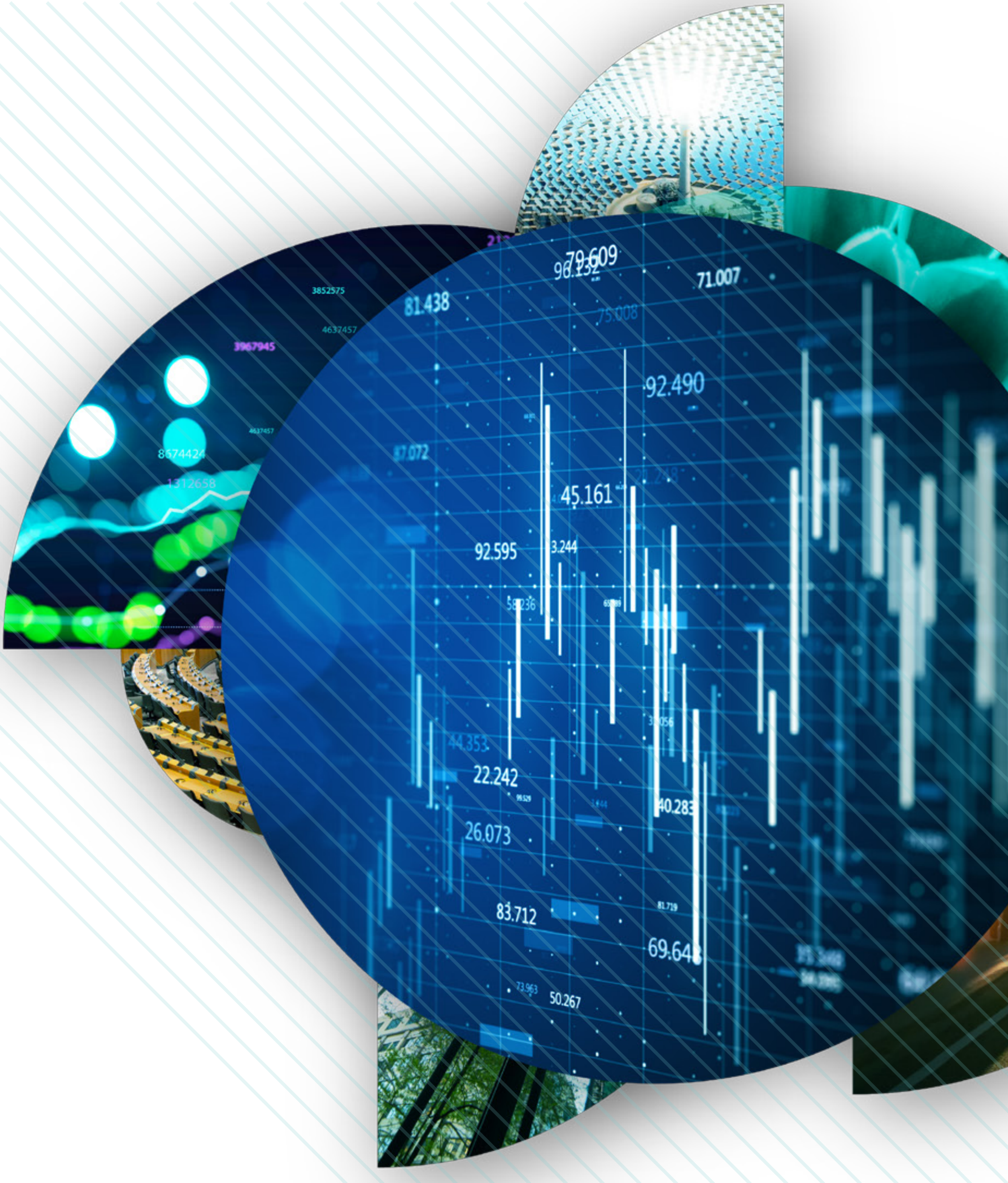
NORTON ROSE FULBRIGHT

ESG | Sustainability

Financial Services regulatory ESG updater

6 November – 6 December 2024



Introduction

Environmental, Social and Governance (**ESG**) is changing the landscape for financial institutions as a wide range of stakeholders including investors increasingly expect them to make their operations more sustainable. Financial services regulators also view ESG as a priority, embedding the principles of climate-related financial risks into their supervisory frameworks and dealing with institutions that may be making exaggerated or unsubstantiated sustainability-related claims that do not stand up to closer scrutiny (so-called 'greenwashing'). However, the key problem for institutions, particularly those operating cross border, is that there is limited uniformity in regulation, financial services regulators are at different stages in developing their ESG regulatory framework particularly in relation to disclosures and taxonomy. It is therefore critical that institutions monitor the latest announcements from the regulators.

The purpose of this updater is to track ESG regulatory developments from the period 6 November 2024 to 6 December 2024, from the United Kingdom, France, Europe Union, the Netherlands United States, Australia, and certain international regulators.

This month's highlights

11 November 2024 - Let's talk asset management: Episode 8 – ESMA's guidelines on funds' names using ESG or sustainability related terms
In this latest episode of our podcast series, Let's talk asset management, Cyril Clugnac and Simon Lovegrove discuss the European Securities and Markets Authority's final guidelines on funds' names using ESG or sustainability-related terms. The guidelines apply from 21 November 2024.

We have also published a briefing note on ESMA's guidelines.

Listen to the podcast here.

12 November 2024 - Global Regulation Tomorrow Plus: FCA survey results on non-financial misconduct
In this latest episode of our podcast series, Let's In February this year the FCA sent a survey to over 1,000 regulated wholesale financial services firms asking a series of questions about incidents of non-financial misconduct recorded by the firms in the years 2021, 2022 and 2023. In this latest Global Regulation Tomorrow Plus episode, Katie Stephen, Hannah Meakin, Simon Lovegrove and Catherine Pluck discuss the results of the FCA's survey which were published on 25 October 2024.

Listen to the podcast here.

