2023 ESG YEAR IN REVIEW

Key 2023 Developments in the ESG Regulatory Landscape

2023 featured a flurry of new rules and regulations aimed at environmental, social and governance (ESG) and responsible investing practices.

In Silver's year-end summary, we provide a non-exhaustive overview of the key developments in the ESG regulatory landscape across the U.S., EU and UK.

Go to:

→ ***U.S. Regulatory Landscape***

→ ***EU Regulatory Landscape***

→ ***UK Regulatory Landscape***

U.S. Regulatory Landscape

What's the Hold Up on the SEC's ESG Regulations?

Summary

Although highly anticipated, the SEC has not yet published the final Climate Disclosure Rule or the final ESG Disclosure Rule. Each rule was expected before year-end, but both are now ***likely delayed*** to 2024 based on the SEC's December Agenda.

Silver's Take

It is well known that the Commission is evaluating submitted comments and will undertake adjustments to keep both rules from being disputed in the courts. However, it seems all but inevitable that any final iteration will meet serious opposition in the form of lawsuits and Congressional attempts to undo the rule changes. We will have more to say once the final rules are released.

California Passes Landmark Climate Disclosure Laws

Summary

On September 22, 2023, ***California passed two landmark laws*** that represent a milestone in U.S. climate disclosure efforts. Together, the Climate Corporate Data Accountability Act (CCDAA) and the Climate-Related Financial Risk Act (CRFRA) have the capacity to mark a new standard for corporate climate transparency and accountability.

Under the CCDAA, any company that does business in California and has at least $1 billion in annual revenue will be required to publicly disclose Scope 1 and Scope 2 emissions on an annual basis **beginning in 2026**. Scope 3 emissions will be required to be disclosed annually **beginning in 2027**.

Companies subject to CCDAA must also have their public disclosures verified according to the Act's assurance schedule:

- Limited Assurance: Required for Scope 1 and Scope 2 Emissions in 2026
- Reasonable Assurance: Required for Scope 1 and Scope 2 Emissions by 2030
- Limited Assurance: Required for Scope 3 Emissions to begin in 2030

Importantly, ***CCDAA provides a safe harbor for Scope 3 emissions*** reporting, whereby companies will not be subject to administrative penalties so long as these emissions are reported using a reasonable basis and made in good faith.

Under CRFRA, any company that does business in California and has at least $500 million in annual revenues must publish a climate-related financial risk report on its website beginning on January 1, 2026 and biennially thereafter.

Disclosures should include:

1. A company's climate-related financial risks; and
2. Those measures the company has adopted to reduce and adapt to those risks.

"Climate-related financial risk" for purposes of CRFRA is expected to be determined using the Task Force on Climate-related Financial Disclosures (TCFD) or equivalent framework.

If a company is not able to report on climate risk in a manner that is consistent with the TCFD or equivalent framework, it must provide the recommended disclosures to the best of its ability, including a detailed explanation for any reporting gaps as well as a description of steps it will take to prepare complete disclosures.

Silver's Take

California Governor Gavin Newsom indicated that the required disclosure timelines and cost burden for reporting to CCDAA and CRFRA need to be further evaluated in 2024. In their current form, the laws are expected to meaningfully affect market expectations related to climate disclosure. With 7,000+ companies impacted, the practices of evaluating, publishing and putting action plans in place to address and mitigate financial risks related to climate are expected to become more common – and may make it harder to defend the position that climate risks are not material to a business or investment strategy.

SEC's ESG Enforcement Activity Continues

Summary

In September, the ***SEC announced a conclusion to its long-running investigation into the ESG practices of Deutsche Bank's asset management subsidiary, DWS***, which resulted in a $25 million fine. The decision, which was issued in conjunction with AML-related offenses, cites DWS for making "materially misleading statements about its controls for incorporating ESG factors into research and investment recommendations."

