Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments.

17 May 2023

Contents

Remuneration

UK High Pay Centre says recent calls to raise CEO pay are 'tone-deaf'

A recent statement published on the London Stock Exchange (LSE) website from LSE CEO Julia Hoggett suggests that the cost of UK companies attracting and retaining gifted leaders may be to offer them larger and more globally competitive pay packets. Ms Hoggett calls for a 'big tent' conversation on the issue with all stakeholders ie listed company Chairs, Founders of potentially listed companies, Asset Managers and Owners, the Financial Reporting Council, the Investment Association, other investee groups. Ms Hoggett states:

> 'It is essential to have a constructive discussion with all stakeholders about a topic that tends to generate emotion and strong views. If the UK capital markets community chooses to remain on the current path, the consequences of that decision should be explicitly recognised and accepted….We are at a pivotal moment. We should be encouraging and supporting UK companies to compete for talent on a global basis, so we remain an attractive place for companies to base themselves, stay and grow. The alternative is we continue standing idly by as our biggest exports become skills, talent, tax revenue and the companies that generate it'.

- Ms Hoggett's comments followed the recent 'pay revolt' at Unilever which saw 58% of shareholders vote down the company's remuneration report and moves to loosen the UK Listing Rules to remove barriers to companies electing to list in the UK/stem the tide of companies electing to list elsewhere (also covered in more detail below).
- Research from Insightia suggests that executive pay in the UK has also reached record levels – according to the report, in 2022 total pay for CEOs of FTSE 350 companies averaged £3.03m (up from £2.6m in 2021). Insightia also found that the approval rate for 'say on pay' proposals during Q1 2023 has fallen from an average of 93.5% in 2020/21 to 92.5%.
- In response to Ms Hoggett's comments, the High Pay Centre has issued a statement arguing there is no justification for raising CEO pay, especially given the current cost of living crisis. The High Pay Centre's position is that encouraging employers to increase spending on executive pay could in fact further exacerbate cost of living pressure on workers, as if companies increase executive wages they would have less money 'left over for their wider workforce'. The High Pay Centre states:

  > 'We are unconvinced of the business case or the moral case for increasing executive pay. From a business perspective, there remains limited evidence of executives fleeing overseas due to low pay in the UK. And while executives in the UK are paid significantly less than in the US, they remain amongst the best paid in Europe. Assuming that some executive exodus did take place, the view that at prevailing rates (£3.4m a year for a FTSE 100 CEO) the only replacements willing to do the job would be so hopeless they would damage the companies and the country as a whole seems pretty ludicrous'.

- The High Pay Centre suggests that if UK companies are finding it difficult to attract suitable leaders it may be a question of revisiting educational requirements/training, rather than increasing executive pay:

  > 'If UK companies really are struggling to find high calibre senior managers, that is perhaps a reflection of their training and development processes. There is certainly no shortage of people willing to work for £3.4m and there are hundreds of thousands of business and management graduates in the UK. The pipeline of potential future leaders is something boards and investors can address directly, unlike the constraints on their capacity to blow football transfer-style sums of money on their CEOs, and would be a better focus for their energies'.

  [Source: LSE media release: We need a constructive discussion on the UK's approach to executive compensation; High Pay Centre media release 09/05/2023]

Shareholder Activism

Berkshire Hathaway shareholders reject shareholder ESG proposals, endorse Warren Buffett as Chair

All shareholder ESG proposals failed to be carried

Three shareholder climate proposals, two of which were 'flagged' by Climate Action 100+ ahead of the meeting (Proposals 4 and 5 in the Notice), failed to secure the necessary support to be carried at Berkshire Hathaway's 6 May 2023 shareholder meeting. None of the three had board backing.

> [Note on 'flagging': For clarity, investor signatories to Climate Action 100+ are not bound to/required to vote against 'flagged' resolutions – they vote on shareholder proposals in their individual capacity and not on behalf of the Climate Action 100+ initiative. Nor does Climate Action 100+ 'take a formal position on shareholder voting'. Rather, 'flagging' a resolution considered to be aligned with the goals of the initiative is intended to highlight/draw attention to the resolution and help ensure it receives due consideration from investor signatories to the initiative. Climate Action 100+ publishes a list of 'flagged' proposals (which is regularly updated) here]

Three other shareholder proposals, also opposed by the board, also failed to be carried.

The table below provides a snapshot of the proposals, the voting outcome and an indication of how investors voted.

BERKSHIRE HATHAWAY		
PROPOSAL	RESULT	HOW INVESTORS VOTED
Climate: Report on physical and transition risks/opportunities: Proposal 4 in the Notice (filed by California Public Employees' Retirement System (CalPERS) and Caisse de Dépôt et Placement du Québec (CDPQ)) called on the company to: 'publish an annual assessment addressing how the Company manages physical and transitional climate-related risks and opportunities, commencing prior to its 2024 annual shareholders' meeting.' The proposal was 'flagged' by Climate Action 100+ ahead of the vote.	▪ (Approx) 27%	▪ Norges Bank Investment Management (NBIM) voted in support stating that: 'The board should account for material sustainability risks facing the company, and the broader environmental and social consequences of its operations and products. Sustainability disclosures should be aligned with applicable global reporting standards and frameworks to support investors in their analysis of risks and opportunities'. ▪ Legal and General Investment Management (LGIM) voted in support ▪ Storebrand voted in support stating that: 'A vote FOR the proposal is warranted as shareholders would benefit from corporate-level disclosure on the climate risks the company judges as material and plans to mitigate those risks' ▪ New York pension funds (New York City Employees' Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers' Retirement System of the City of New York,New York City Board of Education Retirement System) voted in support ▪ As flagged above Neuberger Berman voted in support. ▪ CalPERS voted in support ▪ CalSTRS voted in support ▪ Neuberger Bergman
Climate: Audit committee/board oversight of climate risk: Proposal 5 in the Notice (filed by The Office of the Treasurer for	▪ (Approx) 18%	▪ NBIM voted in support. The rationale given was the same as that given for supporting Proposal 4 above. ▪ LGIM voted in support stating that:

BERKSHIRE HATHAWAY		
PROPOSAL	RESULT	HOW INVESTORS VOTED
the State of Illinois as Trustee of the Bright Start College Savings Trust and Robeco) called on the Board to disclose: 'in their annual proxy statement how climate-related risks are being governed by the company, including, but not limited to, the audit committee's oversight of climate risks and disclosures'. The disclosure should also include: The proposal further called for this disclosure to include: ▪ 'If and how the company is testing the impacts of climate-related risks on the business, including how assumptions from low-carbon scenarios would affect assumptions, costs, estimates, and valuations underlying its financial statements'; and ▪ 'The degree to which the company deems directors to be competent in climate-related risks and any internal or external training that the board received on climate and ESG matter' and ▪ 'If and how climate and ESG attributes are considered in director elections and succession planning'. The proposal was 'flagged' by Climate Action 100+ ahead of the vote.		'A vote in favour is applied as LGIM expects the company to be undertaking appropriate analysis and reporting on climate change matters, as we consider this issue to be a material risk to companies'. ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted at this time because the enhanced disclosure would allow shareholders to assess the board's governance and risk oversight mechanisms in place to protect the company from potentially adverse regulatory requirements and market changes related to the energy transition'. ▪ New York pension funds (New York City Employees' Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers' Retirement System of the City of New York,New York City Board of Education Retirement System) voted in support ▪ Neuberger Berman voted against stating that: 'While we acknowledge the potential benefits of greater transparency reflected in shareholder proposals #5 and #6, we believe the proposals' requests could be better addressed through a TCFD report as requested in shareholder proposal #4. As such, we intend to vote against the shareholder proposals regarding disclosure and oversight of climate risks and regarding aligning GHG reductions with the Paris Agreement goals'. ▪ CalPERS voted in support ▪ CalSTRS voted in support
Climate: Alignment of underwriting/insuring/investment with Paris goals: Proposal 6 in the Notice (filed by You Sow on behalf of Elizabeth Kantor Trust) called on the company to: 'issue a report…addressing if and how it intends to measure, disclose, and reduce the GHG	▪ (Approx) 23%	▪ NBIM voted in support. The rationale given was the same as that given for supporting Proposal 4 above. ▪ LGIM voted in support stating that: 'A vote in favour is applied to improve transparency on the company's financing activities that may hamper climate change mitigation'. ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted at this time because the requested report would allow