19 November 2024 - Let's talk asset management: Episode 10 – UK FCA's recent work on non-financial misconduct
In this latest episode of our podcast series, Let's talk asset management, Hannah Meakin, Lucy Dodson, Rebecca Dulieu and Simon Lovegrove discuss the UK Financial Conduct Authority's recent work on non-financial misconduct and its impact on the UK asset management sector.

Listen to the podcast here.

United Kingdom

6 November 2024 - FCA publishes speech on sustainable investment and finance
The Financial Conduct Authority (**FCA**) published a speech delivered by its chief operating officer, Emily Sheppard, at the UK Sustainable Investment and Finance Association Leadership Summit in London, entitled 'All aboard: strong infrastructure for smooth journeys.'

The speech highlights that:

- The FCA's objectives aim to underpin the growth of the economy and encourage investment required for UK and financial services to achieve net zero by 2050.
- The FCA plans to continue to engage with industry, balancing proportionate regulations more broadly while recognising and avoiding unnecessary regulatory pressures and costs on businesses.
- The expansion of the FCA to Leeds and Edinburgh is intended to enable it to attract new talent and better reflect the demographic of firms nationwide.

Ms Sheppard discusses topics including:

- Recent regulatory changes introduced by the FCA to encourage sustainable investment, including the Sustainability Disclosure Requirements and investment labels regime, and the anti-greenwashing rule guidance.
- The FCA's involvement in wider initiatives such as the Government's recently published Transition Finance Market Review and its Transition Plan Taskforce.
- The Government's plans for the FCA to regulate ESG ratings providers.

- The FCA's intention to consult on strengthening expectations for listed companies' transition plan disclosures, with the aim of giving investors transparency on a business' future alignment with net-zero goals.
- The recent Call for Input on the FCA's review of its rules following the introduction of the Consumer Duty – Ms Sheppard notes that the FCA is current reviewing 172 responses to the Call for Input and plans to feed back next year, with the aim of addressing areas of duplication, confusion or over-prescription which create unnecessary costs for business while at the same time demonstrating that it is possible to pursue market growth through sustained consumer benefit.

14 November 2024 – UK Green Taxonomy

HMT issued a consultation on a UK Green Taxonomy.