In addition, the ***Financial Times reported*** in August that the SEC's Division of Enforcement had launched inquiries, including issuing subpoenas, into several asset managers concerning their incorporation of ESG in their investment marketing materials. While these inquiries have yet to be confirmed by the SEC, they would align with the ongoing attention the Commission has paid to ESG-related wrongdoing.

Silver's Take

The SEC's ESG enforcement activity in 2023 did not deviate from 2022's trends. The finalization of the DWS case and the reported subpoenas should serve as a reminder to all investment managers that the SEC is carefully reviewing ESG disclosures and related commitments to investors. Silver's guidance to clients is to ensure that ESG disclosures made to investors align with internal practices. This alignment should be routinely assessed as part of a manager's internal controls and annual review activities.

SEC Modernizes "Names Rule" – Focus on "Particular Characteristics"

Summary

On September 20, 2023, the ***SEC passed amendments to the "Names Rule"*** of the Investment Company Act of 1940, as amended (Investment Company Act).

The amendments expanded the Names Rule's application by including terms that suggest a registered investment company (a registered fund) focus on strategies with **"particular characteristics"** in addition to the prior focus on investment **in particular types of securities.**

"Particular Characteristics" is not defined in the rule; however, the adopting release provides "Growth" and "Value" as terms indicating that a registered fund's investment decisions incorporate one or more ESG factors in a non-exclusive list of examples.

For existing and new registered funds with names that suggest a focus on a "particular characteristic," the amendments require that, among others, the fund adopt a policy to invest at least 80% of the fund's assets in the manner suggested by the name.

The SEC's effort to adopt stricter rules to guard against deceptive fund naming practices underscores its commitment to enhancing market transparency and reflects the regulators' dedication to fostering a more informed and secure financial environment. However, these amendments do not provide a mechanism to meaningfully address and significantly limit greenwashing, as anticipated in the proposed format.

Silver's Take

The Names Rule amendments were the least controversial of the SEC's three ESG-focused rule proposals published in 2022. So, while it is no surprise they were finalized first, in their final state, they are hardly "ESG-focused." Instead, the amendments represent a common-sense change that addresses the misuse of registered fund names and improves transparency between fund managers and their investors, including sustainability and ESG-marketed products.

Importantly, the Names Rule applies to entities that are subject to the Investment Company Act. Private fund managers are not subject to this rule; however, the SEC's posture related to registered fund names should be considered when naming new and future fund vehicles.

ESG Comes Under Attack by Politicians and Political Groups

Summary

A comprehensive review is necessary to dive into the myriad aspects of the anti-ESG movement that has spread from state houses to the halls of Congress.

In 2023 alone, an estimated 165 pieces of legislation were introduced across 37 states, all designed to "weaponize government funds, contracts, and pensions" to prevent companies and investors from considering ESG factors when making investment decisions. According to ***research from Pleiades Strategy***, just 22 bills and six resolutions were approved by state lawmakers, suggesting that anti-ESG legislative efforts were not as successful or widespread as may be thought. Anti-ESG shareholder proposals fared even worse – according to a ***study by the Sustainable Investments Institute***, the 36 anti-ESG proposals that went to a vote received average support of 2.8%—half what is needed to qualify for resubmission in the first year and a decrease from 3.5%, as recorded in 2022.

ESG also came under attack at the Federal level, most notably in the form of a ***Republican-led effort to overturn a Department of Labor rule that allows ERISA-governed fiduciaries to consider material ESG factors when making investment decisions.*** This effort failed by way of veto issued by President Biden.

House Republicans also formed a new ESG Working Group with a stated aim to "combat the threat to our capital markets posed by those on the far-left pushing environmental, social, and governance (ESG) proposals." This Working Group spearheaded the publication of several papers attacking ESG, a string of Congressional hearings and the introduction of several proposed bills that were opposed by industry groups and Democrats alike. While the furor over ESG has died down as of late, we expect a ratcheting up of both pro and anti-ESG rhetoric and policymaking in the run-up to the 2024 election.

