciales, las inundaciones y los incendios que han venido en aumento en México, incluyendo, por ejemplo:
 - a. El desbordamiento del río Tula.
 - b. La pérdida del glaciar Ayoloco del volcán Iztaccíhuatl.
 - c. Las inundaciones en el Estado de México, Jalisco y Chihuahua en 2021.
 - d. Sequía de presas en gran parte del país, como el lago de Cuitzeo en Michoacán.
 - e. Incendios que consumieron 617,142 hectáreas en 2021, lo que representa casi el doble de la cifra del año anterior.
 - f. Los incendios consumieron 7,000 hectáreas de bosque en Coahuila y Nuevo León.
 - g. La temporada de ciclones tropicales en el Atlántico rompió un récord con un total de 30 huracanes.

Estos casos tuvieron un impacto en múltiples sectores en México y fueron causados por el cambio climático, lo que afectó operaciones, finanzas y rentabilidad de múltiples empresas. Los administradores debieron tomar medidas para compensar los efectos de estos sucesos, aunque no reconocieran que dichos sucesos son causados por el cambio climático. La falta de interés y reconocimiento de estos eventos como consecuencia del cambio climático podría hacer responsables a los administradores de sus omisiones en la identificación e implementación de medidas para reducir los riesgos de transición.

2. El caso del sector turístico en ciertas zonas costeras del sureste de México, donde el aumento del nivel del mar tendrá muy probablemente un impacto importante en dichas zonas para el año 2050. En estos casos, los administradores de, por ejemplo, las empresas que desarrollan infraestructuras hoteleras deben tener en cuenta los efectos del cambio climático y el aumento del nivel del mar, para tomar decisiones a mediano y largo plazo. Si los administradores no tienen en cuenta un riesgo tan importante en su proceso de toma de decisiones, pueden resultar responsables por la omisión en la adopción de medidas para prevenir los daños que cause el aumento del nivel del mar en la empresa.

Como se ha señalado, la responsabilidad no se actualiza hasta el momento en que la empresa sufre daños o pérdidas y exista un vínculo causal entre los actos u omisiones de los administradores y los daños o pérdidas sufridos por la empresa. En la medida en la que los efectos directos e indirectos del cambio climático se manifiesten en las operaciones, las finanzas y la rentabilidad de las empresas, los administradores serían responsables si incumplieron con los criterios que les imputan responsabilidad analizados anteriormente, y exista un vínculo causal entre la conducta (acción u omisión) del administrador y los daños y perjuicios sufridos por la empresa.

Empresas privadas no reguladas

La Ley General de Sociedades Mercantiles no explica qué ha de entenderse por "*actuar con prudencia y con la máxima diligencia*"; sin

embargo, en la medida en la que la Ley del Mercado de Valores aclara el significado del deber de diligencia y deber de lealtad para los administradores de las empresas bursátiles, éstos son deberes implícitos para los administradores de las empresas privadas no reguladas, y puede ser razonable interpretar dichas definiciones como el establecimiento de un estándar válido para sus deberes de administrador bajo la Ley General de Sociedades Mercantiles, tal y como se ha expuesto anteriormente y en los precedentes judiciales.

Empresas bursátiles

El gobierno corporativo de las sociedades bursátiles está principalmente regulado por la Ley del Mercado de Valores.

La Ley del Mercado de Valores regula expresamente los deberes de diligencia y lealtad de los administradores de las empresas bursátiles, y como se ha explicado anteriormente, el alcance de los deberes de diligencia y de lealtad pueden utilizarse para interpretar el alcance y la extensión de la obligación de los administradores de actuar con prudencia y con la máxima diligencia, como deberes expresos de los administradores.

De acuerdo con la Ley del Mercado de Valores:

- i. El deber de diligencia exige actuar de buena fe y en el mejor interés de la empresa; estar debidamente capacitado, preparado e informado en relación con todos los aspectos que sean relevantes para el correcto funcionamiento de la empresa; y utilizar los recursos y la organización del negocio para lograr la mayor eficiencia posible en su funcionamiento y en la gestión de los riesgos financieros; y
- ii. El deber de lealtad se refiere a anteponer en todo momento los intereses de la empresa, lo que incluye, entre otras cosas, la obligación inherente de mantener la confidencialidad de la información de la empresa y de tomar decisiones exentas de conflictos de intereses.

B. Empresas reguladas

El gobierno corporativo de las entidades reguladas, como las instituciones financieras, está sujeto a una regulación específica prevista en la ley aplicable a la respectiva entidad.

Los deberes fiduciarios también son aplicables a las empresas reguladas en relación con su normativa específica.

A la fecha de redacción de este informe, no existe una regulación expresa sobre las obligaciones de las entidades financieras o de sus administradores para hacer frente a los riesgos ambientales, con la notable excepción de que las Administradoras de Fondos Para el Retiro (AFOREs) están sujetas a la obligación de evaluar los factores Ambientales, Sociales y de Gobernanza (ASG) en sus inversiones a partir de enero de 2022.

C. Deberes extracontractuales

Los deberes fiduciarios descritos anteriormente son en todos los casos deberes contractuales, ya que derivan de la relación contractual entre los accionistas y los administradores, y por lo tanto, sólo los accionistas y la sociedad tienen derecho a exigir una indemnización si los administradores incumplen sus deberes causando un perjuicio económico a la sociedad.

El derecho mexicano también contempla la responsabilidad extracontractual que se puede atribuir a los administradores por el incumplimiento de la ley o de las buenas costumbres, con base en el artículo 1910 del Código Civil Federal. Adicionalmente, la Constitución Política de los Estados Unidos Mexicanos establece la obligación general del sector privado de actuar con "*responsabilidad social*", al señalar en su artículo 25 que "*Al desarrollo económico nacional concurrirán, con responsabilidad social, el sector público, el sector social y el sector privado ...*"

Desde el punto de vista ambiental, México cuenta con legislación que impone sanciones a las empresas que dañen el medio ambiente, ya sea por acción u omisión de su consejo de administración. El artículo 24 de la Ley Federal de Responsabilidad Ambiental señala que las

empresas son responsables del daño ambiental causado por sus administradores, funcionarios, y empleados, y cualquier persona que controle las operaciones de la empresa si omiten o actúan dentro de sus facultades en representación de la empresa, o cuando ordenan o acuerdan acciones que dañan el medio ambiente.

Con independencia de las obligaciones contractuales que les impongan los estatutos de las sociedades en las que ejercen como administradores, éstos deben actuar en todo momento conforme a las buenas prácticas y asumiendo su responsabilidad social.

A la fecha de redacción de este documento, no existen precedentes judiciales ni criterios sobre lo que debe considerarse como buenas prácticas o asunción de la responsabilidad social.

Obligaciones de los administradores de proporcionar información y el cambio climático

La Ley General de Sociedades Mercantiles establece que los administradores deben presentar un informe financiero anual a los accionistas, que incluya los estados financieros e información que describa el estado financiero de la empresa.⁴ No existe una obligación expresa de divulgar información sobre los posibles riesgos climáticos; sin embargo, dicha obligación puede inferirse como parte del deber fiduciario de cuidado, y en la medida en que los riesgos del cambio climático se consideren razonablemente importantes para el negocio y el objetivo de la empresa, como ocurre cada vez más.

En el caso de las empresas bursátiles, conforme a la Ley del Mercado de Valores, los administradores deben revelar al público en general la información o hechos relevantes. La legislación no establece expresamente la obligación de revelar los riesgos relacionados con el cambio climático, pero deben ser revelados en la medida en la que éstos se consideren hechos materiales. La omisión de cualquier revelación de hechos materiales, o

⁴ De acuerdo con el artículo 172 de la Ley General de Sociedades Mercantiles, cada año se debe presentar a los accionistas, como mínimo, la siguiente información: una explicación de la situación general de la empresa, de las principales políticas aplicadas y de los proyectos más

importantes; una explicación de las normas contables utilizadas para elaborar la información financiera; las finanzas actualizadas de la empresa; un informe sobre la evolución de las finanzas generales y del patrimonio de la empresa; y cualquier nota o aclaración sobre la información facilitada.

las declaraciones erróneas de importancia, puede dar lugar a sanciones financieras.

En los últimos años, el mercado de valores mexicano y un número importante de empresas bursátiles han promovido activamente la divulgación de información ASG y la adhesión a las recomendaciones del Grupo de Trabajo sobre Divulgaciones Financieras Relacionadas con el Clima (TCFD) y las pautas del Consejo de Normas Contables de Sostenibilidad (SASB).⁵ En diciembre de 2021, se implementó

el Consorcio TCFD México.⁶ El Consorcio trabaja en apoyo a la integración y divulgación de los riesgos financieros relacionados con el cambio climático, quien, junto con el Banxico, señalaron la importancia de adoptar las recomendaciones del TCFD.

A la fecha de este documento, la divulgación de información ASG, la adhesión a las recomendaciones de la TCFD, los criterios de la SASB o cualquier otra norma de divulgación climática o ASG son voluntarias.

Implicaciones prácticas para los administradores

A pesar del retraso con el que los legisladores y reguladores mexicanos han emitido e implementando la regulación para la adopción de medidas de resiliencia climática en las prácticas y divulgaciones empresariales, las empresas deben actuar con base en su propio análisis de riesgo y escenarios, para adoptar medidas de resiliencia climática y divulgaciones, y prevenir potenciales daños financieros. En este sentido, los consejos de administración que estén bien asesorados:

- a. Reconocerán y establecerán expresamente la responsabilidad del consejo de administración en identificar riesgos y oportunidades relacionadas con el cambio climático, y nombrarán un equipo claramente identificado en la administración de la sociedad, encargado de mantener informado al respecto al director general y al consejo de administración;
- b. Incluir en el orden del día del consejo, la propuesta de elaborar una hoja de ruta para la transición climática hasta 2050, con objetivos transparentes de neutralidad y reducción de emisiones de carbono, con objetivos intermedios claros hasta los años 2030 y 2040, y un plan estratégico plurianual, con informes periódicos al consejo de administración;
- c. Delegar al comité o a los comités apropiados del consejo, así como al comité de riesgos, de auditoría, jurídico y de gobierno corporativo, de estrategia, de remuneración o al de sostenibilidad/responsabilidad corporativa, según corresponda, la tarea de implementar la estrategia a largo plazo en un proceso claro de toma de decisiones en cada aspecto que sea relevante para cada comité; y
- d. Analizar con los asesores de divulgación el desarrollo de un plan de compromiso ambiental y comunicación externa.

Como consideración práctica, el 3 de noviembre de 2021 los fideicomisarios de la Fundación de Normas Internacionales de Información Financiera (NIIF), crearon el Consejo de Normas Internacionales de Sostenibilidad (ISSB) para ayudar a la demanda creciente de las carteras de inversión mundiales en la presentación de informes de alta calidad, transparentes, confiables y comparables por parte de las empresas en lo que respecta a su sostenibilidad, impacto del cambio climático y su adhesión a criterios ASG. Los administradores deben tener en cuenta que estas normas de información probablemente darán forma a la práctica internacional por lo que respecta a las normas de divulgación relacionadas con la sostenibilidad, teniendo en cuenta que proporcionarán a los inversionistas y a otros participantes en el mercado de capitales, información sobre los riesgos y oportunidades de las empresas relacionados con su sostenibilidad.⁷

⁵ Algunas de las empresas que apoyan al Grupo de Trabajo sobre Divulgación Financiera Relacionada con el Clima y son promotoras activas de la divulgación de los riesgos climáticos son: Afore XXI Banorte, Cemex, BIVA, Citibanamex, Citibanamex Afore, Fresnillo, Orbia y Funo. CONFIRMAR QUE ESTA ACTUALIZADA ESTA LISTA.

⁶ Raquel Rosas y Gabriela Niño, 'Lanzamiento oficial del Consorcio TCFD México' (17 de diciembre de 2021) <<https://iki-alliance.mx/en/lanzamiento-oficial-del-consorcio-tcdf-mexico/>>.

⁷ IFRS, 'About the International Sustainability Standards Board' (accessed 18 May 2022)

La Comisión de Bolsa y Valores (SEC) propuso nuevas directrices en marzo de 2022, para mejorar y estandarizar la información relacionada con el impacto del cambio climático, con el fin de satisfacer las necesidades de los inversionistas. Muchas emisoras intentan proactivamente atender la demanda de los inversionistas para este tipo de información, pero los métodos actuales de divulgación están fragmentados y son desiguales. Las normas propuestas facilitarán que las emisoras divulguen estos riesgos de forma más homogénea, lo que beneficiará tanto a los inversionistas como a las emisoras.

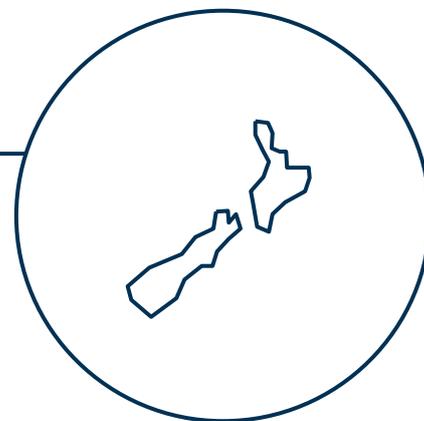
Al día de hoy no hay una fecha concreta sobre cuándo entrarán en vigor estas normas, pero se estima que las normas propuestas se adoptarán y entrarán en vigor en diciembre de 2022.

Colaboradores: Yves Hayaux du Tilly L., Nader, Hayaux & Goebel Mexico
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<https://www.ifrs.org/groups/international-sustainability-standards-board/>.

New Zealand



Regulators in New Zealand readily acknowledge the systemic financial problems posed by climate change.

The New Zealand Government has pledged to halve New Zealand's emissions by 2030 relative to 2005 levels, and has a legislative target of reaching net-zero emissions by 2050.¹ The Climate Change Commission was established in November 2019, to provide independent, evidence-based advice to the Government on climate issues, including the country's ability to meet these goals. Advice will be given progressively over the years² and forms a key resource to inform business leaders of some of the impacts they will need to consider.

From 2023 'Climate Reporting Entities' (CREs) will, as described below, be required to report publicly on climate change impacts, in accordance with Task Force on Climate-Related Financial Disclosures (TCFD) aligned standards issued by the External Reporting Board (XRB), and supervised by the Financial Markets Authority (FMA). CREs will include large listed companies, and specified large financial institutions. This is expected to provide greater transparency on climate-related impacts in relation to part of the New Zealand economy and inform stakeholders in CREs as to the potential exposure they have.

In the meantime, the Reserve Bank of New Zealand (RBNZ) has stated its intention to introduce a climate stress test in 2023 for registered banks and licensed insurers and to increase "supervisory intensity on entities that are not positively progressing their climate change capabilities".³ Directors of those entities will be concerned to comply with the RBNZ's requirements.

The FMA has also signalled its aim to "ensure [the] effects of climate change are routinely considered in financial decision-making" by CREs.⁴ The FMA has also set expectations for issuers of financial products that claim non-financial features, such as 'green' bonds and 'socially responsible' managed funds.

Directors' Duties and Climate Change

New Zealand directors' statutory duties are set out in the *Companies Act 1993* (the Companies Act) (Part 8).⁵ The core duties of directors include the duty to act in good faith and in the best interests of the company (section 131), to exercise powers for a proper purpose (section 133), and to exercise reasonable care, diligence and skill (section 137).

Currently before the New Zealand Parliament is the *Companies (Directors Duties) Amendment*

¹ *Climate Change Response (Zero Carbon) Amendment Act 2019*, pt 1B; New Zealand Government, Govt increases contribution to global climate target (31 October 2021) <www.beehive.govt.nz/release/govt-increases-contribution-global-climate-target>. See also Ministry for the Environment, Emissions budgets and the emissions reduction plan (2021) <<https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/emissions-budgets-and-the-emissions-reduction-plan/>>.

² He Pou a Rangi Climate Change Commission, Ināia tonu nei: a low emissions future for Aotearoa (31 May 2021), Figure 3.1, <<https://ccc-production-media.s3.ap-southeast-2.amazonaws.com/public/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa/Figure-3.1-our-responsibilities-under-the-Act.pdf>>.

³ Reserve Bank of New Zealand, Climate Change 2021 & Beyond - The Reserve Bank Climate Change Report, (26

October 2021) <www.rbnz.govt.nz/financial-stability/climate-change/climate-change-report>.

⁴ Financial Markets Authority, Investor News Wrap: October 2021 (1 November 2021), <<https://www.fma.govt.nz/investors/resources/newswrapoct21/>>.

⁵ *Companies Act 1993*: ss. 131, 133, 137. There is support in the case law that the common law duties continue alongside directors' statutory duties, i.e. unlike in some other jurisdictions such as England, New Zealand directors owe duties under both statute and judge-made law. For the strongest statement of this approach see *Benton v Priore* [2003] 1 NZLR 564 at 573. See also *Sojourner v Robb* [2006] 3 NZLR 808 at 829. This does not have practical implications for the analysis, so the primer follows the Aotearoa Circle opinion and focuses on the statutory duties.

Bill (the Amendment Bill),⁶ which aims to clarify that directors may take into consideration “*recognised environmental, social and governance factors*” when acting in the best interests of the company, whether they have direct financial implications or not. As at 28 July 2022, the Amendment Bill is awaiting its first reading in Parliament. While that is Members Bill (meaning it was introduced by a member of parliament and not the Government), there have been multiple calls recently in New Zealand for a review of directors’ duties generally including from the Institute of Directors.⁷ While the Bill is permissive, if passed, it would provide additional comfort to directors as to their ability to take into account non-financial factors.

In terms of the current law, in 2019, The Aotearoa Circle Sustainable Finance Forum published a legal opinion on the duties, of New Zealand company directors and managed investment scheme providers regarding climate-related risks (the [Aotearoa Circle opinion](#)).⁸

The opinion acknowledged that climate change includes foreseeable financial risks and must therefore be considered by directors and fund managers in the same way as any other financial risk.⁹ In particular, where companies are affected by climate-related financial risk, directors’ duty of care requires that they, at a minimum:

- identify that risk;
- periodically assess the nature and extent of the risk to the company, including by seeking and critically evaluating advice as necessary; and
- decide whether, and if so, how to take action in response, taking into account the likelihood of the risk occurring and

possible resulting harm. The more material the risk, the more it would be reasonably expected to be considered.¹⁰

Directors' Disclosure Obligations and Climate Change

In October 2021, the *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021* (the *Climate Disclosure Act*) received royal assent.¹¹ The *Climate Disclosure Act* amends the *Financial Markets Conduct Act 2013* (the FMCA), the *Financial Reporting Act 2013* and the *Public Audit Act 2001* to:

- enable the XRB to prepare and issue climate-related reporting standards that align with the TCFD framework; and
- require CREs to make climate-related disclosures in line with the XRB standards that will be accessible to stakeholders and regulators.

CREs include large listed issuers (entities with a market capitalisation exceeding NZ\$60 million); and large registered banks, licensed insurers, credit unions, and building societies (with total assets exceeding NZ\$1 billion, or in the case of licensed insurers where premium income exceeds NZ\$250 million); and large managers of registered managed investment schemes (with total assets exceeding NZ\$1 billion).¹² Crown Financial Institutions are not included but are directed under letters of expectations from the Minister of Finance to report against the TCFD framework.¹³

The Government has stated that the NZ\$1 billion threshold for CREs will ensure that 90% of assets under management in New Zealand

⁶ New Zealand Parliament, *Companies (Directors Duties) Amendment Bill*, <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_115958/companies-directors-duties-amendment-bill>.

⁷ Institute of Directors and MinterEllisonRuddWatts, Stakeholder governance – A call to review directors’ duties (30 July 2021) <<https://www.iod.org.nz/resources-and-insights/research-and-analysis/stakeholder-governance/>>.

⁸ The Aotearoa Circle Sustainable Finance Forum, Chapman Tripp, Legal Opinion 2019 (October 2019) <<https://chapmantripp.com/media/r30jdd05/climate-change-risk-legal-opinion-2019.pdf>>.

⁹ The Aotearoa Circle Sustainable Finance Forum, Chapman Tripp, Legal Opinion 2019 (October 2019), 3, <<https://chapmantripp.com/media/r30jdd05/climate-change-risk-legal-opinion-2019.pdf>>.

¹⁰ *Ibid*, 4.

¹¹ *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021*, <www.legislation.govt.nz/act/public/2021/0039/latest/whole.html#LMS479698>; Ministry for the Environment, Mandatory climate-related disclosures (1 December 2021) <<https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/mandatory-climate-related-financial-disclosures/>>.

¹² *Ibid*, which will be FMCA, new section 461O.

¹³ The Treasury, Enduring Letter of Expectation Information Release (October 2021) <<https://www.treasury.govt.nz/sites/default/files/2021-10/loe-cfiri-28oct21.pdf>>; New Zealand Government, 'Climate reporting for Crown financial institutions' (12 March 2021) <<https://www.beehive.govt.nz/release/climate-reporting-crown-financial-institutions>>.

are included within the disclosure system.¹⁴ The New Zealand Government has indicated that it may publicly consult on possible wider private sector application after the regime comes into force.¹⁵

At a high-level, CREs will be required to:

- prepare annual climate statements that comply with the XRB's climate standards and are signed off by directors;
- keep proper records that will ensure climate statements comply with the framework;
- obtain an assurance engagement in relation to the climate statements to the extent those statements are required to disclose greenhouse gas emissions (though this requirement will only come into force 2 years after the climate standards have been issued); and
- lodge copies of climate statements with the Registrar of Financial Service Providers within 4 months after the balance date of the CRE.¹⁶

An exposure draft of the climate standards is due to be published in July 2022.¹⁷ Assuming the XRB issues the climate standards in December 2022 (as currently projected), this will make climate risk disclosure mandatory for CREs from the 2023 financial year and require any climate disclosures on GHG emissions to be assured as part of the 2024 reporting.

The FMA is tasked under the *Climate Disclosure Act* with the independent monitoring, reporting and enforcement of CREs under this regime. The FMA has released an implementation approach for the regime and indicated that it hopes to issue more guidance on its enforcement approach in December 2022

(which coincides with the XRB's proposed timing around the issuance of the climate standards).¹⁸

The *Climate Disclosure Act* details a series of behaviours that will be incorporated into the FMCA as offences committed by companies and/or directors personally, including:

- a failure to comply with the new provisions on climate reporting disclosure records;¹⁹
- knowingly failing to comply with an applicable climate standard;²⁰
- for directors or employees, failing to provide information or an explanation to the climate assurance practitioner;²¹
- failing to file climate statements within four months of the CRE's balance date;²² and
- for a CRE that is required to prepare an annual report under the *Companies Act*, failing to state and include in its annual report that the entity is a CRE and a copy of the statements prepared under the new legislation or a link or address to where these can be found online.²³

The Aotearoa Circle opinion also considered directors' disclosure obligations more generally, with respect to climate-related risks. It concluded that where a company has public disclosure obligations (e.g., in product disclosure statements, continuous disclosure obligations, etc), directors must ensure that they disclose material financial risks associated with climate change beyond the scope of the FMCA.²⁴ Best practice corporate governance guidance issued by New Zealand's Exchange (NZX) and the FMA is also explicit on the importance of reporting on environmental

¹⁴ New Zealand Government, 'New Zealand first in the world to require climate risk reporting' (15 September 2020) <<https://www.beehive.govt.nz/release/new-zealand-first-world-require-climate-risk-reporting>>.

¹⁵ New Zealand Parliament, Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill — Second Reading (23 September 2021) <https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20210923_20210923_28>.

¹⁶ *Ibid*, which will be FMCA, new section 461N and new section 461ZH. For registered schemes, climate statements must be prepared for the separate funds of the scheme.

¹⁷ Ministry for the Environment, Mandatory climate-related disclosures (1 December 2021) <<https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/mandatory-climate-related-financial-disclosures/>>. For more information on the External Reporting Board's consultation on the standards, see External Reporting Board, Climate-related Disclosures (2022)

<www.xrb.govt.nz/standards/climate-related-disclosures/governance-and-risk-management-consultation-document/>.

¹⁸ Financial Markets Authority, Climate-related Disclosures regime: Implementation approach (November 2021) <www.fma.govt.nz/assets/Guidance/Climate-related-disclosures-implementation-approach.pdf>.

¹⁹ FMCA, new section 461W, including fines up to NZ\$50,000.

²⁰ FMCA, new section 461ZG, including fines up to NZ\$500,000 and/or imprisonment for up to five years for persons, and fines up to NZ\$2.5 million in any other case.

²¹ FMCA, new section 461ZHE, including fines up to NZ\$50,000.

²² FMCA, new section 461ZI, including fines up to NZ\$50,000.

²³ FMCA, new section 461ZJ, including fines up to NZ\$50,000.

²⁴ The Aotearoa Circle Sustainable Finance Forum, Chapman Tripp, Legal Opinion 2019 (October 2019) 3 <<https://chapantripp.com/media/r30jdd05/climate-change-risk-legal-opinion-2019.pdf>>.

(including climate change), social and governance factors.²⁵

An emerging issue for directors is also the claiming of climate or sustainability benefits in

goods or services (including financial services) which have not been substantiated.²⁶ Both regulators are actively monitoring for greenwashing.

Practical Implications for Directors

Given that regulators in New Zealand have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and particularly given that mandatory climate-related reporting will soon apply to some entities in New Zealand, well-counselled boards will:

- a) delegate climate risk(s) and opportunity(ies) identification and evaluation, and scenario analysis, to a clearly-identified team in management (who may have assistance from a task force of relevant staff and teams around the company) which reports directly to the CEO and board;
- b) put on the agenda for the board a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board – for CREs, this should occur before the XRB issues the climate standards in December 2022;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process with targets and metrics for accountability for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

The boards of CREs will be subject to specific additional scrutiny because of the transparency of their reporting.

Even if a company is not a CRE for the purposes of the FMCA, some are now voluntarily adopting the TCFD framework as part of their reporting. Also, businesses interacting with CREs may also be required to monitor and report to them on their climate policy and climate-related impacts.

