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Corporate Social Responsibility Disclosure and Compliance: An Overview of Selected Legislation, Guidance and Voluntary Initiatives

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Corporate social responsibility disclosure and compliance is an increasing area of focus for many in-house legal and compliance departments. This Article provides an overview for in-house personnel of selected legislation, guidance and voluntary initiatives driving CSR disclosure and compliance at corporates in the United States and abroad.

CONFLICT MINERALS (TIN, TANTALUM, TUNGSTEN AND GOLD)

Adopted Legislation

U.S. Conflict Minerals Rule (2012): If tin, tantalum, tungsten or gold is necessary to the functionality or production of a product manufactured or contracted to be manufactured by a U.S. public company registrant, it must conduct a "reasonable country of origin inquiry" to determine whether the necessary 3TG minerals in the product originated in the Democratic Republic of the Congo or an adjoining country. If the minerals originated outside of the DRC region or are from recycled or scrap sources, the registrant is required to disclose on Form SD its determination and describe its reasonable country of origin inquiry and the related results. Form SD is an annual filing requirement. If the registrant knows or has reason to believe that necessary 3TG minerals are from the DRC region, it must conduct enhanced due diligence and file a separate Conflict Minerals Report exhibit to its Form SD, detailing the measures taken to exercise due diligence on the source and chain of custody of the minerals and information concerning the processing facilities, the country of origin and the efforts to determine the mine or location of origin. The Rule also contains mandatory independent private sector audit and "labeling" requirements, which have been stayed pursuant to SEC guidance issued in 2014.

EU Conflict Minerals Regulation (2017): The regulation requires EU importers of tin, tantalum, tungsten or gold in mineral or metal form to conduct due diligence and make certain disclosures to their immediate purchasers and publicly concerning the 3TG that they import into the European Union. The regulation also creates a voluntary reporting mechanism for downstream companies to encourage them to responsibly source 3TG. The regulation takes effect on January 1, 2021.

Guidance and Voluntary Initiatives

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas (Third Edition, 2016): Due diligence under both the U.S. Conflict Minerals Rule and the EU regulation must be conducted using the OECD Guidance framework. The OECD Guidance advocates a five-step due diligence framework:

- (1) establish strong company management systems;

- (2) identify and assess risks in the supply chain;
- (3) design and implement a strategy to respond to identified risks;
- (4) carry out independent third-party audit of supply chain due diligence at identified points in the supply chain; and
- (5) report on supply chain due diligence.

In addition to base guidance, the OECD Guidance includes supplements for tin, tantalum and tungsten and for gold.

China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters Conflict Minerals Guidance (2015): The CCCMC’s voluntary guidance applies to Chinese companies at any point in the supply chain. The guidance is aligned with the OECD Guidance five-step framework and is intended to help Chinese companies to address inquiries under the U.S. and EU legislation.

EU Guidelines for the Identification of Conflict-Affected and High-Risk Areas and Other Supply Chain Risks (2018): The Guidelines address the following topics:

- (1) due diligence/steps for identifying and addressing 3TG sourcing risk;
- (2) the definition of conflict-affected and high-risk areas;
- (3) open source information to help identify CAHRAs and other risks; and
- (4) potential red flags in the mineral supply chain.

RESOURCE EXTRACTION

Adopted Legislation

EU Accounting and Transparency Directives (2013): The Directives require listed and large non-listed extractive and logging companies to each year publicly report, at a project level, payments of more than €100,000 that they make to governments. Extractive companies include those involved in the exploration, prospecting, discovery, development and extraction of minerals, oil, natural gas deposits or other materials. Logging activities include clear cutting, selective logging and thinning on land containing primary forest areas as well as the disturbance of primary forests by mining, mineral, water, oil or gas extraction activities. Listed entities include those with securities traded on an exchange in an EU member state. Large undertakings subject to the Directives include EU entities that exceed two of the following criteria:

- (1) balance sheet total assets of €20 million;
- (2) net turnover of €40 million; and
- (3) an average number of 250 employees for the year.

Canadian Extractive Sector Transparency Measures Act (2014): The ESTMA requires extractive entities engaged in the commercial development of oil, gas or minerals to publicly disclose, on an annual basis, specific payments made to governments in Canada and abroad, to the extent totaling at least C\$100,000. The ESTMA applies to:

- (1) entities listed on a Canadian stock exchange; or
- (2) if not listed on a Canadian stock exchange:
 - (a) that have a place of business in Canada, do business in Canada or have assets in Canada; and
 - (b) meet two of the following thresholds in one of their two most recent financial years:
 - (i) C\$20 million in assets;
 - (ii) C\$40 million in revenue; and
 - (iii) an average of 250 employees.