BERKSHIRE HATHAWAY		
PROPOSAL	**RESULT**	**HOW INVESTORS VOTED**
emissions associated with its underwriting, insuring, and investment activities in alignment with the Paris Agreement's 1.5°C goal, requiring net zero emissions'. As You Sow has filed similar proposals at Chubb and The Travelers.		shareholders to evaluate emissions from Berkshire's insurance group, its peers have made public commitments, and the report may help the company prepare for state climate regulations'. ▪ New York pension funds (New York City Employees' Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers' Retirement System of the City of New York,New York City Board of Education Retirement System) voted in support ▪ As flagged above Neuberger Berman voted against proposals 5 and 6 because it considers the issued raised in both would be 'better addressed through a TCFD report' as requested in Proposal 4. ▪ CalPERS voted in support ▪ CalSTRS voted in support
Effectiveness of DEI measures: Proposal 7 in the Notice (filed by Meredith Benton of Whistle Stop Capital, on behalf of Myra K. Young) called on the company to: 'report to shareholders on the effectiveness of the Company's diversity, equity, and inclusion efforts'. The proposal further calls for this disclosure to: 'provide transparency on outcomes, using quantitative metrics for hiring, retention, and promotion of employees, including data by gender, race, and ethnicity'.	▪ (Approx) 21%	▪ NBIM voted in support. The rationale given was the same as that given for supporting Proposal 4 above. ▪ LGIM voted in support stating that: 'A vote in favour is applied as LGIM believes that disclosing the level of information contained in the EEO report may lead to reduced inequality'. ▪ Storebrand voted in support stating that: 'A vote FOR this resolution is warranted due to: * the absence of information regarding comprehensive company diversity-related policies, programs or metrics; and * the potential benefits for shareholders of increased reporting of diversity-related efforts and program effectiveness'. ▪ CalSTRS voted in support ▪ New York pension funds (New York City Employees' Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers' Retirement System of the City of New York,New York City Board of Education Retirement System) voted in support ▪ CalPERS voted in support ▪ CalSTRS voted in support
Independent Chair/separate Chair and CEO roles: Proposal 8 in the Notice (filed by National Legal and Policy Center) called on the board to: 'adopt as policy, and amend the governing documents as necessary, to require hereafter that two separate people hold the office of the	▪ (Approx) 11%	▪ NBIM voted in support, stating that: 'The board should exercise objective judgement on corporate affairs and be able to make decisions independently of management. The roles of chairperson and CEO should not be held by the same individual'. ▪ LGIM voted in support stating that: 'A vote in favour is applied as LGIM expects companies to establish the role of independent Board Chair'.

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PROPOSAL	RESULT	HOW INVESTORS VOTED
Chairman and the office of the CEO' [Note: A number of similar proposals have been filed with financial institutions this year. Similar proposals filed at Goldman Sachs, Bank of America and Citigroup also failed to be carried.]		▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted given the importance of having an independent board chair'. ▪ New York pension funds (New York City Employees' Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers' Retirement System of the City of New York,New York City Board of Education Retirement System) abstained ▪ CalPERS abstained ▪ CalSTRS voted in support
Avoid 'political speech' (conservative proposal): Proposal 9 in the Notice (filed by American Conservative Values ETF) called on the board to: 'encourage a Senior Management Commitment at Berkshire Hathaway and its portfolio companies to avoid supporting or taking a public position on any controversial social or political issues (collectively "political speech"), without having previously, comprehensively and without bias justified by action on the basis of underlying business strategy, exigencies, and priorities'.	▪ (Approx) 1%	▪ NBIM voted against ▪ LGIM voted against stating that: 'A vote AGAINST this resolution is applied as the intention of the proposal as disclosed in the supporting statement is considered to be of an anti-ESG nature'. ▪ Storebrand voted in against stating that: 'A vote AGAINST this proposal is warranted. Especially given the fact that there are no well-known controversies related to senior executives' political speech, such micromanaging of senior executives' speech is not necessary'. ▪ New York pension funds (New York City Employees' Retirement System, New York City Fire Pension Fund, New York City Police Pension Fund, Teachers' Retirement System of the City of New York,New York City Board of Education Retirement System) voted against ▪ CalPERS voted against ▪ CalSTRS voted against ▪

Director elections

The 15 directors standing for election were duly elected – all had board backing.

Ahead of the meeting:

- CalPERS predeclared its intention to withhold votes for thee directors (who are also longstanding members of the Audit Committee) - Christopher Davis, Susan Decker and Meryl Witmer - on climate grounds. Votes against the audit committee members have been flagged by the Climate Action 100+ initiative.
- Majority Action went further, recommending shareholders vote against the entire board to communicate concern about the company's failure to:
  - 'Commit to implementing the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) framework,
  - Announce a full phase-out of coal-fired generation or the end of unrestricted coal underwriting from its insurance business in a manner that is consistent with the IEA's Below 2°C Scenario, and
  - Set a company-wide ambition to achieve net zero greenhouse gas (GHG) emissions by 2050';

[Sources: Berkshire Hathaway Inc Notice of Meeting; Results of Meeting]

UPS shareholders reject shareholder ESG proposals, the level of support for GHG targets proposal fell 8% on last year

United Parcel Service, Inc shareholders rejected all six shareholder ESG proposals that went to a vote at the 4 May 2023 meeting, in line with the board's 'against' recommendation. Four of the proposals secured 20% or more support.

The table below provides an overview of each proposal, the result and an indication of how investors voted.

PROPOSAL	UPS RESULT	HOW INVESTORS VOTED
Equal voting rights: Proposal 5 in the Notice (filed by John Chevedden) called on the board to: 'take steps to ensure that all of our company's outstanding stock has an equal one-vote per share in each shareholder voting situation'.	(Approx) 33% support	▪ Norges Bank Investment Management (NBIM) voted in support stating that: 'All shareholders should have the right to vote on fundamental corporate decisions, and voting rights should be proportionate to cash flow rights. Any unequal voting rights should be time-limited and aligned with cash flow rights over time'. ▪ Legal and General Investment Management (LGIM) voted in support stating that: 'A vote in favour is applied as LGIM expects companies to apply a one-share-one-vote standard'. ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted, as it would provide all shareholders with equal voting rights on all matters'. ▪ CalPERS voted in support ▪ CalSTRS voted in support
Science based GHG emissions reduction targets: Proposal 6 in the Notice (filed by Green Century and Trillium Asset Management) called for the adoption of: 'independently verified short and long-term science-based greenhouse gas emissions reduction targets, inclusive of emissions from its full value chain, in order to achieve net-zero emissions by 2050 or sooner and to attain appropriate emissions reductions prior to 2030, in line with the Paris Agreement's goal of limiting global temperature rise to 1.5 degrees Celsius'.	(Approx) 20% support (down from 28% in 2022)	▪ NBIM voted against ▪ LGIM voted in support stating that: 'A vote in favour is applied as LGIM expects companies to introduce credible transition plans, consistent with the Paris goals of limiting the global average temperature increase to 1.5°C. This includes the disclosure of scope 1, 2 and material scope 3 GHG emissions and short-, medium- and long-term GHG emissions reduction targets consistent with the 1.5°C goal'. ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted, as additional information on the company's efforts to reduce its carbon footprint and align its operations with Paris Agreement goals would allow investors to better understand how the company is managing its transition to a low carbon economy and climate change related risks'.

PROPOSAL	UPS RESULT	HOW INVESTORS VOTED
		▪ CalPERS voted in support ▪ CalSTRS voted against
Tying ESG targets to executive compensation: Proposal 7 in the Notice (filed by Zevin Asset Management) called on the: 'Board Compensation Committee prepare a report assessing the feasibility of integrating the UPS' committed GHG emissions targets, goals, and other relevant sustainability measures, (as determined by the Board) into the performance goals, metrics, and vesting conditions applicable to senior executives under the UPS' compensation incentive plans'.	(Approx) 18% support	▪ NBIM voted against ▪ LGIM voted in support stating that: 'Companies that are exposed to high levels of environmental, social or reputational risk should include relevant and clearly measurable targets that focus management in mitigating these risks. A vote in favour is therefore warranted as LGIM supports proposals related to how ESG issues are integrated into the company's strategy and executive remuneration as we consider these disclosures to be material information for investors'. ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted because this request is not considered burdensome and there is some ambiguity around how and whether the company's executive compensation strategy includes climate goals'. ▪ CalPERS voted against ▪ CalSTRS voted in support
Disclosure of impact of climate strategy on stakeholders: Proposal 8 in the Notice (filed by The International Brotherhood of Teamsters) called on the board to: 'prepare a report disclosing how United Parcel Service, Inc. ("UPS" or the "Company") is addressing the impact of its climate change strategy on relevant stakeholders, including but not limited to its employees, workers in its supply chain, and communities in which it operates, consistent with the "Just Transition" guidelines of the International Labor Organization and indicators of the World Benchmarking Association'.	(Approx) 24% support	▪ NBIM voted against ▪ LGIM voted in support stating that: 'A vote in favour is applied as LGIM expects companies to be taking sufficient action on the key issue of climate change'. ▪ Storebrand voted in support stating that: 'A vote FOR this proposal is warranted to provide shareholders with disclosure on how the company is assessing and mitigating related risks' ▪ CalPERS voted in support ▪ CalSTRS voted in support
Report on risks/costs of restrictions on reproductive healthcare: Proposal 9 in the Notice (filed by Arjuna Capital) called on 'Shareholders request that the UPS Board of Directors issue a public report prior to December 31, 2023…detailing any known and potential risks or costs to the company caused by enacted or proposed state policies severely	(Approx) 9% support	▪ NBIM voted in support, stating that: 'The board should account for material sustainability risks facing the company, and the broader environmental and social consequences of its operations and products. Sustainability disclosures should be aligned with applicable global reporting standards and frameworks to support investors in their analysis of risks