²⁵ The NZX is New Zealand's stock exchange. NZX, Guidance Note: Environmental, Social and Governance (December 2017), 4-6, <https://s3-ap-southeast-2.amazonaws.com/nzx-prod-c84t3un4/comfy/cms/files/files/000/002/924/original/NZX_ES_G_Guidance_Note_-_11_December_2017_%28final_for_publication%29.pdf>; FMA, Corporate Governance Handbook 2018, 16, <<https://www.fma.govt.nz/assets/Guidance/180228-Corporate-Governance-Handbook-2018.pdf>>; New Zealand Corporate Governance Forum, NZ Corporate Governance Forum Guidelines, (July 2015), 7,

<<https://cmpartners.co.nz/wp-content/uploads/2015/02/NZCGF-Corporate-Governance-Guidelines-July-2015.pdf>>.

²⁶ FMA, 'FMA sets expectations for issuers of 'green' and 'responsible' investment products' (14 December 2020) <<https://www.fma.govt.nz/news-and-resources/media-releases/expectations-green-investment-products/>>; Commerce Commission, 'Commerce Commission releases guidelines on environmental claims' (7 July 2020) <<https://comcom.govt.nz/news-and-media/media-releases/2020/commerce-commission-releases-guidelines-on-environmental-claims/>>.

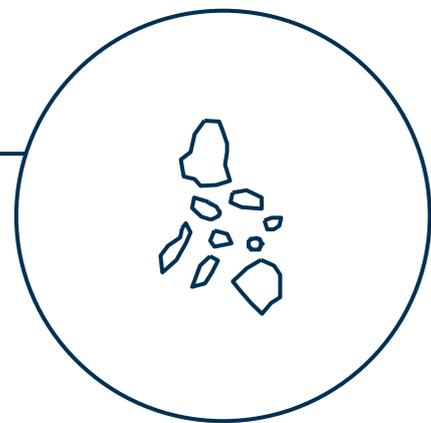
The recognition of climate risk from regulators (such as the RBNZ, FMA, and Commerce Commission) also signals that directors and other business leaders should be educating themselves on climate risks and should, if they have or do not already, educate themselves on climate risks and opportunities. Further, directors have a responsibility to set the tone from the top to acknowledge the financial and other risks and opportunities arising from climate change for their company. They should require management and the business to have robust processes and controls to mitigate or take advantage of such climate change impacts, and set accountability measures and report on them.

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Philippines



Climate change has become an increasing focus for government and regulators in the Philippines in recent years. The Philippines' Nationally Defined Contribution (NDC) submitted to the United Nations Framework Convention on Climate Change stipulates that it will reduce its greenhouse gas emissions by 75% by 2030 (of which 72.29% is conditional on multilateral support under the Paris Agreement).¹

The NDC is based on the *Climate Change Act of 2009*, and two key policy documents; the *National Framework Strategy on Climate Change 2010-2022*,² which sets out the Philippines' principles of climate change mitigation and adaptation, the risks arising from climate change, and overarching strategies for mitigation and adaptation, and the *National Climate Change Action Plan 2011-2028*,³ which outlines the Philippine Government's comprehensive commitments to respond to climate risks that involves both the public and the private sectors.

The Philippine Constitution recognizes the citizens' "right to health" and "right to a balanced and healthful ecology," with corresponding obligations of the state to "protect and promote the right to health of the people,"⁴ and to "protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature."⁵ The Philippine Supreme Court also recognized "the right of Filipinos to a balanced and healthful ecology" that carries with it "the correlative duty to refrain from impairing the environment."⁶ It also held that even without the constitutional provisions on the rights to health and to a balanced and healthful ecology, the same would constitute part of the law of the land because the Philippines is a signatory to the Universal Declaration of Human Rights and

the Alma Conference Declaration of 1978 which recognizes health as a fundamental human right.⁷

In May 2022, the Commission on Human Rights of the Philippines concluded an investigation into climate change and human rights. While non-binding, the Commission's findings and recommendations included: climate change poses a threat to individual's human rights; international treaties and resolutions, including the Universal Declaration on Human Rights, form part of Philippine law; and that therefore entities incorporated or doing business in the Philippines in the value chain of high-emission companies could be compelled to undertake human rights due diligence.⁸

Regulators have also made their perspective on climate change risk clear. The Securities and Exchange Commission's (SEC) Code of Corporate Governance⁹ encourage publicly-held companies to be socially responsible in their dealings with the communities where they operate by pursuing "sustainable development" which means that companies not only comply with existing regulations, but also voluntarily employ value chain processes that take into consideration economic, environment, social and governance issues and concerns, which includes climate change.¹⁰ The *Bangko Sentral ng Pilipinas* (Philippine Central Bank) has approved frameworks requiring financial institutions to embed sustainability principles in their corporate governance framework, and to incorporate physical and transition climate

¹ Republic of the Philippines, Intended Nationally Determined Contribution (15 April 2021) <<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Philippines%20First/Philippines%20-%20NDC.pdf>>.

² Climate Change Commission, National Framework Strategy on Climate Change 2010-2022 (28 April 2010) <<https://climate.gov.ph/files/NFSCC.pdf>>.

³ Climate Change Commission, National Climate Change Action Plan 2011-2028 (2011) <<https://policy.asiapacificenergy.org/sites/default/files/National%20Climate%20Change%20Action%20Plan%202011-2028.pdf>>.

⁴ Sec. 15, Art. II (*Declaration of Principles and State Policies*), 1987 Constitution.

⁵ *Ibid*, sec. 16, Art. II.

⁶ *Oposa v. Factoran*, G.R. No. 101083, 30 July 1993; 224 SCRA 792 (1993).

⁷ *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, 16 March 1994; 231 SCRA 292, 307-308.

⁸ Commission on Human Rights of the Philippines, National Inquiry on Climate Change (May 2022) <<https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf>>.

⁹ Code of Corporate Governance for Publicly-Listed Companies (SEC Memorandum Circular No. 19-2016), Code of Corporate Governance for Public Companies and Registered Issuers of Securities (SEC Memorandum Circular No. 24-2019).

¹⁰ *Ibid*, Principle 16 (*Encouraging Sustainability and Social Responsibility*) and underlying Explanation.

change risks into their risk management frameworks.¹¹

The Philippines may see increasing litigation against corporations in respect of climate change. The Philippine Supreme Court promulgated “*Rules of Procedure for Environmental Cases*,”¹² to “*govern the procedure in civil, criminal and special civil actions before [trial and appellate courts] involving enforcement or violations of environmental and other related laws, rules and regulations.*”¹³ The Rules formally recognize “*citizen suits*” that allow any Filipino citizen in representation of others, including minors or members of generations yet unborn, to file an action to enforce rights or obligations under environmental laws, with power by the courts to issue an environmental protection order; allows the issuance of a *writ of kalikasan* as a remedy to a natural or juridical person, entity authorized by law, people’s organization, non-governmental organization, or any public interest group on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with or by an unlawful act or omission of a public official or employee, or private individual or entity, any possible large-scale ecological threats.

In light of these developments, it is apparent that climate change poses material financial and litigation risk by government and regulators in the Philippines.

Directors’ Duties and Climate Change

Under Philippine Corporation Law, the board of directors is vested directly by law with nearly all corporate powers to conduct all business and to control all properties of the corporation.¹⁴ Consequently, directors are bound by the fiduciary *duty of obedience* – to pursue corporate affairs in accordance with the purpose for which it is constituted and in compliance with the law; and the *duty of diligence* – to exercise corporate powers with the diligence of a prudent person, in good faith and in the interests of the corporation and its stockholders. The corporate governance framework for publicly-held companies extends these fiduciary duties to other stakeholders of the company, which includes among others, customers, creditors, employees, suppliers, investors, as well as the government and the community in which they operate.¹⁵

Under the *doctrine of centralized management*, Philippine Corporation Law constitutes the directors as fiduciaries in fulfilling their companies’ long-term economic, moral, legal and social obligations towards the shareholders and other stakeholders, with a mandate to maximize the organization’s long-term success, creating sustainable value for its shareholders, stakeholders and the nation. Under the common-law doctrine of the *business judgment rule*, the manner of fulfilment of directors’ fiduciary duties to the company, its stockholders and other stakeholders is addressed to the board’s business judgment.¹⁶ The exercise of that business judgment, even when it causes damage to the corporation, its stockholders or other stakeholders, does not make directors’ personally liable,¹⁷ *unless it is shown that the directors’ have in the process violated the law, acted with fraud, negligence or bad faith.*¹⁸

¹¹ Bangko ng Sentral Philippines, Circular No. 1085: Sustainable Finance Framework (2020) <<https://www.bsp.gov.ph/Regulations/Issuances/2020/c1085.pdf>>; Bangko ng Sentral Philippines, Circular No. 1128: Environmental and Social Risk Framework (October 2021) <[https://www.bsp.gov.ph/Regulations/Issuances/2021/1128\(Corrected%20Copy\).pdf](https://www.bsp.gov.ph/Regulations/Issuances/2021/1128(Corrected%20Copy).pdf)>.

¹² Administrative Matter No. 09-6-8-SC, 13 April 2010, hereinafter referred to as “Rules of Procedure for Environmental Cases.”

¹³ Sec. 2 (Scope), Rule 1, Part I, Rules of Procedure for Environmental Cases.

¹⁴ This embodies the principle of “centralized management” that is provided for under section 23 of the Revised Corporation Code (Rep. Act No. 11232).

¹⁵ Principle 14 of the SEC CG Codes: “*The rights of stakeholders established by law, by contractual relations and through voluntary commitments must be respected. Where stakeholders’ rights and/or interests are at stake, stakeholders*

should have the opportunity to obtain prompt effective redress for the violation of their rights.”

¹⁶ *Montelibano v. Bacolod-Murcia Milling Co., Inc.*, G.R. No. L-15092, 18 May 1962; 5 SCRA 36, 42 (1962); *Gamboa v. Victoriano*, G.R. No. L-40620, 05 May 1979; 90 SCRA 40 (1979).

¹⁷ *Western Agro Industrial Corp. v. Court of Appeals*, G.R. No. 82558, 20 August 1990; 188 SCRA 709 (1990); *Rustan Pulp & Paper Mills v. Intermediate Appellate Court*, G.R. No. 70789, 19 October 1992; 214 SCRA 665 (1992).

¹⁸ Section 30 of the Revised Corporation Code provides in part: “*Directors or trustees who wilfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom*

When it comes to climate change, the emerging “*role of directors*” – which in turn defines the potential liabilities to which they are exposed to in relation to climate change – is a bit nuanced, if not bifurcated. Under Philippine corporate governance framework which adheres to the ‘comply or explain’ approach, directors are *encouraged* (not mandated) to “*adopt a clear and focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social and governance (ESG) issues of its business, which underpin sustainability ... [and] should adopt a globally recognized standard/framework in reporting sustainability and non-financial issues.*”¹⁹ Other than the disclosure obligations for publicly-listed companies on ESG matters (see discussions below), there are no regulations specifically providing the requirements or processes by which directors are to monitor, manage and take steps to mitigate climate change risks. Therefore, the fulfillment of their fiduciary duties to the company, its stockholders and other stakeholders is addressed to the exercise of their business judgment. *In the absence of fraud, gross negligence or bad faith*, stockholders and other affected stakeholders cannot ascribe a breach of fiduciary duties against directors whose approach on climate change risks is within their business judgment to pursue; much less can they be held personally liable for exercising their business judgment when there is no showing of fraud, gross negligence or bad faith.

The deference to the board's business judgment also means that boards are able to take actions to mitigate the impacts of climate change on their company without exposing themselves to the risk of liability for breaching their duties. For instance, directors that implement a strategy to address climate impacts, in order to ensure the long-term viability of the company during the energy transition – even where this may risk incurring greater costs in the short term – will be protected from fiduciary liability unless they have violated the law, or acted with fraud, negligence or bad faith.

On the other hand, the emerging “*role of directors in climate change*” under the *Climate Change Act* and related environmental laws

imposes a duty on directors to refrain from harming the environment and to refrain from committing any of the “*prohibited acts*” laid down by the state in various environmental laws; otherwise directors could be held both criminally and civilly liable. Unless environmental laws relating to climate change make directors liable for a corporation's violation of prohibited act, the prevailing rule is that when such prohibited acts are committed by the corporation, directors as such do not become criminally punishable, but only those directors, officers and employees of the corporation who are directly responsible for the commission of the prohibited acts shall be penalized.

While the enumeration of “*prohibited acts*” under the various environmental laws provide for the specified areas when directors may be held criminally liable for corporate offenses, the same may be the legal basis – especially when the commission by the corporation of such prohibited acts is egregious – under Section 30 of the Revised Corporation Code for stockholders and other affected stakeholders to pursue legal action to make the directors personally liable (civil) for “*wilfully and knowingly assenting to patently unlawful acts of the corporation,*” or at least for “*gross negligence or bad faith in directing the affairs of the corporation.*”

While the failure of directors to pro-actively pursue climate change activism may not necessarily expose them to personal, criminal or administrative liabilities, the pursuit by non-government organizations and public-interest groups through citizen suits constitutes the graver risk to directors that constitute a threat to their professional reputation as the stewards of the private corporate sector's mandate to pursue sustainable development. The Philippines is now experiencing climate change activism, coupled with the very accommodating litigation rules on environmental cases, and the current demand of local and international investors in companies that have a clear and focused policy on ESG matters.

Private corporations, especially publicly-held companies which control much of the productive resources in the country, must

suffered by the corporation, its stockholders or members and other persons.”

¹⁹ Recommendation 10.1, Code of Corporate Governance for Publicly-Listed Companies (SEC Memorandum Circular No. 2016-19, 22 November 2016).

pursue sustainable development in their corporate strategies. This means not only complying with existing environmental rules and regulations and disclosing material climate-related risks, but also collaborating closely with the government and civil society in contributing solutions to the challenges of climate change facing the country.²⁰

Directors' Disclosure Obligations and Climate Change

When it comes to sustainability reporting in general, under the 'comply or explain' approach of the Code of Corporate Governance issued by the SEC, publicly-held companies are mandated to ensure that material and reportable non-financial and sustainability issues are disclosed,²¹ under the recommendation to the board to have a clear and focused policy on the disclosure of non-financial information with emphasis on the management of economic, environmental, social and governance (EESG) issues of its business, which underpin sustainability, and to adopt a globally recognized standard/framework in reporting sustainability and non-financial issues.²²

The SEC's Sustainability Reporting Guidelines for Publicly Listed Companies are based on, and refer to, the Task Force on Climate-related Financial Disclosures (TCFD) recommendations, as well as other global reporting standards. These guidelines include reporting on environmental risks and impacts, including the board's governance, strategy, risk management and metrics and targets in respect to climate-related risks and opportunities. Philippine publicly-listed companies must report in accordance with these guidelines on a 'comply or explain' basis and submit the sustainability report as part of its annual reportorial requirements with the SEC.²³ The SEC is reportedly planning to make

sustainability reporting mandatory for publicly listed companies by 2023.²⁴

Disclosures in the sustainability report should reflect the publicly-listed companies' significant economic, environmental, and social impacts, including climate-related risks and opportunities and UN sustainability goals, and should consider the reasonable expectations and interests of key shareholders. Further, such disclosures should be quantifiable and measurable, adequately providing a comprehensive record of the company's non-financial performance for the relevant reporting period.

It is interesting to note that the specific disclosures for climate-related risks and opportunities fall under the category of economic disclosures for sustainability reporting, which may emphasise the recognition by the SEC of climate change as a material financial risk for publicly-listed companies. Philippine companies have leeway in determining what may constitute material climate-related risks that arise in the pursuit of the companies' business operations, plans and strategies. This is consistent with the policy of the Philippine government and its regulators allowing company discretion in determining and disclosing its corporate climate policy, particularly for publicly-listed companies which are subject to the materiality threshold under the PSE disclosure rules.

Further, the broad materiality threshold provided under the PSE disclosure rules which require publicly-listed companies to disclose "*any material fact or event that occurs which would reasonably be expected to affect investors' decisions in relation to trading the securities*"²⁵ and "*such information [which] may reasonably be expected to materially affect market activity and the price of its securities,*"²⁶ would generally include the disclosure of climate-related risks particularly when such impacts trading and price of company shares.

²⁰ For further discussion, please see Dean Cesar L. Villanueva, Dean Lily K. Gruba, Angelo Patrick F. Advincula and Joyce Anne C. Wong, Legal Opinion on Directors' Responsibilities and Disclosure Obligations under Philippine Law on Climate Change Risks and Related Considerations (forthcoming).

²¹ Principle 10, Code of Corporate Governance for Publicly-Listed Companies (SEC Memorandum Circular No. 19, 20 November 2016).

²² *Ibid*, Recommendation 10.1.

²³ Securities and Exchange Commission Philippines,

Memorandum Circular No.4 of 2019 – Sustainability Reporting Guidelines for Publicly-Listed Companies (15 February 2019) <<https://www.sec.gov.ph/wp-content/uploads/2019/10/2019MCNo04.pdf>>.

²⁴ Anne Ruth Dela Cruz, 'SEC to make sustainability reporting mandatory by 2023', *Business Mirror* (30 August 2021) <<https://businessmirror.com.ph/2021/08/30/sec-to-make-sustainability-reporting-mandatory-by-2023/>>.

²⁵ Sec. 4, Art. VII, PSE Disclosure Rules.

²⁶ *Ibid*, sec. 4.3(c), Art VII.

Based on a review of current disclosure rules for publicly-listed companies in the Philippines, the obligation to disclose and submit the sustainability report, including material climate-change disclosures, is primarily a corporate responsibility, as it is the publicly-listed corporation itself which faces the administrative penalties of reprimand, fine, delisting or revocation of license for failure to do so. Under

Philippine law, directors are not directly and personally liable for corporate disclosures, unless they make false or misleading statements of material fact in required SEC filings which are tantamount to “*market manipulation*,”²⁷ or “*fraudulent transactions*,” as defined under the Securities and Regulation Code.²⁸

Practical Implications for Directors

With the increased climate change activism and continued public interest litigation on the environment prevailing in the Philippines, directors of private corporations are potentially exposed to the following actions: (a) criminal and civil prosecution by the Philippine government for engaging their companies to violate prohibited acts under various environmental laws; (b) citizen suits for violating the right of the people to a healthful environment or violation of environmental laws; and (c) administrative penalties for failure to properly quantify and disclose climate change risks.

In order to ensure that they are fulfilling their fiduciary duties to their companies, and to reduce litigation exposure (*e.g.*, by citizen suits), directors of Philippine companies, especially those of publicly-held companies, must ensure that they act on a fully informed basis, with due diligence and care in addressing the physical, transition and reputational risks facing their company by:

- a) putting in place and overseeing a sound enterprise risk management framework that identifies key risks exposures relating to economic, environmental, social and governance (EESG) factors consonant with achieving the company’s strategic objectives;
- b) devoting time and attention in board meetings necessary to developing climate risk mitigation plan, including monitoring and evaluating the effectiveness of the company’s climate change risk management processes; and
- c) communicating to the various stakeholders climate change risks and opportunities facing their company and the status of implementation of risk management strategies.

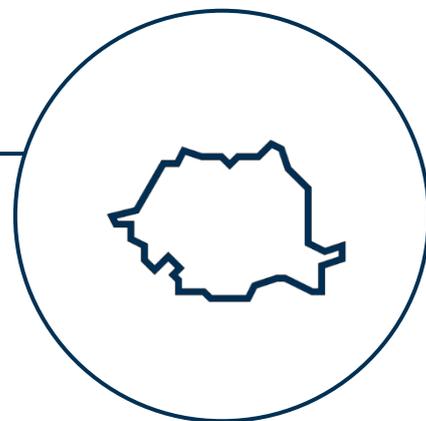
For large publicly-held companies, it is additionally recommended for their boards to constitute a Sustainability Committee with a clear charter to mandate and oversee sustainability principles and climate action.

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²⁷ Sec. 24 (d), Securities Regulation Code.
²⁸ *Ibid*, sec. 27.

Romania



This section is to be read in conjunction with the above EU section, and focuses specifically on rules under Romanian law regarding directors' duties and obligations as they pertain to climate change.

Regulators and government bodies in Romania have recognised that climate change is a global challenge that requires a responsible approach and concrete action at global, regional, national and local levels.

Romania has signed and ratified into national legislation both treaties: the United Nations Framework Convention on Climate Change (UNFCCC) by *Law No. 24/1994*, as well as the Kyoto Protocol by *Law No. 3/2001*. Moreover, Romania ratified the Paris Agreement by *Law No. 57/2017* and entered into force on 1 June 2017. The Paris Agreement was adopted by 196 Parties, including the EU and its Member States at COP 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016 (Paris Agreement) and includes a goal of limiting global warming to well below 2°C, preferably to 1.5°C, compared to pre-industrial levels.

Romania remains firmly committed to the international legal framework developed by the United Nations – the 2030 Agenda for Sustainable Development, the Paris Agreement, Kyoto Protocol and the UNFCCC.

National Bank of Romania

There is a concern at the level of National Bank of Romania (NBR) about green financing and the sustainability of climate change, respectively how well the Romanian economy and the banking sector would withstand in the context of climate change. A study has been launched in this regard and its result, which was also presented in the 2019 Financial Stability Report,¹ shows that the stakes are important, both for the authorities and for the private environment.

In this regard, NBR pays special attention in identifying the financial risks related to the climate change and is developing a framework for monitoring economic sectors that may be affected by climate risk and their importance to the banking sector.

In September 2020, NBR became a member of the group of central banks and financial supervisors called the Network for Greening the Financial System (NGFS). In order to stimulate green financing, NBR has decided to set up at the level of the National Committee for Macprudential Oversight (NCMO) a working group which has over 90 members both from the state (NBR, ministries, regulators), as well as from the private environment. The NCMO report put forward recommendations for authorities with short implementation deadlines, covering three areas: sustainably increasing access to finance for climate change projects, supporting structural change in the economy towards higher value-added and improving transparency, reporting and the availability of information on climate change, as well as raising awareness of the impact of climate change on society and the financial system.²

On April 2022, NBR Regulation No. 5/2022 partially went into force, amending and supplementing NBR Regulation No. 5/2013 on capital requirements for credit institutions and repealing certain pieces of legislation, inter alia, incorporating into the national legislation the Guidelines issued by the European Banking Authority (EBA) on loan origination and monitoring.

One of the topics addressed by NBR Regulation No. 5/2022 is incorporating into national legislation the EBA recommendations for credit institutions to consider environmental, social and governance (ESG) in the lending process.

Starting on 1 April 2022, credit institutions are required to:

- put in place an adequate strategy for credit-risk analysis to include ESG factors;
- include in their policies and procedures ESG factors and related risks (e.g. the

¹ National Bank of Romania, Financial Stability Report Year IV (XIV), No. 7 (June 2019) <<https://www.bnr.ro/Financial-Stability-Report-no.-1,-2019-19835.aspx>>.

² NCMO, Analysis of the NCMO Working Group on supporting green finance (2021) <<https://www.cnsmro.ro/res/ups/Summary-Report-NCMO-green-finance.pdf>>.

physical risk of climate change over the financial performance of the borrower, the transition risk that a transition to a low carbon economy might have over the borrower, market changes, etc.).

Financial Supervisory Authority

The strategy of the Financial Supervisory Authority (FSA) for the period 2021-2023 contains both the Strategic Objectives of the FSA and the program of activities, which are adapted to new realities and unprecedented challenges brought by the Covid-19 pandemic, as well as ESG, aiming to fulfil the strategic role of the institution.³

Under these circumstances, the FSA's risk analysis activities will focus on integrating the new perspectives generated by financial innovation and environmental, social and governance (ESG) factors. In order to ensure cross-sectoral convergence and harmonization of rules and practices at the level of the three financial sectors, the FSA envisages to issue, *inter alia*, an integrated regulation on content, methodologies and presentation information on sustainability indicators in the financial services sector (ESG risks) with a view to establishing harmonized and transparent rules on informing investors in non-banking financial products on environmental and social risks and governance associated with investments.

The FSA has published the 'Recommendations for a prudent approach to climate risk'.⁴ The purpose of these recommendations is to support entities supervised by the FSA by providing a first set of information on sustainable financing, in particular on the growing importance of sustainability risks, in a global, European and local context, by making every effort to support the financing of environmentally sustainable activities with a view to transform real savings into long-term sustainable ones.

Bucharest Stock Exchange

The Bucharest Stock Exchange (BSE) is a partner exchange to the United Nations Sustainable Stock Exchanges (SSE) initiative. In April 2022, the BSE published ESG Reporting Guidelines in which it sets out its form of recommended disclosures on ESG issues, including, *inter alia*:

- Integrating sustainability
 - If the company integrates risks and opportunities regarding sustainability (including those related to climate change) in its economic strategy and in its risk management process;
 - A textual presentation that explains the resilience of the business model and the company's strategy on the risks associated with the issues concerning sustainability;
 - 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.
- Sustainability governance
 - Description of the role of management and supervisory bodies in terms of sustainability issues.

In Romania, companies covered by the NFRD now have the opportunity to present the required information on ESG either:

- in a management report; or
- in a separate report, which is not part of the management report on sustainability (provided that the deadline for the publication of such a report does not exceed six months from the date of submission of the balance sheet).

However, after the entry into force of the CSRD, this option will no longer be available and the requested ESG information will have to be published in the management report.

³ Financial Supervisory Authority, The Strategy of the Financial Supervisory Authority for 2021-2023 (31 July 2020) <<https://asfromania.ro/en/a/6/the-strategy-of-the-financial-supervisory-authority-for-the-period-2021--2023>>; Financial Supervisory Authority, Recomandări privind abordarea

prudentă a riscului climatic, <<https://asfromania.ro/uploads/articole/attachments/619627df-e59a1282090234.pdf>>.