U.S. Resource Extraction Issuer Disclosure Rule (2016; disapproved in 2017): During June 2016, the SEC adopted a resource extraction issuer disclosure rule, as required by the Dodd-Frank Act. The rule required U.S. public companies to annually report on payments made to foreign governments and the U.S. federal government relating to the commercial development of oil, natural gas and minerals. Shortly after President Trump took office, the rule was disapproved pursuant to the Congressional Review Act, which allows a rule to be disapproved by Congress within a specified number of days after it receives the rule from the promulgating federal agency. Accordingly, the rule is no longer in force. However, the statutory Dodd-Frank Act requirement to adopt a resource extraction issuer disclosure rule is still on the books, and the SEC has previously indicated that it is working on a new proposed rule.

Guidance and Voluntary Initiatives

Extractive Industries Transparency Initiative: The EITI is a voluntary initiative with the objective of improving transparency and accountability in countries rich in oil, gas and mineral resources. Once a host country endorses the initiative, the EITI process is mandatory for all extractive industry operators (including those that are state-owned) operating within that country. Among other things, the EITI Standard contemplates public reporting of resource extraction-related payments.

IPIECA Oil and Gas Industry Guidance on Voluntary Sustainability Reporting (Third Edition, 2015): IPIECA, which was originally known as the International Petroleum Industry Environmental Conservation Association, is a global oil and gas industry association for environmental and social issues. IPIECA's industry guidance on voluntary sustainability reporting addresses both the structure and content of sustainability reporting, including environmental, health and safety and social issues.

MODERN SLAVERY, CHILD LABOR AND OTHER WORKFORCE- AND HUMAN CAPITAL-RELATED ISSUES

Adopted Legislation

California Transparency in Supply Chains Act (2010): Requires retail sellers and manufacturers doing business in California that have annual worldwide gross receipts exceeding \$100 million to disclose on their websites information

regarding their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. Disclosure topics include:

- (1) verification of product supply chains;
- (2) supplier audits;
- (3) supplier certifications;
- (4) internal accountability; and
- (5) training.

U.S. Federal Acquisition Regulation Anti-human Trafficking Provisions (2015; amended 2018): Prohibits specified human trafficking conduct by contractors and subcontractors in connection with U.S. federal contracts. Also requires a compliance plan to be adopted and certifications to be provided if the contract or subcontract involves supplies acquired or services to be performed outside of the United States with an estimated value greater than \$500,000, excluding commercially available off-the-shelf items. In December 2018, the FAR anti-human trafficking provisions were amended to add a definition of recruitment fees.

U.K. Modern Slavery Act (2015): Requires commercial organisations that supply goods or services, are doing business in the United Kingdom and have an annual turnover of at least £36 million to annually prepare a slavery and human trafficking statement indicating the steps taken to ensure that modern slavery is not occurring in the supply chain or business. The U.K. Home Office has indicated that it expects subject commercial organisations to post their statements on their websites within six months after their fiscal year end. Suggested disclosure topics include:

- (1) organizational structure, business model and supply chain relationships;
- (2) applicable policies;
- (3) due diligence and auditing processes;
- (4) human trafficking risks and steps taken to assess and mitigate risk;
- (5) compliance effectiveness and key performance indicators; and
- (6) training.

In 2018, the U.K. Government commissioned an independent review of the U.K. MSA, which was completed during 2019. In response to that review, the U.K. Government has indicated that it will consider possible amendments to the U.K. MSA, including whether:

- (1) the currently suggested disclosure topics should be mandatory;
- (2) a single statement deadline is appropriate; and
- (3) whether additional enforcement mechanisms, such as monetary penalties, are appropriate.

U.S. Trade Facilitation and Trade Enforcement Act (2016): Repealed the “consumptive demand exception” to the U.S. Tariff Act. This exception allowed goods made using forced labor to be imported into the United States under certain circumstances.

U.S. Countering America’s Adversaries Through Sanctions Act (2017): The CAATSA established a presumption that goods, wares, articles and merchandise mined, produced or manufactured wholly or in part by the labor of North Korean nationals or citizens, wherever located, involve forced labor. As a result, under the Tariff Act, the goods will be denied U.S. entry (in addition to other potentially available enforcement measures), absent clear and convincing evidence that they were not produced using forced labor.

Australian Modern Slavery Act (Commonwealth) (2018): Australia-based entities and other entities that carry on business in Australia and that have at least A\$100 million in annual consolidated worldwide revenue are required to report each year on their actions to address modern slavery in both their operations and their supply chains. Statement content requirements include, at a minimum:

- (1) the structure, operations and supply chains of the reporting entity;
- (2) the modern slavery risks in the operations and supply chains of the reporting entity and any controlled entities;
- (3) the actions taken to assess and address modern slavery risks, including due diligence and remediation processes;
- (4) how the reporting entity assesses the effectiveness of the above actions;
- (5) the process of consultation with any controlled entities and, in the case of joint statements, between each reporting entity and the entity preparing the joint statement; and
- (6) details of statement approval.

Reporting entities are required to submit statements to the Minister for Home Affairs for publication within six months after their fiscal year-end. The Commonwealth MSA took effect on January 1, 2019 and applies beginning with the first fiscal year after it took effect.