The purpose of the consultation is to establish whether a UK Taxonomy would be additional and complementary to existing policies in meeting the objectives of mitigating greenwashing and channelling capital in support of the Government's sustainability objectives. The Government is also seeking feedback on how to maximise the usability of a UK Taxonomy, should respondents support taking one forward. This includes considering key design features that will impact the overall usability of a UK Taxonomy.

Next steps

The deadline for comments on the consultation is 6 February 2024.

14 November 2024 - HMT response to consultation on future regulatory regime for ESG ratings providers

HM Treasury (**HMT**) published its response document to its earlier consultation on the future regulatory regime for ESG ratings providers.

Earlier consultation

Previously HMT issued a consultation on the regulation of ESG ratings providers on 30 March 2023, and this closed on 30 June 2023. It sought views on:

- The introduction of regulation for ESG ratings providers.
- Description of ESG ratings and their provision.
- Activities to exclude from regulation.
- Sectoral and territorial scope of regulation.
- Making regulation proportionate.

Policy

The response document now published summarises the views received to the consultation and sets out HMT's response.

Among other things the response document provides that:

- The definition of an ESG rating for the purposes of the regulatory regime has been developed as: *"an assessment regarding one or more ESG factors, produced in the form of an ESG opinion, an ESG score or a combination of both, whether or not it is characterised as an ESG rating".*
- An ESG opinion is defined as "*an ESG rating involving substantial analytical input from an analyst, whether or not it is characterised as an ESG opinion".*
- An ESG score is defined as *"an ESG rating derived from data and a pre-established statistical or algorithmic system or model, without additional substantial analytical input from an analyst, whether or not it is characterised as an ESG score".*
- The scope of the regulation is designed to capture:
  - UK firms providing ESG ratings to UK users by any means – this applies whether provided by way of a business relationship (paid for by the user, either on its own or as part of another service or bundle of products) or provided for free to users.
  - Overseas firms providing ESG ratings to UK users by way of a business relationship (paid for by the user in the UK, either on its own or as part of another service or bundle of products). The reference to a business relationship means that for overseas ESG ratings providers, paid-for ratings and ratings that are provided as part of a broader commercial arrangement will be in scope, whether by a subscription model or any other contractual relationship, including as part of a bundle of products or services, to a person located in the UK.
  - The provision of ESG ratings to non-UK users by UK firms. This was not proposed in the initial consultation but is designed to support confidence in the UK's growing ESG ratings sector, and to provide clarity to all market participants whether in the UK or outside.

Draft statutory instrument

HMT has also published a draft statutory instrument, The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2024 which frames how the regulatory perimeter for ESG ratings provision will be established including specific exclusions to address primary risks of harm (a discussion regarding the exclusions is also set out in the response document).

HMT welcomes technical comments on the draft statutory instrument by 14 January 2025.

European Union

6 November 2024 - Council publishes text of Regulation on the transparency and integrity of ESG rating activities

The Council of the EU published the text of the proposed Regulation on the transparency and integrity of ESG rating activities, and amending Regulations (EU) 2019/2088 and (EU) 2023/2859. The draft Regulation is designed to govern the issuance, distribution and, where relevant, publication of ESG ratings, without being intended to regulate their use. The Council is to formally adopt the draft Regulation, which will then enter into force 20 days after its publication in the Official Journal of the EU (**OJ**). It will apply 18 months following its entry into force.

8 November 2024 - Commission Notice on the interpretation and implementation of certain legal provisions of the Disclosures Delegated Act under Article 8 of the EU Taxonomy Regulation on the reporting of Taxonomy-eligible and Taxonomy-aligned economic activities and assets

There was published in the OJ, a Commission Notice on the interpretation and implementation of certain legal provisions of the Disclosures Delegated Act under Article 8 of the EU Taxonomy Regulation on the reporting of Taxonomy-eligible and Taxonomy-aligned economic activities and assets. The purpose of the Commission Notice is to provide further interpretative and implementation guidance to financial undertakings in the form of replies to Frequently Asked Questions (**FAQs**) on the reporting of their key performance indicators under Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing the Taxonomy Regulation.