Directors' duties and climate change

Generally, directors are authorised to perform all acts necessary and useful for the conduct of the company's business, other than those acts requiring the approval of shareholders at a general meeting. These acts are found in the articles of association of the company and/or are expressly provided for by Romanian law.

The Romanian law imposes certain general duties on directors of companies. In this regard, it is provided that the directors must fulfil their duties acting diligently, with loyalty, in the interest of the company, as well as within the limit of their powers.

The directors are liable to the company for losses caused to it by their wilful misconduct or inaction.

Considering that the *Company Law No. 31/1990*, as modified, does not explicitly provide for directors' duties to address the risk of the adverse impacts of climate change on the company, it could be however interpreted that their obligation to cover this risk is included in their overall responsibility and failure to do so may lead to damage suffered by the company and personal liability. Indeed, in light of the focus by Romanian regulators and the government on climate change risks and finance, as discussed above, directors should consider the risks and opportunities posed by climate change in order to ensure that they are fulfilling their duties to the company.

Directors' disclosure obligations and climate change

As a rule, the directors are responsible for ensuring that their companies comply with all relevant statutory obligations, including environment-related disclosure.

Public and private entities

According to the Romanian accounting regulations on financial statements, both public and private entities that, at the balance sheet date, exceed the criterion of having an average number of 500 employees (FTEs) during the financial year should include in the directors' report a non-financial statement containing, insofar as it is necessary to understand the development, performance and position of the entity and the impact of its work, information on environmental issues. If such an entity does not

implement policies regarding one or more of the aspects previously mentioned, the non-financial statement should provide a clear and reasoned explanation of this option (the comply or explain principle).

The non-financial statement should contain, in relation to the environmental aspects, details of the current and foreseeable impact of the entity's operations on the environment and, where applicable, on health and safety, use of renewable and non-renewable energy, greenhouse gas emissions, water use and air pollution. Furthermore, the non-financial statement must also include the consequences for the entity's climate change activity and the use of the goods and services it produces, as well as for its commitments to sustainable development.

Specifically, the report must cover:

- The company's business model;
- The policies pursued to address these ESG risks, including due diligence applied;
- The outcome of these policies;
- The main ESG risks resulting from the company's own operations and, where relevant and proportionate, its business relationships, products or services;
- Non-financial key performance indicators related to the company's response to ESG risks.

Securities and stock exchange-related disclosures

The BSE regulates under its code that a listed company must continuously provide to the BSE, *inter alia*, the 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.

Further, as set out above, the ESG Reporting Guidelines issued by the BSE, while voluntary, set out a best practice approach for Romanian

listed companies to fulfil their reporting obligations under relevant EU law.

In Romania, environmental monitoring by the state is conducted, through the National Authority for Environment Protection, by means of collecting and processing data on environmental matters as reported by companies. Such state statistical reporting is mandatory and covers, among others, air and water. The following discusses reporting obligations most relevant to climate change:

Greenhouse gas emissions

On January 14, 2019 the *Romanian Law No. 14/2019* entered into force, establishing the legal, institutional and procedural framework necessary for the application of *Decision No. 406/2009/EC* on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission

reduction commitments up to 2020. This law establishes the legal, institutional and procedural framework for the application of this Decision in order to ensure Romania's contribution to the European Union's commitment by limiting the increase in greenhouse gas emissions by 2020 to a level of 19% compared to the level of emissions in 2005. Moreover, we expect in the near future that the Romanian regulators will set out binding national climate targets in accordance with the agreement between EU leaders and European Parliament negotiators in which it is envisaged a gradual reduction in greenhouse gas emissions compared with 1990 levels, with at least a 55 percent reduction target by the year 2030, and a long term goal to reach a greenhouse gas neutrality by 2050. Under such scenario, there may be regulated further obligations related to this topic for certain industrial companies.

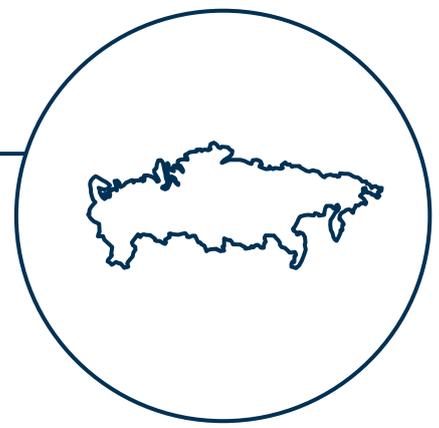
Practical implications for Directors

Considering that regulators in Romania, including, but not limited to, the Romanian Government, NBR, FSA and BSE, have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and the likely coming into effect of expanded climate and ESG disclosure, a well-counselled board will:

- a) delegate climate risk identification and evaluation to a clearly identified team in management that reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to initiate the development of a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030 and the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

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Russian laws expressly regulate only following the issues connected with climate change, including:

- prohibitions and restrictions on the activity causing harm to the environment: in particular, by means of rate-setting and regulation;
- liability measures for violations of such prohibitions and restrictions: in particular, measures of public liability of directors for violations committed by their companies, i.e. fines, disqualification, etc.; measures of private liability, i.e. compensation of damages, subsidiary liability for the company's obligations in case of bankruptcy, disciplinary liability for the improper performance of their duties as directors, per their legal and contractual obligations.

The Russian Civil Code provides for the obligation of directors to act reasonably and in good faith for the benefit of the company.¹ However, the Code does not make explicit reference to directors' fiduciary duty in respect of climate change. To the extent that directors are held to such duties, they arise from the company itself voluntarily committing to good practice, placing responsibility for climate governance with the board and disclosing these commitments via publicly available statements and documents.

Examples of such internal documents determining corporate governance standards are as follows:

- corporate ethics (culture) codes;
- corporate governance codes;
- ESG and disclosure policies etc.

In 2014, the Bank of Russia approved the Corporate Governance Code, the implementation of which is recommended to public companies.² The Corporate Governance Code is not mandatory. However, public companies are encouraged to adhere to it, and may adopt model language contained in the Code as their own, and include it in their public documents.

Directors' Duties and Climate Change

The Corporate Governance Code sets out the following duties of company directors:

- to assess and take into account non-financial environmental risks;
- to disclose additional information in the areas of social and environmental responsibility, in particular, the company's policies and management systems related to the environment); and
- to include in annual reports information on the company's policy in the field of environmental protection and environmental policy.

In addition, most public companies have adopted their own definitions of director duties, which they incorporate into their by-laws or other documentation that are made public. These definitions often include the following duties:

¹ Financial Supervisory Authority, The Strategy of the Financial Supervisory Authority for 2021-2023 (31 July 2020) <https://asfromania.ro/uploads/articole/attachments/6163e0731e00b316200043.pdf?TSPD_101_R0=08cc9ed8fdab20005998b78a75acdc0614f2fbf83102a950d27bd4f08d1a5f0e7c05cdbc2866d25908a2f1c4ef14300095bba>

² [e225c204de35d27ffca3881addcabfc7f0dbb8eec2c49bd78a61f6b4e2819b3e>](https://www.bkr.ru/ru/press-releases/2014/04/06-52-2463); Russian Civil Code, art. 53.1, clause 3. Financial Supervisory Authority, The Strategy of the Financial Supervisory Authority for 2021-2023 (31 July 2020); Letter of the Bank of Russia, 'On the Corporate Governance Code', No. 06-52/2463 dated 10 April 2014.

- to be guided by the principle of preventing rather than remediating environmental damage;
- to improve competencies and raise awareness amongst employees in the field of environmental best practice; and
- to take measures to reduce greenhouse gas emissions.

Russian legislation continues to develop. At present, there are several draft laws under consideration that address the regulation of companies' carbon footprints. If they are adopted, they may also affect directors' duties in the sphere of climate change.

Directors' Disclosure Obligations and Climate Change

Information regarding climate change is normally disclosed within annual reports,

sustainable development reports and environmental reports.

Public disclosure generally includes:

- data on certification (*inter alia* voluntary) of products, equipment and buildings;
- corporate environmental goals and performance against them;
- environmental management systems;
- Information concerning the issuance of Green Finance instruments, such as bonds, project finance and bank loans used to finance renewable energy projects;
- resource efficiency processes and policies; and
- efforts to improve energy efficiency etc.

Practical implications for Directors

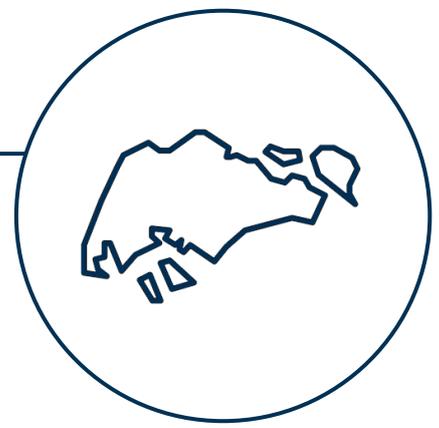
Given that issues connected with climate change are on the agenda of Russian public companies and their boards, it is highly recommended to adopt climate resilience measures in business practices, which may include:

- a) adopting internal documents determining corporate governance standards (ESG policies, etc.);
- b) delegating climate risk identification and evaluation to a clearly-identified management team which reports directly to the CEO and board;
- c) initiating the development of a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets for 2040 and 2030, a current rolling multi-year strategic plan, and periodical reports back to the board;
- d) delegating to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of implementing the long-term strategy into a clear decision-making process for each aspect relevant to each committee; and
- e) discussing with the disclosure counsel, in order to develop an external engagement and communications plan.

Contributors: Nikita Shabalin, DLA Piper Russia



Singapore



In Singapore, regulators are increasingly scrutinising financial institutions' and companies' responses (or lack thereof) to climate risks and, more generally, environmental risks. In June 2020, the Monetary Authority of Singapore (MAS), a founding member of the NGFS, urged financial institutions to report the impact of material climate-related risks on their business and operations in accordance with international guidelines such as the TCFD recommendations.¹ In October 2020, the Managing Director of the MAS opined that "*Singapore has much at stake in global efforts to mitigate climate risk*" and that "*[f]inancial institutions cannot afford to ignore these risks*".²

In December 2020 the MAS, in its capacity as central bank and financial regulator, issued its Guidelines on Environmental Risk Management for the banking, insurance, and asset management sectors.³ These guidelines establish the expectation that financial institutions will assess, monitor, mitigate and disclose environmental risks, including physical and transition risks, and financial institutions must implement these expectations from June 2022.

In addition, since 2016 the Singapore Exchange (SGX) has required listed companies to furnish annual sustainability reports containing their identification and evaluation of material environmental, social and governance issues on a comply or explain basis.⁴ In 2021, the SGX issued amendments to the listing rules regarding sustainability issues, in particular climate change.⁵ These include a requirement for the annual sustainability report to include climate-related disclosures, and for first-time

directors to undertake mandatory sustainability training.

Singapore has had a carbon tax in place since 2019, which has to date been set at S\$5/tCO₂. In the 2022 Budget, the Ministry of Finance announced that it would raise the carbon tax significantly from 2024 onwards (to S\$25/tCO₂ and to S\$45/tCO₂), with a view to reaching S\$50-80/tCO₂ by 2030. Companies will be permitted to use high-quality international carbon credits to offset up to 5% of their taxable emissions from 2024.⁶ Directors, particularly of companies with high emissions, should be alert to the potential increased costs this may entail.

Directors' Duties and Climate Change

Singapore is a common law jurisdiction where both statute (principally the *Companies Act* (Cap 50)) and common law inform directors' duties. The *Companies Act* imposes several specific obligations on company directors. Section 157(1) of the *Companies Act* provides that directors shall "... at all times act honestly and use reasonable diligence in the discharge of the duties of his office". The assessment of reasonable diligence is an objective one, requiring investigation as to whether the director exercised the same degree of care and diligence as a reasonable director would have in the relevant circumstances.⁷ This duty exists

¹ MAS, 'Consultation Paper on Proposed Guidelines on Environmental Risk Management for Banks' (25 June 2020) <<https://www.mas.gov.sg/publications/consultations/2020/consultation-paper-on-proposed-guidelines-on-environmental-risk-management-for-banks>>; MAS, Consultation Paper on Proposed Guidelines on Environmental Risk Management for Insurers (25 June 2020) <<https://www.mas.gov.sg/publications/consultations/2020/consultation-paper-on-proposed-guidelines-on-environmental-risk-management-for-insurers>>.

² MAS, 'Harnessing the Power of Finance for a Sustainable Future' (October 2020) <<https://www.mas.gov.sg/news/speeches/2020/harnessing-the-power-of-finance-for-a-sustainable-future>>.

³ MAS, 'Guidelines on Environmental Risk Management for Asset Managers' (8 December 2020) <<https://www.mas.gov.sg/regulation/guidelines/guidelines-on-environmental-risk-management-for-asset-managers>>; MAS, 'Guidelines on Environmental Risk Management for Insurers' (8

December 2020) <<https://www.mas.gov.sg/regulation/guidelines/guidelines-on-environmental-risk-management-for-insurers>>; MAS, 'Guidelines on Environmental Risk Management for Banks' (8 December 2020) <<https://www.mas.gov.sg/regulation/guidelines/guidelines-on-environmental-risk-management>>.

⁴ Singapore Exchange Listing Rules, rr 711A and 711B.

⁵ SGX, Climate and Diversity: The Way Forward (15 December 2021) <https://api2.sgx.com/sites/default/files/2021-12/Response%20Paper%20on%20Climate%20and%20Diversity%20-%20The%20Way%20Forward_0.pdf>.

⁶ Ministry of Finance, Budget Statement 2022: D. Advance Our Green Transition (February 2022) <<https://www.mof.gov.sg/singaporebudget/budget-2022/budget-statement/d-advance-our-green-transition>>.

⁷ *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [28].

in addition to the similar duty at common law to exercise care, skill, and diligence in relation to the company.⁸ Section 157(2) requires that a director not make improper use of his office or any information in that capacity to gain, directly or indirectly, an advantage for himself or another, or to cause detriment to the company.

As fiduciaries, directors also have a duty to act *bona fide* in the best interests of the company,⁹ and to avoid any action that may result in them being in a position of conflict of interests with the company.¹⁰ Furthermore, there are numerous offence-creating provisions in Singapore's environmental legislation that specifically provide for the directors of companies to be criminally liable for their companies' breaches of these laws.¹¹

In 2021, Singaporean barrister and former Deputy Solicitor General Jeffrey Chan Wah Teck SC released a legal opinion on directors' responsibilities and climate change under Singaporean law (the [Chan Opinion](#)). Chan SC concluded that:

*[A]t this time, directors in Singapore are obliged, when carrying out their responsibilities as directors, to take into account climate change and its associated risks, particularly insofar as those risks are or may be material to the interests of the company.*¹²

The Chan Opinion identified that such obligations arise from the directors' duties of care and diligence and to act in good faith, as well as statutes addressing environmental sustainability and climate change. Notably, the Chan Opinion observed that directors may be held criminally liable under Singaporean environmental sustainability and climate change statutes for failing to ensure that their companies have in place principles and systems for compliance.¹³

Moreover, the Chan Opinion highlighted that the Singaporean business judgement defence will not protect a director who fails to make a conscious decision, does not exercise their judgment, or fails to properly inform themselves

of the relevant facts and circumstances before undertaking a course of action.¹⁴ Furthermore, Chan SC posited that Singaporean law requires “*at the very least*” that directors consider their companies' exposure to the physical, transitional, and liability risks associated with climate change, with directors who fail to do so potentially facing criminal prosecution as well as personal liability.¹⁵ Accordingly, the Chan Opinion urges directors to institute governance and management processes for identifying, monitoring, managing, and reporting on climate risks.¹⁶

Directors' Disclosure Obligations and Climate Change

Companies listed in Singapore have an obligation of continuous disclosure with respect to information that is likely to have a material effect on the price or value of their securities.¹⁷ The Chan Opinion highlighted that there are numerous ways in which climate risks may have a material effect on the price or value of securities, including through:

- a) Legislative changes rendering certain company assets or activities unusable or untenable at cost (such as the phase-out of petrol and diesel vehicles);
- b) Damage caused by extreme weather events in particular geographical locales which might be especially susceptible (such as flood-prone or coastal areas);
- c) The commencement of climate change litigation against the company or one of its subsidiaries;
- d) Rising financing or insurance costs for certain company activities or assets (such as coal-fired power plants); and

⁸ *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16.
⁹ *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.

¹⁰ *Bray v Ford* [1896] AC 44 at 51

¹¹ For example, see *Environmental Protection and Management Act* (Cap 94A, 2002 Rev Ed.) s. 71(1).

¹² Jeffrey Chan SC et al, 'Legal Opinion on Directors' Responsibilities and Climate Change Under Singaporean Law' (April 2021) at [79], <[https://ccli.ubc.ca/wp-](https://ccli.ubc.ca/wp-content/uploads/2021/04/Legal-Opinion-on-Directors-Responsibilities-and-Climate-Change-under-Singapore-Law.pdf)

[content/uploads/2021/04/Legal-Opinion-on-Directors-Responsibilities-and-Climate-Change-under-Singapore-Law.pdf](https://ccli.ubc.ca/wp-content/uploads/2021/04/Legal-Opinion-on-Directors-Responsibilities-and-Climate-Change-under-Singapore-Law.pdf)>.

¹³ *Ibid* at [45].

¹⁴ *Ibid* at [76].

¹⁵ *Ibid* at [79].

¹⁶ *Ibid* at [80].

¹⁷ Singapore Exchange Listing Rules, r 703.

- e) The exposure of its counter-parties to the above risks.¹⁸

Accordingly, the Chan Opinion opines that where these circumstances are present, directors ultimately hold responsibility for ensuring that their company discloses in compliance with the Singapore Exchange Listing Rules.¹⁹ Singaporean companies are also required to furnish an annual sustainability report which must include material environmental, social and governance factors; policies, practices and performance; targets; sustainability reporting frameworks; and board statements.²⁰

Regarding disclosure obligations and climate change under Singaporean law, the Chan Opinion concluded that:

*[...] directors who fail to disclose physical and transition risks to the valuation of the assets and liabilities under their stewardship may face various civil liabilities, even within the context of existing financial reporting standards.*²¹

Further, the SGX has now amended the Singapore Listing Rules to require listed companies to disclose climate change risks in alignment with the recommendations of the Taskforce on Climate-related Financial

Disclosures.²² These requirements apply on a 'comply or explain' basis from January 2022; from 2023, climate-related disclosures will be made mandatory for issuers in the financial, energy, and agriculture, food and forest products industries; and from 2024, such disclosures will be made mandatory for issuers in the materials, buildings and transportation industries.²³ The SGX amendments explicitly extend the requirement for the sustainability report to include a statement of the board on its consideration of sustainability risks to include: a description of the board's oversight of climate-related risks and opportunities, and a description of management's role in assessing and managing such risks. Issuers are also required to describe their process for identifying, assessing and managing climate-related risks, their metrics and targets used to assess and manage climate-related risks, and disclose their Scope 1, 2 and, if appropriate, Scope 3 emissions.

Additionally, under the *Banking Act* (Cap 19) the MAS may also require banks to publicly disclose information relating to their risk profile and risk management processes.²⁴ Foreseeably, the MAS could seek information pursuant to its recently released Guidelines on Environmental Risk Management to examine banks governance of climate risks.

¹⁸ Jeffrey Chan SC et al, 'Legal Opinion on Directors' Responsibilities and Climate Change Under Singaporean Law' (April 2021) at [64].

¹⁹ *Ibid* at [65].

²⁰ Singapore Exchange Listing Rules, rr 711A and 711B.

²¹ Jeffrey Chan SC et al, 'Legal Opinion on Directors' Responsibilities and Climate Change Under Singaporean Law' (April 2021) at [69].

²² Singapore Exchange Listing Rules, r 711B(aa); Singapore Exchange Listing Rules Practice Note 7.6, at [4.7]-[4.17].

²³ SGX, SGX mandates climate and board diversity disclosures (15 December 2021) <<https://www.sgx.com/media-centre/20211215-sgx-mandates-climate-and-board-diversity-disclosures>>.

²⁴ Sections 10B(1) and (2), *Banking Act* (Cap 19) (see also s. 26(1)).

Practical Implications for Directors

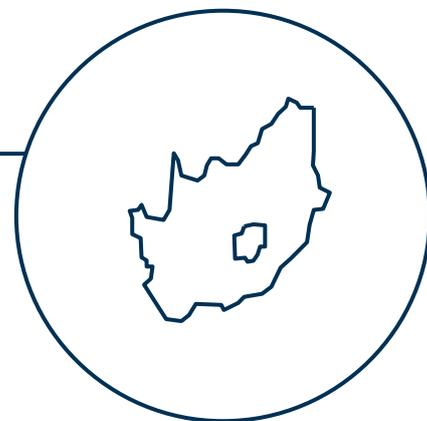
Given that regulators in Singapore have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and in particular the above-noted recognition of climate risk by the MAS, its guidelines for Environmental Risk Management and disclosure for banking, insurance, and asset management, the Singapore Exchange regulations regarding sustainability reporting and training, and the Chan legal opinion, well-counselled boards should:

- a) ensure that board members have adequate training on sustainability management, including risk and opportunity identifications and oversight (including climate risks), and delegate sustainability risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent net-zero-aligned reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

Contributors: CCLI



South Africa



The Climate Change Bill, which among other things will require government entities to align their policies to take into account climate change risks and require the government to set legally binding greenhouse gas emissions targets, will come before the country's parliament this year.¹ The National Adaptation Strategy, which was adopted by South Africa's cabinet in October 2017, will serve as binding guidance for sectors on preparing for the impact of climate change.² South Africa has had a tax on greenhouse gas emissions since 2019 under the *Carbon Tax Act, 2019*. In the 2022 budget, the National Treasury announced that this levy would increase to reach US\$20 per tonne by 2025, in line with the government's commitments made at the 26th Conference of Parties to the UNFCCC (COP 26), and that from 2026 onwards, the rate of increase would increase rapidly and allowances would fall away.³

The South African Reserve Bank, Prudential Authority (PA) and Financial Sector Conduct Authority each recognize that climate change poses systemic risks to the financial system. In 2019, the Prudential Authority surveyed the South African banking and insurance sector's implementation of the Task Force on Climate-related Financial Disclosures' (TCFD) recommendations. As a result, the PA intends to enhance its supervision of climate-related financial risks and to publish guidelines "outlining proposals to insurers and banks to consider climate risks".⁴

As part of this, the PA carried out a survey of financial institutions to

examine their responses to specific climate risks which are the subject of supervisory focus.⁵

In May 2020, South Africa's financial regulators worked with the National Treasury to produce a technical paper entitled 'Financing a Sustainable Economy'.⁶ A 2021 technical paper has since been produced.⁷ Moreover, in June 2020 the South African Reserve Bank, a member of the Network of Central Banks and Supervisors for Greening the Financial System, published a working paper entitled 'Climate Change and its Implications for Central Banks in Emerging and Developing Economies'.⁸ The Reserve Bank has since released a report on climate risk and financial institutions, which found that 90% of the institutions surveyed said they were taking steps to understand the risks posed by climate change, and has announced that it is integrating climate risk into its analyses.⁹

This regulatory focus upon addressing climate-related financial risks also led to the establishment of the Prudential Authority Climate Think Tank (PACTT) in September 2020.¹⁰ The PACTT's mandate is to promote, develop and coordinate the Prudential Authority's regulatory and supervisory response to climate risks.

¹ Climate Change Bill (B9-2022) <<https://www.parliament.gov.za/bill/2300773>>.

² Department of Environment, Forestry and Fisheries, National Climate Change Adaptation Strategy (October 2017) <https://www.dffe.gov.za/sites/default/files/legislations/session_2_draftnational_adaptationstrategy.pdf>.

³ National Treasury, 2022/23 Budget Speech by Minister of Finance Enoch Godongwana (23 February 2022) <<http://www.treasury.gov.za/documents/national%20budget/2022/speech/speech.pdf>>.

⁴ Prudential Authority, 'Prudential Authority Annual Report 2019/2020' (2020), 13, <<https://www.resbank.co.za/en/home/publications/publication-detail-pages/reports/pa-annual-reports/2020/10227>>.

⁵ Prudential Authority, Climate Risk Survey Report (October 2021) <<https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/pa-public-awareness/Financial-Sector-Awareness/Prudential-Authority-Climate-Survey-Report-2021%5d>>.

⁶ South African National Treasury, 'Financing a Sustainable Economy: Technical Paper 2020' (2020) <http://sustainablefinanceinitiative.org.za/wp-content/downloads/Sustainability_technical_paper_2020.pdf>.

⁷ National Treasury, *Financing a Sustainable Economy: Technical Paper 2021* (15 October 2021) <http://www.treasury.gov.za/comm_media/press/2021/2021.01501%20Financing%20a%20Sustainable%20Economy.pdf>.

⁸ South African Reserve Bank, 'Climate Change and its Implications for Central Banks in Emerging and Developing Economies', *Working Paper Series WP/20/04* (2020) <<https://www.resbank.co.za/en/home/publications/publication-detail-pages/working-papers/2020/10001>>.

⁹ Lameez Omarjee, 'Can central banks do more to fight climate change?' (23 August 2021) <<https://www.news24.com/fin24/companies/can-central-banks-do-more-to-fight-climate-change-20210823>>; South African Reserve Bank, *Prudential Authority Climate Risk Survey Report 2021* (October 2021) <<https://www.resbank.co.za/content/dam/sarb/publications/prudential-authority/pa-public-awareness/financial-sector-awareness/2021/PA%20Climate%20Survey%20Report%2021.pdf>>.

¹⁰ Sustainable Insurance Forum, 'Jurisdiction: South Africa: Prudential Authority (PA)' (2020) <https://www.sustainableinsuranceforum.org/view_pdf.php?pdf_file=wp-content/uploads/2020/11/South-Africa-Prudential-Authority-PA-1.pdf>.

Directors' Duties and Climate Change

The fiduciary duties of South African directors that have been partially codified in the *Companies Act 71 of 2008 (Companies Act)*, are mandatory, and apply to all companies. The general duties of directors fall into two categories: fiduciary duties of good faith, honesty and loyalty; and the duty to exercise reasonable care, skill and diligence, which is not a fiduciary duty and instead centres on the issue of competence.