New South Wales Modern Slavery Act (2018): An entity must prepare an annual modern slavery statement under the NSW Act if:

- (1) it has employees in NSW;
- (2) supplies goods and services for profit or gain; and
- (3) has total turnover for the applicable fiscal year of at least A\$50 million, or such other amount as may be prescribed by regulation.

Modern slavery statements will be required to contain information pertaining to the steps taken by the subject entity during the applicable fiscal year to ensure that its goods and services are not a product of supply chains in which modern slavery is taking place. Statement content requirements will be set forth in subsequent regulations.

Statements will be required to be made public and will be due as also provided for in subsequent regulations. The transparency provisions of the NSW Act will not apply to entities with obligations under a law of Australia or another Australian state or a territory that is prescribed as a corresponding law. During June 2019, the NSW Act was referred to the Standing Committee on Social Issues of the New South Wales Parliament due to concerns relating to the constitutionality of the NSW Act and duplication of and inconsistencies with the Commonwealth MSA.

U.S. Pay Ratio Rule (2015): Covered SEC registrants are required to disclose in their proxy statements the median of the annual total compensation of all employees (other than the chief executive officer) and the ratio of the median to the chief executive officer's annual total compensation.

U.K. Gender Pay Gap Information Regulations (2017): U.K. employers with 250 or more employees are required to annually publish gender pay gap information on their websites.

Pending Legislation

Dutch Child Labor Due Diligence Act (2019): The Dutch Parliament and Senate have approved a Child Labor Due Diligence Act that will require companies that sell or provide goods or services to Dutch end-users to exercise due diligence concerning child labor in their supply chains, make related disclosures and, if there is a reasonable suspicion of child labor, adopt and implement a plan of action. The legislation is awaiting approval by the King. After approval by the King, the Act will be submitted to the designated regulator, which is expected to be the Consumer and Market Authority or a new government agency, for implementation. By its terms, the Act will enter into force not earlier than January 1, 2020. However, the current expectation is that the Act will become effective sometime in 2022.

Proposed Legislation

Amendments to Item 101 of U.S. Regulation S-K (2019): As part of its Disclosure Effectiveness effort, the SEC has proposed amendments to Item 101, Description of Business, of Regulation S-K. Based on the view that "human capital may represent an important resource and driver of performance for certain companies," the proposed rule would replace the current requirement in Item 101(c) of Regulation S-K to disclose the number of employees with a requirement that the issuer describe its human capital resources, including, to the extent material, any human capital measures or objectives that management focuses on in managing the business. The proposed rule provides non-exclusive examples by referring to measures or objectives that address the attraction, development and retention of personnel. The intent of the proposed requirement is to elicit human capital resource disclosures that allow investors to better understand and evaluate an issuer's human capital resources and to see through the eyes of management how these resources are managed.

Washington State Transparency in Agricultural Supply Chains Act (2019): This Act would require every retail seller of agricultural products doing business in Washington State and having annual worldwide gross receipts of \$200 million or more to publish an annual disclosure statement. "Agricultural products" are defined as cocoa, dairy, coffee, sugar and fruit products, but exclude wheat, potato, onions, asparagus or other vegetable products.

In addition, subject retail sellers would be required to have their suppliers report to them annually any violations of employment-related laws and incidents of slavery, peonage and human trafficking. This would include, without limitation, any:

- (1) court or arbitration rulings;
- (2) citations or other rulings by governmental agencies; and

(3) criminal convictions.

At a minimum, the annual disclosure statement would be required to state:

(1) the retail seller's specific actions taken with respect to its product supply chains to evaluate and address risks of slavery, peonage and human trafficking, comply with employment law obligations and respect workers' human rights; and

(2) any violations information reported by suppliers.

Canadian Modern Slavery Act (2018): As proposed, subject entities would be required to publish an annual modern slavery report that discusses:

(1) the steps taken during the previous year to prevent and reduce the risk that forced or child labor is used at any step of the manufacture, production, growing, extraction or processing of goods in Canada or elsewhere by the subject entity or of goods imported into Canada by the entity;

(2) the entity's structure and the goods that it manufactures, produces, grows, extracts or processes in Canada or elsewhere or that it imports into Canada;

(3) the entity's policies in relation to forced and child labor;

(4) the entity's activities that carry a risk of forced or child labor being used and the steps it has taken to assess and manage that risk;

(5) any measures taken to remediate any forced or child labor; and

(6) the training provided to employees on forced and child labor.

Subject to the jurisdictional thresholds indicated below, the Canadian MSA would apply broadly to any entity that:

(1) manufactures, produces, grows, extracts, processes or sells goods in Canada or elsewhere;

(2) imports into Canada goods manufactured, produced, grown, extracted or processed outside Canada; or

(3) that controls an entity described above.