The FAQs originate from the stakeholders subject to the reporting requirements, the Platform on Sustainable Finance and national and European supervisory authorities. Through this Notice, the European Commission (**Commission**) intends to facilitate the compliance of stakeholders with the regulatory requirements in a cost-effective way and to ensure the usability and comparability of the reported information for scaling up sustainable finance. The Commission may update these FAQs where appropriate.

13 November 2024 - Commission Notice on the interpretation of certain legal provisions in the Accounting Directive, Audit Directive, Audit Regulation and Transparency Directive

There was published in the OJ, a Commission Notice containing FAQs which clarify the interpretation of certain provisions on sustainability reporting introduced by the Corporate Sustainability Reporting Directive into the Accounting Directive, the Audit Directive, the Audit Regulation, and the Transparency Directive with the aim of facilitating their implementation by undertakings. It also clarifies certain provisions of the Sustainable Finance Disclosures Regulation.

13 November 2024 - Published in OJ – MiCAR ITS on appropriate public disclosure of inside information

There was published in the OJ, Commission Implementing Regulation (EU) 2024/2861 of 12 November 2024 laying down implementing technical standards (**ITS**) for the application of the Regulation on markets in crypto assets with regard to the technical means for the appropriate public disclosure of inside information and for delaying the public disclosure of that information. The objective of the ITS is to (i) identify the appropriate means for disclosure of inside information which ensures investors are promptly informed in a non-discriminatory way; and (ii) harmonise the technical means issuers, offerors or persons seeking admission to trading should use to delay the disclosure. The Implementing Regulation enters into force on the twentieth day following its publication in the OJ.

19 November 2024 - Report on 'Fit for 55' climate scenario analysis

The European Supervisory Authorities (**ESAs**) together with the European Central Bank (**ECB**) issued the results of the one-off 'Fit-for-55' climate scenarios analysis.

Fit-for-55

The 'Fit-for-55' package is a set of legislative proposals and policy initiatives designed as part of the European Green Deal with the aim of ensuring that EU policies are aligned with the climate goals agreed by the European Council and the European Parliament. More precisely, 'Fit-for-55' refers to the EU's target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to the 1990 levels. The EU commitment is to transition to a climate-neutral economy by 2050.

Climate risk analysis

The objective of the 'Fit-for-55' climate risk analysis was to assess the resilience of the EU financial sector to climate and macro financial shocks, while the 'Fit-for-55' package is being smoothly implemented in the EU. The exercise was based on three scenarios that were developed by the European Systemic Risk Board (**ESRB**). It is part of the ESAs and ECBs' joint effort to develop more advanced methodologies to better capture climate risks, in light of the urgency of the challenges posed by climate change. Additionally, it allows to gain insights into the financial sector's capacity to support the green transition even under conditions of stress.

The three scenarios were:

- The baseline scenario, the 'Fit-for-55' package is implemented in an economic environment that reflects the ESRB's June 2023 forecasts, while still facing additional cost related to the green transition.
- The first adverse scenario, transition risks materialise in the form of 'Run-on-Brown' shocks, whereby investors shed assets of carbon-intensive firms. This hampers the green transition, since 'brown' firms do not have the financing they need to green their activities.
- The second adverse scenario, the 'Run-on-Brown' shocks are amplified with other standard macro-financial stress factors.

Findings

The results of the exercise show that estimated losses stemming from a 'Run-on-Brown' scenario have a limited impact on the EU financial system.

The banking sector records first-round credit and market losses amounting to 5.8% of total exposures in scope, equivalent to EUR 343 billion, under the baseline scenario. In the first adverse scenario, the run on brown results in total losses of 6.7% relative to total exposures in scope, bringing total losses to EUR 393 billion. The second adverse scenario leads to total losses of 10.9% relative to total exposures in scope, totalling EUR 638 billion.

EU investment funds undergo a fall in value of 4.0% of initial total exposure in the baseline scenario, or around EUR 396 billion, driven largely by declines in the values of equities held by the funds. In the second adverse scenario, the additional effect of a sharp, exogenous deterioration in the macroeconomic environment drives an overall immediate decline of 15.8% (EUR 1 563 billion). EU funds experience similar overall declines in asset values to the rest of the global investment fund sector in all scenarios.