A 2018 report by the Commonwealth Climate and Law Initiative concluded that “*fiduciary and other company law duties requiring company directors to act in the best interests of the company are likely to apply in the climate-risk context, given the material financial risks that climate change poses, which are foreseeable, requiring company directors to develop strategies to manage these risks*”.¹¹ These duties evolve with the values of society and what is considered to be the industry norm, or ‘best practice’, at any given time. In the South African context, the King Report, and the Constitution and Bill of Rights, are of particular relevance to the framing of climate issues within directors' duties. A forthcoming legal opinion by the Centre for Environmental Rights finds that in light of South African company law in relation to fiduciary duties, corporate governance requirements, and policy and regulatory developments, directors of South African companies and financial institutions are required to consider climate-related financial risks when fulfilling their legal duties.¹²

On the issue of investor fiduciary duties and climate change, a leading South African pension lawyer, Rosemary Hunter of law firm Fasken, published an opinion in April 2019 that found that the boards of South African pension and provident funds are required, per their fiduciary duties, to fully consider climate risk

when making investment decisions (the [Fasken opinion](#)).¹³ Failure to do so exposes trustees to the threat of legal liability for losses incurred by the fund as a result.

Directors' Disclosure Obligations and Climate Change

According to the 2016 King IV Report on Corporate Governance (King IV),¹⁴ boards are advised that, in preparing their integrated report, they must address “*matters that could significantly affect the organisation's ability to create value*”. King IV explicitly links value creation to the six capitals, one of which is natural capital. Entities listed on the Johannesburg Stock Exchange must report on their compliance with King IV's disclosure and application regime as part of their annual report.¹⁵ Non-listed entities are also encouraged to comply.

Disclosure in accordance with the TCFD's recommendations is also becoming a norm in South Africa. In a survey conducted by the Prudential Authority, 67% of banks and 100% of non-life insurers stated they intended to make TCFD-aligned disclosures in financial year 2019-2020.¹⁶ Furthermore, in November 2020 the Code for Responsible Investing in South Africa (CRISA) Committee released their draft revised Code.¹⁷ The Code calls upon institutional investors to integrate sustainable finance practices (including climate resilience activities) into their operations and to disclose how such practices are being integrated, which standards, guidelines or models are being used and the outcomes of such implementation.

South Africa is considering developing climate disclosure requirements for financial institutions, and the Prudential Authority has noted that the TCFD framework may be a useful disclosure tool.¹⁸ Furthermore, the

¹¹ Christine Reddell, Commonwealth Climate and Law Initiative, *Directors' Liability and Climate Risk: South Africa - Country Paper* (April 2018) <<https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/04/CCLI-South-Africa-Paper-Final.pdf>>.

¹² Centre for Environmental Rights, *Legal opinion on Directors' Duties and Climate Change under South African Law* (forthcoming).

¹³ Fasken, ‘Pension Funds and Climate Risk’ (April 2019) 2-3, 15-16, <https://justshare.org.za/wp-content/uploads/2019/04/2019_Pension-fund-legal-opinion-by-Fasken.pdf>

¹⁴ Institute of Directors in South Africa and King Committee on Corporate Governance, ‘King Report on Corporate Governance for South Africa 2016’ (2016) <https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf>

¹⁵ See *JSE Listings Requirements Service Issue 27*, [8.63(a)].

¹⁶ South African Prudential Authority, ‘Survey Results: Task Force on Climate-related Financial Disclosures’ (2020) <<https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/pa-public-awareness/Covid-19-Response/9855>>.

¹⁷ CRISA Committee, ‘CRISA Code for Responsible Investment in South Africa: 2020 Revision Consultation Draft’ (2020) <<https://collaborate.unpri.org/group/5346/stream>>.

¹⁸ Financial Stability Board, *Report on Promoting Climate-Relating Disclosures* (7 July 2021), 14 and n 8, <<https://www.fsb.org/wp-content/uploads/P070721-4.pdf>>.

Johannesburg Stock Exchange has launched guidance on sustainability and climate change disclosure for issuers.¹⁹ The guidance proposes that issuers follow a three-stage process: disclosure diagnosis and context, integrating

climate risks, and disclosing climate-related information.²⁰ Therefore, while TCFD-aligned disclosures are not required of South African companies, boards may wish to prepare for such disclosures becoming mandatory.

Practical Implications for Directors

Given that regulators in South Africa have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and in particular the above-noted recognition of climate risk by the Reserve Bank Prudential Authority and Financial Sector Conduct Authority, the Government's coordination of sustainable finance analysis, the Faskin opinion on pension funds' climate change obligations, and King IV Report on Corporate Governance, well-counselled boards will:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

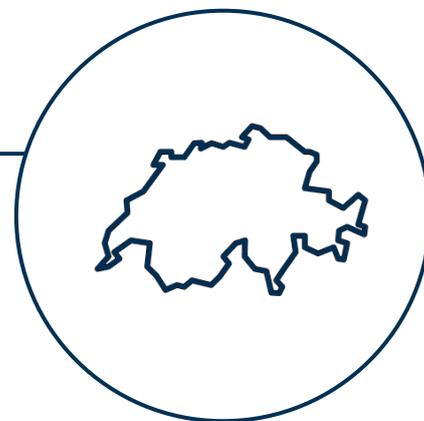
Contributors: CCLI



¹⁹ Johannesburg Stock Exchange, *Leading the way for a better tomorrow: JSE Sustainability Disclosure Guidance* (15 December 2021) <https://www.jse.co.za/sites/default/files/media/documents//JSE%20Sustainability%20Disclosure%20Guidance%202021_SPS.pdf>; Johannesburg Stock Exchange, *Leading the way for a better tomorrow: JSE Climate Change Disclosure Guidance* (15 December 2021) <https://www.jse.co.za/sites/default/files/media/documents//JSE%20Climate%20Disclosure%20Guidance%202021_SPS.pdf>; Sustainable Stock Exchanges Initiative, 'Exchange in Focus:

JSE launches new Sustainability and Climate Change Disclosure Guidance' (15 December 2021) <<https://sseinitiative.org/all-news/exchange-in-focus-jse-launches-new-sustainability-and-climate-change-disclosure-guidance/>>.
²⁰ Clyde & Co, 'Development of Environmental, Social and Governance risk reporting: How is this being handled in the South African market' (2 February 2022) <<https://www.clydeco.com/en/insights/2022/01/development-of-environmental-social-and-governance>>.

Switzerland



Sustainability, and environmental aspects in particular, are becoming increasingly important in Switzerland's legislation. In the past few years, there have been numerous legislative efforts aimed at reducing negative impacts on the climate and obliging companies to comply with certain due diligence and reporting obligations. On 27 January 2021, the Swiss Federal Council published Switzerland's Long-Term Climate Strategy, which sets out a target of attaining net-zero greenhouse gas emissions by 2050.¹

While the revision of the current *Federal Act on the Reduction of CO₂ Emissions (CO₂ Act)* was narrowly rejected by the Swiss electorate in June 2021 and the new proposal for the revision of this Act is only expected in autumn 2022, developments in climate reporting have advanced.

In May 2021, the Swiss Financial Market Supervisory Authority (FINMA) introduced reporting obligations for large banks and insurance companies (supervisory categories 1 and 2) in line with the Task Force on Climate-related Financial Disclosures (TCFD), by amending its Circulars 'Disclosure – banks' (Circular 2016/1) and 'Disclosure – insurers' (Circular 2016/2).² The revised disclosure rules require relevant financial institutions to: describe the main features of the entity's governance structure to enable it to identify, evaluate, manage, monitor and report on climate-related financial risks; describe the major climate-related financial risks identified and their impact on the business model and strategy; describe risk-management structures in respect of such risks; and disclose quantitative information on their climate-related financial risks.³

In November 2021, the Swiss government tasked the Finance Department to propose, in consultation with the Department of the Environment, Transport, Energy and Communication, amendments to financial market legislation to prevent greenwashing. Such legislative proposals are expected by the end of 2022.⁴

In January 2022, a revision of the *Swiss Code of Obligations* came into force, implementing new due diligence and reporting obligations for Swiss companies. This new law was introduced as a counter-proposal to the Responsible Business Initiative, which would have opened up Swiss companies to litigation in Swiss courts for alleged violations of human rights or environmental laws around the world. The new ESG reporting requirements are modelled after the EU Non-Financial Reporting Directive (*Directive 2014/95*) (cf. below section on directors' disclosure obligations).

Lastly, in March 2022, the Swiss government published a draft ordinance, which specifies the climate-related reporting obligations for large Swiss companies, being part of the ESG reporting requirements introduced with the aforementioned revision of the *Swiss Code of Obligations*.⁵ The draft ordinance provides for the implementation of the recommendations of the TCFD by large Swiss companies. The ordinance is expected to come into force on 1 January 2023.

¹ Federal Council, Switzerland's Long-Term Climate Strategy (27 January 2021) <<https://www.news.admin.ch/news/message/attachments/65879.pdf>>.

² FINMA, FINMA specifies transparency obligations for climate risks (31 May 2021) <<https://www.finma.ch/en/news/2021/05/20210531-mm-transparenzpflichten-zu-klimarisiken/>>.

³ FINMA, Circ. 16/1, 'Disclosure – banks' at [14.1], Annexure 5; FINMA Circ. 16/2, 'Disclosure – insurers' at [13]-[13.7]

⁴ Federal Council, Federal Council strives to be international leader in sustainable finance with climate transparency (17 November 2021) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-85925.html>>

⁵ Federal Council, Federal Council initiates consultation on ordinance on climate reporting by large companies (30 March 2022) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87790.html>>

Directors' Duties and Climate Change

The duties of the directors of Swiss companies are primarily governed by the *Swiss Code of Obligations* (CO). The legal provisions are supplemented by soft law, such as the Swiss Code of Best Practice.⁶

According to article 716a CO, the board of directors is *inter alia* responsible for the overall management of the company, the determination of the company's organisation, the organisation of the accounting, financial control and financial planning systems and the overall supervision of the persons entrusted with managing the company. In particular, the board of directors must define the company's strategy and ensure that the strategy is in the company's best interests and can be implemented with the resources available. The board of directors also needs to ensure that the company's risks are sufficiently identified, assessed and managed.

The members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith (article 717 CO). If the directors intentionally or negligently breach their duties, they are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from the breach of their duties (article 754 CO).

The law does not explicitly stipulate that directors must also take climate-related risks into account when determining the company's strategy and overseeing its risk management systems. However, in light of the developments mentioned above, in particular the widespread recognition by financial regulators that climate change poses material financial risks to business and the new ESG reporting requirements, it logically follows that directors must integrate climate risks and opportunities into their governance roles.

Directors' Disclosure Obligations and Climate Change

As explained at the outset, the revision of the *Swiss Code of Obligations* introduced as a counter-proposal to the Responsible Business Initiative came into force on 1 January 2022. The new provisions of the *Swiss Code of Obligations* provide for two new obligations. Firstly, large Swiss companies will be obliged to issue a *general* ESG report showing the risk of their business activities on environmental, social, labour, human rights and anti-corruption issues, as well as the measures taken against them. Secondly, companies with risks in the sensitive areas of child labour and so-called conflict minerals must comply with special and far-reaching due diligence and reporting obligations. The Federal Council has determined the details of these *specific* due diligence and reporting requirements in a new *ordinance on due diligence and transparency in relation to minerals and conflict-affected areas and child labour* (DDTrO).⁷ The new requirements will apply for the first time for the financial year beginning in 2023. This means that the first reports based on the new statutory ESG reporting and due diligence framework must be issued in 2024 with respect to the 2023 financial year.

The *general* ESG reporting obligation (Article 964a-964c CO) applies to companies of public interest domiciled in Switzerland that, together with controlled companies in Switzerland and abroad, (i) have at least 500 FTEs on average annually, and (ii) have assets of at least CHF 20 million or revenues of CHF 40 million in two consecutive years. Other than FINMA regulated financial institutions, companies of public interest include companies incorporated in Switzerland that are listed in Switzerland or abroad, have bonds outstanding, or contribute at least 20% of the assets or of the turnover to the consolidated accounts of such companies. However, companies that are controlled by a company to which the new reporting requirements apply, or that are subject to equivalent reporting under foreign laws, are not required to prepare an additional report.

⁶ economiesuisse, 'Swiss code of best practice for corporate governance' (2016) <https://www.economiesuisse.ch/sites/default/files/publication/economiesuisse_swisscode_e_web_2.pdf>.

⁷ *Ordinance of 3 December 2021 on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour* (DDTrO) <<https://www.fedlex.admin.ch/eli/cc/2021/847/en>>

While Swiss subsidiaries of foreign companies would usually not be listed on any stock exchange, the ESG reporting obligations may apply to such subsidiaries, if they have bonds outstanding, unless a direct or indirect parent company is subject to equivalent reporting obligations under foreign law, such as the EU Non-Financial Reporting Directive.

The ESG report must include information necessary to understand the company's business and the impact of its activities on the environment (including CO₂ targets), as well as societal concerns related to employees, respect for human rights and the fight against corruption across their value chains.⁸

As indicated at the outset, the ESG reporting requirement is modelled after the EU Non-Financial Reporting Directive, and the non-exhaustive list of topics that the report must cover tracks its model closely. Specifically, the report has to cover the following topics:

- the company's business model (Business Model);
- the main ESG risks resulting from the company's own operations and, where relevant and proportionate, its business relationships, products or services (Risk Assessment);
- the policies pursued to address these ESG risks, including due diligence applied (Policies and Due Diligence);
- the outcome of these policies (Outcome); and
- non-financial key performance indicators related to the company's response to ESG risks (KPIs).

If a company does not have policies addressing certain ESG risk areas, the report must include an explanation of the reasons for such a gap (comply or explain). The only defensible explanation that one could expect to see is an assessment that a company's activities do not raise concerns in a certain area.

The report may be based on national, European or international reporting standards, such as for example the [OECD Guidelines for Multinational Enterprises](#)⁹ or the standards of the [Global Reporting Initiative](#) (GRI).¹⁰ Further, companies may want to draw from guidelines the EU has issued on the methodology for reporting non-financial information.¹¹ Under the above headings, these guidelines list out in detail the aspects that the ESG report should cover.

In addition, as stated above, the Federal Council has in the meantime specified the requirements for climate-based reporting in a [draft ordinance](#).¹² According to this draft ordinance, it is assumed that companies comply with their climate-based reporting obligations if they follow the recommendations of the TCFD as specified in Article 3 of the draft ordinance. This assumption does not prevent companies from reporting on the impact of the climate on its business and the impact of its business' activities on the climate in other ways, in particular by relying on other guidelines or standards. However, in such a case, the company must specifically demonstrate that it meets the obligation to report on climate issues or explain why it has no policies addressing climate-related issues (comply or explain).

The report may be established in one of the Swiss national languages (i.e., German, French or Italian), or in English. It must be approved by the board of directors and the shareholders' meeting and made electronically accessible to the public for a period of 10 years. However, unlike the company's financial statements, there is no requirement for the ESG report to be audited.

Non-compliance with the new ESG reporting regime is subject to criminal liability. Non-compliance includes the inclusion of false statements in any of the newly-required reports, the generic ESG Report and the report on compliance with due diligence measures in the areas of conflict minerals and child labour, or the failure to issue any of these reports, or the

⁸ In addition to the generic ESG reporting obligation, the new ESG legislation provides for further specific due diligence and reporting obligations related to so-called Conflict Minerals and related to child labour.

⁹ OECD, [OECD Guidelines for Multinational Enterprises](http://www.oecd.org/daf/inv/mne/48004323.pdf) (2011) <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>.

¹⁰ GRI, [GRI Standards](https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/) (May 2020) <<https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/>>.

¹¹ European Commission Communication, 'Guidelines on Non-financial Reporting: Supplement on Reporting Climate-related Information', 2019/C 209/1, (20 June 2019) <https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf>.

¹² Verordnung über die Berichterstattung über Klimabelange <<https://www.news.admin.ch/news/message/attachments/70878.pdf>>.

failure to keep records of, or publish, these reports. If any of these acts are committed intentionally, the fine is up to CHF 100,000; if committed negligently, the fine is up to CHF 50,000.

In addition, deficient ESG due diligence or reporting may trigger civil liability under existing law, namely the liability of board members and management under article 754 of the *Swiss Code of Obligations*.

Practical Implications for Directors

In addition to our standing recommendation to develop and maintain a well-documented and effective general Compliance Program, we suggest that in response to the developments laid out in this note, board directors lend particular attention to the following points as a matter of priority:

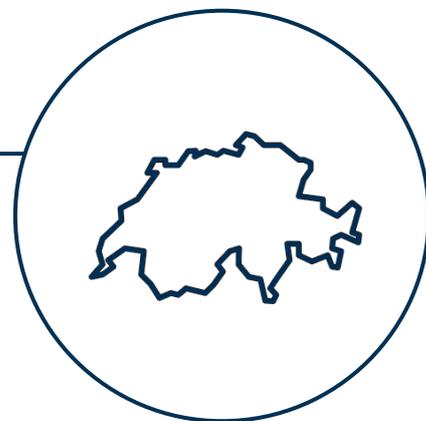
- a) Review and where required adjust governance to ensure appropriate leadership at the board level in relation to climate-related risks, including adverse impacts the company's activities may cause and legal risks the company may face;
- b) Designate responsible function(s) to monitor and provide ongoing advice in relation to the increasing body of laws and regulations in the area of climate risk management requirements both in Switzerland and in their companies' markets abroad;
- c) Delegate climate risk identification and evaluation to a clearly identified team in management that reports directly to the CEO and board, and is charged with bringing together all key functions, including the Legal and/or Compliance function, Enterprise Risk Management, Strategic Planning, Audit, Remuneration, Human Resources, Investor Relations, Stakeholder Relations, etc.;
- d) Review and where required adjust climate-related risk management policies and processes across the company's supply chain and distribution network, including affiliates and third parties, on the basis of a solid risk assessment. In this regard, broaden and deepen the company's third party intermediary due diligence framework to address climate-related risk factors and do so into tiers 2 and 3 of their companies' supply chains; and
- e) Review and where required adjust their reporting on climate-related risk factors and the measures they take to address these risks. Introduce internal assurance processes in relation to reporting.

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La durabilité, et en particulier les aspects environnementaux, occupent une place de plus en plus importante dans la législation suisse. Ces dernières années, de nombreux efforts législatifs ont été déployés pour réduire les impacts négatifs sur le climat et obliger les entreprises à se conformer à certaines obligations de diligence raisonnable et de rapport. Le 27 janvier 2021, le Conseil fédéral suisse a publié la Stratégie climatique à long terme de la Suisse, qui fixe l'objectif d'atteindre des émissions nettes de gaz à effet de serre nulles d'ici 2050.¹

Même si la révision de l'actuelle *loi fédérale sur la réduction des émissions de CO₂* (*loi sur le CO₂*) a été rejetée de justesse par le peuple suisse en juin 2021 et que la nouvelle proposition de révision de cette loi n'est attendue qu'en automne 2022, les développements en matière de rapport climatique ont continué de progresser.

En mai 2021, l'Autorité fédérale de surveillance des marchés financiers (FINMA) a introduit des obligations de rapport destinées aux grandes banques et aux compagnies d'assurance (catégories de surveillance 1 et 2), conformément à la *Task Force on Climate-related Financial Disclosures* (TCFD). Pour ce faire, la FINMA a modifié ses circulaires 'Publication – banques' (Circulaire 2016/1) et 'Publication – assureurs' (Circulaire 2016/2).² Les règles de publication révisées exigent que les institutions financières concernées : décrivent les caractéristiques centrales de la structure de gouvernance de l'entité pour lui permettre d'identifier, d'évaluer, de gérer, de surveiller et de rendre compte des risques financiers liés au climat ; décrivent les principaux risques financiers liés au climat identifiés et leur impact sur la stratégie commerciale, le modèle d'entreprise et la stratégie ; décrivent les structures de gestion des risques en ce qui concerne ces risques ; et

publient des informations quantitatives sur leurs risques financiers liés au climat.³

En novembre 2021, le gouvernement suisse a chargé le Département des finances de proposer, en concertation avec le Département de l'environnement, des transports, de l'énergie et de la communication, des modifications de la législation sur les marchés financiers afin d'empêcher l'écoblanchiment (le *greenwashing*). De telles propositions législatives sont attendues d'ici la fin de l'année 2022.⁴

En janvier 2022, une révision du *Code des obligations* suisse est entrée en vigueur, mettant en œuvre de nouvelles obligations de diligence raisonnable et de rapport pour les entreprises suisses. Cette nouvelle loi a été introduite en tant que contre-proposition à l'Initiative pour des entreprises responsables, qui aurait permis de poursuivre les entreprises suisses devant les tribunaux suisses en cas de violations présumées commises dans le monde entier à l'encontre des droits de l'homme ou des lois environnementales. Les nouvelles exigences en matière de rapport ESG s'inspirent de la directive européenne sur le Reporting Non Financier (*directive 2014/95*) (cf. ci-dessous la section sur les obligations de divulgation des administrateurs).

Finalement, en mars 2022, le gouvernement suisse a publié un projet d'ordonnance, faisant partie des exigences de rapport ESG introduites avec la révision du *Code des obligations* susmentionnées, qui précise les obligations de rapport climatique destinées aux grandes entreprises suisses.⁵ Le projet d'ordonnance prévoit la mise en œuvre des recommandations du TCFD par les grandes

¹ Conseil fédéral, Stratégie climatique à long terme de la Suisse (27 janvier 2021) <<https://www.bafu.admin.ch/dam/bafu/fr/dokumente/klima/fac-hinfo-daten/langfristige-klimastrategie-der-schweiz.pdf.download.pdf/Strat%C3%A9gie%20climatique%20C3%A0%20long%20terme%20de%20la%20Suisse.pdf>>.
² FINMA, La FINMA concrétise les obligations de transparence en matière de risques climatiques (31 mai 2021) <<https://www.finma.ch/fr/news/2021/05/20210531-mm-transparenzplichten-zu-klimarisiken/>>.
³ FINMA, Circ. 16/1, 'Publication – banques', [14.1], Annexe 5 ; Circ. 16/2, 'Publication – assureurs', [13]-[13.7].

⁴ Conseil fédéral, Le Conseil fédéral entend faire de la Suisse un leader mondial en matière de placements durables grâce à la transparence climatique (17 novembre 2021) <<https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-85925.html>>.
⁵ Conseil fédéral, Le Conseil fédéral ouvre la procédure de consultation concernant l'ordonnance relative au rapport des grandes entreprises sur les questions climatiques (30 mars 2022) <<https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-87790.html#:~:text=Berne%2C%2030.03.2022%20%2D%20Lors,suisses%20sur%20les%20questions%20climatiques>>>.

entreprises suisses. L'entrée en vigueur de l'ordonnance est prévue pour le 1^{er} janvier 2023.

Devoirs des administrateurs et changement climatique

Les obligations des administrateurs de sociétés suisses sont principalement régies par le *Code des obligations* (CO). Les dispositions légales sont complétées par des lois non-contraignantes, comme le Code suisse de bonnes pratiques.⁶

Selon l'article 716a CO, le conseil d'administration est *inter alia* chargé d'exercer la haute direction de la société, de fixer l'organisation de la société, de fixer les principes de la comptabilité et du contrôle financier ainsi que le plan financier et d'exercer la haute surveillance sur les personnes chargées de la gestion pour s'assurer. En particulier, le conseil d'administration doit définir la stratégie de la société et s'assurer que cette stratégie est dans l'intérêt de la société et qu'elle puisse être mise en œuvre par les ressources disponibles. Le conseil d'administration doit également veiller à ce que les risques de la société soient suffisamment identifiés, évalués et gérés.

Les membres du conseil d'administration, de même que les tiers qui s'occupent de la gestion, exercent leurs attributions avec toute la diligence nécessaire et veillent fidèlement aux intérêts de la société (article 717 CO). Si les administrateurs manquent à leurs devoirs, que ce soit intentionnellement ou par négligence, ils sont responsables, tant envers la société qu'envers les actionnaires et les créanciers individuellement, des pertes ou dommages résultant de la violation de leurs devoirs (article 754 CO).

La loi ne prévoit pas explicitement que les administrateurs doivent également prendre en compte les risques liés au climat lorsqu'ils déterminent la stratégie de l'entreprise et supervisent ses systèmes de gestion des risques. Toutefois, à la lumière des développements mentionnés ci-dessus, en

particulier de la prise de conscience répandue chez les régulateurs financiers que le changement climatique présente des risques financiers considérables pour les entreprises, ainsi que des nouvelles exigences en matière de rapport ESG, il s'ensuit en toute logique que les administrateurs doivent intégrer les risques et opportunités climatiques dans leurs rôles de gouvernement d'entreprise.

Obligations de divulgation des administrateurs et changement climatique

Comme expliqué précédemment, la révision du *Code des obligations* suisse, introduite comme contre-projet à l'initiative pour des entreprises responsables, est entrée en vigueur le 1^{er} janvier 2022. Les nouvelles dispositions du *Code des obligations* suisse prévoient deux nouvelles obligations. D'une part, les grandes entreprises suisses seront tenues de publier un rapport ESG *général* présentant les risques de leurs activités commerciales en matière environnementale, sociale, personnel, le respect des droits de l'homme et la lutte contre la corruption, ainsi que les mesures prises à cet égard. D'autre part, les entreprises présentant des risques dans les domaines sensibles du travail des enfants et des minerais dits de conflit doivent se conformer à des obligations spéciales et étendues de diligence raisonnable et de rapport. Le Conseil fédéral a fixé les détails de ces obligations *spécifiques* de diligence et de rapport dans une nouvelle *ordonnance sur les devoirs de diligence et de transparence en matière de minerais et de métaux provenant de zones de conflit et en matière de travail des enfants* (ODiTr).⁷ Les nouvelles exigences s'appliqueront à partir de l'année financière de 2023. Cela signifie que les premiers rapports basés sur le nouveau cadre légal de rapport et de diligence raisonnable ESG doivent être publiés en 2024 pour l'année financière de 2023.