PROPOSAL	UPS RESULT	HOW INVESTORS VOTED
restricting reproductive rights, and detailing any strategies beyond litigation and legal compliance that the company may deploy to minimize or mitigate these risks'. [Note: A broadly similar proposal filed at Coca-Cola (Item 9 in the Notice) by As You Sow also failed to be carried at the recent meeting securing approximately 13.12% support. Reproductive healthcare looks to be a growing category of shareholder 'S' proposals this year in the US. Building on an initiative first launched in 2019, Rhia Ventures announced in February 2023 that 31 shareholder proposals on a range of reproductive healthcare related issues (including the proposal at UPS) had been filed at US companies (up from a total of 28 proposals filed on the topic previously).]		and opportunities. Where a company's disclosure does not meet our needs as a financial investor, we will consider supporting a well-founded shareholder proposal calling for reasonable disclosure' ▪ LGIM voted in support stating that: 'a vote in favour is applied as this issue may pose a real health risk to employees and it is important that the company considers the impact a change in law would pose for its employees and consider what steps they can take to help their employees'. ▪ Storebrand voted in support stating that: 'A vote FOR this resolution is warranted, as additional information on the potential risks and costs associated with proposed or enacted state policies that restrict reproductive healthcare would allow shareholders to assess how the company is managing such risks'. ▪ CalPERS voted in support ▪ CalSTRS voted against
(Conservative) Cost of DEI/reverse discrimination report: Proposal 10 in the Notice (filed by National Center for Public Policy Research) called on the board to: 'commission an audit analysing the impacts of the Company's Equity, Diversity & Inclusion policies on civil rights, non-discrimination and returns to merit, and the impacts of those issues on the Company's business'.	(Approx) 6% support	▪ NBIM voted against ▪ LGIM voted against stating that: 'A vote AGAINST this resolution is warranted as the company's current policies and disclosures provide adequate information for shareholders to determine whether its employee programs and training materials are having a reverse discrimination effect'. ▪ Storebrand voted against stating that: 'A vote AGAINST this resolution is warranted as the company's current policies and disclosures provide adequate information for shareholders to determine whether its employee programs and training materials are having a reverse discrimination effect'. ▪ CalPERS voted against ▪ CalSTRS voted against
DEI disclosure request: Proposal 11 in the Notice (filed by As You Sow) called for a report on: 'the Company's diversity, equity, and inclusion efforts. The report should…provide transparency on outcomes, using quantitative metrics for	(Approx) 24% support	▪ NBIM voted in support. In doing so, NBIM gave the same justification as was provided for supporting Proposal 9 above. ▪ LGIM voted in support stating that:

UPS		
PROPOSAL	**RESULT**	**HOW INVESTORS VOTED**
hiring, retention, and promotion of employees, including data by gender, race, and ethnicity'.		'A vote in favour is applied as LGIM believes that disclosing the level of information contained in the EEO report may lead to reduced inequality'. ▪ Storebrand voted in support stating that: 'A vote FOR this resolution is warranted, as reporting quantitative and comparable diversity statistics would allow shareholders to better assess the effectiveness of the company's diversity initiatives and its management of related risks'. ▪ CalPERS voted in support ▪ CalSTRS voted in support

[Sources: Notice of meeting; Results of meeting]

As You Sow welcomes release of Caterpillar Inc's TCFD-aligned report as a demonstration of the company's responsiveness to last year's majority vote

- In 2022, shareholder GHG targets proposal (with board endorsement) secured 96.5% support at construction and mining equipment manufacturer, Caterpillar Inc's annual shareholder meeting.
- In response, and in response to continued engagement efforts from the Climate Action 100+ initiative, Caterpillar has released its first annual TCFD-aligned report, together with an estimate of its Scope 3 emissions.
- Though acknowledging that the report does not fully meet the demands in the 2022 proposal – ie it does not include Paris-aligned short and long term targets across all Scopes - As You Sow, has welcomed this as a 'move in the right direction' by the company and an important demonstration of the 'company's responsiveness to investor concerns'.
- According to As You Sow's statement, shareholders from the Climate Action 100+ plan to continue to engage with Caterpillar to persuade the company to include Scope 3 emissions in their new emissions reduction targets.

[Source: As you Sow media release 10/05/2023]

Shareholder thermal coal resolution filed at Glencore looks to be gaining traction with Allianz Global Investors joining other investors in predeclaring its support

- A shareholder coal production resolution (coordinated by ShareAction, the Australasian Centre for Corporate Responsibility (ACCR) and others, Proposal 19 in the Notice) is set to go to a vote at Glencore's 26 May 2023 meeting.
- For context, the proposal calls on the company to disclose how the company's projected thermal coal production aligns with the goals of the Paris Agreement and with the IEA Net Zero scenario timelines for the phase out of unabated thermal coal. Full text of resolution here.
- Ahead of the meeting, Allianz Global Investors has predeclared its intention to support the resolution and its intention to vote against the management-proposed 'Say on Climate' resolution (Proposal 13 in the Notice). The chief reason given for this is the perceived 'lack of transparency' provided by Glencore around its exposure to transition risk. AllianzGI's Global head of Sustainable and Impact Investing Matt Christensen, states:

  'We note the progress Glencore made in recent years in areas such as managing methane emissions, better transparency and their approach to a Just Transition. We recognise the inclusion of Scope 3 within emissions reduction targets but would also expect further detail on how plans for thermal coal production and capital expenditures are Paris-aligned. This is key as it would provide us valuable information to enhance our understanding of the company's long-term value creation paradigm'.

- In addition, Allianz GI considers that more information about the environmental impacts of Glencore's coal portfolio on biodiversity is warranted given the risk this poses to the health of surrounding ecosystems.

Investor support looks to be building?

The Glencore board has recommended shareholder oppose the resolution. Despite this, there are signs that the proposal is gaining support. For example:

- The resolution has been 'flagged' by Climate Action 100+ ahead of the meeting. It is also included on ShareAction's list of shareholder ESG resolutions that the group considers should be a 'priority' for investors this 2023 voting season.
- According to the ACCR, the following investors have given their 'indicative' support for the resolution.
  - Man Group
  - Brunel Pension Partnership
  - EFG Asset Management
  - Swiss Federal Pension Fund PUBLICA
  - Border to Coast Pensions Partnership
  - Pensionskasse SBB
  - Scottish Widows
  - Downing Fund Managers
  - Fulcrum Asset Management

  [Source: Allianz Global Investors LinkedIn post 15/05/2023]

Follow This Scope 3 shareholder proposal filed at Shell 'flagged' by Climate Action 100+

Climate Action 100+ has flagged a shareholder a Scope 3 shareholder proposal (filed by Follow This, Proposal 26 in the Notice) at Royal Dutch Shell Plc calling on the company to:

> 'align its existing 2030 reduction target covering the greenhouse gas (GHG) emissions of the use of its energy products (Scope 3) with the goal of the Paris Climate Agreement: to limit global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C'.
>
> [Note on 'flagging': For clarity, investor signatories to Climate Action 100+ are not bound to/required to vote against 'flagged' resolutions – they vote on shareholder proposals in their individual capacity and not on behalf of the Climate Action 100+ initiative. Nor does Climate Action 100+ 'take a formal position on shareholder voting'. Rather, 'flagging' a resolution considered to be aligned with the goals of the initiative is intended to highlight/draw attention to the resolution and help ensure it receives due consideration from investor signatories to the initiative. Climate Action 100+ publishes a list of 'flagged' proposals (which is regularly updated) here]

According to the PRI, the following investors have (so far) predeclared their intention to support the proposal:

- PPPGM Investments
- Degroof Petercam Asset Management (DPAM)
- MN
- Anima Sgr

The Shell board has recommended shareholders oppose the proposal ahead of the 23 May 2023 meeting and instead support the management-proposed and backed 'Say on Climate' proposal (Proposal 25). The board writes:

> 'The Directors unanimously recommend that shareholders continue to support Shell's progress in delivering its energy transition strategy by voting for Resolution 25 [management-proposed 'Say on Climate' proposal], and also support the mitigation of climate risk by voting against the Follow This proposal, Resolution 26.'