Silver's Take

The net effect of the politicized attacks on ESG has done little to alter the continued focus on ESG practices across the investment management landscape. In 2023, we've noticed private fund managers are taking a more conservative approach when discussing or disclosing details related to their ESG programs. However, our view is that this shift stems from a continued focus on ESG rulemakings and enforcement activities by regulators, rather than a knee-jerk reaction to the anti-ESG movement.

Silver believes that ESG-related efforts must be rooted in financial materiality. Managers should be able to clearly articulate how they define ESG and substantiate how their investment strategy and ESG efforts are consistent with identifying and managing material risks and opportunities. This approach has proved resilient as our clients face and react to investor scrutiny.

California Passes New Venture Capital Diversity Disclosure Law

Summary

In October, California SB54, ***"Fair Investment Practices by Investment Advisers," was signed into law.*** This law requires disclosure on behalf of certain venture capital companies (VCCs) regarding the founders of its underlying investments. While this law does not impose any targets related to diversity, it may present a significant burden on in-scope VCCs. Additionally, the law's broad definition of VCCs may cause the law to apply more broadly, including to private equity firms.

According to the law, on an annual basis, VCCs will be required to disclose, among others:

- Demographic data of the founders of their underlying investments, including the aggregated gender, race, ethnic, disability status, LGBTQ+ self-identification, veteran status and California resident status
- The percentage of total investments made which have a founding team that is "primarily diverse" (i.e., women, non-binary, racial or ethnic minority, disabled, veteran or LGBTQ+)

The law requires in-scope VCCs to report calendar year 2024 information by **March 1, 2025** to the California Civil Rights Department and annually thereafter.

Silver's Take

This law is the latest example of the state exerting its economic power to create far-reaching impact. As the in scope VCCs prepare to report in 2025, it will be important to understand the ongoing requirements and implementation of the law, as Governor Gavin Newsom has already signaled a review of the law's scope and timeline may be forthcoming. Silver will continue to monitor the developments related to this law and its implications for our venture capital and private equity clients.

EU Regulatory Landscape

More Updates to SFDR – and More Questions

Summary

The Sustainable Finance Disclosure Regulation (SFDR) has had a challenging year as regulators try to address the concerns of market actors.

On April 12, 2023, the European Supervisory Authorities (ESAs) announced a series of amendments aimed at simplifying SFDR, including proposals on information regarding the decarbonization of financial products and inclusion of a dashboard providing information about products' sustainable and taxonomy aligned investment. The proposal includes substantial changes to the principle adverse impact (PAI) disclosures (e.g., additional social indicators, refinements to calculation methodologies), proposed changes to the do no significant harm (DNSH) standard of the "sustainable investments" definition, and material amendments to the mandatory disclosure templates for Article 8 and Article 9 products.

In tandem with these amendments, the ***European Commission (EC) published a series of Q&A's aimed at making it easier to understand and implement SFDR***. For example, the Q&A entry on defining "sustainable investments" provides firms with subjective discretion to apply their own assessment methods and qualifications. This means the EC is not setting a minimum quantitative threshold or other approach to determine whether an investment should qualify. In certain circumstances, this broad interpretation will allow market participants flexibility when testing qualifications; however, the lack of specific guardrails will cause continued reliance on third parties to assess and provide opinion and interpretation of the regulation and released guidance.

On September 14, 2023, ***the EC released two consultation papers related to SFDR***, which were open for feedback until December 15, 2023. Both publications seek to address concerns regarding the implementation of SFDR and consider the possibility of applying uniform ESG disclosure obligations to all funds sold in the EU due to industry apprehensions about compliance costs and complexity. The ***first publication is a public consultation on the implementation of SFDR***, while the ***second publication is a targeted consultation*** that identifies potential SFDR shortcomings and explores options for framework improvement. Topics include current SFDR requirements; interactions with other sustainable finance laws; potential changes to disclosure requirements for financial market participants; and the establishment of a categorization system for financial products.