France

There have been no reported updates from France this month.

The Netherlands

18 November 2024 - Consultation on the implementation of CSDDD into Dutch law

The Ministry of Foreign Affairs (*Ministerie van Buitenlandse Zaken*) published its consultation on the draft bill of the Corporate International Responsibility Act (*Wet internationaal verantwoord ondernemen*) (the **Act**). The Act will implement the EU Corporate Sustainability Due Diligence Directive (Directive 2024/1670, the CSDDD), into Dutch law. The Act will impose obligations on large companies to be considerate of human rights, environmental protection and climate change.

Key points of the proposed legislation

The Act will apply to companies established in the Netherlands with more than 1,000 employees and a global net revenue of more than €450 million, as well as non-EU companies with a branch office in the Netherlands that operate in the European Economic Area (EEA) which have more than €450 million of net income. The main provisions of the Act concern:

- Due diligence:Companies must identify, prevent, mitigate and address negative human rights and environmental impacts.
- Climate strategy:Every company must have a strategy to combat climate change.
- Transparency:Companies must report on their actions to ensure compliance with the law.
- Supervision and enforcement: The Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt*, ACM) will be designated as the regulator. In addition, the District Court of Rotterdam and the Trade and Industry Appeals Tribunal will serve as competent administrative bodies.

Comments are particularly encouraged on the supervisory mechanism, where the ACM will supervise compliance and no distinction is made for the supervision of compliance by the financial sector.

Stakeholders may respond to the consultation through the official consultation website until 29 December 2024. For more information on the consultation and the ability to respond, please visit the government website.

19 November 2024 - Asset managers and investment advisors still not always ask about investors' sustainability preferences

The Dutch Authority for the Financial Markets (*Autoriteit Financiele Markten*, **AFM**) published its Consumer Monitor Investors report (*Consumentenmonitor Beleggers*). The key message in the report is that not all asset managers and investment advisors comply with the obligation to ask investors about their sustainability preferences. Only 25% of investors investing with advice or through asset management are asked about these preferences, while 40% of these investors confirm that they consider sustainability to be important in their investment choices.

Sustainability preferences increasingly important for investors

The findings show that a third of investors make sustainable investments and that such investors mainly consider the name of the investment product to determine whether it fits their sustainability goals. For many of these investors, the desire to contribute to positive change in the world plays an important role. However, despite the fact that many investors are willing to include sustainability in their investment decisions, it appears that the industry still lags behind in actively soliciting these preferences. AFM emphasises that investment advisors and asset managers are obliged to ask investors about their sustainability preferences.

Information provision and sustainability

The report shows that independent investors mainly use (historical) price data and websites for their investment decisions. Only 5% of independent investors consult (f) influencers, a significant drop compared to 2022. It also appears that many investors still struggle to understand whether their investments meet their sustainability criteria. Over 40% of investors who consider sustainability important find it difficult to find information on the sustainability of their investments.

For more information and the complete Consumer Monitor Investors, please see the press release.

United States- SEC and CFTC

8 November 2024 – SEC charges Invesco Advisors for making misleading ESG claims

The Securities and Exchange Commission (**SEC**) announced a settled enforcement action against Invesco Advisors Inc (Invesco) for making misleading statements concerning the company-wide percentages of assets under management that integrated ESG factors in investment decisions. Invesco also published similar representations in its publicly available 2020 and 2021 ESG Investment Stewardship Reports.

The Atlanta-based registered investment adviser agreed to pay $17.5 million civil penalty to settle the SEC's charges.

Australia

7 November 2024 - ASIC releases draft regulatory guide on the sustainability reporting regime for consultation

The Australian Securities and Investments Commission (**ASIC**) released Consultation Paper 380 *Sustainability reporting* (**CP 380**). CP 380 seeks feedback from stakeholders on draft Regulatory Guide 000 *Sustainability reporting* (**Draft RG 000**) which is intended to assist Australian entities that will be required to prepare annual statutory sustainability reports containing climate-related financial disclosures from 1 January 2025.