Similar proposals filed at other companies, TotalEnergies proposal also 'flagged'

Follow This has filed similar resolutions at TotalEnergies, Exxon and Chevron. As You Sow's resolution at TotalEnergies has also been flagged by Climate Action 100+

The annual shareholder meetings for the companies targeted are scheduled for:

- 23 May 2023: Shell
- 26 May 2023: TotalEnergies
- 31 May 2023: Chevron

- 31 May 2023 ExxonMobil

In 2022, resolutions calling on companies to set Paris-aligned Scope 1, 2 and 3 emissions reduction targets at Shell, BP, ExxonMobil and Chevron received 20%, 15%, 28% and 33% support respectively.

Hard to square with the lack of investor support for a similar proposal filed at BP?

In a statement, Follow This comments that this marks the first time that the Climate Action 100+ has flagged a Follow This Scope 3 proposal.

Follow This also suggests that support for the proposal by certain investors appears inconsistent with their recent voting behaviour, pointing to their decision not to back a similar Scope 3 proposal filed by BP this year (also filed by Follow This).

For context the shareholder proposal at BP (Resolution 25 in the Notice, filed by Follow This, backed by a €1.1 trillion investor coalition) called on BP to align its 2030 Scope 3 emissions reduction targets with the goals of the Paris Agreement. The proposal failed to secure the necessary support to be carried at the company's 27 April 2023 shareholder meeting securing 16.75% support.

[Source: Climate Action 100+ list of flagged proposals; Follow This media release 10/05/2023]

Shareholder climate lobbying proposal set to go to a vote at Toyota's upcoming meeting

- A shareholder climate lobbying resolution (Proposal 4 in the Notice, full text of the proposal here) – filed by three investors: Danish pension fund, AkademikerPension (US$20 bn in AUM), Norwegian financial services company, Storebrand Asset Management (US$120 bn in AUM), and Dutch pension investment company, APG Asset Management (US$600 bn AUM) – is set to go to a vote at carmaker Toyota Motor Corporation's 14 June 2023 AGM.
- The proposal calls for the following provision to be added to the company's Articles of Incorporation:

  'The Company shall conduct a comprehensive, annual review and issue a report…describing if, and how, the Company's climate-related lobbying activities (direct and through industry associations), including public statements, serve to reduce risks for the Company from climate change and how they align with the goals of the Paris Agreement and the Company's goal of carbon neutrality by 2050. The report should disclose any instances of misalignment with those goals, along with the planned actions to address these.'
- Investors state that the proposal was filed after 'over two years of intense engagement' with the company failed to secure (what they consider to be) sufficient progress towards aligning both Toyota's strategy and indirect lobbying efforts (ie through business associations such as Keidanren and JAMA) with the goals of the Paris Agreement. Anders Schelde, Chief Investment Officer (CIO) at AkademikerPension commented:

  'From an investment perspective, we're concerned that Toyota is missing out on profits from soaring EV sales, jeopardising its valuable brand, and cementing its global laggard status. We welcomed the dialogue and annual disclosure but we need concrete policy changes and a better annual review drawing on independent data to calm international investors.'
- The Toyota board has issued an 'against' recommendation ahead of the meeting. In addition to pointing to the climate measures/initiatives and disclosure already in place/being provided, which the board considers to be sufficient, the board also opposes the proposal because it considers it inappropriate for the company's articles of association to be amended in the manner requested. The board states:

  '…the role of TMC's Board of Directors to address these issues is to make flexible and varying decisions according to the circumstances at the time, make agile changes as required, and swiftly turn decisions into action. Thus, the ideal state of disclosure is subject to sudden change as well. Generally, the articles of incorporation are intended to define the basic details of a corporation and its operation, and is not for stipulating matters related to specific business execution such as those in this shareholder proposal. Therefore, we would like to maintain our current Articles of Incorporation'.

  [Source: Storebrand media release 10/05/2023]

Disclosure and Reporting

Top Story | Greenwashing: 35 greenwashing enforcement actions in nine months and counting…

That greenwashing is a key enforcement focus for ASIC is made very clear in ASIC's latest report detailing examples of instances in which the regulator has intervened over the last nine months. Ahead of the expected introduction of new internationally aligned disclosure requirements and other policy measures designed to support and reinforce Australia's sustainable finance market, ASIC has reiterated called for firms to sharpen their focus on the issue.

Key Takeouts

- Greenwashing occurs when an organisation misrepresents (either expressly or impliedly) its sustainability related risks, business credentials, strategies or those of its products or services. Greenwashing distorts information that consumers need in order to make informed decisions.
- ASIC report 763 highlights ASIC's focus on greenwashing enforcement and is intended by the regulator to supplement the guidance in INFO 271 through providing examples of when ASIC has intervened.
- In its latest report, ASIC underlined that tackling greenwashing remains a key enforcement priority, noting that the 2023 Federal Budget included additional funds to support this work
- ASIC has expanded its greenwashing surveillance to include not only the managed fund and corporate sectors but also the superannuation and wholesale green bond market.
- In her address to the RI 2023 Conference, ASIC Deputy Chair Karen Chester underlined that ASIC's current work is only one aspect of the broader range of measures being progressed in Australia, and globally, to tackle the issue. In light of this, Ms Chester called on firms to sharpen their focus including:
  - reviewing the guidance on how to avoid greenwashing (ASIC INFO 271, and Report 763);
  - keeping abreast of other policy developments including the expected roll out of mandatory ISSB-aligned disclosure requirements in Australia and the development of the government's climate strategy; and
  - ensuring their 'governance practices are, and remain, fit for sustainability purpose – as the tide lifts'

35 greenwashing enforcement actions in nine months

The Australian Securities and Investments Commission (ASIC) has released a report – Report 763 ASIC's recent greenwashing interventions (REP 763) – detailing the main issues identified across the 35 greenwashing actions taken by the regulator during the period 1 July 2022 to 31 March 2023.

These actions included:

- 23 corrective disclosure outcomes
- 11 infringement notices issued
- 1 court action

Key problems identified

For clarity, ASIC defines 'greenwashing' as

> 'the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical'.

The greenwashing concerns flagged in the report fall into the following four categories.

- net zero statements and targets and decarbonisation claims that 'did not appear to have a reasonable basis or were factually incorrect'
- use of terms such as 'carbon neutral', 'clean' or 'green' in prospectuses, product disclosure statements and market announcements when 'there appeared to be no reasonable basis for these claims'

- fund names not 'true to label' in that, ASIC considered 'the names of the products or funds included sustainability-related terms that were inconsistent with the funds' investments or the investment process described'
- the stated scope or application of an investment screen or exclusion was considered too 'vague' or where the scope of investment screens was more limited than stated or where investment screens were not complied with.

The report includes examples of instance where ASIC took action under each of these broad categories with a view to providing transparency around ASIC's expectations and supporting compliance with existing requirements. As such, the report is intended to supplement the guidance in ASIC's information sheet INFO 271) on how to avoid greenwashing.

A key (and continuing) enforcement priority for ASIC

ASIC has previously identified tackling greenwashing as a top enforcement priority for 2023. The recent Federal Budget included additional funding ($4.3 million for 2023-24) to support the regulator in this work.

In her 10 May 2023 speech to the RI Australia 2023 annual Conference, ASIC Deputy Commissioner Karen Chester summed up why ASIC (and regulators globally) consider the issue to be of such importance as follows:

> 'Greenwashing distorts the information that a current or prospective investor might need to make informed investment decisions. In doing so it results in capital misallocation. Greenwashing corrodes investor confidence in the market for sustainability-related financial products and corporate strategies….As capital around the world leans into the investment task at hand, trust and transparency are paramount'.

In her address, Ms Chester made clear that ASIC had expanded its greenwashing surveillance to include not only the managed fund and corporate sectors but also the superannuation and wholesale green bond market.

Beyond TCFD-aligned disclosure: New disclosure obligations on the way

Ms Chester emphasised that enforcement of compliance with existing disclosure requirements is only one aspect of the measures necessary, and being progressed, to tackle greenwashing.

An important development in the Australian context, Ms Chester said, is the expected roll out of new internationally aligned, mandatory disclosure standards which importantly, will go further than the TCFD framework in a number of respects. Ms Chester underlined ASIC's support for this development stating:

> 'ASIC supports both the shift to mandatory disclosure in Australia and the work of the ISSB in developing the global baseline to do so. For all of us, a global baseline is a must-have antidote to greenwashing. And a must-have if Australia is to remain a destination for global capital'.

For context, consultation (summarised) on how and when a new mandatory sustainability reporting regime will be introduced in Australia closed on 17 February 2023.

The new regime is proposed to be aligned with the requirements in draft global standards being developed by the International Sustainability Standards Board (ISSB) – [Draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information (General Requirements Exposure Draft) and [Draft] IFRS S2 Climate-related Disclosures – which are expected to be launched in final form by June 2023.