Silver's Take

Silver sees clear demand for consistent, practical rulemaking on fund designation from managers and investors alike, but to date, SFDR has not satisfied this demand. The European Commission hopes the latest public consultation will help address SFDR's shortcomings and highlight specific opportunities for improvement.

Notably, despite many challenges with SFDR, EU-based investors continue to demonstrate a preference for Article 8 funds, and in the past year have earmarked significant capital for sustainable investments, such as Article 8 and Article 9 designated products. We do not foresee this allocation trend changing in the immediate term, but forthcoming regulations in the U.K. and the US may provide alternative frameworks or labels to managers seeking to win these allocations.

Introduction of the European Sustainability Reporting Standards

Summary

On July 31, 2023, the ***European Commission officially approved the European Sustainability Reporting Standards (ESRS)***, establishing guidelines for companies to report on their sustainability-related impacts, opportunities and risks according to the EU's upcoming Corporate Sustainable Reporting Directive (CSRD). The ESRS encompass various topics, including climate change, biodiversity and human rights. The standards apply to companies within the scope of CSRD. Reporting obligations will be introduced incrementally; for select companies, initial submissions will be required in 2025 detailing their activities in calendar year 2024.

CSRD will apply to all large EU companies, meaning EU companies (including EU subsidiaries of non-EU parent companies) exceeding **at least two** of the following criteria:

1. had more than 250 employees;
2. has turnover of more than €40 million; or
3. has total assets of €20 million.

CSRD will also apply to companies with securities listed on an EU-regulated market, irrespective of whether the issuer is established in the EU or a non-EU country. This includes listed small and medium-size enterprises (SMEs), except for certain listed micro-enterprises.

In drafting these standards, the European Commission engaged in consultations with global standard-setting bodies like the International Sustainability Standards Board (ISSB) and the Global Reporting Initiative (GRI) to ensure interoperability and reduce duplication in reporting requirements.

Silver's Take

Understanding the impact of CSRD, and whether a manager or underlying portfolio company is obligated to comply, is paramount to determining the applicability of ESRS. Regardless of regulatory obligation, we expect investors may use these reporting standards to gather information from each of their GPs. Ongoing awareness of regulatory changes in key markets is a critical input to maintaining a best-in-class ESG program.

EU Taxonomy Regulation: Delegated Acts Published in the Official Journal

Summary

On November 21, 2023, two delegated regulations were published in the Official Journal that amend the previously adopted ***Taxonomy Regulation***. *The first delegated regulation* ***(EU) 2023/2485*** amends the Climate Delegated Act "and establishes additional technical screening criteria for determining the conditions under which certain economic activities qualify as contributing substantially to climate change mitigation or climate change adaptation and for determining whether those activities cause no significant harm to any of the other environmental objectives".

The second delegated regulation (EU) 2023/2486 amends the Taxonomy Disclosures Delegated Act and "establishes the technical screening criteria for determining conditions under which an economic activity qualifies as contributing substantially [to the "non-climate" objectives], including: (i) sustainable use and protection of water and marine resources; (ii) to the transition to a circular economy; (iii) pollution prevention and control; or (iv) the protection and restoration of biodiversity and ecosystems, and for determining whether that economic activity causes no significant harm to any of the other environmental objectives."

The Taxonomy Regulation, initially developed as part of the EU Action Plan, applies to Article 8 and Article 9 products that disclose making "sustainable investments" with an environmental objective that qualifies as environmentally sustainable under the Taxonomy. Accordingly, in-scope entities are required to demonstrate that their economic activities substantially contribute to one of six environmental objectives and do no significant harm to any of the remaining five objectives. Previously, the mechanism to evaluate the "substantial contribution" and "do no significant harm" thresholds were not well defined.

The delegated regulations apply beginning January 1, 2024; however, certain provisions of (EU) 2023/2485 will not apply until January 1, 2025.