L'obligation *générale* de rapport ESG (articles 964a à 964c CO) s'applique aux sociétés d'intérêt public siégeant en Suisse qui, avec les sociétés contrôlées en Suisse et à l'étranger, (i) comptent au moins 500 emplois à plein temps

⁶ Economiesuisse, 'Code suisse de bonnes pratiques pour le gouvernement d'entreprise' (2016) <https://www.economiesuisse.ch/sites/default/files/publication/s/economiesuisse_swisscode_f_web.pdf>.

⁷ Ordonnance du 3 décembre 2021 sur les devoirs de diligence et de transparence en matière de minerais et de métaux provenant de zones de conflit et en matière de travail des enfants (ODiTr) <<https://www.fedlex.admin.ch/eli/cc/2021/847/fr>>.

en moyenne annuelle, et (ii) ont un total du bilan d'au moins 20 millions de francs ou un chiffre d'affaires de 40 millions de francs pendant deux années consécutives. Outre les établissements financiers réglementés par la FINMA, les sociétés d'intérêt public comprennent les sociétés constituées en Suisse qui sont cotées en Suisse ou à l'étranger, qui ont des obligations en circulation ou qui contribuent à hauteur d'au moins 20% des actifs ou du chiffre d'affaires consolidé de ces sociétés. Toutefois, les sociétés qui sont contrôlées par une société à laquelle les nouvelles obligations de rapport s'appliquent, ou qui sont soumises à un rapport équivalent en vertu de lois étrangères, ne sont pas tenues d'établir un rapport supplémentaire.

Bien que les filiales suisses de sociétés étrangères ne soient généralement pas cotées en bourse, les obligations de rapport ESG peuvent s'appliquer à ces filiales, si elles ont des obligations en circulation, à moins qu'une société mère directe ou indirecte ne soit soumise à des obligations de rapport équivalentes en vertu du droit étranger, comme l'impose la directive européenne sur le Reporting Non Financier.

Le rapport ESG doit inclure les informations nécessaires à la compréhension de l'activité de l'entreprise et de l'impact de ses activités sur l'environnement (y compris les objectifs en matière de CO₂), ainsi que les préoccupations sociétales liées aux employés, au respect des droits de l'homme et à la lutte contre la corruption à travers leurs chaînes de valeur.⁸

Comme mentionné précédemment, l'exigence de rapport ESG est calquée sur la directive européenne sur le Reporting Non Financier. La liste non exhaustive des sujets que le rapport ESG doit couvrir suit de près le modèle européen. Plus précisément, le rapport doit couvrir les sujets suivants :

- le modèle commercial de l'entreprise (*Modèle commercial*) ;

- les principaux risques ESG résultant des activités propres de l'entreprise et, lorsque cela est pertinent et proportionné, de ses relations commerciales, produits ou services (Principaux risques et gestion de ces derniers) ;
- les politiques suivies pour traiter ces risques ESG, y compris la diligence raisonnable appliquée (Politiques menées et procédures de diligence raisonnable) ;
- les résultats de ces politiques (Résultats) ; et
- les indicateurs clés de performance non financiers liés à la réponse de l'entreprise aux risques ESG (Indicateurs clés de performance).

Si une entreprise n'a pas de politique concernant certains domaines de risque ESG, le rapport doit inclure une explication des raisons de cette lacune (se conformer ou expliquer). La seule explication défendable à laquelle on pourrait s'attendre est une évaluation selon laquelle les activités de l'entreprise ne suscitent pas de préoccupations dans un certain domaine.

Le rapport peut se fonder sur des normes de rapport nationales, européennes ou internationales, comme par exemple [Les principes directeurs de l'OCDE à l'intention des entreprises multinationales](#)⁹ ou encore les normes du [Global Reporting Initiative](#) (GRI).¹⁰ En outre, les entreprises peuvent vouloir s'inspirer des lignes directrices que l'Union européenne a publiées sur la méthodologie de communication des informations non financières.¹¹ Sous les rubriques susmentionnées, ces lignes directrices énumèrent en détail les aspects que le rapport ESG doit couvrir.

Par ailleurs, comme indiqué ci-dessus, le Conseil fédéral a entre-temps précisé les exigences relatives au rapport basé sur le

⁸ En plus de l'obligation générique de rapport ESG, la nouvelle législation ESG prévoit d'autres obligations spécifiques de diligence raisonnable et de rapport concernant les 'minerais provenant de zones de conflit' et le travail des enfants.

⁹ OCDE, Principes directeurs de l'OCDE à l'intention des entreprises multinationales (2011) <<https://www.oecd.org/fr/daf/inv/mne/2011102-fr.pdf>>.

¹⁰ GRI, Normes GRI (mai 2020) <<https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-french-translations/>>.

¹¹ Communication de la Commission européenne, 'Lignes directrices concernant l'information non financière: Supplément relatif à la communication d'informations en rapport avec le climat', 2019/C 209/1, (20 juin 2019) <[https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52019XC0620\(01\)&from=IT](https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52019XC0620(01)&from=IT)>.

climat dans un [projet d'ordonnance](#).¹² Selon ce projet, il est supposé que les entreprises se conforment à leurs obligations de rapport basé sur le climat si elles suivent les recommandations du TCFD comme spécifié à l'article 3 du projet d'ordonnance. Cette hypothèse n'empêche pas les entreprises de rapporter l'impact du climat sur son activité et de l'impact des activités de son entreprise sur le climat d'une autre manière, notamment en s'appuyant sur d'autres lignes directrices ou normes. Toutefois, dans un tel cas, l'entreprise doit démontrer spécifiquement qu'elle satisfait à l'obligation de faire rapport sur les questions climatiques ou expliquer, dans le cas contraire, pourquoi elle n'a pas de politiques traitant des questions climatiques (se conformer ou expliquer).

Le rapport peut être établi dans l'une des langues nationales suisses (c'est-à-dire en allemand, français ou italien), ou en anglais. Il doit être approuvé par le conseil d'administration et l'assemblée des actionnaires et rendu accessible au public par voie

électronique pendant une période de 10 ans. Cependant, contrairement aux bilans financiers de l'entreprise, il n'est pas obligatoire que le rapport ESG soit audité.

La non-conformité au nouveau régime de rapport ESG est sujette à une responsabilité pénale. La non-conformité comprend l'inclusion de fausses déclarations dans l'un des rapports nouvellement exigés, le rapport ESG générique et le rapport sur le respect des mesures de diligence raisonnable dans le domaine des minerais de conflit et du travail des enfants, ou l'omission d'éditer, conserver ou publier l'un de ces rapports. Si l'un de ces actes est commis intentionnellement, l'amende peut atteindre 100'000 CHF ; s'il est commis par négligence, l'amende peut atteindre 50'000 CHF.

En outre, une diligence raisonnable ou un rapport ESG déficient peut engager la responsabilité civile en vertu du droit existant, à savoir la responsabilité des membres du conseil d'administration et de la direction en vertu de l'article 754 CO.

Implications pratiques pour les administrateurs

En plus de notre recommandation constante de développer et de maintenir un programme général de conformité efficace et bien documenté, nous suggérons qu'en réponse aux développements exposés dans cette communication, les administrateurs accordent une attention particulière aux points suivants:

- a) Examiner et, le cas échéant, ajuster le gouvernement d'entreprise pour assurer un *leadership* approprié au niveau du conseil d'administration en ce qui concerne les risques liés au climat, y compris les impacts négatifs que les activités de l'entreprise peuvent provoquer et les risques juridiques auxquels l'entreprise peut être confrontée;
- b) Désigner une ou plusieurs responsables chargés de suivre et de fournir des conseils permanents concernant le nombre croissant de lois et de réglementations dans le domaine des exigences de gestion des risques climatiques, tant en Suisse que sur les marchés étrangers de leurs entreprises;
- c) Déléguer l'identification et l'évaluation des risques climatiques à une équipe de direction clairement identifiée qui rend directement compte au PDG et au conseil d'administration, et qui est chargée de réunir toutes les fonctions clés, notamment la fonction juridique et/ou de conformité, la gestion des risques d'entreprise, la planification stratégique, l'audit, la rémunération, les ressources humaines, les relations avec les investisseurs, les relations avec les parties prenantes, etc;
- d) Examiner et, le cas échéant, ajuster les politiques et les processus de gestion des risques liés au climat dans l'ensemble de la chaîne d'approvisionnement et du réseau de distribution de

¹² Ordonnance relative au rapport sur les questions climatiques
<<https://www.news.admin.ch/news/message/attachments/70882.pdf>>

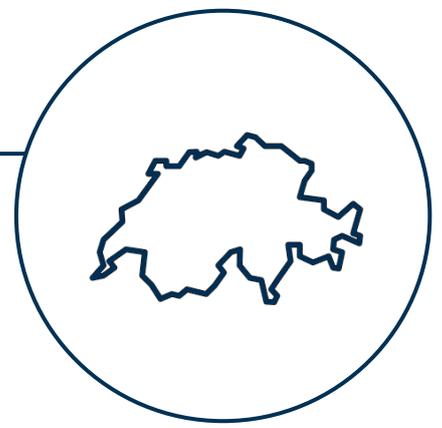
l'entreprise, y compris les filiales et les tiers, sur la base d'une solide évaluation des risques. À cet égard, élargir et approfondir le cadre de diligence raisonnable des intermédiaires tiers de l'entreprise pour prendre en compte les facteurs de risque liés au climat et le faire dans les niveaux 2 et 3 des chaînes d'approvisionnement de l'entreprise; et

- e) Revoir et, le cas échéant, adapter leurs rapports sur les facteurs de risque liés au climat et les mesures qu'ils prennent pour faire face à ces risques. Introduire des processus de contrôle interne en relation avec les rapports.

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Nachhaltigkeit und insbesondere Umweltaspekte gewinnen in der schweizerischen Gesetzgebung zunehmend an Bedeutung. In den letzten Jahren gab es zahlreiche gesetzgeberische Bestrebungen, die darauf abzielten, negative Auswirkungen auf das Klima zu reduzieren und Unternehmen zur Einhaltung bestimmter Sorgfalts- und Berichterstattungspflichten zu verpflichten. Am 27. Januar 2021 veröffentlichte der Bundesrat die langfristige Klimastrategie der Schweiz, welche das Ziel verfolgt, bis 2050 Netto-Null Treibhausgasemissionen zu erreichen.¹

Während die Revision des geltenden *Bundesgesetzes über die Verminderung von Treibhausgasemissionen* (CO₂-Gesetz) im Juni 2021 vom Schweizer Stimmvolk knapp abgelehnt wurde und die neue Vorlage zur Revision dieses Gesetzes erst im Herbst 2022 erwartet wird, sind die Entwicklungen in der Klimaberichterstattung vorangeschritten.

Im Mai 2021 führte die Eidgenössische Finanzmarktaufsicht (FINMA) mit der Änderung ihrer Rundschreiben 'Offenlegung – Banken' (Rundschreiben 2016/1) und 'Offenlegung – Versicherer' (Rundschreiben 2016/2) im Einklang mit der Task Force on Climate-related Financial Disclosures (TCFD) Berichterstattungspflichten für grosse Banken und Versicherungen (Aufsichtskategorien 1 und 2) ein.² Die überarbeiteten Offenlegungsvorschriften verlangen von den betroffenen Finanzinstituten insbesondere: Die Beschreibung der zentralen Merkmale der Governance-Struktur des Unternehmens, die es ihm ermöglichen, klimabezogene Finanzrisiken zu identifizieren, zu beurteilen, zu bewirtschaften, zu überwachen und darüber zu berichten; die Beschreibung der wichtigsten identifizierten klimabezogenen Finanzrisiken und ihrer Auswirkungen auf die Geschäftsstrategie und das Geschäftsmodell; die Beschreibung der Risikomanagementstrukturen in Bezug auf solche Risiken; und die Offenlegung

quantitativer Informationen über ihre klimabezogenen Finanzrisiken.³

Im November 2021 beauftragte die Schweizer Regierung das Finanzdepartement, in Zusammenarbeit mit dem Departement für Umwelt, Verkehr, Energie und Kommunikation Änderungen an der Finanzmarktgesetzgebung vorzuschlagen, um Greenwashing zu vermeiden. Solche Gesetzesvorschläge werden bis Ende 2022 erwartet.⁴

Im Januar 2022 trat eine Revision des *Schweizerischen Obligationenrechts* in Kraft, welche neue Sorgfalts- und Berichterstattungspflichten für Schweizer Unternehmen einführt. Diese Gesetzesrevision wurde als Gegenvorschlag zur Volksinitiative für verantwortungsvolle Unternehmen eingeführt, welche die Möglichkeit eröffnet hätte, Schweizer Unternehmen wegen mutmasslicher Verstöße gegen Menschenrechte oder Umweltgesetze in der ganzen Welt vor Schweizer Gerichten einzuklagen. Die neuen ESG-Berichtspflichten orientieren sich an der EU-Richtlinie über die nichtfinanzielle Berichterstattung (*Richtlinie 2014/95*) (siehe untenstehenden Abschnitt über die Offenlegungspflichten der Verwaltungsräte).

Schliesslich hat die Schweizer Regierung im März 2022 einen Verordnungsentwurf veröffentlicht, der die klimabezogenen Berichterstattungspflichten für grosse Schweizer Unternehmen spezifiziert, welche Teil der ESG-Berichtspflichten sind, die mit der oben erwähnten Revision des *Schweizerischen Obligationenrechts* eingeführt wurden.⁵ Der Verordnungsentwurf sieht die Umsetzung der Empfehlungen des TCFD durch grosse Schweizer Unternehmen vor. Die Verordnung

¹ Bundesrat, Langfristige Klimastrategie der Schweiz (27. Januar 2021) <<https://www.news.admin.ch/news/message/attachments/65874.pdf>>.

² FINMA, FINMA präzisiert Transparenzpflichten zu Klimarisiken (31. Mai 2021) <<https://www.finma.ch/de/news/2021/05/20210531-mm-transparenzpflichten-zu-klimarisiken/>>.

³ FINMA, Rundschreiben 16/1, 'Offenlegung – Banken' in [14.1], Anhang 5; FINMA Rundschreiben 16/2, 'Offenlegung – Versicherer' in [13]-[13.7]

⁴ Der Bundesrat will mit Klimatransparenz einen internationalen Spitzenplatz bei nachhaltigen Finanzanlagen (17. November 2021)

<<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-85925.html>>

⁵ Bundesrat, Bundesrat eröffnet Vernehmlassung über Verordnung zur Klimaberichterstattung von grossen Unternehmen (30. März 2022) <<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-87790.html>>

wird voraussichtlich am 1. Januar 2023 in Kraft treten.

Pflichten der Verwaltungsräte und Klimawandel

Die Pflichten der Verwaltungsräte von Schweizer Unternehmen sind in erster Linie im *Schweizerischen Obligationenrecht* (OR) geregelt. Die gesetzlichen Bestimmungen werden durch Soft Law, wie den Swiss Code of Best Practice, ergänzt.⁶

Gemäss Artikel 716a OR ist der Verwaltungsrat unter anderem verantwortlich für die Oberleitung der Gesellschaft, die Festlegung der Organisation des Unternehmens, die Ausgestaltung des Rechnungswesens, der Finanzkontrolle sowie der Finanzplanung und der Oberaufsicht über die mit der Geschäftsführung betrauten Personen. Insbesondere muss der Verwaltungsrat die Strategie des Unternehmens festlegen und sicherstellen, dass die Strategie im besten Interesse des Unternehmens liegt und mit den verfügbaren Mitteln umgesetzt werden kann. Der Verwaltungsrat muss auch sicherstellen, dass die Risiken des Unternehmens hinreichend erkannt, bewertet und bewältigt werden.

Die Mitglieder des Verwaltungsrats sowie Dritte, die mit der Geschäftsführung der Gesellschaft befasst sind, müssen ihre Pflichten mit aller Sorgfalt erfüllen und die Interessen der Gesellschaft in guten Treuen wahren (Art. 717 OR). Verletzen die Mitglieder des Verwaltungsrats ihre Pflichten absichtlich oder fahrlässig, so haften sie sowohl gegenüber der Gesellschaft als auch gegenüber den einzelnen Aktionären und Gläubigern für den aus der Pflichtverletzung entstandenen Schaden (Art. 754 OR).

Das Gesetz schreibt nicht ausdrücklich vor, dass Verwaltungsräte auch klimabezogene Risiken berücksichtigen müssen, wenn sie die Strategie des Unternehmens festlegen und dessen Risikomanagementsysteme überwachen. In Anbetracht der oben erwähnten Entwicklungen, insbesondere der weit verbreiteten Erkenntnis der

Finanzaufsichtsbehörden, dass der Klimawandel wesentliche finanzielle Risiken für die Wirtschaft birgt, und der neuen ESG-Berichterstattungspflichten, ist es jedoch unabdingbar, dass Verwaltungsräte Klimarisiken und -chancen in ihre Führungsaufgaben integrieren müssen.

Offenlegungspflichten der Verwaltungsräte und Klimawandel

Wie eingangs erläutert, trat die Revision des Obligationenrechts, die als Gegenvorschlag zur Initiative für verantwortungsvolle Unternehmen eingeführt wurde, am 1. Januar 2022 in Kraft. Die neuen Bestimmungen des *Schweizerischen Obligationenrechts* sehen zwei neue Verpflichtungen vor: Einerseits werden grosse Schweizer Unternehmen verpflichtet, einen *allgemeinen* ESG-Bericht zu erstellen, der die Risiken ihrer Geschäftstätigkeit in Bezug auf Umwelt-, Sozial- und Arbeitnehmerbelange, die Achtung der Menschenrechte und die Bekämpfung der Korruption sowie die dagegen ergriffenen Massnahmen aufzeigt. Unternehmen mit Risiken in den sensiblen Bereichen der Kinderarbeit und der sogenannten Konfliktmineralien müssen zudem besondere und weitreichendere Sorgfalts- und Berichtspflichten erfüllen. Der Bundesrat hat die Einzelheiten dieser *besonderen* Sorgfalts- und Meldepflichten in einer neuen *Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit (VSoTr)* festgelegt.⁷ Die neuen Anforderungen gelten erstmals für das im Jahr 2023 beginnende Geschäftsjahr. Die ersten Berichte auf der Grundlage des neuen gesetzlichen Rahmens für ESG-Berichterstattung und Sorgfaltspflichten müssen im Jahr 2024 für das Geschäftsjahr 2023 veröffentlicht werden.

Die *allgemeine* ESG-Berichtspflicht (Art. 964a-964c OR) gilt für Unternehmen des öffentlichen Interesses mit Sitz in der Schweiz, die zusammen mit den von ihnen kontrollierten in- und ausländischen Unternehmen (i) im Jahresdurchschnitt mindestens 500 Vollzeitstellen haben und (ii) in zwei aufeinanderfolgenden Geschäftsjahren eine

⁶ [economiesuisse, 'Swiss Code of Best Practice for Corporate Governance' \(2016\)](https://www.economiesuisse.ch/sites/default/files/publication/economiesuisse_swisscode_d_web.pdf)
<https://www.economiesuisse.ch/sites/default/files/publication/economiesuisse_swisscode_d_web.pdf>.

⁷ [Verordnung vom 3. Dezember 2021 über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit \(VSoTr\)](https://www.fedlex.admin.ch/eli/cc/2021/847/de)
<<https://www.fedlex.admin.ch/eli/cc/2021/847/de>>

Bilanzsumme von mindestens 20 Millionen Franken oder einen Umsatz von 40 Millionen Franken aufweisen. Zu den Unternehmen des öffentlichen Interesses gehören neben den von der FINMA beaufsichtigten Finanzinstituten auch Unternehmen mit Sitz in der Schweiz, die in der Schweiz oder im Ausland börsennotiert sind, Anleihen ausstehend haben oder mindestens 20% der Aktiven oder des Umsatzes zur Konzernrechnung dieser Unternehmen beitragen. Unternehmen, die von einem Unternehmen kontrolliert werden, für welches die neuen Meldepflichten gelten oder die nach ausländischem Recht einer gleichwertigen Meldepflicht unterliegen, sind jedoch nicht verpflichtet, einen zusätzlichen Bericht zu erstellen.

Obwohl Schweizer Tochtergesellschaften ausländischer Unternehmen in der Regel nicht börsennotiert sind, können die ESG-Berichtspflichten für solch eine Tochtergesellschaft gelten, wenn sie Anleihen ausstehend hat, es sei denn, eine direkte oder indirekte Muttergesellschaft unterliegt gleichwertigen Berichterstattungspflichten nach ausländischem Recht, wie beispielsweise der EU-Richtlinie über die nichtfinanzielle Berichterstattung (Richtlinie 2014/95).

Der ESG-Bericht muss Informationen enthalten, die notwendig sind, um die Geschäftstätigkeit des Unternehmens und die Auswirkungen seiner Aktivitäten auf die Umwelt zu verstehen (einschliesslich der CO₂-Ziele). Zudem muss der Bericht Informationen über gesellschaftliche Belange in Bezug auf die Mitarbeiter, die Achtung der Menschenrechte und die Bekämpfung der Korruption in der gesamten Wertschöpfungskette aufweisen.⁸

Wie eingangs erwähnt, orientiert sich die ESG-Berichtspflicht an der EU-Richtlinie über die nichtfinanzielle Berichterstattung (*Richtlinie 2014/95*), und die nicht abschliessende Liste der Themen, die der Bericht abdecken muss, lehnt sich eng an dieses Modell an. Im Einzelnen muss der Bericht die folgenden Themen abdecken:

- das Geschäftsmodell des Unternehmens (Geschäftsmodell);
- die wichtigsten ESG-Risiken, die sich aus der eigenen Geschäftstätigkeit und, sofern relevant und angemessen, aus den Geschäftsbeziehungen, Produkten oder Dienstleistungen des Unternehmens ergeben (wesentliche Risiken und Handhabung dieser Risiken);
- die Massnahmen, die zur Bewältigung dieser ESG-Risiken verfolgt werden, einschliesslich der angewandten Due Diligence (Konzepte und Due Diligence Prozesse);
- das Ergebnis dieser Massnahmen (Ergebnisse); und
- die nichtfinanziellen Leistungsindikatoren im Zusammenhang mit der Reaktion des Unternehmens auf ESG-Risiken (wichtigste Leistungsindikatoren).

Wenn ein Unternehmen keine Richtlinien für bestimmte ESG-Risikobereiche hat, muss der Bericht eine Erklärung über die Gründe für diese Lücken enthalten (comply or explain). Die einzige vertretbare Erklärung, die man erwarten könnte, ist die Einschätzung, dass die Aktivitäten eines Unternehmens in einem bestimmten Bereich keinen Anlass zu Bedenken geben.

Der Bericht kann auf nationalen, europäischen oder internationalen Berichtsstandards beruhen, wie zum Beispiel den [OECD-Leitsätzen für multinationale Unternehmen](#)⁹ oder den Standards der [Global Reporting Initiative](#) (GRI).¹⁰ Darüber hinaus können die Unternehmen auch die von der EU herausgegebenen Leitlinien zur Methodik der Berichterstattung über nichtfinanzielle Informationen heranziehen.¹¹ In diesen Leitlinien werden unter den oben genannten Überschriften die Aspekte, die der ESG-Bericht abdecken sollte, im Detail aufgeführt.

⁸ Neben der allgemeinen ESG-Berichtspflicht sieht die neue ESG-Gesetzgebung weitere spezifische Sorgfalts- und Berichtspflichten in Bezug auf sogenannte Konfliktmineralien und Kinderarbeit vor.

⁹ OECD, *OECD-Leitsätze für multinationale Unternehmen* (2011) <<http://www.oecd.org/corporate/mne/48808708.pdf>>.

¹⁰ GRI, *GRI Standards* (Mai 2020) <<https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-german-translations/>>.

¹¹ Mitteilung der Europäischen Kommission, 'Leitlinien für die Berichterstattung über nichtfinanzielle Informationen: Nachtrag zur klimabezogenen Berichterstattung', 2019/C 209/1, (20. Juni 2019) <[https://eur-lex.europa.eu/legal-content/de/TXT/PDF/?uri=CELEX:52019XC0620\(01\)](https://eur-lex.europa.eu/legal-content/de/TXT/PDF/?uri=CELEX:52019XC0620(01))>.

Darüber hinaus hat der Bundesrat, wie oben erwähnt, die Anforderungen an die klimabasierte Berichterstattung inzwischen in einem Verordnungsentwurf konkretisiert.¹² Gemäss diesem Verordnungsentwurf wird davon ausgegangen, dass Unternehmen ihre klimabasierten Berichtspflichten erfüllen, wenn sie den Empfehlungen des TCFD gemäss Artikel 3 des Verordnungsentwurfs folgen. Diese Annahme hindert die Unternehmen nicht daran, über die Auswirkungen des Klimas auf ihre Geschäftstätigkeit und die Auswirkungen ihrer Geschäftstätigkeit auf das Klima auf andere Art und Weise zu berichten, insbesondere indem sie sich auf andere Leitlinien oder Standards stützen. In einem solchen Fall muss das Unternehmen jedoch ausdrücklich nachweisen, dass es der Verpflichtung zur Berichterstattung über Klimafragen nachkommt oder erklären, warum es keine Richtlinien hat, die sich mit klimabezogenen Fragen befassen (comply or explain).

Der Bericht kann in einer der Schweizer Landessprachen (d.h. Deutsch, Französisch oder Italienisch) oder in Englisch verfasst werden. Er muss vom Verwaltungsrat und der

Generalversammlung genehmigt und der Öffentlichkeit während eines Zeitraums von zehn Jahren elektronisch zugänglich gemacht werden. Jedoch muss der ESG-Bericht, anders als der Jahresabschluss des Unternehmens, nicht geprüft werden.