Treasury's consultation paper suggests that mandatory climate reporting is likely to commence in Australia from the 2024/2025 financial year (though it is not yet clear which entities will be required to report within this timeframe).

> [Note: Ahead of the introduction of new mandatory ISSB-aligned sustainability reporting requirements in Australia, the AICD, in conjunction with Deloitte and MinterEllison, have produced a new guide outlining what is known about the forthcoming requirements, the questions yet to be determined by government, and the steps boards can take now in preparation.]

Other key policy developments

Ms Chester also pointed to the government's planned consultation in the second half of 2023, on a proposed 'comprehensive sustainable finance strategy' which is expected to include the development of new taxonomies for sustainable investment, and other initiatives to reduce greenwashing and strengthen ESG labelling, as another important step towards putting in place the necessary 'policy scaffolding' to support Australia's sustainable finance market.

Ms Chester commented:

> 'Taken collectively, these policy initiatives will provide the "bright lines" to afford greater comparability in climate-related financial disclosure and, over time, sustainability issues more generally.

Taken collectively they will also, over time, prove to be a broad antidote to greenwashing. The "nowhere to hide" transparency of quality and comparable climate-related financial disclosures with the supporting policy installed bright lines.'

ASIC encourages firms to sharpen their focus 'as the tide lifts'

In light of the direction of these developments, Ms Chester encouraged firms to:

- review the guidance in Information Sheet 271 to support compliance with existing obligations
- 'consider' the issues identified in ASIC Report 763 and in particular 'the kinds of statements and disclosures we [ASIC] have been taking issue with'
- 'keep on top of emerging policy developments' (including the expected introduction of ISSB-aligned disclosure requirements in Australia and the policy developments flagged above)
- 'ensure your governance practices are, and remain, fit for sustainability purpose – as the tide lifts'.

[Sources: Report 763 ASIC's recent greenwashing interventions (REP 763); ASIC Deputy Chair speech to the RI Australia 2023 annual conference, ASIC and Greenwashing Antidotes, 10/05/2023]

New report finds 35% of public companies now report Scope 3 emissions

MSCI's latest Net Zero Tracker – a report tracking the alignment of listed companies' climate commitments with the goal of limited global temperature rise to 1.5°C – highlights that:

- **Scope 3 reporting is on the rise:** The report found that more listed companies are disclosing information about their carbon emissions. In particular, the report highlights that:
  - 35% of listed companies globally now disclose at least some of their Scope 3 emissions (up 4% in the seven months to 31 March 2023)
  - 44% of listed companies have set a decarbonisation target (though only 17% of this group have a 1.5°C-aligned target covering Scope 1, 2 and 3 emissions)
- **Emissions aren't coming down?** Despite the increase in disclosure, the report found that listed companies are projected to emit 11.2 Gt of carbon dioxide equivalent (CO_2e) emissions into the atmosphere in 2023 (unchanged from 2022). The report predicts that at this rate, companies will use up their share of the global carbon budget for keeping temperature rise to below 1.5°C by 31 October 2026 (which is two months sooner than previously predicted)
- **Most targets/approaches are not aligned with a 1.5°C pathway:** Overall, the report concludes that based on current commitments, companies are on a trajectory for global temperature to increase by 2.7° above preindustrial levels this century:
  - Just 19% of listed companies' commitments were assessed as aligning with a 1.5°C pathway
  - 51% of companies' commitments were assessed as aligning with a 2°C pathway

Commenting on these findings MSCI Executive Director, Climate Change Investment Research Sylvain Vanston said that they serve to underline the gap between ambition and action. Mr Vanston called on investors to exert pressure to push companies to accelerate action:

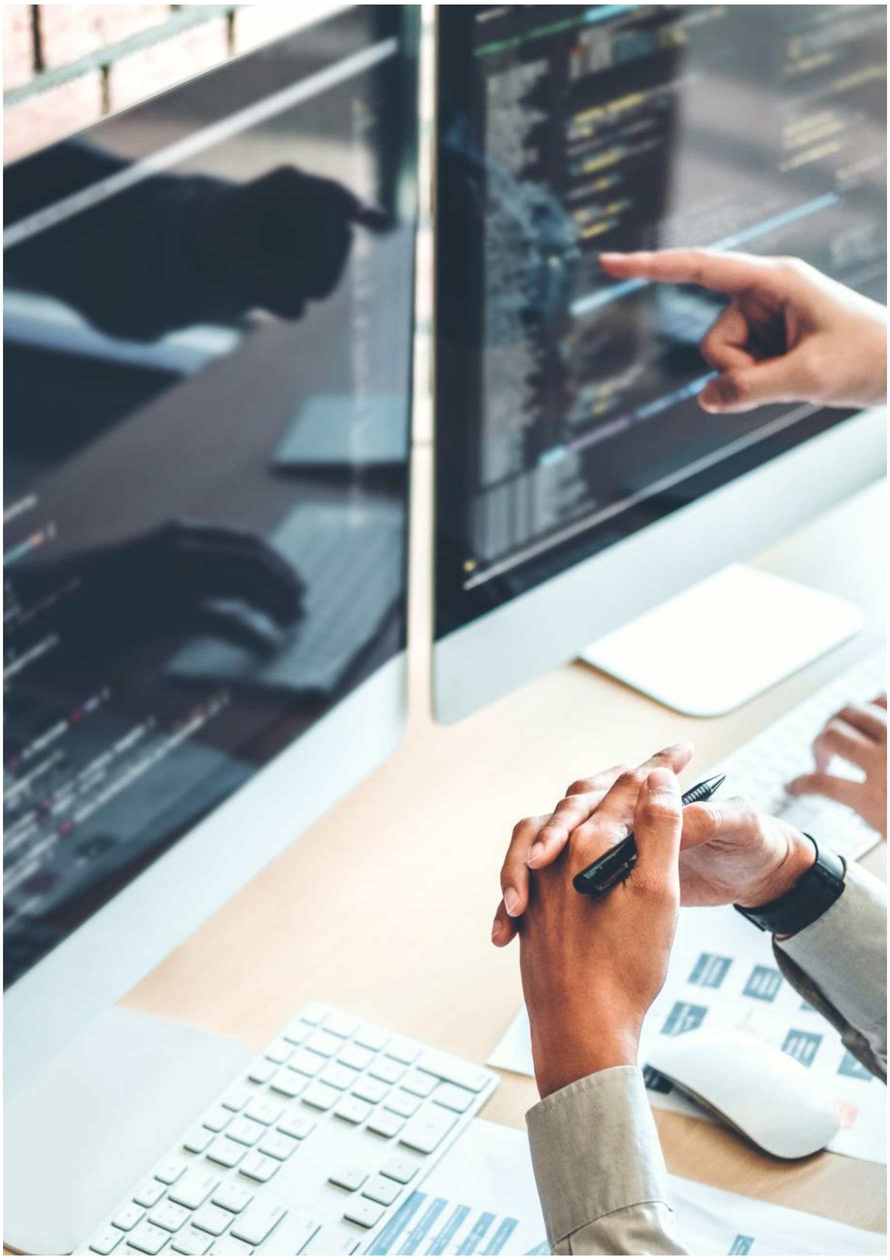
> 'We are seeing greater progress from public companies towards achieving essential climate goals, but the MSCI Net-Zero Tracker reveals that a significant gap remains between their climate commitments and their carbon emissions. The equation for investors is that they must address transition risks today or face severe and irreversible physical risks tomorrow, and that they have a role to play in driving the existential change required. Investors can use their strategic levers, including asset allocation, green investments, and engagement with boards and policymakers, to help not just put companies on a net-zero path, but also encourage the regulatory changes needed to level the business playing field between. Public and private companies and investors must act urgently, as this report clearly shows that time is running out and we are not on track to limit global warming to 1.5°C. Investors are counting on companies to close an ambition gap'.

[Sources: MSCI media release 11/05/2023; Full text report: MSCI Net Zero Tracker May 2023]

ISSB consults on its proposed approach to improving the international applicability of the SASB standards

Ahead of the finalisation of the initial two new global sustainability standards being developed by the International Sustainability Standards Board (ISSB) - – [Draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information (General Requirements Exposure Draft) and [Draft] IFRS S2 Climate-related Disclosures – which are expected to be launched in final form by the end of June 2023, the ISSB is consulting on the proposed methodology for improving the international applicability of the Sustainability Accounting Standards Board (SASB) standards.

Supporting reporting under IFRS S1



Once finalised IFRS S1 will set out the general requirements for disclosure of sustainability-related financial information including the relevant risks/opportunities that could reasonably be expected to affect entities' cash flows; access to finance; and/or cost of capital over the short, medium or long term.

The ISSB considers that compliance with these requirements will mean that entities will need to consider the SASB Standards to identify sustainability-related risks and opportunities and to develop appropriate disclosures.

To support this, the ISSB has launched a consultation on 'the focused methodology for updating references to jurisdiction-specific laws and regulations in the SASB Standards to improve their international applicability'.