Silver's Take

The delegated regulations provide highly sought after guidance to better apply and report to the Taxonomy Regulation. For managers that are not in-scope of the Taxonomy Regulation, these delegated acts are still important; in our view, they provide a starting point for managers who want, or are obliged, to incorporate a focus on climate risk management into overall investment management practices.

UK Regulatory Landscape

UK Introduces New Sustainability Disclosure Requirements (SDRs)

Summary

On November 28, 2023, the UK's Financial Conduct Authority (FCA) introduced its much-anticipated ***Sustainability Disclosure Requirements (SDR)*** and investment labels as part of an effort to "help consumers navigate the market for sustainable investment products" and to address concerns about greenwashing. The final regulation follows numerous delays and an extensive comment period that closed on January 25, 2023.

There is a lot to digest in the 212-page Policy Statement, but here are some of the key takeaways for private fund managers.

Who do the rules apply to?

- The investment labels, disclosure and naming and marketing rules apply to all UK-domiciled asset managers.
- The anti-greenwashing rule applies to all FCA-authorized firms that make sustainability-related claims about their products and services.

What is included in the rules?

- Guidance for the use of four distinct and non-hierarchical investment labels: (i) Sustainability Impact; (ii) Sustainability Focus; (iii) Sustainability Improvers ; (iv) and Sustainability Mixed Goals.
- Naming and marketing rules for investment products to ensure the use of sustainability-related terms is accurate.
- An anti-greenwashing rule to reinforce that all sustainability-related claims must be fair, clear and not misleading.
- A summary of interoperability with SFDR and relevance to other international regulatory developments.

What is the timeline for implementation?

- Anti-greenwashing rule: May 31, 2024
- Firms using product labels: from July 31, 2024
- Firms using sustainability-related terms without product labels: December 2, 2024
- Product-level disclosures: 12 months after the label is first used and annually thereafter, or provided to eligible clients on-demand from December 2, 2025

Silver's Take

SDR has been billed as the UK's answer to SFDR. Upon Brexit, the UK did not onshore SFDR and the FCA has regularly communicated that their ambition was to ensure the SDR was not a duplicative effort. The summary of interoperability is a useful tool to better understand the areas of overlap. Judging by the market's initial reactions to the final rule last month, SDR may have a better chance of widespread adoption, especially as U.S. managers continue to wait for the SEC's similar rulemaking effort. However, with implementation deadlines still several months (or years) away, it will take some time for the full effect of the rules to be felt in the market.

Introduction of Sustainability Disclosure Standards

Summary

On August 2, 2023, the UK government introduced guidance on the country's ***Sustainability Disclosure Standards.*** These standards direct corporate reporting on sustainability-related risks and opportunities, serving as a foundation for future UK legal or regulatory requirements regarding sustainability disclosures, potentially including climate change impacts.

Developed by the Department for Business and Trade (DBT), the UK SDS will be derived from the ISSB's Sustainability Disclosure Standards. The UK intends to endorse these standards by July 2024, with any deviations applicable only if necessary for UK-specific concerns.

Silver's Take

SDR has been billed as the UK's answer to SFDR. Upon Brexit, the UK did not onshore SFDR and the FCA has regularly communicated that their ambition was to ensure the SDR was not a duplicative effort. The summary of interoperability is a useful tool to better understand the areas of overlap. Judging by the market's initial reactions to the final rule last month, SDR may have a better chance of widespread adoption, especially as U.S. managers continue to wait for the SEC's similar rulemaking effort. However, with implementation deadlines still several months (or years) away, it will take some time for the full effect of the rules to be felt in the market.

Looking Forward

Thank you for reading and for your partnership this year. In our Q1 Newsletter, we will look at efforts by key standard-setting and industry bodies to harmonize disclosure standards, as well as key trends to look out for in 2024. We will update you on these regulatory changes on an ongoing basis, but if you have any specific questions or concerns in the interim, please contact a member of Silver's ESG team at ***info@silverreg.com***.

To review Silver's compliance year-end, please see here.

Contact Silver

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