Die Nichteinhaltung der neuen ESG-Berichterstattungspflichten kann strafrechtlich verfolgt werden. Die Nichteinhaltung umfasst die Aufnahme falscher Angaben in einen der neu geforderten Berichte, den allgemeinen ESG-Bericht und den Bericht über die Einhaltung der Sorgfaltspflichten im Bereich der Konfliktmineralien und Kinderarbeit, oder das Versäumen, einen dieser Berichte herauszugeben, aufzubewahren oder zu veröffentlichen. Wird eine dieser Handlungen vorsätzlich begangen, beträgt die Geldstrafe bis zu 100'000 CHF, bei fahrlässiger Begehung bis zu 50'000 CHF.

Darüber hinaus könnte eine mangelhafte ESG Due-Diligence oder eine mangelhafte ESG Berichterstattung eine zivilrechtliche Haftung nach geltendem Recht auslösen, nämlich die Haftung von Verwaltungsratsmitgliedern und Geschäftsleitung nach Artikel 754 des *Schweizerischen Obligationenrechts*.

Praktische Auswirkungen für Verwaltungsräte

Zusätzlich zu unserer ständigen Empfehlung, ein ausführlich dokumentiertes und wirksames allgemeines Compliance-Programm zu entwickeln und aufrechtzuerhalten, schlagen wir vor, dass die Verwaltungsratsmitglieder als Reaktion auf die in dieser Mitteilung dargelegten Entwicklungen den folgenden Punkten besondere Aufmerksamkeit schenken:

- a) Überprüfung und nötigenfalls Anpassung der Unternehmensführung, um eine angemessene Führung auf Verwaltungsratsebene in Bezug auf klimabezogene Risiken sicherzustellen, einschliesslich der negativen Auswirkungen, welche die Aktivitäten des Unternehmens verursachen können, und der rechtlichen Risiken, denen das Unternehmen ausgesetzt sein kann;
- b) Benennung einer oder mehrerer verantwortlichen Funktion(en), welche die zunehmende Zahl von Gesetzen und Vorschriften im Bereich des Klimarisikomanagements sowohl in der Schweiz als auch in den Auslandsmärkten ihrer Unternehmen überwachen und kontinuierlich dazu beraten;
- c) Delegation der Ermittlung und Bewertung von Klimarisiken an ein klar definiertes Team in der Geschäftsleitung, welches direkt dem CEO und dem Verwaltungsrat unterstellt ist und die Aufgabe hat, alle wichtigen Funktionen zusammenzubringen, einschliesslich der rechtlichen und/oder Compliance-Funktion, des Risikomanagements, der strategischen Planung, der

¹² Verordnung über die Berichterstattung über Klimabelange
<<https://www.news.admin.ch/news/message/attachments/70878.pdf>>

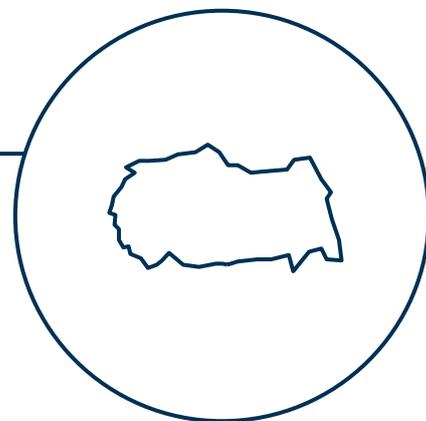
Rechnungsprüfung, der Vergütung, der Personalabteilung, der Beziehungen zu Investoren, der Beziehungen zu den Interessengruppen usw.;

- d) Überprüfung und nötigenfalls Anpassung der Richtlinien und Verfahren für das klimabezogene Risikomanagement in der gesamten Lieferkette und im Vertriebsnetz des Unternehmens, einschliesslich verbundener Unternehmen und Dritter, auf der Grundlage einer soliden Risikobewertung. Erweiterung und Vertiefung des Rahmens für die Sorgfältigkeitsprüfung von Zwischenhändlern, um klimabezogene Risikofaktoren zu berücksichtigen, und zwar auf den Ebenen 2 und 3 der Lieferketten ihrer Unternehmen; und
- e) Berichterstattung über klimabezogene Risikofaktoren und die Massnahmen, die die Verwaltungsratsmitglieder zur Bewältigung dieser Risiken ergreifen, überprüfen und gegebenenfalls anpassen. Einführung interner Sicherungsprozesse in Bezug auf die Berichterstattung.

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**Baker
McKenzie.**





In light of international and national developments in the perception of climate change as a financial risk to companies and the wider economy, directors of Turkish companies should, as part of their duty of care, be alert to climate risks, act in accordance with any legislative obligations on the company, and take steps to reorient the company's activities in line with the sustainability principles. Directors should also ensure that ESG risks and opportunities are disclosed in line with the Capital Markets Board's Sustainability Principles Compliance Framework, and take steps towards measuring and disclosing greenhouse gas emissions in order to ensure a smooth integration of the company's business model with the forthcoming emissions trading scheme, as well as EU laws which may affect Turkish businesses.

With an increased awareness of the risks caused by climate change that the world is facing, Turkey is expanding its range of work in the fight against climate change day by day. It carries out legislative studies in order to comply with international agreements and fulfil its commitments, and takes steps to prepare the necessary social and financial infrastructure for the struggle. Boards of Turkish companies should be alert to these developments, which may signal increased focus from the Turkish government and regulators, and lead to new or increased risks and opportunities for companies as a result of new policies and legislation.

On 16 July 2021, the Turkish Government approved the 'Green Deal Action Plan', a roadmap aimed at promoting a green economy in multiple policy areas.¹ With this plan, Turkey aims to align with the 'European Green Deal' of the European Union (EU). The plan includes actions such as limiting carbon emissions, increasing green finance and working towards a green and circular economy.

On 27 September 2021, the Presidency announced a target of net-zero emissions by 2053, noting that this would require far-reaching changes, including to investment and production. Turkey's 'Intended National Determined Contribution' (INDC), submitted on 30 September 2015 and laying out Turkey's plans for the targets of the Paris Agreement, states that by 2030 Turkey will reduce greenhouse gas emissions by 21% against the 'business as usual' level.² Murat Kurum, Minister of Environment, Urbanization and Climate Change, has stated that the work on preparing a 'climate law', which will set out a legal framework for Turkey's climate goals, continues.

Turkey signed the Paris Agreement with the representatives of 175 countries at the signing ceremony held in New York on 22 April 2016. *The Law Regarding the Approval of the Paris Agreement by the Turkish Grand National Assembly* was published in the Official Gazette dated 7 October 2021, numbered 31621, and entered into force on 10 November 2021.³

The name of the 'Ministry of Environment and Urbanization' was changed to the 'Ministry of Environment, Urbanization and Climate Change' with the presidential decree published in the Official Gazette dated 29 October 2021 and numbered 31643.⁴ This may suggest an increased focus on climate policy by the Ministry.

The 'Green Borrowing Instrument, Sustainable Borrowing Instrument, Green Lease Certificate, Sustainable Lease Certificate Guide', which was published on the Capital Markets Board (CMB) website on 24 February 2022, aims to increase transparency, honesty, consistency and comparability in the financing of sustainability projects and green projects.⁵

¹ See Ministry of Trade, Turkey's Green Deal Action Plan (2021) <https://ticaret.gov.tr/data/60f1200013b876eb28421b23/MU_TABAKAT%20YE%C5%9E%C4%B0L.pdf>.

² See Republic Of Turkey, Intended Nationally Determined Contribution (30 November 2015) <https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Turkey/1/The_IND_C_of_TURKEY_v.15.19.30.pdf>.

³ See *The Law on Approval of the Paris Agreement*, <<https://www.resmigazete.gov.tr/eskiler/2021/10/20211007-7.pdf>>.

⁴ See Presidential Decree No. 31621, <<https://www.resmigazete.gov.tr/eskiler/2021/10/20211029-35.pdf>>

⁵ See Capital Markets Board, Green Debt Instrument, Sustainable Debt Instrument, Green Lease Certificate,

The economic and financial effects of risks stemming from climate change also affect price stability and financial stability in the markets. As a result, central banks are following developments regarding climate change and factoring climate risks into their monetary policy. The Governor of the Central Bank of the Republic of Turkey (CBRT) Şahap Kavcıoğlu has stated that the CBRT sees the potential impact of climate change on the general price level and that the CBRT will adopt sustainable finance initiatives to reduce climate-related risks. The CBRT has established a 'Green Economy and Climate Change Department' to identify and evaluate the risks and opportunities arising from climate change for the country's financial system.

The Banking Regulation and Supervision Agency (BRSA) published its 2022-2025 Sustainable Banking Strategic Plan in July 2021. The plan includes actions aimed at building capacity in the assessment and management of climate-related risks and strengthening oversight of the management and identification of climate-related financial risks.⁶

Directors' Duties and Climate Change

Article 369 of the *Turkish Commercial Code* (TCC) No. 6102, titled 'Duty of care and loyalty', regulates the responsibility of the members of the board of directors of companies based on trust. The article reads as follows: "*Members of the board of directors and third parties in charge of the management are responsible for fulfilling their duties with the care of a prudent manager, and following the company's interests with honesty.*"⁷

Violations of the board of directors' responsibilities of care are regulated by Article 553 of the TCC, which provides that "*In case the founders, members of the board of directors, managers and liquidators violate their obligations arising from the law and the articles of association, they are liable to both the company, the shareholders and the creditors of*

the company for the damage they have caused."

In order to determine a road map in the fight against climate change, it is undoubtedly necessary for directors of Turkish companies to determine the current and possible risks of climate change and the steps that can be taken against these risks, to prepare action plans, and to start the necessary infrastructure works in line with these plans.

Climate change risks for Turkey are classified as 'Physical Risks' (including acute risks such as extreme weather events and chronic risks such as sea level rise and changes in precipitation patterns), 'Transition Risks' (including changes in climate policies, technology, consumer preferences and financial market expectations) and 'Nominal Risks' in the 2022-2025 Sustainable Banking Strategy Plan of the BRSA. These risks are considered to have potentially serious financial consequences for organisations.

A related report of the BRSA finds that the Turkish banking sector is exposed to significant transition risks through the fossil fuel-based energy production, cement, iron-steel, aluminium, fertilizer, transportation, construction, and related sectors. The EU 'Carbon Border Adjustment Mechanism', which will be implemented as of 2026, is also considered as an important risk in this sense.

Companies are increasingly discussing climate change at the board level. According to the 'Turkey Climate Change and Water Report' published by the Carbon Disclosure Project (CDP) in 2021, 33% of surveyed companies (a total number of 18) stated that they put climate-related issues on the agenda at every board meeting in 2020, with this rate increasing to 54% (34 companies) in 2021.⁸ In the report, it is stated that 97% of the companies reporting in Turkey define risks related to climate change. In this sense, it can be said that the climate change awareness of companies in Turkey is increasing day by day.

Sustainable Lease Certificate Guide (24 February 2022) <<https://spk.gov.tr/Sayfa/Dosya/1362>>.

⁶ See Banking Regulation and Supervision Agency, Sustainable Banking Strategic Plan (July 2021) <<https://www.alomaliye.com/wp-content/uploads/2021/12/2022-2025-stratejik-bankacilik.pdf>>.

⁷ See the Turkish Commercial Code, <<https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6102-20130328.pdf>>.

⁸ CDP, CDP Climate Change and Water Report 2021 (April 2022) <https://cdpturkey.sabanciuniv.edu/sites/cdpturkey.sabanciuniv.edu/files/cdp_climate_change_and_water_report_2021-turkey_edition.pdf>.

Putting climate change risks on the agenda of the board of directors, following the legislative work on this subject, acting in accordance with the obligations required by the legislation and reorienting the company's activities in line with the sustainability principles, should be considered within the scope of the responsibility of care of each director, even if there is no legal obligation to do so. This is because companies' ability to adapt to changing conditions and continue their existence depends upon the foresight of their directors and the measures they take against risks.

Directors' Disclosure Obligations and Climate Change

The *Regulation on Monitoring of Greenhouse Gas Emissions* in Turkey, number 29003, was published in the Official Gazette dated 17 May 2014, and took its final form with the amendment made on 31 May 2017.⁹ This Regulation sets out principles regarding the regular reporting and verification of annual greenhouse gas emissions by the manufacturing sector representatives of energy-intensive sectors such as electricity, steam generation, oil refineries, petrochemicals, cement, iron-steel, aluminium, brick, ceramics, lime, paper and glass production.

The CMB, which is the regulatory and supervisory authority for the capital markets in Turkey, aims to ensure that the capital markets operate safely, fairly and effectively by protecting the rights and interests of investors. The CMB is of the opinion that good corporate governance practices constitute the infrastructure of fair and orderly functioning capital markets. For this reason, the Corporate Governance Principles were announced to the public for the first time in 2003 and these principles were updated with the communiqués published in the following periods.

Compulsory and non-mandatory corporate governance principles, which apply to companies whose shares are traded on Borsa

Istanbul, are defined in the 'Corporate Governance Communiqué No. II-17.1'.¹⁰ The CMB, which aims to develop corporate governance practices and public disclosure practices, closely monitors whether companies comply with the mandatory principles and the explanations given by companies on the matters where they depart from the non-mandatory principles.

In October 2020, the Corporate Governance Communiqué was amended to include the 'Sustainability Principles Compliance Framework' published by the CMB, which includes the basic Environmental, Social and Corporate Governance (ESG) principles that public companies are expected to adhere to and disclose upon, 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. Although the implementation of these principles is voluntary, it is obligatory to report whether they are implemented or not, on the basis of the 'Comply or Explain' principle.¹¹ In other words; the application of these principles is not a legal obligation. However, companies must explain which of these principles are complied with, which are not followed, and the reasons for non-compliance.

Greenhouse gas emissions reporting may also be required for certain companies as a result of EU climate goals and regulations, and a proposed Turkish Emissions Trading System. As part of the 'Fit For 55' package of policies and legislation, the 'Carbon Border Adjustment Mechanism' published by the European Commission in July 2021 will oblige EU member countries to ensure that imported goods will be subject to an equivalent carbon price to goods originating in EU member countries in the cement, electricity, aluminium, iron, steel and fertilizer sectors following a transition period ending in 2026.¹² Since this obligation indirectly covers countries exporting to EU member countries, it is envisaged that companies importing goods from Turkey in these sectors

⁹ See Regulation on Monitoring of Greenhouse Gas Emissions, <<https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=19678&MevzuatTur=7&MevzuatTertip=5>>.

¹⁰ See Communiqué No. II-17.1, <<https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=19225&mevzuatTur=Teblig&mevzuatTertip=5>>.

¹¹ Capital Markets Board, Sustainability Principles Compliance Framework (October 2020) <<https://www.spk.gov.tr/Sayfa/Dosya/1332>>.

¹² European Commission, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality (14 July 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN>>.

will report the emissions occurring in the production process of the imported goods quarterly, starting from 2023, and detail any carbon price paid abroad, as well as direct and indirect emissions.

In addition, the Minister of Environment, Urbanization and Climate Change Murat Kurum has stated that the Nationally Determined Contribution will be updated before the 27th Conference of the Parties with increased ambition on greenhouse gas emissions reduction targets. In this context, he stated that

the commitments as part of the goal of attaining net-zero emissions by 2053 will be fulfilled, and an 'Emissions Trading System' will be implemented to contribute towards greenhouse gas reduction.¹³ The 'Emissions Trading System' involves determining an upper limit value based on the sector and the greenhouse gas emissions capacity of the facilities in the relevant system, and producing a permit for this upper limit; therefore, Turkish companies may be required to report on their emissions as part of the 'Emissions Trading System'.

Practical Implications for Directors

Considering the approach of the Ministry of Environment, Urbanization and Climate Change, CMB, BRSA and other regulatory and supervisory institutions to climate change and its risks in Turkey, it is recommended that companies and their directors pay attention to the following issues in their commercial practices and public disclosures:

- a) Establishing teams to work on the fight against climate change and sustainability at management and/or board level, determining the risks and opportunities in this regard, making reports within the company, and acknowledging that climate change risks and opportunities are within the responsibility of care and commitment in line with the principle of transparency;
- b) Making a transition to green production disclosures within the scope of sustainable economy principles, using renewable energy sources actively in the production sector, accelerating infrastructure works in this direction, increasing the use of alternative raw materials and fuel and taking measures to reduce emissions, and in order to achieve these goals, preparing short, medium and long-term goals within long-term action plans;
- c) Calculating and verifying the greenhouse gas emissions released as a result of company activities according to the 'ISO 14064 Greenhouse Gas Reporting and Verification Standard' published by the Turkish Standards Institute (TSI), and reporting to relevant authorities in accordance with the legislation on monitoring and reporting of greenhouse gas emissions and reductions with utmost care;
- d) Following the legislative preparations of the legislator regarding climate change, analysing the obligations brought by the regulations that come into force for companies, complying with these obligations, and benefiting from expert opinions on these issues if needed.

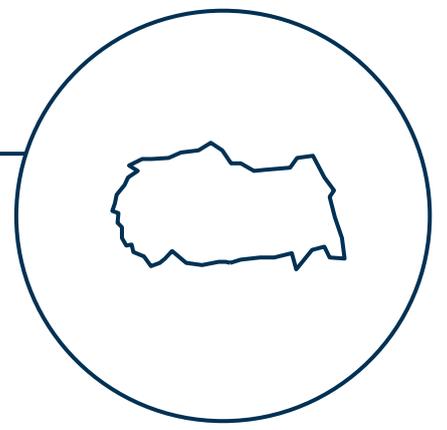
Contributors: Emre Durgun, Nazali Tax & Legal
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¹³ Ministry of Environment, Urbanisation and Climate Change, High Level Climate Dialogue with the European Union (21 April

2022) <<https://ab.csb.gov.tr/avrupa-birligi-ile-yukse-duceyili-iklim-diyalogu-haber-268075>>.

Turkey (Turkish)



İklim değişikliğinin şirketler ve ekonominin geneli için finansal bir risk olarak algılanmasındaki uluslararası ve ulusal gelişmeler ışığında, Türk şirketlerinin yöneticileri, özen yükümlülüklerinin bir parçası olarak iklim risklerine karşı tetikte olmalı, her türlü mevzuata uygun hareket etmeli ve şirket faaliyetlerini sürdürülebilirlik ilkeleri doğrultusunda yeniden yönlendirmek için adımlar atmalıdır. Yöneticiler ayrıca, Sermaye Piyasası Kurulu'nun Sürdürülebilirlik İlkeleri Uyum Çerçevesi doğrultusunda Çevresel, Sosyal, Yönetimsel (ÇSY) risklerinin ve fırsatlarının açıklanmasını sağlamalı ve şirketin iş modelinin AB yasaları ile düzenlenen ve gelecekte Türk işletmelerini de etkileyebilecek emisyon ticareti ile sorunsuz bir şekilde entegrasyonunu sağlamak için sera gazı emisyonlarının ölçülmesine ve açıklanmasına yönelik adımlar atmalıdır.

Dünyanın karşı karşıya olduğu iklim değişikliğinin neden olduğu risklerin artan farkındalığı ile Türkiye, iklim değişikliği ile mücadelede her geçen gün çalışma alanlarını genişletmektedir. Uluslararası anlaşmalara uymak ve taahhütlerini yerine getirmek için mevzuat çalışmaları yapmakta, mücadele için gerekli sosyal ve mali altyapıyı hazırlamaktadır. Türk şirketlerinin yönetim kurulları, Türk hükümetinin ve düzenleyici kurumların bu gelişmelere daha fazla odaklandığının sinyali olan yeni politikalar ve mevzuatın bir sonucu olarak kendileri için yeni risk ve fırsatlara yol açabilecek bu gelişmelere karşı hazırlıklı olmalıdır.

16 Temmuz 2021'de Türk Hükümeti, yeşil bir ekonomiyi birden fazla politika alanında desteklemeyi amaçlayan bir yol haritası olan 'Yeşil Anlaşma Eylem Planını' onaylamıştır.¹ Bu plan ile Türkiye, Avrupa Birliği'nin (AB) 'Avrupa Yeşil Anlaşması' ile uyum sağlanmayı amaçlamakta ve plan, karbon emisyonlarını sınırlama, yeşil finansmanı artırma ve yeşil ve dögüsel bir ekonomi için çalışma gibi eylemleri içermektedir.

27 Eylül 2021'de

Cumhurbaşkanlığı, 2053 yılına kadar net sıfır emisyon hedefini açıklamış ve bunun yatırım ve üretim de dahil olmak üzere geniş kapsamlı değişiklikler gerektireceğini kaydetmiştir. 30 Eylül 2015'de sunulan ve Paris Anlaşması'nın hedeflerine yönelik planlarını ortaya koyan 'Türkiye Niyet Edilen Ulusal Katkı Beyanı' (INDC), 2030 yılına kadar sera gazı emisyonlarını 'olağan iş' düzeyine kıyasla %21 oranında azaltacağını belirtmektedir.² Çevre, Şehircilik ve İklim Değişikliği Bakanı Murat Kurum, Türkiye'nin iklim hedeflerine yasal çerçeve oluşturacak bir 'iklim yasası' hazırlama çalışmalarının sürdüğünü belirtmiştir.

Türkiye, 22 Nisan 2016 tarihinde New York'ta düzenlenen imza töreninde 175 ülke temsilcisi ile birlikte Paris anlaşmasını imzalamıştır. Türkiye Büyük Millet Meclisi tarafından 'Paris Anlaşmasının Onaylanmasının Uygun Bulunduğuna Dair Kanun' 7 Ekim 2021 tarihli ve 31621 sayılı Resmi Gazete'de yayımlanarak 10 Kasım 2021'de yürürlüğe girmiştir.³

29 Ekim 2021 tarihli 31643 sayılı resmi gazetede yayınlanan cumhurbaşkanlığı kararnamesi ile 'Çevre ve Şehircilik Bakanlığı' nın adı 'Çevre, Şehircilik ve İklim Değişikliği Bakanlığı' olarak değiştirilmiştir.⁴ Bu durum Bakanlığın iklim değişikliği politikasına daha çok odaklanacağı izlenimi vermektedir.

24 şubat 2022 tarihinde Sermaye Piyasası Kurulu'nun (SPK) internet sitesinde yayınlanan "*Yeşil Borçlanma Aracı, Sürdürülebilir Borçlanma Aracı, Yeşil Kira Sertifikası, Sürdürülebilir Kira Sertifikası Rehberi*" ile sürdürülebilirlik projeleri ve yeşil projelerin finansmanında, şeffaflık, dürüstlük, tutarlılık ve karşılaştırılabilirliğin artırılması amaçlanmıştır.⁵

¹ Ticaret Bakanlığı'nın Yeşil Mutabakat Eylem Planı için bkz, <https://ticaret.gov.tr/data/60f1200013b876eb28421b23/MU_TABAKAT%20YE%C5%9E%C4%B0L_.pdf>.

² Türkiye Niyet Edilen Ulusal Katkı Beyanı için bkz, <https://yesilekonomi.com/files/The_INDC_of_TURKEY_v_15_19_30-TR.pdf>.

³ Paris Anlaşmasının Onaylanmasının Uygun Bulunduğuna Dair Kanun için bkz,

<<https://www.resmigazete.gov.tr/eskiler/2021/10/20211007-7.pdf>>

⁴ Cumhurbaşkanlığı kararnamesi için bkz, <<https://www.resmigazete.gov.tr/eskiler/2021/10/20211029-35.pdf>>.

⁵ Sermaye Piyasası Kurulu, Yeşil Borçlanma Aracı, Sürdürülebilir Borçlanma Aracı, Yeşil Kira Sertifikası, Sürdürülebilir Kira Sertifikası Rehberi için bkz, <<https://spk.gov.tr/Sayfa/Dosya/1362>>.

İklim değişikliği kaynaklı risklerin ekonomik ve finansal etkileri, piyasalardaki fiyat istikrarını ve finansal istikrarı da etkilemektedir. Bu durum iklim değişikliğine ilişkin gelişmelerin merkez bankaları tarafından takip edilmesini ve bu risklerin para politikası stratejilerine dahil edilmesini gerektirmektedir. Bu nedenle Türkiye Cumhuriyet Merkez Bankası (TCMB) Başkanı Şahap Kavcıoğlu, TCMB'nin iklim değişikliğinin genel fiyat düzeyi üzerindeki potansiyel etkisini gördüğünü ve iklimle ilgili riskleri azaltmak için TCMB'nin sürdürülebilir finansman girişimlerini desteklediğini belirtmiştir.

Bankacılık Düzenleme ve Denetleme Kurumu (BDDK), 2022-2025 Sürdürülebilir Bankacılık Stratejik Planını Temmuz 2021'de yayınlamıştır. Plan, iklimle ilgili risklerin değerlendirilmesi ve yönetilmesi konusundaki kapasitenin artırılmasını ve iklimle ilgili finansal risklerin yönetiminin ve tanımlanmasının denetimini güçlendirmeyi amaçlayan eylemleri içermektedir.⁶

Yöneticilerin Görevleri Ve İklim Değişikliği

6102 sayılı Türk Ticaret Kanunu'nun (TTK) 'Özen ve bağlılık yükümlülüğü' başlıklı 369. maddesi, şirketlerin yönetim kurulu üyelerinin güvene dayalı sorumluluklarını "*Yönetim kurulu üyeleri ve yönetimle görevli üçüncü kişiler, görevlerini tedbirli bir yöneticinin özeniyle yerine getirmek ve şirketin menfaatlerini dürüstlük kurallarına uyararak gözetmek yükümlülüğü altındadırlar.*" ifadelerine yer vermek sureti ile düzenlemektedir.⁷

Yönetim kurulu üyelerinin özen sorumluluklarını ihlal etmeleri hali ise TTK'nın 553. maddesinde düzenlenmiş olup madde metni "*Kurucular, yönetim kurulu üyeleri, yöneticiler ve tasfiye memurları, kanundan ve esas sözleşmeden doğan yükümlülüklerini kusurlarıyla ihlal ettikleri takdirde hem şirkete hem pay sahiplerine hem de şirket alacaklılarına karşı verdikleri zarardan sorumludurlar.*" ifadelerine yer vermektedir.