The Exposure Draft sets out both:

- the proposed methodology for amending SASB Standards metrics to ensure their international applicability; and
- the proposed approach for updating the digital SASB Standards Taxonomy to reflect amendments made to the SASB Standards.

The proposed scope of application of the methodology described excludes all SASB Standards metrics included in Exposure Draft IFRS S2 Climate-related Disclosures (Draft IFRS S2).

Timing

- The due date for submissions is 09 August 2023.
- The ISSB's hopes to revise the metrics within the SASB Standards, based on the outcomes of the consultation, prior to IFRS S1 coming into effect in January 2024.

[Sources: IFRS media release 11/05/2023; Exposure draft]

Institutional Investors and Stewardship

Japan to become the first nation to host a GFANZ Country Chapter

- The Glasgow Financial Alliance for Net Zero (GFANZ) has announced that Japan will become the first nation to host a GFANZ Country Chapter. The Chapter will open in June 2023 and will be part of the broader GFANZ Asia-Pacific (APAC) Network launched in June 2022.

- It's envisioned that the Japan Chapter, will help 'catalyse and accelerate' the investment in transition projects required for Japan to meet its domestic net-zero goal.
- The Japan Chapter Consultative Group, which will comprise 'leading Japanese financial institutions, government representatives, industry leaders and experts' and will be chaired in its first year by Dai-Ichi Life Insurance Company Chair of the Board Seiji Inagaki, is expected to provide strategic input into the Chapter's activities and work products.
- The Japan Chapter will be advised by Masamichi Kono, Former Deputy Secretary General of the OECD and MUFG Bank Senior Advisor, who will also join the GFANZ APAC Advisory Board.

[Source: GFANZ media release 10/05/2023]

In Brief | Church Commissioners (which manages the Church of England's £10bn endowment fund) has predeclared its intention to vote against directors at the upcoming Exxon, Occidental Petroleum, Shell, and Total shareholder meetings on climate grounds

[Source: Church of England media release 09/05/2023]

ESG

BNP Paribas announces new oil/gas committments, Reclaim Finance (and other groups) question whether they go far enough

- Ahead of its16 May 2023 annual shareholder meeting, BNP Paribas SA has announced new oil/gas measures including:
  - ruling out provision of any further financing dedicated to the development of new oil and gas fields (regardless of the financing methods)
  - confirming that is on track to meet the targets announced in 2022 for the power generation, oil and gas, and the automotive sectors.

Initial response

- Though welcoming the announcement, Reclaim Finance considers that the new measures

  'are not enough to bring the bank in line with the International Energy Agency's (IEA) 1.5°C scenario projections or to meet the expectations of scientists and associations calling on BNP Paribas to stop financing oil and gas expansion'.

- For example, Reclaim Finance points to the fact that the bank has not committed to stop financing liquefied natural gas terminals, which it considers 'do not fit into the IEA's Net Zero Emissions scenario any more than new oil or gas fields do'. In addition, the group raises concerns that the bank has committed to turn off funding for new projects, as opposed to ruling out funding for companies that undertake the projects. As such, the group considers that BNP Paribas will 'still support its main clients' (including their gas expansion plans).

- Accordingly, Reclaim Finance has called on the bank to go further and

  > 'follow through on its commitment and demand that the companies in its portfolios stop developing projects that it no longer intends to finance directly'.

- Friends of the Earth France (and others) have also questioned whether the bank's new commitments go far enough.

Pressure from environmental groups

- A lawsuit was filed against the bank by Friends of the Earth France, Notre Affaire à Tous and Oxfam France on 23 February 2023 over its alleged failure to comply with its duty of vigilance regarding climate change (media release here).
- According to Friends of the Earth France, a number of questions on the bank's transition commitments have been submitted to the bank ahead of the General Meeting, on behalf of the 600 scientists who signed an open letter (sent in February 2023 the bank's board). Representatives of the scientific community and NGOs are also expected to be present at the general meeting.

[Sources: BNP Paribas SA media release 11/05/2023; Reclaim Finance 11/05/2023]

In Brief | Ahead of COP28, IEA Executive Director Faith Birol has called on the oil and gas industry to 'show the world that it can make a positive contribution to tackling climate change' by committing to make deep cuts to their emissions by the end of the decade. Dr Birol writes: 'The simple facts are already clear: the oil and gas industry has the technologies, the money and the know-how to cut its emissions by 60% by 2030. And it has the responsibility to do so. This is a moment of truth: if the oil and gas industry wants to be taken seriously in climate discussions, it has to clean up its act'

[Source: IEA article: COP28 is a moment of truth for the oil and gas industry's efforts on climate, IEA Executive Director Faith Birol 13/05/2023]

In Brief | The UK High Court has (reportedly) dismissed an action filed by Client Earth against Shell's board on the basis that Client Earth failed to establish a prima facie case that the directors' (alleged) failure to manage climate risk constituted a breach of their duties under the Companies Act to promote the success of the company/act with reasonable care, skill and diligence

[Source: UK Business and Human Rights Legal Centre media release 12/05/2023]

Regulators

In Brief | New priorities: The 2023 Federal Budget flagged that the frequency of the Financial Regulator Assessment Authority's reviews of the financial regulators has been reduced from every two years to every five years

[Source: Federal Budget 2023 Budget Paper No. 2]

In Brief | The government has announced that Australia will follow the UK in establishing a formal complaints mechanism to enable consumer and small business advocates to raise 'systemic complaints' (complaints about systemic market issues under the consumer law) with the regulator. The new complaints mechanism is planned to be established within the ACCC from July 2024

[Source: Assistant Minister for Competition, Charities and Treasury Andrew Leigh media release 12/05/2023]

Financial Services

Top Story | FAR status update: FAR Bills (still) not passed

Key Takeouts

- The Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023 have passed the House of Representatives without amendment. The Bills are currently before the Senate.
- The Senate is not due to sit again until 13 June 2023 (though it is not certain that the legislation will necessarily be considered/passed during the June sittings)
- If the Bills are passed by the Senate in June (and receive Assent in June), the earliest possible date from which the FAR would apply (for the banking sector) is December 2023 (and December 2024 for the insurance and superannuation sectors).

What is the FAR?

The Financial Accountability Regime (FAR) would replace and expand on the existing Banking Executive Accountability Regime or BEAR.

Broadly, the FAR would extend strengthened, but BEAR-like accountability requirements to other APRA-regulated entities and to the directors/senior executives of those entities in accordance with the government's response to several Hayne Commission recommendations (Hayne Recommendations 3.9, 4.12, 6.6, 6.7 and 6.8).

The aim of the FAR is ultimately to strengthen and increase individual and entity level accountability across the financial services sector, including for non-financial conduct risk.

Status update

- On 8 September 2022, the government introduced two Bills – the Financial Accountability Regime Bill 2022 (2022 FAR Bill) and the Financial Sector Reform Bill 2022 (FS Reform Bill) - which together would establish the proposed Financial Accountability Regime (FAR).
- The Financial Sector Reform Bill 2022 which also contained reforms intended to strengthen the consumer protection framework for consumers of small amount credit contracts and consumer leases, received Assent on 12 December 2022. Importantly, the Bill was amended in the Senate to remove both consequential amendments to support the proposed Financial Accountability Regime (FAR) and the proposed Compensation Scheme of Last Resort (CSLR). The government has indicated (here and here) that the policy intent behind the removal of the FAR and CSLR related amendments was to enable more time for further consultation on the implementation of both schemes without holding up the consumer credit reforms included in Schedule 4 of the Financial Sector Reform Bill 2022.
- The substantive 2022 FAR Bill which had progressed to second reading stage in the senate, the Senate Committee having recommended (summary of the Senate Committee Report) its passage, is not proceeding.
- On 8 March 2023 the government (re)introduced two new Bills:
  - the Financial Accountability Regime (Consequential Amendments) Bill 2023 (FAR Consequential Amendments Bill) which sets out transitional arrangements to support the implementation of the proposed FAR. The proposed approach appears identical in substance to the measures that were dropped from the Financial Sector Reform Bill 2022.
  - the Financial Accountability Regime Bill 2023 (2023 FAR Bill) which is very similar in substance to, and essentially replaces the 2022 FAR Bill. The government has indicated it has chosen to reintroduce the Bill in order to include an amendment previously proposed by Senator David Pocock (outlined below).
- The government considers that reintroducing the Bills is the 'neatest, lawful path to the agreed objective'.
- The Bills passed the House of Representatives on 22 March 2023. The Bills are currently before the Senate.

The substantive Bill to establish the proposed FAR is essentially unchanged

As flagged, the Financial Accountability Regime Bill 2023 is substantially the same as the previous version of the same name. You can access our detailed summary of the proposed FAR here.