The entities subject to the Canadian MSA include those that:

(1) are listed on a Canadian stock exchange;

(2) have a place of business in Canada, do business in Canada or have assets in Canada and meet at least two of the following conditions for at least one of their two most recent financial years:

(a) have at least C\$20 million in assets;

(b) have generated at least C\$40 million in revenue; or

(c) employ an average of at least 250 employees; or

(3) are prescribed by regulations.

The Canadian MSA provides for an effective date of January 1, 2020 if the legislation is adopted.

Interpretations, Guidance and Voluntary Initiatives

U.S. SEC Compliance and Disclosure Interpretations 116.11 and 133.13 (2019). These CDIs, which are identical, provide guidance concerning disclosures of self-identified director diversity characteristics under Regulation S-K Items 401, Directors, Executive Officers, Promoters and Control Persons, and 407, Corporate Governance. According to the CDIs:

(1) if a board member or nominee has provided for inclusion in the company's disclosure self-identified specific diversity characteristics, those characteristics and how they were considered should be discussed in response to Item 401; and

(2) the SEC expects any description of diversity policies followed under Item 407 to include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications the diversity policy takes into account, such as diverse work experiences, military service or socio-economic or demographic characteristics.

International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (5th Edition, 2017): The MNE Declaration provides direct guidance to enterprises (multinational and national) on social policy and inclusive, responsible and sustainable workplace practices. It is intended to encourage the positive contribution that international companies can make to economic and social progress and the realization of decent work for all, and to minimize and resolve the difficulties to which their various operations may give rise. Topics covered include employees, training, conditions of work and life, industrial relations and general policies.

U.K. Labour Standards Assurance System (2012): LSAS was commissioned by the U.K. Department of Health and NHS Supply Chain, which procures products for the National Health Service. LSAS is the foundation of NHS Supply Chain's ethical procurement strategy. LSAS has 15 policy, procedure and practice action points. There are four audit levels under LSAS, each of which requires a specified level of compliance with the LSAS action points.

Welsh Code of Practice for Ethical Employment in Supply Chains (2017): The goal of the Code – which covers procurement, supplier selection, tendering and contract and supplier management – is to ensure that workers in Welsh public sector supply chains are employed ethically and in compliance with both the letter and the spirit of U.K., EU and international laws. The Welsh government has indicated that it expects businesses involved in Welsh public sector supply chains to adhere to the Code. Among other things, the Code contains a requirement to publish an annual modern slavery statement outlining the steps taken during the fiscal year, and plans for future actions, to ensure that slavery and human trafficking are not taking place in any portion of the organization or its supply chains.

ISO Guidelines for Internal and External Human Capital Reporting (ISO 30414) (2018): ISO 30414, which has been developed by the International Organization for Standardization and is applicable to all organizations, regardless of the type, size, nature or complexity of their business, provides guidelines and metrics on the following core human capital reporting areas:

(1) compliance and ethics (number and type of employee grievances filed, number and type of concluded disciplinary actions and percentage of employees who have completed training on compliance and ethics);

(2) costs (total workforce costs);

- (3) diversity (with respect to age, gender, disability and “other indicators of diversity” and diversity of leadership team);
- (4) leadership (“leadership trust,” to be determined by employee surveys);
- (5) organizational culture;
- (6) organizational health, safety and well-being (lost time for injuries, number of occupational accidents and number of people killed during work);
- (7) productivity (EBIT/revenue/turnover/profit per employee and human capital ROI, or the ratio of income or revenue to human capital);
- (8) recruitment, mobility and turnover (average time to fill vacant positions, average time to fill critical business positions, percentage of positions filled internally, percentage of critical business positions filled internally and turnover rate);
- (9) skills and capabilities (total development and training costs);
- (10) succession planning; and
- (11) workforce availability (number of employees and full-time equivalents).

CLIMATE CHANGE AND OTHER ENVIRONMENTAL ISSUES

Guidance and Voluntary Initiatives

U.S. SEC Guidance Regarding Disclosure Related to Climate Change (2010): The Guidance identifies four items in Regulation S-K that may require disclosures relating to climate change:

- (1) Item 101, Description of Business, requires a description of the registrant’s business, including its principal products and services, and the principal markets it operates in. This item expressly requires disclosure of the material effects of complying with environmental laws upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.
- (2) Item 103, Legal Proceedings, requires a registrant to include information about certain material pending legal proceedings, including, in certain circumstances, those arising under any federal, state or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment.
- (3) Item 503(c) (which has been subsequently replaced by Item 105), Risk Factors, requires registrants to discuss the most significant factors that make investment in the registrant speculative or risky.
- (4) Item 303, Management’s Discussion and Analysis of Financial Condition and Results of Operations, requires registrants to identify and disclose known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on their financial condition or operating performance.