Specifically, Draft RG 000 proposes to provide guidance on:

- when reporting entities need to prepare a sustainability report and how to comply with related requirements, such as around keeping sustainability records;
- specific issues in relation to the contents of a sustainability report, such as statements with forward-looking climate information, labelling, the use of cross-referencing, and the proportionality mechanisms and exceptions under AASB S2;
- how the sustainability reporting requirements interact with existing legal and regulatory requirements; and
- how ASIC will administer and enforce the sustainability reporting requirements, including ASIC's approach to exercising its powers to grant leave from the requirements.

ASIC has made clear that it expects reporting entities to engage with the new sustainability reporting requirements and take steps to ensure they will be ready to comply with them as they are phased in.

ASIC is seeking feedback on the draft guidance by 19 December 2024.

14 November 2024 - ASIC's 2025 Enforcement Priorities highlight ongoing focus on greenwashing

At the 2024 ASIC Annual Forum, Australia's financial regulator announced that greenwashing and misleading ESG credentials claims will continue to be an enforcement priority for 2025.

At the forum, ASIC Deputy Chair Sarah Court noted that ASIC's three successful greenwashing proceedings confirmed:

- when an entity uses unqualified language or unequivocal terms such as we will 'not invest' or 'we will 'eliminate' in relation to investments, it cannot correct those representations by relying on consumers to conduct their own searches for policies that may qualify those statements; and
- when superannuation trustees or managed investment schemes make representations as to investment screens or their green credentials, there is no valid distinction to be made between direct and indirect investments.

ASIC has indicated that in 2025, its focus on greenwashing will span a broad range of sectors including listed companies, managed funds, and superannuation funds.

28 November 2024 - The Environmental Defender's Office ordered to pay over $9 million in costs for its failed suit against Santos

On 28 November 2024, the Federal Court of Australia ordered the Environmental Defender's Office (**EDO**) to pay Santos Ltd over $9 million in legal costs in relation to its unsuccessful proceedings against the gas company.

In 2023, the EDO commenced proceedings against Santos (Australia's second largest listed oil and gas company) on behalf of its Tiwi Islander client arguing that Santos' Barossa pipeline project would impact on culturally significant sites that represented the Ampiji rainbow serpent and Crocodile Man.

In January this year, the Federal Court rejected the claim and further, found that expert reports relied upon by the EDO had been manipulated and EDO's lawyers had engaged in a "form of subtle [witness] coaching".

International regulators – FSB, IOSCO, Basel Committee, NGFS, SASB, IFRS, ISSB

14 November 2024 - NGFS publishes a Conceptual Note on Adaptation and a Synthesis Report on the greening of the financial system

The Network for Greening the Financial System (**NGFS**) published a Conceptual Note on Adaptation and a Synthesis Report on the greening of the financial system.

Conceptual Note

The Conceptual Note is the first comprehensive exploration by the NGFS of climate adaptation and its implications for financial stability. It highlights the importance of integrating adaptation into risk

management, promoting adaptation finance and bridging insurance protection gaps, for both developed economies and Emerging Markets and Developing Economies.

The Conceptual Note begins with a presentation of the costs and benefits of adaptation (Section 1) and then describes the importance of adaptation as a form of risk management for the financial system and society more broadly (Section 2). It explores the challenges facing efforts to scale up adaptation financing (Section 3). It then outlines considerations for future work to be conducted by the NGFS, central banks and supervisors (Section 4). Several national case studies are included to showcase specific actions being taken by regulators, both individually and in collaboration with other public and private sector groups (Annex).

The Conceptual Note outlines four specific areas of interest for central banks and supervisors that lay the groundwork for future NGFS initiatives, with the aim of identifying good practices and developing recommendations and guidelines:

- The role of metrics and tools for better measurement and disclosure of adaptation.
- Exploring the need to enhance policy, supervisory and regulatory frameworks.
- Fostering an enabling environment for adaptation finance.
- Collaborating at the international level, with actions focused on local considerations.

Synthesis Report

The Synthesis Report consolidates key publications and findings that help assess the progress on greening of the financial system and aligning the financial sector with global climate goals. It examines the readiness of financial institutions and the contribution of regulatory bodies, highlights gaps and challenges, and proposes actionable recommendations to advance towards a greener financial system.

