Directors’ Duties Navigator: Climate Risk and Sustainability Disclosures*

Fourth edition, September 2024

**Previously titled ‘Primer on Climate Change: Directors’ Duties and Disclosure Obligations’*

CCLI Commonwealth Climate and Law Initiative

Climate Governance Initiative

Philippines

1. Legal and Regulatory Landscape Regarding Climate Change

1.1. Government approach to climate change

1.1.1. *Climate change legislation*

The Philippines' *Climate Change Act of 2009* (the **CCA**),[1] embodies the state policy "*to afford full protect-ion and the advancement of the right of the people to a healthful ecology in accord with the rhythm and harmony of nature*," as well as confirming the adoption of "*Philippine Agenda 21 framework which espouses sustainable development, to fulfill human needs while maintaining the quality of the natural environment for current and future generations*."

1.1.2. *Transition plans and targets*

The CCA established the Climate Change Commission (**CCC**) as "*an independent and autonomous body …shall be the sole policy-making body of the government which shall be tasked to coordinate, monitory and evaluate the programs and action plans of the government relating to climate change.*" The CCC is empowered to formulate: (a) the Framework Strategy on Climate Change to serve "*as the basis for a program for climate change planning, research and development, extension, and monitoring of activities to protect vulnerable communities from the adverse effects of climate change*"; and (b) the National Climate Change Action Plan, which includes among others assessment of the national impact of climate change, identification of the most vulnerable communities/areas, identification of differential impacts of climate change on men, women and children, assessment and management of risk and vulnerability, and identification of GHG mitigation potentials.

The Act was amended[2] in 2011 to establish a People's Survival Fund, which provides the mechanism for long-term finance streams to enable the Philippine Government to effectively address climate change, support adaptation activities, and prevent and mitigate disasters. The amendment explicitly recognized the Philippines' vulnerability "*to potential dangerous consequences of climate change, such as increasing temperatures, rising seas, changing landscapes, increasing frequency and/or severity of droughts, fire, floods and storms, climate-related illnesses and diseases, damage to ecosystems, and biodiversity loss that affect the country's environment, culture, and economy*."

The Philippines does not have a legally-mandated net zero emissions goal, although the Government has set a national target to reduce GHGs.

The Philippines' Nationally Defined Contribution (**NDC**) submitted to the United Nations Framework Convention on Climate Change (**UNFCCC**) stipulates that it will reduce its GHGs by 75% by 2030, of which 72.29% is conditional on multilateral support under the Paris Agreement.[3] The NDC is based on the CCA, and two key policy documents:

- National Framework Strategy on Climate Change 2010-2022,[4] which sets out the Philippines' principles of climate change mitigation and adaptation, the risks arising from climate change, and overarching strategies for mitigation and adaptation; and
- National Climate Change Action Plan 2011-2028,[5] which outlines the Government's comprehensive commitments to respond to climate risks that involve both the public and the private sectors.

1 Republic Act No 9729, promulgated on 23 October 2009.
2 Republic Act No. 10174.
3 Republic of the Philippines, Intended Nationally Determined Contribution (15 April 2021) <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Philippines%20First/Philippines%20-%20NDC.pdf>.
4 Climate Change Commission, National Framework Strategy on Climate Change 2010-2022 (28 April 2010) <https://climate.gov.ph/files/NFSCC.pdf>.
5 Climate Change Commission, National Climate Change Action Plan 2011-2028 (2011) <https://policy.asiapacificenergy.org/sites/default/files/National%20Climate%20Change%20Action%20Plan%202011-2028.pdf>.

In November 2023, the Department of Energy released the Philippine Energy Plan 2023-2050 that includes energy transition strategies aimed at increasing the contribution of renewable energy to power generation from 32% to 35% by 2030, and to 50% by 2040.[6]

During COP28, the Philippine Government presented the first Philippines' National Adaptation Plan (**NAP**) that aims to identify high-risk climate change vulnerable areas in the Philippines, provide guidance on integrating adaptation considerations, and harmonise national strategies with international commitments for developing robust medium and long-term adaptation plans.[7]

On 4 June 2024, the CCC confirmed that the Government has submitted the NAP to the UNFCCC.[8]

1.1.3. *Wider government approach to climate change*

The Philippine Constitution recognizes citizens' "*right to health*" and "*right to a balanced and healthful ecology*", with corresponding obligations of the state to "*protect and promote the right to health of the people,*"[9] and to "*protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature.*"[10]

The Philippine Supreme Court recognized "*the right of Filipinos to a balanced and healthful ecology*" that carries with it "*the correlative duty to refrain from impairing the environment.*"[11] It held that even without the constitutional provisions on the rights to health and to a balanced and healthful ecology, the same would constitute part of the law of the land because the Philippines is a signatory to the Universal Declaration of Human Rights (the **Declaration**) and the Alma Conference Declaration of 1978 which recognize health as a fundamental human right.[12]

In addition, in May 2022, the Philippine Commission on Human Rights concluded an investigation into climate change and human rights. While non-binding, the Commission's findings and recommendations recognized that climate change poses a threat to individual's human rights; international treaties and resolutions, including the Declaration, form part of Philippine law; and therefore, entities organized or doing business in the Philippines in the value chain of high-emission companies could be compelled to undertake human rights due diligence.[13]

The Philippines' national budget makes a provision for climate change through the annual appropriations given to the CCC, as well as the climate change items in the various Executive Departments.