The one change flagged by the Assistant Treasurer in his second reading speech is that the 2023 FAR Bill has been amended:

> 'to incorporate an amendment, previously circulated by Senator David Pocock, to articulate more clearly the scope of the minister's exemption power [ie the Minister's power to provide an exemption to an accountable entity] and to provide for parliamentary oversight of the exercise of that power'.

No individual civil penalties included

The Financial Accountability Regime Bill 2023 does not include individual penalties for breaches of accountability obligations (as recommended by the Greens in the Senate Report on the 2022 Bill). This is because the government considers that:

> 'The government's bill already contains effective measures to address executive failures to comply, including disqualification, loss of deferred bonuses, and individual civil penalties for assisting in an entity's contravention of its obligations. That is to say, the bill already contains instances where individual civil penalties apply. These sanctions are on top of penalties for misconduct already in place in other financial services laws.
>
> These measures are finely balanced to improve, on the one hand, executive conduct and accountability in the financial services sector without adversely impacting the sector's efficiency. Adding individual civil penalties on top of those that are already extant within the general law and within this bill is not likely to substantially increase the level of deterrence that already exists, noting that the removal of access to deferred remuneration acts as a financial penalty on individual accountable persons under the regime. So, while it may impact on firms seeking to attract and retain the best executive talent, it would not add to the already extant penalties in a meaningful way'.

Attempts by the Greens to introduce amendments in the House to include civil penalties were unsuccessful.

What's included in the Financial Accountability Regime (Consequential Amendments) Bill 2023?

Transitional arrangements for the banking sector

- The FAR Consequential Amendments Bill sets out the transitional arrangements for the banking sector to transition from the BEAR to the proposed FAR. If legislated in its current form, the changes would mean that:
- Once the Financial Accountability Regime starts applying to the banking industry, ADIs and their authorised NOHCs would become accountable entities, and the BEAR would be repealed.
- Accountability statements provided to APRA under the BEAR would automatically transition to become accountability statements under the FAR.
- APRA and ASIC would be able to jointly make rules prescribing transitional arrangements.

Transitioning of accountable persons

- Accountable persons of entities in the banking industry would automatically have their registration transitioned from the BEAR to the new FAR (though the transition from the BEAR to the FAR will likely result in changes to the details of the responsibilities of accountable persons which will need to be flagged with the regulator).
- A person who became an accountable person under the BEAR on a temporary basis, would be taken to be a new temporary accountable person when the FAR starts to apply to the banking sector.
- Any applications to register accountable persons under the BEAR that are pending when the FAR commences, would be considered to be applications for registration under the FAR.
- Entities would be able to register new accountable persons in the 30 days prior to the FAR applying to the banking sector.

Deferred remuneration

- The FAR deferred remuneration obligations for the banking industry would 'apply when the decision to provide remuneration occurs in first financial year that begins six months after the Financial Accountability Regime applies to the banking industry'.
- Remuneration that was decided to be provided to an accountable person before this, would still be subject to existing BEAR remuneration requirements.

- Despite the repeal of the BEAR, BEAR deferred remuneration obligations would continue to apply to accountable persons who do not transition to the proposed FAR until the period for the deferral finishes.

Transitional arrangements for insurance and superannuation industries

- The FAR would apply in full (including deferred remuneration obligations) to the accountable entities in the insurance and superannuation industries 18 months after commencement of the Financial Accountability Regime Bill 2022.
- For clarity, deferred remuneration obligations under the proposed FAR would apply to remuneration that was determined after the start of the first financial year after the Financial Accountability Regime applies to the insurance and superannuation industries.

Planned commencement of the proposed FAR

The planned timing of the reforms is unchanged.

If legislated in its current form, the FAR Bill will commence on the day after it receives Assent.

- the FAR will apply to the banking industry six months after commencement of the FAR Bill and to any new entrants beyond that, from the time they become an ADI or a non-operating holding company (NOHC).
- the FAR will apply to the insurance and superannuation industries 18 months after commencement of the FAR Bill and to any new entrants beyond that, from the time they become licensed.

Outlook

- It is not clear how quickly the legislation to establish the FAR will be enacted.
- The Bills were not considered by the end of the May Senate sittings. The Senate is now not due to sit again until 13 June 2023. Though the FAR Bills are listed on the latest Senate Notice Paper, it is not certain that the Bills will necessarily be considered or passed during the June sittings.
- Assuming the passage of the legislation, and assuming Assent is given in June, the earliest possible date from which the FAR would apply (for the banking sector) is December 2023 (and December 2024 for the insurance and superannuation sectors).

'Predatory lending' in focus: ASIC Regulatory update January to March 2023

Key Takeaways from ASIC REP 764 ASIC enforcement and regulatory update: January to March 2023

The Australian Securities and Investments Commission (ASIC) has released its latest quarterly enforcement update (REP 764) on its enforcement activity during the period 1 January to 31 March 2023.

Unlike previous reports, REP 764 does not include a statistical summary of enforcement outcomes for the period. Rather, the report highlights what ASIC considers to be 'the key' actions taken to address specific forms of non-compliance/misconduct.

Targeting predatory lending is an ongoing focus, more enforcement actions expected

Announcing the release of the report, ASIC underlined its continuing focus on 'predatory lending' pointing to the outcomes secured during the first quarter of 2023 - $30 million in civil penalties and the finalisation of court proceedings against credit providers – in support.

ASIC also underlined its intention to use the full suite of enforcement powers available to tackle misconduct where necessary.

ASIC cautioned credit providers and debt management firms that:

> 'strong, targeted action against predatory lending, high-cost credit and misconduct impacting consumers experiencing financial difficulty is expected in the coming months as part of its continuing focus on protecting consumers'

ASIC Deputy Chair Sarah Court added that:

> 'Credit providers and debt management firms that look to take advantage of vulnerable consumers are in our sights and we expect further action in the coming months against operators in this area'.

ASIC emphasises that its enforcement actions in this area are not limited to court action. ASIC states:

> 'We will continue to use our full suite of powers to protect consumers looking to access credit. This could be via a stop order for breaching the financial product design and distribution requirements or could be warning the company directly via our monitoring and surveillance programs'.

Market integrity

The report cites several examples of enforcement actions during the quarter aimed at 'strengthening market integrity' including enforcement action to address: a) breach of continuous disclosure laws: b) insider trading; and market manipulation.

Tackling greenwashing was also highlighted as a continuing area of focus.

'Fostering' compliance

The report includes examples of the initiatives the regulator has implemented to support industry compliance with various obligations including:

- compliance with whistleblower obligations: the release of a report (REP 758) highlighting what ASIC considers to be 'good practice' for handling whistleblower disclosures, and launching court proceedings over alleged breaches of whistleblower provisions
- DDO: providing life insurers with conditional relief from the design and distribution obligations,
- insurance in superannuation: reviewing the progress superannuation trustees have made toward improving the life insurance they provide to their members.

[Sources: ASIC media release 11/05/2023;

Unfair Contact Terms: ASIC takes court action against insurer over alleged use of UCT in certain policies

- The Australian Securities and Investments Commission (ASIC) has commenced civil proceedings against HCF Life Insurance Company Pty Limited (HCF Life) over the inclusion of a 'pre-existing condition' term in three types of insurance policies, which ASIC alleges is an unfair contract term.
- Broadly, ASIC alleges that the term is an unfair contract term and could mislead the public because:
  - 'the term purports to deny coverage if a customer did not disclose a pre-existing condition before entering the contract, and a medical practitioner forms an opinion that symptoms of the condition existed prior to the customer entering into the contract, even if a diagnosis had not been made;
  - the term suggests that HCF Life can deny coverage even if the customer was not aware of the pre-existing condition; and
  - s47 of the Insurance Contacts Act prevents insurers from excluding coverage for non-disclosure of a pre-existing condition where the customer was unaware of the condition when taking out the insurance, and a reasonable person in the circumstances could not be expected to have been aware of the condition'.
- ASIC is seeking declarations that the term is void as well as injunctions and corrective orders. ASIC is also seeking a penalty over the allegation that HCF Life's contracts are liable to mislead the public.

You can find further details of ASIC's allegations in the originating process and concise statement.

Addressing use of UCT is an enforcement priority for ASIC

- Announcing this, ASIC Deputy Chair Sarah Court said that addressing the use of unfair contact terms, including in insurance contracts, is an enforcement priority for ASIC. Ms Court stated:

  > 'Given the expansion of the unfair contract terms regime in April 2021 to include insurance contracts, ASIC's current focus on enforcement action concerning unfair contract terms should not come as a surprise. Rather, it should serve as a reminder to providers of financial services, whose contracts are subject to the regime, that potentially unfair terms should be removed from their standard form consumer contracts'.

- The action against HCF Life is only the second court action ASIC has taken over alleged use of unfair contract terms in an insurance contract. On 4 April 2023, ASIC launched its first court action against another insurer, Auto & General Insurance Company Limited, alleging that its standard form home and contents insurance contracts contained unfair contract terms.