İklim değişikliği ile mücadelede bir yol haritası belirlemek için kuşkusuz iklim değişikliğinin mevcut ve muhtemel risklerinin belirlenmesi, bu

riskler karşısında atılabilecek adımların tespit edilmesi, eylem planları hazırlanması ve bu planlar doğrultusunda gerekli alt yapı çalışmalarına başlanması gerekmektedir.

Türkiye için iklim değişikliği riskleri, 'Fiziksel Riskler' (aşırı hava olayları gibi akut riskler ve deniz seviyesinin yükselmesi ve yağış düzenindeki değişiklikler gibi kronik riskler dahil), 'Geçiş Riskleri' (iklim politikaları, teknoloji, tüketici tercihleri ve finansal piyasa beklentileri dahil) ve BDDK'nın 2022-2025 Sürdürülebilir Bankacılık Strateji Planında yer alan 'Nominal Riskler olarak sınıflandırılmaktadır. Bu risklerin kuruluşlar için potansiyel olarak ciddi finansal sonuçları olduğu düşünülmektedir.

BDDK'nın ilgili raporunda, Türk bankacılık sektörünün fosil yakıtı dayalı enerji üretimi, çimento, demir-çelik, alüminyum, gübre, ulaştırma ve inşaat sektörleri ve ilgili sektörlerde önemli geçiş risklerine maruz kaldığı tespit edilmiştir. 2026 yılından itibaren hayata geçecek olan AB 'Karbon Sınır Ayarlama Mekanizması' da bu anlamda önemli bir risk olarak değerlendiriliyor.

Şirketler iklim değişikliğini yönetim kurulu düzeyinde giderek daha fazla tartışmaktadır. Karbon Saydamlık Projesi (CDP) tarafından 2021 yılında yayınlanan 'Türkiye İklim Değişikliği ve Su Raporu'na göre, ankete katılan şirketlerin her yönetim kurulu toplantısında iklimle ilgili konuları gündeme aldıkları belirtilmiştir. 2020'de bu oran %33 ile toplam 18 iken 2021'de %54'e (34 şirket) çıkmıştır. Raporla, Türkiye'de raporlama yapan şirketlerin %97'sinin iklim değişikliği ile ilgili risk tanımladığı belirtiliyor.⁸ Bu anlamda Türkiye'deki şirketlerin iklim değişikliği bilincinin her geçen gün arttığı söylenebilecektir.

Yönetim kurulunun iklim değişikliği risklerini gündemine alması, bu konudaki mevzuat çalışmalarını takip etmesi, mevzuatın gerektirdiği yükümlülüklerle uygun hareket etmesi ve şirket faaliyetlerinin sürdürülebilirlik ilkeleri doğrultusunda yeniden yönlendirilmesi, yasal bir zorunluluk olmasa bile her yöneticinin özen yükümlülüğü kapsamındadır. Çünkü şirketlerin değişen koşullara uyum sağlayabilmeleri ve varlıklarını sürdürebilmeleri,

⁶ Sürdürülebilir Bankacılık Stratejik Planı için bkz, <<https://www.alomaliye.com/wp-content/uploads/2021/12/2022-2025-stratejik-bankacilik.pdf>>.

⁷ 6102 sayılı Türk Ticaret Kanunu için bkz, <<https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6102-20130328.pdf>>.

⁸ CDP'nin Türkiye 2021 İklim Değişikliği ve Su Raporu için bkz, <https://cdpturkey.sabanciuniv.edu/sites/cdpturkey.sabanciuniv.edu/files/cdp_climate_change_and_water_report_2021-turkey_edition.pdf>.

yöneticilerinin öngörülerine ve risklere karşı alacakları önlemlere bağlıdır.

Yöneticilerin Açıklama Yükümlülükleri

Türkiye'de 'Sera Gazı Emisyonlarının Takibi Hakkında Yönetmelik' 17 Mayıs 2014 tarihli ve 29003 sayılı Resmi Gazete'de yayınlanmış, 31.05.2017'de yapılan değişiklik ile son halini almıştır.⁹ Yönetmelik uyarınca elektrik, buhar üretimi, petrol rafinerileri, petrokimya, çimento, demir-çelik, alüminyum, tuğla, seramik, kireç, kağıt ve cam üretimi gibi enerji yoğun sektörlerin imalat sektörü temsilcilerinin yıllık sera gazı emisyonlarını düzenli olarak raporlaması ve doğrulamasına ilişkin ilke ve esaslar belirlenmiştir.

Türkiye'deki sermaye piyasasında düzenleyici ve denetleyici otorite olan SPK, yatırımcıların hak ve çıkarlarını koruyarak sermaye piyasalarının güvenli, adil ve etkili bir şekilde çalışmasını sağlamayı amaçlamaktadır. SPK, iyi kurumsal yönetim uygulamalarının adil ve düzenli işleyen sermaye piyasalarının altyapısını teşkil ettiği görüşündedir. Bu nedenle, 2003 yılında Kurumsal Yönetim İlkeleri ilk kez kamuya duyurulmuş ve sonraki dönemlerde yayımlanan tebliğler ile bu ilkeler güncellenmiştir.

Payları Borsa İstanbul'da işlem gören şirketler tarafından benimsenmesi beklenen zorunlu ve zorunlu olmayan kurumsal yönetim ilkeleri 'II-17.1 Sayılı Kurumsal Yönetim Tebliği'nde tanımlanmaktadır.¹⁰ Kurumsal yönetim uygulamaları ve kamuyu aydınlatma uygulamalarının geliştirilmesini amaçlayan SPK, şirketlerin zorunlu ilkelere uyup uymadıklarını ve zorunlu olmayan ilkelere aykırılıklarını hususlara ilişkin açıklamaları yakından izlemektedir.

Ekim 2020'de SPK tarafından yayınlanan 'Kurumsal Yönetim Tebliği', halka açık şirketlerin uymaları ve açıklamaları beklenen temel Çevresel, Sosyal ve Kurumsal Yönetim (ÇSY) ilkelerini içeren 'Sürdürülebilirlik İlkelerine Uyum Çerçevesi'ni içermektedir. Kurumsal Yönetim İlkeleri, ÇSY risklerinin,

fırsatlarının ve ilgili politikaların belirlenmesi, şirketin kurumsal stratejisinin ÇSY politikaları, riskleri ve fırsatları ile nasıl uyumlu olduğu ve şirketin sürdürülebilirlik performansı, hedefleri ve eylemleri dahil birçok konuyu kapsamaktadır. Bu ilkelerin uygulanması isteğe bağlı olmakla birlikte, uygulanıp uygulanmadığının 'Uy ya da Açıkla' ilkesi temelinde raporlanması zorunludur.¹¹ Diğer bir deyişle; bu ilkelerin uygulanması yasal bir zorunluluk değildir. Ancak şirketler bu ilkelere hangilerine uyulduğunu, hangilerine uyulmadığını ve uymama nedenlerini açıklamak zorundadır.

AB iklim hedefleri ve düzenlemelerinin bir sonucu olarak bazı şirketler için sera gazı emisyonlarının raporlanması ve bir Türk Emisyon Ticareti Sistemine geçiş gerekli olabilecektir. '55'e Uyum' paketinin bir parçası olarak, Avrupa Komisyonu tarafından Temmuz 2021'de yayınlanan 'Sınırdaki Karbon Düzenleme Mekanizması', 2026 yılında sona erecek olan geçiş dönemi sonrasında AB üye ülkelerinde ithal edilen malların, mallara eşdeğer bir karbon fiyatına tabi olmasını zorunlu kılacaktır.¹² Bu yükümlülük, dolaylı olarak AB üyesi ülkelere ihracat yapan ülkeleri kapsadığından çimento, elektrik, alüminyum, demir, çelik, gübre ve sektörlerinde Türkiye'de mal ihraç eden şirketlerin, ihraç edilen malın üretim sürecinde oluşan doğrudan ve dolaylı emisyonları 2023'ten itibaren üçer aylık dönemler itibarıyla raporlayacakları ve yurt dışında ödenen karbon bedellerini detaylandıracakları öngörülmektedir.

Ayrıca Çevre, Şehircilik ve İklim Değişikliği Bakanı Murat Kurum, sera gazı emisyonlarını azaltma hedeflerine yönelik iddiaların artmasıyla Niyet Edilen Ulusal Katkı Beyanı'nın 27. Taraflar Konferansı öncesinde güncelleneceğini belirtmiştir. Bu kapsamda, 2053 yılına kadar net sıfır emisyon hedefi kapsamında verilen taahhütlerin yerine getirileceğini ve sera gazı azaltımına katkı sağlamak için 'Emisyon Ticareti Sistemi'nin uygulanacağını belirtti.¹³ Emisyon Ticareti Sistemi, ilgili sistemdeki tesislerin sektör ve sera gazı emisyon kapasitesi bazında

⁹ Sera Gazı Emisyonlarının Takibi Hakkında Yönetmelik için bkz, <<https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=19678&MevzuatTur=7&MevzuatTertip=5>>.

¹⁰ II-17.1 Sayılı Kurumsal Yönetim Tebliği için bkz, <<https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=19225&mevzuatTur=Tebliğ&mevzuatTertip=5>>.

¹¹ Sermaye Piyasası Kurulu, Sürdürülebilirlik İlkeleri Uyum Çerçevesi için bkz, <<https://www.spk.gov.tr/Sayfa/Dosya/1332>>.

¹² European Commission, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality (14 July 2021) metni için bkz, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN>>.

¹³ Avrupa Birliği İle Yüksek Düzeyli İklim Diyalogu için bkz, <<https://ab.csb.gov.tr/avrupa-birligi-ile-yuksek-duzeyli-iklim-diyalogu-haber-268075>>.

bir üst sınır değerinin belirlenmesini ve bu üst sınır için izin belgesi hazırlanmasını ifade etmektedir. Bu nedenle, Türk şirketlerinin

emisyonlarını 'Emisyon Ticareti Sistemi'nin bir getirisi olarak raporlamaları gerekebilir

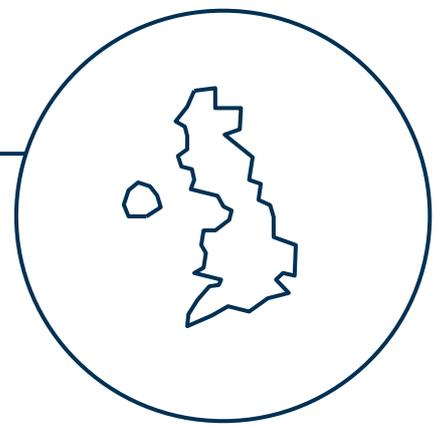
Yöneticiler için Uygulanabilir Öneriler

Türkiye'de Çevre, Şehircilik ve İklim Değişikliği Bakanlığı, SPK, BDDK ve sair düzenleyici ve denetleyici kurumların iklim değişikliği ve risklerine yaklaşımı göz önüne alındığında şirketlerin ve yöneticilerinin ticari uygulamalarında ve kamuoyuna bildirimlerinde şu hususlara dikkat etmesi önerilmektedir:

- Yönetim ve/veya yönetim kurulu düzeyinde iklim değişikliği ve sürdürülebilirlik ile mücadele konusunda çalışacak ekipler oluşturmak, bu konudaki risk ve fırsatları belirlemek, şirket içinde raporlama yapmak, iklim değişikliği risk ve fırsatlarının öngörülmesinin şeffaflık ilkesi doğrultusunda Yönetim Kurulunun özen yükümlülüğü kapsamında olduğunu kabul etmek;
- Sürdürülebilir ekonomi ilkeleri kapsamında yeşil üretime geçiş çalışmaları yapılması, yenilenebilir enerji kaynaklarının üretim sektöründe aktif olarak kullanılması, bu yöndeki alt yapı çalışmalarının hızlandırılması, alternatif hammadde ve yakıt kullanımının artırılması ve emisyon azaltımını sağlayacak tedbirlerin alınması, bu amaçlara ulaşabilmek adına kısa, orta ve uzun vadeli eylem planları hazırlanması;
- Şirket faaliyetleri sonucunda açığa çıkan sera gazı emisyonlarının Türk Standartları Enstitüsü (TSE) tarafından yayınlanan ISO 14064 Sera Gazı Raporlama ve Doğrulama Standardı'na göre hesaplanması, doğrulanması, sera gazı emisyonlarının izlenmesi ve raporlanması hakkındaki mevzuat uyarınca ilgili makamlara raporlanması ve azaltımı konularında azami özen gösterilmesi;
- Kanun koyucunun iklim değişikliği ile ilgili yapılması planlanan mevzuat hazırlıklarının takibi, yürürlüğe giren düzenlemelerin şirketler açısından getirdiği yükümlülüklerin analiz edilmesi, bu yükümlülüklerle uygun davranılması ve ihtiyaç duyulması halinde bu hususlarda uzman görüşlerinden faydalanılması.

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The Bank of England Prudential Regulation Authority (PRA), the Financial Conduct Authority (FCA), the Financial Reporting Council (FRC), and the Pensions Regulator (TPR) released a joint statement in 2019 setting out their position on climate change:

Climate change is one of the defining issues of our time. We recognise it presents far-reaching financial risks relevant to our mandates from both physical factors, such as extreme weather events, and transition risks that can arise from the process of adjustment to a carbon-neutral economy. Companies should consider the likely consequence of climate change on their business decisions, in addition to meeting their responsibility to consider the company's impact on the environment.¹

In October 2021, the FCA, PRA, TPR and FRC released a further joint statement on the publication of the Climate Change Adaptation Reports by the FRA, PRA and TPR under the *Climate Change Act 2008*.² In these reports, the organisations each emphasised the risks posed by climate change to their regulatory objectives, and how they will integrate climate change considerations into their guidance and supervisory roles.³

In June 2021, the Bank of England announced its Climate Biennial Exploratory Scenario

(CBES), a stress test to assess the resilience of the U.K. financial system and individual institutions.⁴ The results of the first CBES were published in May 2022; the Bank of England found that banks and insurers had taken some steps to integrate climate risk management into their processes, but that more remained to be done, and that if no changes were made to business models, climate impacts could cause an equivalent to a 10-15% drag on profits each year.⁵ A second round of the CBES was launched in February 2022.⁶

It is clear that U.K. regulators view climate change as a financially material risk. Well-advised boards should seek to incorporate climate risk into their decision-making.

Directors' Duties and Climate Change

Historically, company directors owed duties to their company under common law. However, in 2006, directors' duties were codified in the *Companies Act 2006*.⁷ Two relevant duties are the duty to promote the success of the company for the benefit of its members as a whole (section 172), and the duty to exercise reasonable care, skill, and diligence (section 174), the latter of which is not fiduciary in nature.⁸ The duty to promote the success of the company has been described as the 'principal

¹ Joint statement on climate change by the Bank of England, Financial Conduct Authority, Financial Reporting Council and the Pensions Regulator (2 July 2019) <<https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/publication/2019/joint-statement-on-climate-change.pdf>>.

² Joint statement by the FCA, PRA, TPR and FRC on the publication of Climate Change Adaptation Reports (28 October 2021) <<https://www.fca.org.uk/news/statements/joint-statement-fca-pra-tpf-frc-climate-change-adaptation-reports>>.

³ PRA, Climate-related financial risk management and the role of capital requirements: Climate Change Adaptation Report 2021 (28 October 2021) <<https://www.bankofengland.co.uk/prudential-regulation/publication/2021/october/climate-change-adaptation-report-2021>>; FCA, FCA Climate Change Adaptation Report (28 October 2021) <<https://www.fca.org.uk/publications/corporate-documents/fca-climate-change-adaptation-report>>; TPR, Climate Change Adaptation Report (28 October 2021)

<<https://www.thepensionsregulator.gov.uk/en/document-library/corporate-information/climate-change-and-environment/climate-adaptation-report>>.

⁴ Bank of England, Key elements of the 2021 Biennial Exploratory Scenario: Financial risks from climate change (8 June 2021) <<https://www.bankofengland.co.uk/stress-testing/2021/key-elements-2021-biennial-exploratory-scenario-financial-risks-climate-change>>.

⁵ Bank of England, Results of the 2021 Climate Biennial Exploratory Scenario (CBES) (24 May 2022) <<https://www.bankofengland.co.uk/stress-testing/2022/results-of-the-2021-climate-biennial-exploratory-scenario>>.

⁶ Bank of England, Bank of England launches a second round of the Biennial Exploratory Scenario (BES) exercise on financial risks from climate change (9 February 2022) <<https://www.bankofengland.co.uk/news/2022/february/boe-launches-second-round-of-biennial-exploratory-scenario>>.

⁷ See generally *Companies Act 2006* (UK) sections 171-177.

⁸ *Maidment v Attwood & Ors* [2012] EWCA Civ 998, [22].

duty',⁹ consistent with the primacy of the duty of loyalty at common law.¹⁰ Section 174 further informs the exercise of section 172 by directors by setting standards for the manner in which directors are expected to act and the knowledge, skill and experience they should hold.

Given the breadth and potential materiality of climate change-related risks, it seems increasingly likely that directors should consider these when fulfilling their duty under section 172.¹¹ Discussing this in August 2019, Lord Sales, Justice of the U.K. Supreme Court, delivered a speech on directors' duties in respect of climate change.¹² Lord Sales recognised the links between directors' duties and climate change, noting that general fiduciary and duty of care obligations may require directors to have regard to climate-related risks and to take action to reduce their contribution to climate change.

Additionally, in promoting the success of the company under section 172, directors are required to "*have regard*" to a non-exhaustive list of factors. This includes "*the impact of the company's operations on the community and environment*" (section 172(1)(d)) which captures consideration of climate change issues.

Therefore, when fulfilling their duty to promote the success of their company, directors should consider climate change risks both in light of the general duty under section 172 and the requirement to have regard to climate change issues. A well-counselled director should ensure that they consider climate-related issues in good faith as they carry out their role, using their own skill and judgment, and having regard to the likely long-term consequences of the decision being considered.

The application of these duties with respect to climate change is the subject of ongoing litigation. In March 2022, the UK NGO

ClientEarth announced that it had issued a pre-action letter to the board of Shell plc, indicating its intention to bring a derivative claim against the board alleging that the directors had breached their duties to act in the best interests of the company and with due skill, care and diligence in failing to develop and implement a climate strategy that aligns with the Paris Agreement goals, increasing its risk of stranded assets and having to make write-downs.¹³

Directors' Disclosure Obligations and Climate Change

Climate-related disclosures are also required to be integrated into disclosures on which directors are required to sign off, including Strategic Reports, the section 172 statement, and the financial statements.

The Strategic Report must include information about environmental matters, including the impact of the company's business on the environment, with additional disclosures in this regard being required following implementation of the EU Non-Financial Reporting Directive in the U.K. The Strategic Report must also include a section 172 statement on how the board has complied with its duty to promote the success of the company, including by having regard to the impacts of the company on the environment. The FRC published guidance in July 2018 on companies' annual Strategic Reports, advising companies to report on climate-related risk where "*material*".¹⁴

The U.K. government's July 2019 Green Finance Strategy set out its expectation that large asset owners and listed companies should disclose in line with the Taskforce on Climate-related Financial Disclosures (TCFD)

⁹ See Rosemary Teele Langford, 'The Duty of Directors to Act Bona Fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared' 11(1) *Journal of Corporate Law Studies* (2011) 215, 234.

¹⁰ *Bristol and West Building Society v Mothew* [1998] Ch 1, 16 (Millet LJ): the 'obligation of loyalty' is the distinguishing, 'core' obligation of a fiduciary.

¹¹ See Alexia Staker and Alice Garton, Commonwealth Climate and Law Initiative, *Directors' Liability and Climate Risk: United Kingdom - Country Paper* (April 2018) <<https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/04/CCLI-UK-Paper-Final.pdf>>.

¹² Lord Sales, 'Directors' duties and climate change: keeping pace with environmental challenges,' (27 August 2019) <<https://www.supremecourt.uk/docs/speech-190827.pdf>>

¹³ See ClientEarth, Redirecting Shell <<https://www.clientearth.org/redirecting-shell/#theclaim>>.

¹⁴ Financial Reporting Council Guidance on the Strategic Report (July 2018): 44-45 <<https://www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf>>. See also Janis Sarra, "Following the Footpath to Mandatory TCFD Disclosure in the United Kingdom: Lessons for Canadian and Other Regulators", (forthcoming June 2021, Canada Climate Law Initiative (ubc.ca)).

recommendations by 2022,¹⁵ and rules enacting this have now been put in place (see below). In November 2020, the U.K. government announced its intention that TCFD-aligned disclosure would be mandatory across the economy by 2025, going beyond the 'comply or explain' approach.¹⁶

Certain listed companies have been required to produce disclosures aligned with the TCFD recommendations since January 2021. In December 2020, the FCA implemented amendments to the listing rules to implement TCFD disclosure reporting for premium-listed companies on the London Stock Exchange (other than investment companies) on a comply or explain basis for financial years starting on or after 1 January 2021.¹⁷

In December 2021, the FCA published rules expanding the scope of these requirements to include standard-listed companies and asset managers, life insurers and FCA-regulated pension providers.¹⁸ These rules apply from 1 January 2022 (although asset managers and asset owners will have a phased implementation, with the rules initially applying to the largest firms and coming into effect for smaller firms one year later).

In January 2022, the U.K. government published regulations requiring large U.K. incorporated companies to disclose climate-related information. *The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022* (the Climate Disclosure Regulations) amends sections 414C, 414CA and 414 CB of the *Companies Act 2006* to

require listed companies and those with a turnover greater than £500 million to provide a non-financial and sustainability information statement in their Strategic Report, and applies to disclosures made in financial years beginning on or after 6 April 2022.¹⁹ This statement must include climate-related information including: the actual and potential climate-related risks and opportunities arising in connection with their operations, and the time periods over which these are assessed; the impacts of climate-related risks and opportunities on their business model; their governance arrangements in assessing and managing climate-related risks and opportunities; their process for identifying these risks and opportunities; and an analysis of the resilience of the company's business model under different climate scenarios. The Department for Business, Energy and Industrial Strategy (BEIS) has produced guidance on complying with these requirements.²⁰

The disclosures required under the Climate Disclosure Regulations are less extensive than those introduced under the FCA rules (see above),²¹ but the FCA rules are on a comply or explain basis rather than being fully mandatory. BEIS' guidance on the Climate Disclosure Regulations also explains the overlap between the FCA rules and the Climate Disclosure Regulations, noting that UK-registered listed companies are likely to be subject to both sets of requirements. In such a case, BEIS notes that disclosure in a manner consistent with the TCFD recommendations and recommended disclosures in line with the FCA rules are likely

¹⁵ HM Treasury and Department for Business, Energy & Industrial Strategy, Green Finance Strategy (July 2019) <<https://www.gov.uk/government/publications/green-finance-strategy>>. The UK government has recently concluded a consultation on an update to the Green Finance Strategy, including questions on disclosures including the importance of scope 3 emissions data for investors and the role of the UK government in supporting disclosures. See UK government, Update to Green Finance Strategy: Call for Evidence (11 May 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074650/green-finance-strategy-cfe.pdf>.

¹⁶ UK Government, Chancellor sets out ambition for future of UK financial services (9 November 2020) <<https://www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services>>.

¹⁷ FCA, PS20/17: *Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations* (December 2020) <<https://www.fca.org.uk/publication/policy/ps20-17.pdf>>.

¹⁸ FCA, PS21/23: *Enhancing climate-related disclosures by standard listed companies* (December 2021) <<https://www.fca.org.uk/publication/policy/ps21-23.pdf>>; FCA, PS21/24: *Enhancing climate-related disclosures by asset*

managers, life insurers and FCA-regulated pension providers (December 2021) <<https://www.fca.org.uk/publication/policy/ps21-24.pdf>>.

¹⁹ The companies which are within the scope of the regulations are traded companies, AIM-listed companies, banking companies, insurance companies, and companies with an annual turnover higher than £500 million. Similar regulations have been made in respect of limited liability partnerships under the *Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022*.

²⁰ Department for Business, Energy & Industrial Strategy, Green Finance Strategy, Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs - Non-binding guidance (February 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf>.

²¹ *The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022* disclosures require reporting in line with the four 'pillars' of the TCFD recommendations (Governance, Strategy, Risk Management and Metrics and Targets), rather than requiring disclosures in line with the 11 specific TCFD recommendations within these categories, which are required by the listing rules.

to fulfil the requirements of the Climate Disclosure Regulations.²²

From 1 October 2021, occupational pension schemes have been required by new regulations to make TCFD-aligned disclosures, as well as put governance and management structures in place governance, strategy and risk management measures in respect of climate change-related risks.²³ BEIS has noted that the Climate Disclosure Regulations are likely to inform the disclosures of pension schemes under these regulations.²⁴

The FCA is also sharing views and expertise internationally through its co-chairing a workstream on disclosure as part of IOSCO's Sustainable Finance Task Force.²⁵

Climate-related issues may be required to be included in companies' financial statements, on which the board is required to sign-off. The FRC has published a thematic review on climate change reporting in November 2020 which identified that improvements were required.²⁶ It supported the introduction of global standards on non-financial reporting, but, as an interim step, encouraged public interest entities to report against the TCFD's recommended disclosures and the Sustainability Accounting Standards Board metrics for their sector. In November 2021, the FRC published a factsheet explaining how climate change-related matters may impact financial statements prepared under U.K. Generally Accepted Accounting Principles.²⁷

Practical Implications for Directors

The focus on climate risk by U.K. regulators and the new disclosure requirements is likely to mean that directors of companies which are subject to these requirements will be required to consider climate change-related risks in order to properly fulfil their legal duties. In order to ensure high-standards of governance, well-counselled boards will:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

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²² Department for Business, Energy & Industrial Strategy, Green Finance Strategy, Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs - Non-binding guidance (February 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf>.