The Guidance also indicates climate change-related matters that may trigger disclosure:

- (1) Legislation and regulation: pending or existing regulations or legislation related to climate change at all levels of government. For example, registrants could face costs to improve facilities and equipment to reduce emissions to comply with regulatory limits, or to purchase or profit from the sale of allowances or credits under a “cap and trade” system.
- (2) International accords: treaties or international accords relating to climate change.
- (3) Indirect consequences of regulation or business trends: new opportunities or risks created by legal, technological, political or scientific developments related to climate change. For example, registrants may face decreased demand for goods that produce significant greenhouse gas emissions and may face potential adverse consequences to their business operations or financial condition from the public’s perception of publicly available data about their greenhouse gas emissions.
- (4) Physical impacts: significant physical effects of climate change such as severity of storms, sea levels and water availability. For example, severe weather could cause property damage and disruptions to operations for registrants with operations concentrated on coastlines. It could also cause indirect financial and operational impacts by disrupting the operations of major customers or suppliers.

TCFD Recommendations (2017): The objective of the Financial Stability Board’s Task Force on Climate-related Financial Disclosures is to encourage companies to evaluate and disclose, as part of their financial filing preparation and reporting processes, the material climate-related risks and opportunities pertinent to their business activities. This is intended to help investors and other financial market participants, such as lenders and insurance underwriters, to assess and price climate-related risks and opportunities. The TCFD’s high level recommendations for all sectors center around four elements:

- (1) governance;
- (2) strategy;
- (3) risk management; and
- (4) metrics and targets.

The TCFD recommendations also include supplemental guidance for the financial sector (banks, insurance companies, asset owners and asset managers) and non-financial groups (energy, transportation, materials and buildings and agriculture, food and forest products), including suggested metrics.

Climate Disclosure Standards Board Framework (2018, most recent update): CDSB is an international consortium of business and environmental NGOs. It works to provide decision-useful environmental information to markets via mainstream corporate reports, such as an annual report or SEC Form 10-K. CDSB has developed a framework for reporting environmental information, natural capital and climate change-related information in these reports.

CDP (f/k/a the Carbon Disclosure Project): CDP focuses on climate, water and forests. Among other things, it solicits information from companies on behalf of investors, via annual questionnaires. Companies also can join to gather information on their supply chains. Questionnaires request qualitative and quantitative information regarding, among other things, strategy, targets, performance, methodology, resource usage and emissions data. Questionnaire responses can be public or private.

Proposed Legislation

Amendments to Item 103 of U.S. Regulation S-K (2019): As part of its Disclosure Effectiveness effort, the SEC has proposed amendments to Item 103, Legal Proceedings, of Regulation S-K. Under the proposed amendments, Item 103 would be revised to increase the \$100,000 threshold for disclosure of environmental proceedings to which the government is a party to \$300,000, to adjust for inflation.

U.S. Climate Risk Disclosure Act (2019): This Act would require U.S. public companies to include in their annual reports information regarding:

- (1) the identification of, the evaluation of potential financial impacts of and any risk management strategies relating to physical and transition risks posed to the issuer by climate change;
- (2) a description of any established corporate governance processes and structures to identify, assess and manage climate-related risks; and
- (3) a description of specific actions that the issuer is taking to mitigate identified risks.

The Act would require the SEC to, in connection with its rulemaking, establish climate-related risk disclosure guidance, which:

- (1) to the extent practicable, is specialized for industries within specific sectors of the economy, including specifically at a minimum the finance, insurance, transportation, electric power, mining and non-renewable energy sectors;
- (2) includes reporting standards for estimating and disclosing direct and indirect greenhouse gas emissions by an issuer and its affiliates, that separate, to the extent practicable, total emissions of each specified greenhouse gas by the issuer and include greenhouse gas emissions by the issuer during the period covered by the disclosure;
- (3) includes reporting standards for disclosing the total amount of fossil fuel-related assets owned or managed by the issuer and the percentage of fossil fuel-related assets as a percentage of total assets owned or managed by the issuer;
- (4) establishes a minimum social cost of carbon for use in preparing climate-related disclosure statements;
- (5) specifies requirements for, and the disclosure of, input parameters, assumptions and analytical choices to be used in climate scenario analyses required by the Act; and
- (6) includes documentation standards and guidance with respect to certain specified information required under the Act.

More specifically, the Act would require issuers to:

- (1) incorporate into their climate-related disclosure:
 - (a) quantitative analysis to support any qualitative statement made by the issuer;
 - (b) the climate-risk disclosure guidance established by the SEC pursuant to the Act;

