

Looking Ahead: Top Litigation and Regulatory Risks for Fund Managers Right Now

October 6, 2021

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Special Purpose Acquisition Companies (SPACs)

Disclosures, Novelty and Risks

Dorothy Murray, Todd Ohlms and Jonathan Weiss

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SPACs – Disclosures, Novelty, and Risks

- Key Risks and Issues for US SPAC Sponsors
 - PSLRA Safe Harbor?
 - Are de-SPACs IPOs?
- Key Risks and Issues for UK SPAC Sponsors
 - New Listing Rules
 - Investor Protection and Disclosure Obligations

SPACs – Disclosures, Novelty, and Risks

- Key Lesson from SEC Enforcement
 - Diligence, Diligence, Diligence
- Governance and Conflicts
 - Resignations upon de-SPAC
- SPARCs

“ The fact that a target lies to a SPAC “does not absolve [the SPAC] of its failure to undertake adequate due diligence to protect shareholders.”
-- Gensler

ESG

Drivers and Litigation Risks

Kirsten Lapham and Josh Newville

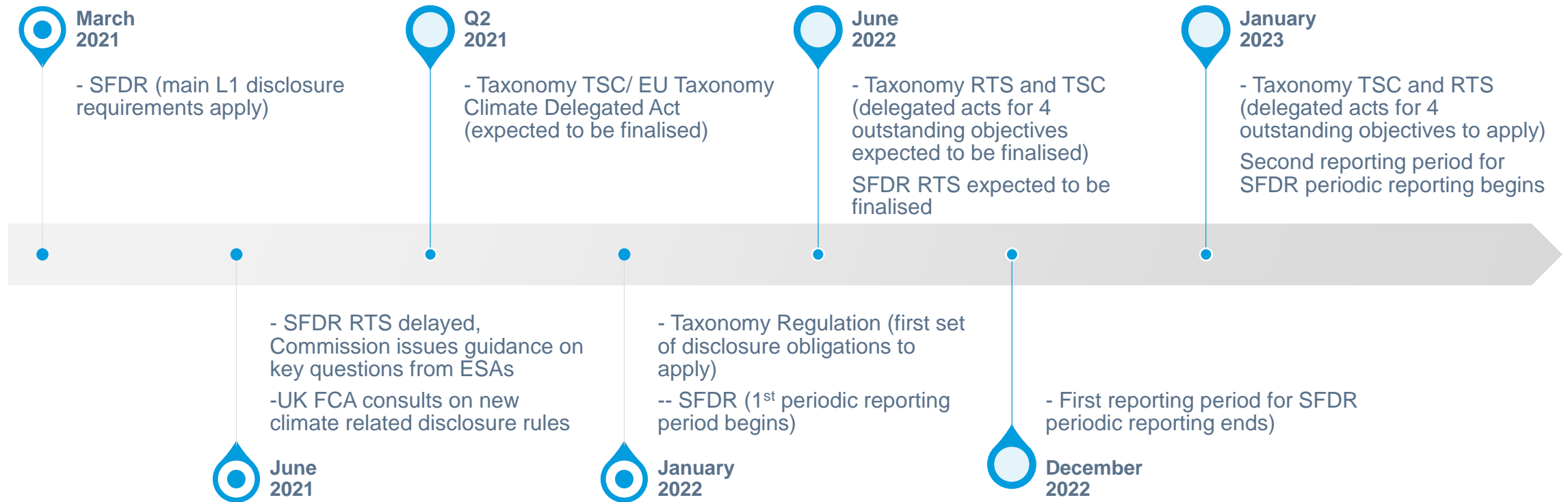
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Overview

- ESG
 - EU Developments
 - SFDR
 - Taxonomy Regulation
 - UK Framework
- US Developments
 - Regulatory examinations
 - Enforcement risks
- Practical insight

EU Regulation: Timeline of EU Regulatory ESG Milestones



EU and UK Regulatory Motivations

Europe

- Sustainable Finance Disclosure Regulation (2019)
- Non-Financial Reporting Directive (2014)
- Market Abuse Regulation (2014)
- Taxonomy Regulation (2020)
- AIFMD/MiFID II proposed amendments
- Proposed Green Bond Standard
- Carbon impact benchmark regulations
- Proposed legislation for mandatory corporate human rights due diligence
- Proposed legislation on directors' duties and sustainable corporate governance

United Kingdom

- Companies Act 2006
- Companies (Misc. Reporting) Regs 2018
- FRS 102: (UK/Ire Financial Reporting Standard) (updated 2019)
- FCA: Mandatory enhanced climate-related disclosures by listed issuers
- UK government announcement: Proposal for mandatory climate change disclosures across all industries by 2025
- DEFRA: Forest risk commodities – Proposed mandatory due diligence
- Modern Slavery Act 2015 (Proposal for enhanced obligations)
- Equality Act 2010 (Gender Pay Gap Information) Regs 2017
- Equality Act 2010 (Specific Duties and Public Authorities) Regs 2017
- Criminal Finances Act 2017, s13

ESG – SEC Scrutiny for Fund Managers

- Current environment
 - SEC under the Biden administration is focused on importance of ESG factors
 - SEC Exams: detailed requests relating to ESG
 - Potential for enforcement actions against fund managers
- Government enforcement theories
 - Anti-fraud provisions
 - False or misleading disclosures (e.g., greenwashing allegations)
 - Section 206 of the Advisers Act and general fiduciary concepts
 - The Compliance Rule (Rule 206(4)-7)
 - Requires policies and procedures reasonably designed and implemented to prevent violations of the securities laws.
- Private litigation risks

ESG – Litigation in the UK

- Claims fall into three broad categories:
 - **Regulatory** enforcement
 - **Private** claims:
 - **Statutory** claims: e.g. under the Financial Services and Marketing Act 2000 (s. 90 and 90A)
 - **Tortious** claims: e.g. for negligent misstatement
 - **Equitable** claims: e.g. for breach of directors' duties
- The main trends to watch are:
 - Expanding risk for **parent companies** for ESG activities of their subsidiaries
(see: Lungowe and others v Vedanta Resources plc and another [2019] UKSC 20, [2019] 2 WLR and Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2018] EWCA Civ 191)
 - Potentially increased risk of **group actions** for ESG claims
(awaiting judgment in: Lloyd (Respondent) v Google LLC (Appellant) [2019] EWCA Civ 1599 and see: Jalla & Anr v Shell International Trading & Anr [2021] EWCA Civ 1389)

Digital Assets/ Cryptocurrency / Decentralized Finance

William Komaroff, Seetha Ramachandran and Samuel Waldon

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SEC Perspective

- What we (think) we know about digital assets
 - Initial Coin Offerings involve the offer and sale of securities
 - Bitcoin and Ether are not securities
 - The SEC is continuing to litigate regarding XRP/Ripple
- What we still don't know about digital assets
 - When does a digital asset move from being a security to something else?
 - Does the Corp Fin framework still apply?
- What are we seeing about De-Fi
 - Lending programs that involve interest payments likely involve the offer and sale of securities

Beyond the SEC

- Department of Justice approach
 - Focus on low hanging fruit
 - But risks abound on the periphery
- How will AML laws apply to NFTs and cryptocurrency companies
 - Anti-Money Laundering Act of 2020
 - Financial Action Task Force (FATF): New Guidance
- Regulatory Agencies
 - FinCEN
 - OFAC
 - New York Department of Financial Services (DFS)



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