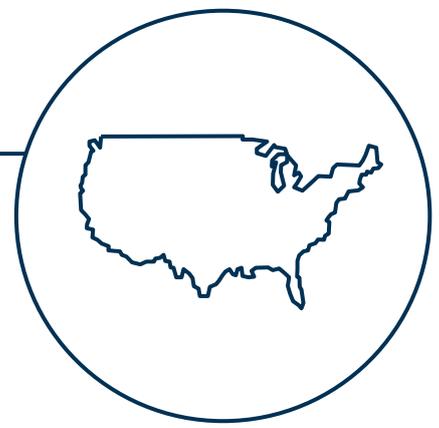
²³ *Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021*.

²⁴ Department for Business, Energy & Industrial Strategy, Green Finance Strategy, Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs - Non-binding guidance (February 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf>.

²⁵ FCA, Climate change and sustainable finance (21 April 2021) <<https://www.fca.org.uk/firms/climate-change-sustainable-finance>>.

²⁶ FRC, Climate Thematic (November 2020) <<https://www.frc.org.uk/getattachment/ab63c220-6e2b-47e6-924e-8f369512e0a6/Summary-FINAL.pdf>>.

²⁷ FRC, FRS 102 Factsheet 8: Climate-related Matters (November 2021) <<https://www.frc.org.uk/getattachment/63c18c7a-6f3d-42a8-9f6c-ce181c8f287a/Fact-Sheet-8-FRS-102-Climate-FINAL.pdf>>.



Climate change has become a part of both U.S. foreign and domestic policy under the Biden administration. On his first day of office, 20 January 2021, President Biden declared support for the Paris Climate Agreement and its threefold goals of “*a safe global temperature, increased climate resilience, and financial flows aligned with a pathway toward low greenhouse gas emissions and climate-resilient development.*”¹ His climate change Executive Order on 27 January 2021 established a process to embed climate risk mitigation in every executive agency of the federal government, including establishing an inter-agency coordinating process and appointing both a foreign and domestic policy lead in newly-established positions within the White House.²

In October 2021, the White House issued a roadmap to Build a Climate Resilient Economy, where it acknowledged that “*Climate change poses serious and systemic risks to the U.S. economy and financial system*”.³ The report presents a climate risk accountability framework that identifies core principles for addressing climate-related financial risk, following with a roadmap and implementation strategy for action. In December 2021, President Biden signed an Executive Order for federal sustainability, pledging to reduce emissions across all federal operations, invest in local clean energy industries and manufacturing, and create clean, healthy and resilient communities.⁴

Secretary of the Treasury Janet Yellen has stated that climate change will be a priority, creating a hub within Treasury that will focus on

financial system-related risk posed by climate change, and tax policy incentives to effect change.⁵ In a speech on 21 April 2021, she vowed to build on President Biden’s ‘whole of government’ approach with a “*whole of economy*” approach⁶ and released a Climate Action Plan in July.⁷ On 20 May 2021, President Biden issued an Executive Order on Climate Change Financial Risk, with responsibilities for Treasury, the Office of Management and Budget (OMB), and the Financial Stability Oversight Council (FSOC) and its constituent agencies.⁸ Among its significant aspects are initiatives to:

- (1) require the development of a government-wide strategy to assess, measure, mitigate, and disclose climate change financial risk across the Federal Government;
- (2) request a financial analysis of the capital needed to move the American economy to net-zero by 2050;
- (3) require the Treasury to work with FSOC and its constituent agencies to identify actions within each agency to identify, measure, mitigate, and disclose climate change financial risk;
- (4) identify financial risk from climate within the insurance industry;

¹ The White House, ‘Paris Climate Agreement: Acceptance on Behalf of the United States of America’ (20 January 2021) <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/>>.

² The White House, *Executive Order on Tackling the Climate Crisis at Home and Abroad* (27 January 2021), <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>>.

³ The White House, ‘U.S. Climate-Related Financial Risk Executive Order 14030: A roadmap to build a climate-resilient economy’ (14 October 2021) <<https://www.whitehouse.gov/wp-content/uploads/2021/10/Climate-Finance-Report.pdf>>.

⁴ The White House, ‘Fact Sheet: President Biden signs executive order catalyzing America’s clean energy economy through federal sustainability’ (8 December 2021) <[https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-](https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/)

[executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/](https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/)>.

⁵ Reuters, ‘Yellen says would appoint senior climate official at Treasury’ (19 January 2021), <<https://www.reuters.com/article/us-usa-biden-yellen-climate-idUSKBN29O2B3>>.

⁶ U.S. Department of the Treasury, ‘Secretary of the Treasury Janet L. Yellen’s Remarks to the Institute of International Finance’ (21 April 2021) <<https://home.treasury.gov/news/press-releases/jy0139>>.

⁷ U.S. Department of the Treasury, ‘Climate Action Plan’ (July 2021) <<https://home.treasury.gov/system/files/136/Treasury-Climate-Action-Plan-July-2021-Final.pdf>>.

⁸ The White House, *Executive Order on Climate Related Financial Risk* (20 May 2021) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>>.

- (5) identify actions that can be taken by the Department of Labor to protect pension savings and Federal pension insurance from climate change financial risk; and
- (6) identify how the Federal Government can incorporate climate change financial risk into its lending, risk underwriting, procurement, and budgeting.⁹

On 21 October 2021, the FSOC issued a report on climate-related financial risk, noting that “[t]he increasing economic effects of climate change imply that climate-related financial risks are an emerging threat to the financial stability of the United States”, and recommending that regulators of financial institutions to require increased climate change-related disclosures and the use of scenario analysis to identify climate-related risks.¹⁰

These actions are consistent with the conclusions of and actions by the Federal Reserve Bank Board of Governors, which for the first time identified climate change as a risk to the American financial system in its Financial Stability Report (Report) of November 2020.¹¹ As part of its Report, the Federal Reserve stated that “*Federal Reserve supervisors expect banks to have systems in place that appropriately identify, measure, control, and monitor all of their material risks, which for many banks are likely to extend to climate risks.*”¹² In October 2021, the Federal Reserve Board issued its annual financial stability report, assessing the resilience of the U.S. financial system. It noted that climate change “*poses significant challenges for the global economy and the financial system*”.¹³

A subcommittee of the U.S. Commodity Futures Trading Commission has likewise recognised the “*serious emerging risks*” to the U.S. financial system posed by climate change and has urged U.S. financial regulators to “*move urgently and decisively to measure, understand, and address these risks*”.¹⁴

Additionally, the Federal Deposit Insurance Corporation (FDIC), which insures consumer deposits and supervises financial institutions for financial stability and consumer protection, has stated that addressing the financial risks posed by climate change is a top priority for 2022,¹⁵ and has produced draft principles for climate-related financial risk management for large financial institutions, which provide a framework for the management of exposures to climate-related financial risks consistent with existing FDIC rules and guidance.¹⁶

Directors' Duties and Climate Change

Directors' fiduciary duties are sourced in state corporate legislation and the common law, as developed by the courts. A majority of U.S. public companies are incorporated in the state of Delaware. Directors' core fiduciary duties are the duty of loyalty, which includes a duty to act in good faith without conflicts of interests, and in the best interest of the company; and the duty of care, which means making decisions on an informed basis after reasonable inquiry and deliberation. The duty of loyalty also includes a duty to provide adequate oversight of legal compliance, including by ensuring that reasonable information and reporting systems are implemented and maintained to provide the board and senior management with timely, accurate information to support informed decision-making. This ancillary duty is often

⁹ *Ibid.*

¹⁰ Financial Stability Oversight Committee, 'Report on Climate-Related Financial Risk' (21 October 2021) <<https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>>

¹¹ United States Federal Reserve Bank Board of Governors, *Financial Stability Report* (November 2020), 59-60, <<https://www.federalreserve.gov/publications/2020-november-financial-stability-report-purpose.htm>>.

¹² *Ibid.*

¹³ Board of Governors of the Federal Reserve System, 'Financial Stability Report' (November 2021) <<https://www.federalreserve.gov/publications/files/financial-stability-report-20211108.pdf>>.

¹⁴ Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission, 'Managing Climate Risk in the U.S. Financial

System: Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission' (September 2020), ii, <<https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>>

¹⁵ FDIC, Acting Chairman Martin J. Gruenberg Announces FDIC Priorities for 2022 (7 February 2022) <<https://www.fdic.gov/news/press-releases/2022/pr22015.html>>.

¹⁶ FDIC, Request for Comment on Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions (30 March 2022) <<https://www.fdic.gov/news/financial-institution-letters/2022/fil22013.html>>.

called the board's *Caremark* duty based on the case that established it.¹⁷

There has been an increasing focus on *Caremark* duties since the 2019 decision in *Marchand v. Barnhill*,¹⁸ allowing a duty of oversight claim to go forward, giving guidance on directors' responsibilities for oversight of "mission critical" operations and compliance risk. In *Marchand*, a case involving the Blue Bell ice cream manufacturer, the Court allowed the case to go forward because the plaintiff had provided enough facts to potentially prove a "dearth of any board-level effort at monitoring" to ensure board oversight of health, safety, and sanitation controls.¹⁹ *Marchand* may signal a doctrinal development in oversight liability that both expands the scope of the doctrine to operational oversight over "mission critical" aspects of the business, and expresses higher expectations of board vigilance regarding such core operations. This conclusion is consistent with four other recent oversight decisions applying *Marchand* to allow cases to proceed.²⁰

These cases might provide scope for fiduciary liability if a board has not ever turned its collective attention to analysing the relevance of climate change risks to the company, its operations, long-term strategy, or disclosure. Directors and officers may be liable for a breach of their duty of oversight where they have utterly failed to implement any reporting or information system or controls or where they have consciously failed to monitor such a system or controls. In the context of climate-related risks, oversight liability related to climate change may arise where directors and officers:

fail to consider or oversee the implementation of climate-related legal risk controls; fail to monitor mission-critical regulatory compliance (either specific climate change-related regulations or existing regulations which require consideration or disclosure of climate change risks, such as securities law); or fail to monitor climate-related mission-critical business risks (although liability for a failure to monitor business risks has not yet been imposed in a Delaware case).²¹

In exercising their fiduciary duties, directors are charged with maintaining a long-term focus. In a 2017 case involving a conflict between short-term and longer-term shareholder interests, the Delaware Chancery Court confirmed the "*the fiduciary relationship requires that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term ...*"²² It added, "*The fact that some holders of shares might be market participants who are eager to sell and would prefer a higher near-term market price likewise does not alter the presumptively long-term fiduciary focus.*"

Directors' Disclosure Obligations and Climate Change

Public companies' disclosure obligations are governed by federal securities laws²³ and regulations.²⁴ In 2010, the U.S. Securities and Exchange Commission (SEC) issued specific guidance to public companies to clarify their climate change-related disclosure obligations pursuant to risk factors disclosure

¹⁷ *In re: Caremark Int'l Derivative Litigation*, 698 A.2d 959 (Ch. Ct. Del. 1996). *Caremark* construed the duty of oversight as part of the board's duty of care, but a later Delaware Supreme Court opinion reconceptualized it as an aspect of the duty of loyalty, not care. See *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

¹⁸ *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019). The board had exercised no oversight of operations or food safety in the company's ice cream plants, leading to a *listeria* outbreak in which three people died, and the company's entire inventory had to be recalled and destroyed. These facts were sufficient to allege a breach of the board's duty of loyalty under *Caremark*. The parties agreed to a \$60 million settlement less than a week prior to the scheduled commencement of the trial: Jennifer F Longhurst and Joseph DiPonio, 'Canada: Canadian Directors Should Heed Recent US Caremark Litigation', *Mondaq* (18 June 2020) <<https://www.mondaq.com/canada/directors-and-officers/954780/canadian-directors-should-heed-recent-us-caremark-litigation->>.

¹⁹ *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

²⁰ *In re Clovis Oncology Inc. Derivative Litigation*, C.A. No. 2017-0222-JRS (2019) (failure of oversight of pharmaceutical company's research protocols); *Hughes v. Xiaoming Hu*,

C.A.No.2019-0112-JTL (Apr. 27, 2020) (failure of oversight over audited financial statements and internal accounting function); *Teamsters Local 443 Health Servs. v. Chou*, C.A. No. 2019-0816-SG (Del. Ch. Aug. 24, 2020) (failure of oversight over indirect subsidiary's criminal activities regarding handling of pharmaceutical injections); *In re The Boeing Co. Derivative Litig.* No. 2019-0907-MTZ, 2021 WL 4059931 (Del. Ch. Sept. 7, 2021) (failure to establish a monitoring system regarding aircraft safety).

²¹ See Commonwealth Climate and Law Initiative, *Fiduciary Duties and Climate Change in the United States* (October 2021) <<https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States.pdf>>.

²² *Frederick Hsu Living Trust v. ODN Holding Corp.*, No. 12108-VCL, 2017 WL 1437308 (Del. Ch. Apr. 24, 2017).

²³ See generally *Securities Act of 1933* and *Securities Exchange Act 1934* (for public disclosures).

²⁴ See generally *Regulation S-K, Standard Instructions for Filing Forms under Securities Act of 1933, Securities Exchange Act of 1934, and Energy Policy and Conservation Act of 1975*, 17 C.F.R. §§ 229.10-229.1016 (2020).

requirements, management discussion and analysis (MD&A) requirements, and general materiality principles. The guidance emphasised that every company should consider how climate change impacts their operations and financial statements, including both direct and indirect impacts, such as impacts on suppliers and customers. It stated that:

*Legal, technological, political, and scientific developments regarding climate change may create new opportunities or risks for registrants. These developments may create demand for new products or services, or decrease demand for existing products or services... These business trends or risks may be required to be disclosed as risk factors or in MD&A.*²⁵

The SEC identified regulatory and legislative developments at a state, federal, and transnational level that could increase or decrease prices as issues to be evaluated for disclosure, such as cap-and-trade arrangements among various states and countries, or new fuel standards. It also discussed physical changes from climate change as similarly requiring analysis, such as

increased frequency and intensity of storms having financial implications for insurance companies, property firms, and mortgage lenders, for instance.²⁶

In early March 2021, the SEC announced an enforcement task force that will focus on problems with companies' climate and ESG disclosure.²⁷ In mid-March of 2021, the SEC published a request for public input on climate and ESG disclosure.²⁸ On 21 March 2022, following this public consultation process, the SEC 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. The proposed rules would require climate-related disclosures in an issuer's registration statements and annual reports. The proposed rules would be phased in, the earliest application being for certain large companies for FY 2023.²⁹

Practical Implications for Directors

Given that regulators in the U.S. have become increasingly emphatic regarding the need for companies and their directors to adopt climate resilience measures in business practices and disclosure, and in particular the above-noted recognition of climate risk by the President, the Federal Reserve Bank Board of Governors, the U.S. Treasury, the FDIC and the SEC; obligations for the Office of Management and Budget and the Financial Stability Oversight Council to incorporate climate risk into their work across the Federal Government; and the likely coming into effect of expanded climate and ESG disclosure across the economy, particularly for financial institutions, including insurance companies, well-counselled boards will:

- a) delegate climate risk identification and evaluation to a clearly identified team in management which reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to start developing a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear

²⁵ Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change*, Release No.33-9106; 34-61469; FR-82 (8 February 2010) <<https://www.sec.gov/rules/interp/2010/33-9106.pdf>>.

²⁶ *Ibid.*

²⁷ SEC, SEC Announces Enforcement Task Force Focussed on Climate and ESG Issues (4 March 2021) <<https://www.sec.gov/news/press-release/2021-42>>.

²⁸ SEC, Public Input Welcome on Climate Change Disclosures (15 March 2021) <<https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>>.

²⁹ SEC, 'The Enhancement and Standardization of Climate-Related Disclosures for Investors' (21 March 2022) <<https://www.sec.gov/rules/proposed/2022/33-11042.pdf>>.

interim targets to 2040, 2030, and within the current rolling multi-year strategic plan, and periodically thereafter report back to the board;

- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) discuss with disclosure counsel, to develop an external engagement and communications plan and to oversee rigorous disclosure and accounting.

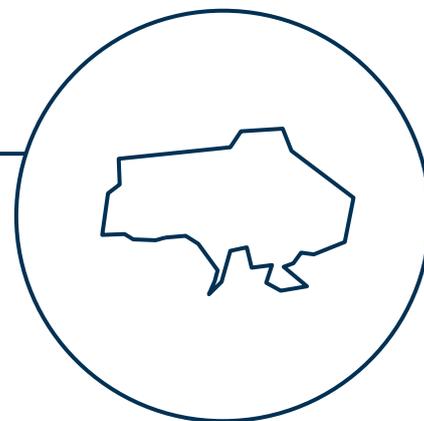
For Directors of Banks, Insurance Companies and Asset Managers

Given the special attention paid by the Treasury to the implications of climate risk for systemic financial stability, and the focus of FSOC on the insurance sector, well-counselled boards of companies in the banking, insurance, and fund management sectors will:

- a) Monitor closely the evolution of the Network of Central Banks and Supervisors for Greening the Financial System (NGFS), of which the U.S. Federal Reserve became a member in December 2020, as it develops specialized guidance for prudential regulators aimed at addressing climate-related systemic financial risk;
- b) Engage with their Chief Risk Officers to ensure the robustness of internal control systems to assess, mitigate, and monitor exposure to climate risk embedded in their portfolios of loans, insurance customers and investments, insofar as the exposure of these companies to climate risk may affect their credit quality, insurance risk profile, and market valuations;
- c) Incorporate climate climate-related scenario-modelling and stress-testing within their regular risk oversight responsibilities;
- d) Oversee innovation and product development opportunities related to expansion of the low-carbon economy; and
- e) Monitor the emergence of new disclosure criteria affecting the finance sector.

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This section has not been updated since the first edition of the *Primer* published in June 2021.

In 2018, Ukraine adopted the Low Emission Development Strategy 2050, which defines a potential pathway for economic development that takes due account of the goals set by state policy on emissions reduction and greenhouse gases emissions absorption. Implementation of this strategy will inevitably have a significant impact on the private sector. Therefore, substantial legislative and institutional developments envisaged by the strategy should be taken into account by company directors.

Directors' Duties and Climate Change

Ukrainian law¹ imposes certain general duties on directors of companies. The fundamental duties of directors include, *inter alia*, the duty to act in the best interests of their company, to act diligently and in good faith, to act within their powers. A more detailed and comprehensive list of directors' duties and authorities is set out in each company's charter.

Directors are liable for losses to their companies caused by their wilful misconduct or inaction. In such cases, the companies' founders (shareholders) may submit a derivative claim on behalf of the company.

Although the law does not explicitly provide for directors' duties to address the risk of the adverse impacts of climate change on the company, their failure to do so may lead to damage suffered by the company. In such cases, the court would decide if the damage has been caused to the company by the directors' wilful misconduct, and if the loss was therefore the directors' fault as a matter of law.

Directors' Disclosure Obligations and Climate Change

A. Climate change and environment

Directors are responsible for ensuring that their companies comply with all relevant statutory

obligations, including environment-related disclosure. In

Ukraine, environmental monitoring by the state is conducted by means of collecting and processing data on environmental matters as reported by companies. Such state statistical reporting is mandatory and covers, among others, air and water. The following discusses reporting obligations most relevant to climate change:

i. Greenhouse gas emissions

On 1 January 2021, the Law of Ukraine *On Principles of Monitoring, Reporting and Verification of Greenhouse Gas Emissions* entered into force. The law is deemed to be a step towards Ukrainian integration with the EU in terms of compliance with the EU *acquis* on environmental protection.

Companies operating equipment or facilities that produce greenhouse gases are obliged to prepare plans for monitoring their GHG emissions and submit them to the Ministry of Environment and Natural Resources of Ukraine for approval. They have to prepare annual reports on GHG emissions for verification by independent experts. The verified reports must then be further approved by the Ministry of Environment and Natural Resources of Ukraine.

According to the Ukrainian Law *On Commercial Activities with Ozone-Depleting Substances and Fluorinated Greenhouse Gases*, dated 12 December 2019, separate accounting and reporting must be made on imports, exports and use of the aforementioned substances and fluorinated greenhouse gases.

ii. Atmospheric air pollution

All companies operating stationary sources of air emissions must annually submit to the state statistical authorities a report on emissions of

¹ Law of Ukraine 'On Limited Liability and Additional Liability Companies' dated 6 February 2018, No. 2275-VIII; Law of Ukraine 'On Joint-Stock Companies' dated 17 September

2008, No. 514-VI; Civil Code of Ukraine dated 16 January 2003, No. 435-IV.

pollutants and greenhouse gases into the atmospheric air (according to form No.2-tp (air)).

The data on emissions of pollutants from mobile sources (industrial, agricultural and other machinery, automobile etc.) must be submitted separately.

B. Securities and stock exchange-related disclosures

Ukrainian companies issuing securities listed on the stock exchange are obliged to submit

annual management reports containing both financial and non-financial information characterizing the company's status and the prospects of its development. The report must include, *inter alia*, a description of the risks and uncertainties faced by the company in its business activities. In that context, we assume that any climate risk-related information may be considered by the company's management as relevant and should be disclosed in the annual management report.

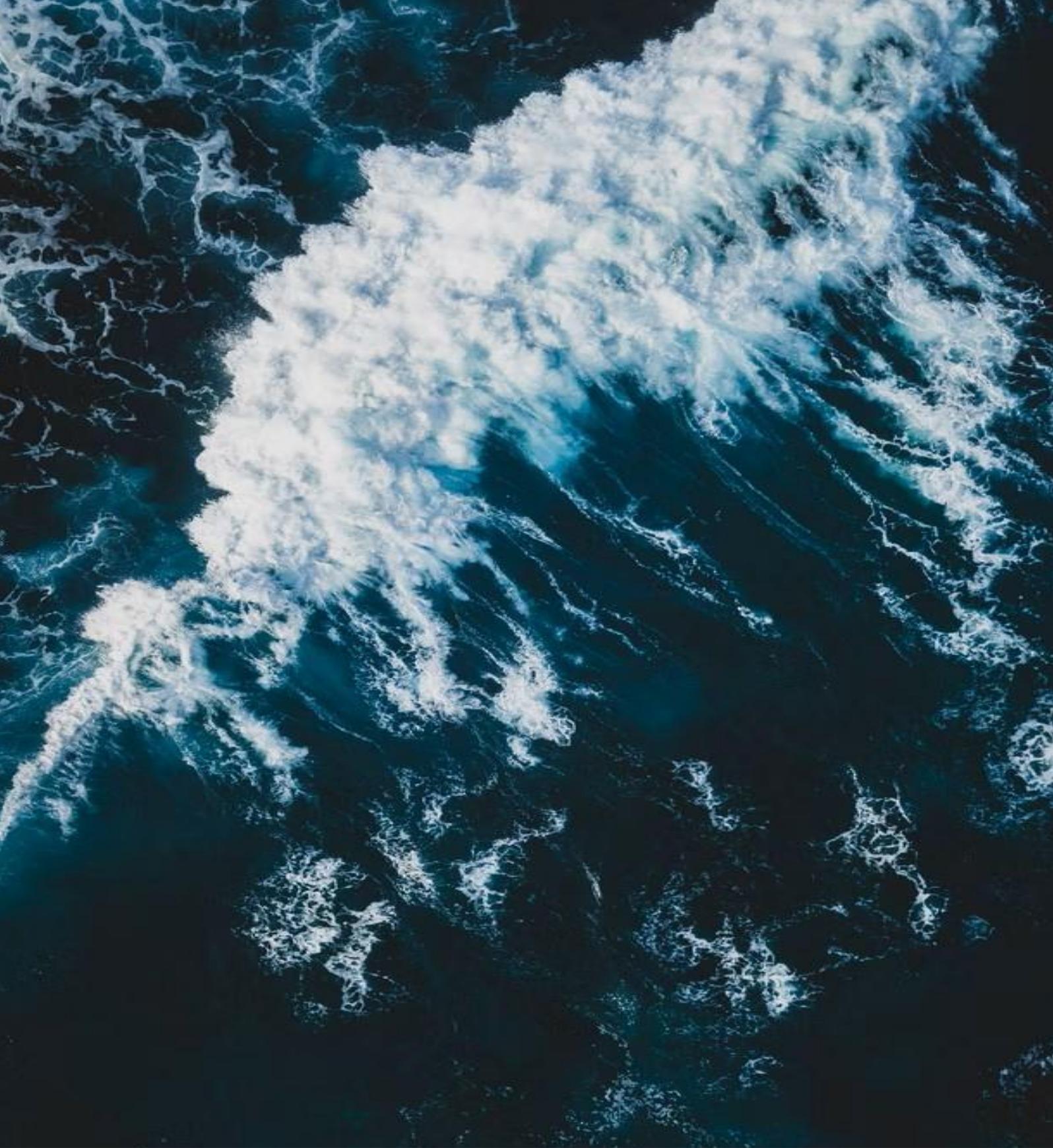
Practical implications for Directors

Despite climate change attracting more attention from the Government, Ukrainian legislation does not explicitly include any regulations on specific climate resilience measures that companies must take to adapt to climate change and minimize related risks. However, as the risks related to climate change become more obvious each year, and damage resulting from climate change can be better anticipated and measured, the following best practices should be considered by companies and their boards:

- a) delegate climate risk identification and evaluation to a clearly-identified team in management that reports directly to the CEO and board;
- b) put on the agenda for the board within 3 or 6 months a process to initiate the development of a climate transition roadmap to 2050 with transparent carbon neutrality or reduction targets, with clear interim targets to 2040, 2030 and the current rolling multi-year strategic plan, and periodically thereafter report back to the board;
- c) delegate to the appropriate committee(s) of the board, such as risk, audit, legal and governance, scenarios/strategy, nominations/remuneration, or sustainability/corporate responsibility, the task of translating the long-term strategy into a clear decision-making process for each aspect that is relevant to each committee; and
- d) initiate discussions with relevant sector associations and NGOs about the risks anticipated for the business and possible mitigation opportunities.

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