- (c) industry-specific metrics that comply with the requirements developed by the SEC pursuant to the Act;
 - (d) specific risk management actions that the issuer is taking to address identified risks;
 - (e) a discussion of the short-, medium- and long-term resilience of any risk management strategy, and the evolution of applicable risk metrics, of the issuer under each scenario described in the reporting standards established by the SEC for estimating and disclosing direct and indirect greenhouse gas emissions by the issuer; and
 - (f) the total cost of carbon attributable to the direct and indirect greenhouse gas emissions of the issuer, using, at minimum, the social cost of carbon;
- (2) consider when preparing any qualitative or quantitative risk analysis statement contained in the disclosure:
- (a) a baseline scenario that includes physical impacts of climate change;
 - (b) a well below 1.5 degrees scenario; and
 - (c) any additional climate analysis scenario considered appropriate by the SEC; and
- (3) if the issuer engages in the commercial development of fossil fuels, disclose:
- (a) an estimate of the total and a disaggregated amount of direct and indirect greenhouse gas emissions of the issuer that are attributable to combustion, flared hydrocarbons, process emissions, directly vented emissions, fugitive emissions or leaks and land use changes; and
 - (b) a description of:
 - (i) the sensitivity of fossil fuel reserve levels to future price projection scenarios that incorporate the social cost of carbon into hydrocarbon pricing;
 - (ii) the percentage of the reserves of the issuer that will be developed under the scenarios required to be considered under the Act, as well as a forecast for the development prospects of each reserve under each of the scenarios;
 - (iii) the potential amount of direct and indirect greenhouse gas emissions that are embedded in proved and probable hydrocarbon reserves, with each such calculation presented as a total and in subdivided categories by the type of reserve;
 - (iv) the methodology of the issuer for detecting and mitigating fugitive methane emissions, which will be required to include the frequency with which applicable assets of the issuer are observed for methane leaks, the processes and technology that the issuer uses to detect methane leaks, the percentage of assets of the issuer that it inspects under that methodology, and quantitative and time-bound reduction goals of the issuer with respect to methane leaks;
 - (v) the amount of water that the issuer withdraws from freshwater sources for use and consumption in operations of the issuer; and

(vi) the percentage of the water described above that comes from regions of water stress or that face wastewater management challenges.

The Act provides that, if, two years after its enactment, the SEC has not issued rules implementing the Act, until rules are issued, an issuer will be deemed in compliance with the requirements of the Act if disclosures set forth in its annual report satisfy the TCFD recommendations.

BROAD-BASED HUMAN RIGHTS/CORPORATE SOCIAL RESPONSIBILITY AND MISCELLANEOUS HUMAN RIGHTS/CORPORATE SOCIAL RESPONSIBILITY TOPICS

Adopted Legislation

EU Non-financial Reporting Directive (2014; subsequently implemented into national legislation in the EU member states): The EU Non-financial Reporting Directive requires subject EU companies to disclose in their management reports material information relating to environmental matters, social and employee matters, respect for human rights, anti-corruption and bribery matters and diversity. Disclosure topics include:

- (1) business model;
- (2) relevant policies, including due diligence processes implemented;
- (3) outcomes of policies;
- (4) principal risks, where relevant and proportionate, including business relationships, products or services which are likely to cause adverse impacts and how the risks are managed; and
- (5) non-financial key performance indicators.

French Duty of Vigilance Law (2017): The Law addresses serious violations of human rights and fundamental freedoms, as outlined in the UN Guiding Principles on Business and Human Rights (which is discussed below), the health and safety of people and the environment. The Law requires large French companies to establish vigilance plans to allow for the identification and prevention of severe violations of human rights in their businesses and at certain subcontractors and suppliers. The vigilance plan and a report on its implementation must be made public and included in the subject company's annual report.

Proposed Legislation

U.S. ESG Disclosure Simplification Act (2019): This Act would require U.S. public companies to disclose in their annual meeting proxy statements:

- (1) a clear description of the issuer's views about the link between ESG metrics and the long-term business strategy of the issuer; and
- (2) a description of any process the issuer uses to determine the impact of ESG metrics on its long-term business strategy.

U.S. Corporate Human Rights Risk Assessment, Prevention and Mitigation Act (2019): This Act would require U.S. public companies to conduct an annual analysis to:

- (1) identify the existence of any **human rights risks** in their operations and value chain that are known or should be known, and rank any risks identified based on their severity; and
- (2) identify the existence of any **human rights impacts** in their operations and value chain that are known or should be known, and rank any impacts identified based on their severity.

Under a heading labeled “Human Rights Risk and Impact Report,” the issuer’s annual report would be required to include:

- (1) a brief description of the business structure of its supply chain, including subsidiaries and business relationships, to the extent not otherwise disclosed in the report;
- (2) a description of any process through which it educates executives, employees, contractors, sub-contractors and other actors in its value chain about any human rights policies that the issuer has;
- (3) a description of the human rights analysis conducted;
- (4) the results of the human rights analysis conducted, including the ranked list of any human rights risks and impacts identified;
- (5) a description of any action, including the establishment of any monitoring process, the issuer has taken to avoid or mitigate any human rights risks and impacts identified in the then-current analysis and its most recent annual report;
- (6) for any action taken, the assessment of the issuer of the efficacy of the action and a description of any outcomes of the action;
- (7) if no action was taken, a reasoned explanation of why no action was taken;
- (8) a description of any process the issuer has in place to avoid and mitigate any human rights impacts that it has caused or may cause; and
- (9) if no such process is in place, a reasoned explanation of why no such process is in place.