[Source: ASIC media release 12/05/2023]

Fewer complaints than anticipated: AFCA releases complaints data on COVID-related complaints

The Australian Financial Complaints Authority (AFCA) has released data on complaints made during the COVID-19 pandemic (between 12 March 2020 and 6 May 2023).

Key Points

- 17,403 COVID-related complaints about financial products or services. For context, this represents 7% of all complaints made to AFCA during the period. Compensation or refunds for these complaints totalled $21.6 million.
- Of the 17,403 complaints received, 4,368 concerned financial institutions' response to customers in financial hardship/difficulty.
- Most complained about products:
  - Travel insurance 3,859. According to AFCA's statement, these disputes were largely about denied or delayed insurance claims after travel plans were disrupted by pandemic lockdowns.
  - Credit cards 2,703
  - Home loans 2,254
  - Personal loans 1,629
  - Superannuation 1,134
- Top five issues that gave rise to the disputes were:
  - Failure to respond to a request for assistance: 2,404
  - Denial of insurance claim due to exclusion or condition: 1,463
  - Denial of insurance claim: 1,454
  - Delay in insurance claim handling: 1,286
  - Service quality: 1,162
- AFCA has resolved 97% of all COVID-related complaints to date with the majority of disputes settled by agreement. Overall, 79% of disputes have been resolved by agreement or in favour of the complainant.

Commenting on the data, AFCA Chief Ombudsman and CEO David Locke said he was 'grateful complaint numbers were not even higher'. Mr Locke said:

> 'While not seeking to downplay what people went through – every complaint matters – we received far fewer COVID-related complaints than we thought might arise from the pandemic…Banks, for example, were generally quick to respond, providing emergency support as they handled an unprecedented volume of requests for repayment deferrals. It shows what's possible when firms and consumers talk to each other. We hope financial firms have a similar mindset as we face new challenges amid rising interest rates and cost of living pressures.'

[Source: AFCA media release 11/05/2023]

In Brief | Enforcement of Responsible Lending Obligations: ASIC has commenced civil penalty proceedings against car finance provider over alleged breaches of its RLOs when providing finance for the purchase of second-hand vehicles

[Source: ASIC media release 17/05/2023]

In Brief | The government is (reportedly) expected to release its response to the Quality of Advice Review in early June

[Sources: Independent Financial Advice 12/05/2023; The Australian 11/05/2023]

Risk Management

Continuous disclosure: Managing Director fined $70,000, banned for two years over misleading representations made at overseas conferences

- Following the Federal Court's decision in January 2023 to fine Australian Mines Limited (AML) $450,000 for breach of its continuous disclosure obligations, the Court has fined AML Managing Director Benjamin Bell $70,000 and disqualified him from managing corporations for two years.
- This follows Mr Bell's admission that he failed to act with the degree of care and diligence required of a director (by causing the company to breach its continuous disclosure obligations) when he gave presentations at investment conferences in Hong Kong and London at which he claimed that:
  - the company had secured funding to construct a plant for its main asset, the Sconi Project (when this was not the case); and
  - the value of the offtake agreement with SK Innovation, based on expected production from the Sconi Project, was $5 billion (despite the agreement including a potential buyers discount of 15%, and despite the fact that AML had recently retracted the same valuation following inquiries by the ASX).

More details are available in the Orders here.

ASIC has reminded directors of the need to comply with continuous disclosure obligations when attending overseas conferences

- ASIC Commissioner Sean Hughes commented that the

  'outcome [in this case] reinforces how fundamental the continuous disclosure regime is in ensuring that Australia's financial markets are well-informed and fair. The outcome is a timely reminder for ASX listed companies attending overseas conferences that compliance with the law is expected and enforceable. A contravention of continuous disclosure laws has the potential to undermine investor confidence and the integrity of the market. ASIC will continue to take enforcement action to ensure that Australia's markets operate fairly and are transparent.'

  [Source: ASIC media release 12/05/2023]

Combatting scams: New national anti-scams centre to open in July, CHOICE has welcomed the announcement

The Australian Competition and Consumer Commission (ACCC) has welcomed the government's commitment to establish a new National Anti-Scam Centre (NASC) within the ACCC.

The NASC is to be launched from 1 July 2023, with capability including data sharing technology to be built over the next three years.

What the NASC is planned to do

The 2023 Federal Budget included $58 million in funding for the Australian Consumer and Competition Commission (ACCC) to establish the National Anti-Scam Centre (NASC)

$44 million of this funding is allocated to building the technology for the NASC to be able to support high frequency data sharing with a range of agencies, law enforcement and the private sector. That is, for the NASC to be able to:

- 'Receive a report of a scam from any institution (private or government) and centralise this intelligence
- Distribute data to agencies/law enforcement and others such as banks to freeze an account, telcos to block a call, digital platforms to take down a website or account.
- Analyse and act on the trends sourced from this data to disrupt scams and educate Australians'.

The remaining funding of $14 million will be used to resource the NASC to deliver 'fusion cells'(group of experts with experience/expertise across different sectors which will coordinate scam prevention efforts across government and the private sector); provide education and communications activities in collaboration with the private sector and support the ongoing data analysis; intelligence gathering, and scam disruption.

The ACCC has indicated that in the first year of operation, it's envisioned that the NASC will work closely with ASIC in delivery of its scam website takedown service as well as support the Australian Communications and Media Authority ACMA in combatting telecommunications scams.

Disrupting impersonation scams: SMS Sender ID register

The ACCC has also welcomed the government's commitment to introduce and SMS Sender ID register which will help consumers to determine whether a text message using a Sender ID is from a trusted source.

ACCC considers the introduction of cross industry standards would further assist

The ACCC considers that the work of the new NASC would be further strengthened by the introduction of a cross-industry code. ACCC Deputy Chair Catriona Lowe commented:

> 'While these are all positive steps in the fight against scams, we also believe the work of the NASC would be greatly assisted by the establishment of effective cross-industry standards with coverage and teeth to ensure scammers can't exploit weak links'.

Reportedly (The AFR) the Assistant Treasurer has committed to the development of a mandatory cross-industry 'co-regulatory' Code, by the ACCC over the next six months with a view to the Code being in place by the end of 2023.

CHOICE has welcomed the establishment of the NASC

Consumer group CHOICE has welcomed the establishment of the NASC as an important step towards increasing protection for consumers from scams.

CHOICE CEO Alan Kirkland commented:

> 'Scams have the potential to ruin the livelihoods of people across Australia. We've heard from people who have lost their life savings from scams that could have been intercepted. Large businesses like banks, telecommunication companies and social media platforms are often in the best position to identify and intercept scams. They've access to better data and technology than their customers and need to be using this to protect them. The only way we can stop the growing harm caused by scams is by requiring businesses to work closely with the government to identify and intercept scams in real time. We're glad to see this approach at the heart of the new Centre.'

> [Sources: Assistant Treasurer and Minister for Financial Services Stephen Jones media release 16/05/2023; ACCC media release 15/05/2023; CHOICE media release 15/05/2023]

Report finds assurances of staff protection missing in many FTSE 350 companies' Codes of Ethics

The UK Institute of Business Ethics (IBE) has called on UK listed companies to ensure they have a publicly accessible Code of Ethics in place and for this Code to include 'unequivocal assurances of non-retaliation against those who raise an ethical concern' following its assessment of the Codes of Ethics of FTSE 350 companies.

Broadly, the IBE found that in FTSE 100 companies:

- 19% of companies had no publicly accessible Code (which this proportion much higher (40%) for FTSE 250 companies)
- It was unclear how current the Codes are as many were undated. Where they were dated, one in seven was found to be five or more years old
- Only 53% Codes were assessed as having a strong/unequivocal commitment to zero tolerance of retaliation against those who choose to speak up.

The IBE offers a number of suggestions around how the Codes assessed could be improved. These include:

- adding a clear endorsement by Senior leadership
- explaining the speak-up process
- ensuring the Code includes a clear, unequivocal commitment to protect staff who choose to speak up

Announcing the release of the report Director of the Institute of Business Ethics Ian Peters commented:

> 'What this research shows is the biggest firms get the importance of a code of ethics, but there is substantial room for improvement. Although the number and quality of codes among FTSE 100 companies is

improving, too many fail to include protections for staff who feel they need to raise concerns. Worryingly, there are several FTSE 250 organisations, which are among the country's biggest businesses, without a publicly available code of ethics. A code of ethics should be the cornerstone for any organisation, ensuring it's doing the right thing for the right reasons. Any business without a code available for public scrutiny needs to up its game or risk the loyalty and support of both staff and customers.'

[Source: IBE media releases 15/05/2023; (Key Findings) 15/05/2023; Full text report: FTSE 100 Codes of Ethics: Room for Improvement]

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