It assesses three key areas to provide an overview of the evolution of the financial system in its journey to reach the Paris objectives. Each area constitutes one of the three foundations that are necessary to build a greener financial system: 1) developing a common understanding of what climate goals mean for finance and the progress made on the provision of finance aligned with those goals; 2) scaling up the relevant market instruments and strategies, and 3) establishing regulatory and supervisory frameworks that foster and enable an ecosystem for an effective and just green transition.

Resources

ESG is high on the regulatory agenda. Businesses, governments, regulators, financial services firms and individuals all have a part to play in tackling climate change and this view is increasingly shared across society. In terms of financial markets, investors are increasingly seeking sustainable financial products and ESG investing, traditional investing combined with sustainable or otherwise philanthropic aims, has seen huge growth in recent years. Regulated firms are also seeking to improve their own ESG performance more generally to build stronger relationships with their stakeholders, including those who use their services. Whilst the growing emphasis on ESG presents opportunities for financial services providers, it also brings with it a number of risks, which need to be properly managed with a view to avoiding future regulatory investigations and enforcement.

We have produced a number of resources, including articles, podcasts and newsletters, to help clients navigate this evolving, complex landscape:

Financial services: Regulation tomorrow

Our blog, Financial services: Regulation tomorrow offers a convenient resource for those keeping track of the evolving and increasingly complex global financial services regulatory environment.

Financial Services Regulatory Developments in ESG

Developed by our global financial services regulatory lawyers and integrated risk advisory group, our Financial Services Regulatory Developments in ESG Hub provides resources and insights to help clients stay informed of key regulatory developments in the sector.

ESG and Sustainability Insights newsletter

Our ESG and Sustainability Insights newsletter brings together recent insights and resources on key topics affecting your business, including climate change and regulation, business and human rights, sustainable finance, energy transition and more.

Contacts

Global

Jonathan Herbst
Global Head of Financial Services, London
+44 20 7444 3166
jonathan.herbst@nortonrosefulbright.com

Haney Saadah
Managing Director of Risk Consulting, EMEA, London
+44 20 7444 2519
haney.saadah@nortonrosefulbright.com

Simon Lovegrove
Global Director of Financial Services Knowledge, Innovation and Product, London
+44 20 7444 3110
simon.lovegrove@nortonrosefulbright.com

Europe

Claire Guilbert
Partner, Luxembourg
+352 28 57 39 298
claire.guilbert@nortonrosefulbright.com

Sébastien Praicheux
Partner, Paris
+33 1 56 59 54 25
sebastien.praicheux@nortonrosefulbright.com

Roberto Cristofolini
Partner, Paris
+33 1 56 59 52 45
roberto.cristofolini@nortonrosefulbright.com

Salvatore Iannitti
Partner, Milan
+39 02 86359 429
salvatore.iannitti@nortonrosefulbright.com

Floortje Nagelkerke
Partner, Amsterdam
+31 20 462 9426
floortje.nagelkerke@nortonrosefulbright.com

Anna Carrier
Senior Governance and Regulatory Affairs Advisor, Brussels
+32 2 237 61 46
anna.carrier@nortonrosefulbright.com

Michael Born
Counsel, Frankfurt
+49 69 505096 421
michael.born@nortonrosefulbright.com

United States

Andrew Lom
Global Head of Private Wealth and Head of Financial Services, New York
+1 212 318 3119
andrew.lom@nortonrosefulbright.com

Steven Lofchie
Partner, New York
+1 212 318 3075
steven.lofchie@nortonrosefulbright.com

William Troutman
Partner, Los Angeles
+1 213 892 9208
william.troutman@nortonrosefulbright.com

Australia

Helen Taylor
Partner, Sydney
+61 2 9330 8218
helen.taylor@nortonrosefulbright.com

Kate Green
Partner, Sydney
+61 2 9330 8928
kate.green@nortonrosefulbright

Elisa de Wit
Partner, Melbourne
+61 3 8686 6266
elisa.dewit@nortonrosefulbright.com

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