U.S. Shareholder Protection Act (2019): This Act would prohibit a U.S. public company from making an expenditure for political activities in a fiscal year unless the expenditure is approved by a vote of a majority of the outstanding shares of the issuer. The following expenditures, among others, would be picked up by the Act:

- (1) an independent expenditure as defined in section 301(17) of the Federal Election Campaign Act;
- (2) an electioneering communication as defined in section 304(f)(3) of the Federal Election Campaign Act and any other public communication as defined in section 301(22) of that Act that would be an electioneering communication if it were a broadcast, cable or satellite communication; or
- (3) dues or other payments to trade associations or organizations described in section 501(c) of the Internal Revenue Code and exempt from tax under section 501(a) of that Code that are, or could reasonably be

anticipated to be, used or transferred to another association or organization for the purposes described in (1) or (2) above.

The following would not require shareholder approval:

- (1) direct lobbying efforts through registered lobbyists employed or hired by the issuer;
- (2) communications by an issuer to its shareholders and executive or administrative personnel and their families; or
- (3) the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation.

A violation of the shareholder approval requirement by an issuer would be considered to be a breach of a fiduciary duty of any officer or director who authorized the covered expenditure. An officer or director who authorizes an expenditure in violation of the Act will be jointly and severally liable to any person or class of persons that held shares at the time the expenditure was made in an amount that is equal to three times the expenditure.

In addition, pursuant to the Act, the U.S. securities exchanges would be required to adopt rules requiring, as a condition to the listing of a class of equity securities, that the listed issuers provide in their bylaws that a vote of the board of directors be required for any expenditure for political activities that is more than \$50,000 and that would result in the total amount spent by the issuer for a particular election to be more than \$50,000. The board vote would be required to be made publicly available not later than 48 hours after the vote, including in a clear and conspicuous location on the issuer's website.

Furthermore, issuers would be required to quarterly report the following:

- (1) a description of any expenditure for political activities made during the preceding quarter;
- (2) the date of each expenditure for political activities;
- (3) the amount of each expenditure for political activities;
- (4) the votes of each member of the board of directors of the issuer authorizing the expenditure for political activity;
- (5) if the expenditure for political activities was made in support of or in opposition to a candidate, the name of the candidate and the office sought by, and the political party affiliation of, the candidate; and
- (6) the name or identity of trade associations or organizations described in section 501(c) of the Internal Revenue Code and exempt from tax under section 501(a) of the Code that receive dues or other payments as described in the Act.

Issuers would be required to include in their annual reports a summary of each expenditure for political activities made during the preceding year in excess of \$10,000, and each expenditure for political activities for a particular election if the total amount of such expenditures for that election are in excess of \$10,000.

U.S. Disclosure of Tax Havens and Offshoring Act (2019): This Act would, among other things, require U.S. public companies that are part of a multinational enterprise group that meets a to-be-specified revenue threshold to report annually specified financial metrics and tax information by tax jurisdiction.

Swiss Human Rights Due Diligence Legislation (various proposals, 2016-2019): The Responsible Business Initiative, a coalition of Swiss civil society organizations, has advocated for a requirement for Swiss companies to conduct human rights due diligence and publicly report on their activities, and that Swiss parent entities be liable for human rights harm caused by entities under their control. During March 2019, the Council of States (the upper chamber of the Federal Assembly) rejected a compromise bill put forward by its Legal Affairs Committee. Following rejection by the Council of States, the matter was referred back to the National Council (the lower chamber of the Federal Assembly), which, reaffirming action it took in 2018, voted in favor of its counter-proposal bill. The matter is again now sitting with the Council of States for its consideration.

German Human Rights Due Diligence Legislation (2019): As proposed, the law would require German-based companies and other companies that exceed a specified size threshold to engage in due diligence concerning specified human rights and environmental matters and take remedial action if a deficiency is identified. The proposed law also includes documentation and reporting requirements.

Guidance and Voluntary Initiatives

UN Guiding Principles on Business and Human Rights (2011): The Guiding Principles implement the United Nation’s “Protect, Respect and Remedy” framework. They cover all internationally recognized human rights. The Guiding Principles contain recommendations regarding policies, due diligence and remediation of adverse human rights impacts linked to business activity.

OECD Guidelines for Multinational Enterprises (2011 Edition): The OECD Guidelines for Multinational Enterprises are non-binding principles and standards for responsible business conduct in a global context. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promote. The topics covered in the OECD Guidelines include:

- (1) general policies;
- (2) disclosure;
- (3) human rights;
- (4) employment and industrial relations;
- (5) environment;
- (6) combating bribery, bribe solicitation and extortion;
- (7) consumer interests;
- (8) science and technology;
- (9) competition; and
- (10) taxation.

OECD Due Diligence Guidance for Responsible Business Conduct (2018): The objective of the Guidance is to provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises, to help enterprises avoid and address adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance that may be associated with their operations, supply chains and other business relationships.

UN Sustainable Development Goals (2015): The Sustainable Development Goals include 17 economic, social and environmental goals with 169 associated targets. The SDGs are intended to be universal goals that meet urgent environmental, political and economic challenges facing the world.

The GRI Standards (2016, with further updates): The GRI Standards provide a voluntary framework for reporting on economic, environmental and social impacts to a wide variety of global stakeholders, ranging from civil society to investors. They can be used for comprehensive sustainability reporting or more narrowly for issue-specific disclosures. The Standards take a modular approach, consisting of three universal standards – Foundation (101), General Disclosures (102) and Management Approach (103) – and 33 topic-specific standards organized into Economic (200), Environmental (300) and Social (400) topics.

The SASB Standards (2018): The Sustainability Accounting Standards Board’s mission is to help businesses around the world identify, manage and report on the sustainability topics that matter most to their investors. The SASB framework covers 26 different sustainability activities organized under five pillars:

- (1) environment;
- (2) human capital;
- (3) social capital;
- (4) business model and innovation; and
- (5) leadership and governance.

The SASB has developed standards for 77 industries that identify the minimal set of financially material sustainability topics and their associated metrics for the typical company in an industry. The standards contain both quantitative and qualitative disclosure metrics. The SASB standards are complementary with the TCFD recommendations.

Hong Kong Stock Exchange Environmental, Social and Governance Reporting Guide (2016): The Guide consists of both mandatory “comply or explain” provisions and recommended disclosures relating to environmental and social matters. For each of the subject areas, the Guide contains general disclosures and key performance indicators for issuers to report on in order to demonstrate how they have performed.

London Stock Exchange Group ESG Reporting Guidance (2018): The LSE Group has published recommendations for ESG reporting for listed issuers. The guidance builds on the TCFD recommendations and the SDGs.

Nasdaq ESG Reporting Guide 2.0 (2019): The Guide builds upon Nasdaq’s 2017 Guide specific to the Nordic and Baltic markets. The new version of the ESG Reporting Guide, which covers all Nasdaq markets, is intended to:

- (1) eliminate and revise uncommon or impractical metrics;
- (2) incorporate new developments in the marketplace;

- (3) simplify and standardize guidance, labels and calculations; and
- (4) improve ESG engagement for small- and medium-sized business enterprises.

International Integrated Reporting Council Framework (2013): The IIRC is a global coalition of regulators, investors, companies, standard setters, the accounting profession and NGOs that seeks to promote integrated reporting. The IIRC has published a principles-based Framework that establishes guiding principles and content elements for integrated reporting.

UN Global Compact: Founded by the United Nations, the UNGC is involved with a variety of sustainability issues. Participating companies are required to express a commitment to:

- (1) the UNGC and its ten principles, which address human rights, labor, the environment and corruption;
- (2) take action in support of UN goals; and
- (3) the annual Communication on Progress submission.

The COP describes members' practical actions taken or planned to implement the ten UNGC principles.

Delaware Certificate of Adoption of Transparency and Sustainability Standards Act (2018): Entities organized under Delaware law can request the Delaware Secretary of State to issue a Certificate of Adoption of Transparency and Sustainability Standards. The Certificate can be used by companies to help demonstrate a commitment to sustainability. A company seeking a Certificate must file a standards statement with the Delaware Secretary of State that indicates the following:

- (1) the company has adopted resolutions setting forth sustainability standards based on third-party criteria, and related performance assessment measures;
- (2) the website address for information on the standards and assessment measures; and
- (3) a commitment to:
 - (a) use the assessment measures to assess performance in meeting the standards;
 - (b) review and assess the standards and assessment measures from time to time and modify them as necessary or advisable in furtherance of meeting the standards; and
 - (c) prepare and make public a report within 90 days after each annual reporting period.

The publicly available annual report must include information on the following for the applicable reporting period:

- (1) the standards and assessment measures in effect;
- (2) actions taken to meet the standards;
- (3) objective and factual information on performance in meeting the standards;
- (4) if the standards have not been met, any additional efforts to be undertaken to improve performance;

- (5) the identity of any third party assisting in measuring, managing or reporting the impact of the entity's business and operations in light of its standards;
- (6) any changes to the standards, assessment measures or reporting period; and
- (7) a summary of any new actions for the next reporting period.

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About Our ESG, Corporate Social Responsibility and Supply Chain Compliance Practice

Ropes & Gray has a leading ESG, Corporate Social Responsibility and Supply Chain Compliance (business and human rights) practice. With team members in the United States, Europe and Asia, we are able to take a holistic, global approach to ESG, CSR and supply chain compliance. Senior members of the practice have advised on these matters for almost 30 years, enabling us to provide a long-term perspective that few firms can match. For further information on the practice, contact Michael Littenberg at 212-596-9160 or michael.littenberg@ropesgray.com.

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