In March 2023, the *Low Carbon Economy Bill of 2022* was filed in Philippine Congress, which aims to support the transition to a low-carbon economy by introducing annual reduction targets on GHG emissions (the **Bill**). It also establishes an emissions trading system where entities with excess GHG emissions may purchase allowances from those with lower emissions. The Bill sets up the Philippine Greenhouse Gas Inventory Management and Reporting System. It also emphasises international and cross-sectoral collaboration for the development of low-carbon technologies.[14]

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6 Department of Energy, 'Philippine Energy Plan 2023-2050', (November 2023) <https://doe.gov.ph/pep/ philippine-energy-plan-2023-2050>; International Trade Administration, 'Philippines Energy Transition Strategies', (25th April 2024), <https://www.trade.gov/market-intelligence/philippines-energy-transition-strategies>.

7 Department of Environment and Natural Resources, 'Philippines presents commitments and ambitions towards climate-resilience at COP28' (5 December 2023) <https://denr.gov.ph/news-events/philippines-presents-commitments-and-ambitions-towards-climate-resilience-at-cop28/>.

8 F Cervantes, 'CCC calls for 'whole country' effort for nat'l adaptation plan', (Philippine News Agency, 8 June 2024) <https://www.pna.gov.ph/articles/1226512>; National Integrated Climate Change Database and Information Exchange System, 'National Adaptation Plan' <https://niccdies.climate.gov.ph/climate-reports/national-adaptationplan#:~:text=The%20Philippines'%20NAP%20aims%20to,%2C%20programs%2C%20and%20government%20activities.>.

9 Sec. 15, Art. II (*Declaration of Principles and State Policies*), 1987 Constitution.

10 *Ibid*, sec. 16, Art. II.

11 *Oposa v. Factoran*, G.R. No. 101083, 30 July 1993; 224 SCRA 792 (1993).

12 *Laguna Lake Development Authority v. Court of Appeals,* G.R. No. 110120, 16 March 1994; 231 SCRA 292, 307-308.

13 Commission on Human Rights of the Philippines, National Inquiry on Climate Change (May 2022) <https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf>.

14 House Bill No. 7705, 19th Congress of the Republic; French Chamber of Commerce and Industry in the Philippines,

In February 2024, the Philippine central bank, Bangko Sentral ng Pilipinas (**BSP**), approved the use of the Philippine Sustainable Taxonomy Guidelines (**STFG**) that relies on a principles-based approach; it has no quantitative criteria for classification purposes.[15] The Philippine Securities and Exchange Commission (**SEC**) also adopted the SFTG in February 2024, mandating that issuers should refer to the SFTG when making investment decisions, or designing sustainable financial products and services. In addition, they must comply with the Memorandum Circulars on bond standards or guidelines issued by the SEC when issuing green, social, sustainability, and sustainability-linked bonds.[16]

The Philippines may see increasing litigation against corporations in respect of climate change. The Philippine Supreme Court promulgated the Rules of Procedure for Environmental Cases (the **Rules**),[17] to "*govern the procedure in civil, criminal and special civil actions before [trial and appellate courts] involving enforcement or violations of environmental and other related laws, rules and regulations.*"[18] The Rules formally recognize "*citizen suits*" that allow any Filipino citizen in representation of others, including minors or members of generations yet unborn, to file an action to enforce rights or obligations under environmental laws, with power by the courts to issue an environmental protection order; allows the issuance of a *writ of kalikasan* as a remedy to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with or by an unlawful act or omission of a public official or employee, or private individual or entity, any possible large-scale ecological threats.

An important development occurred in November 2023, when the Philippines' House of Representatives introduced the *Climate Accountability Bill* (the **Bill**) that seeks to hold corporate actors accountable by setting minimum due diligence standards regarding climate change. Businesses are required to proactively identify climate harms caused by their operations and adopt measures to address them. Failure to do so can result in the business being held accountable for negligence from their role in exacerbating extreme weather events or slow-onset events where they exceed established GHG emission threshold.

The Bill will establish: (a) a reporting facility for GHG emissions, and a threshold for acceptable emissions; and (b) the Climate Change Reparations Fund to finance the claims approved by the Climate Change Reparations Board for climate change victims/survivors.

Under the Bill, businesses are imposed the following responsibilities:

- Update their conduct and policies in accordance with the United Nations Guiding Principles on Business and Human Rights.
- Disclose to the SEC climate-related financial disclosures and the names of those who authorised the climate-related financial transactions.
- Measure their GHG emissions to ensure compliance with standards based on scientific evidence and reports of the IPCC.
- Ensure that throughout their value change efforts are made to ensure the

'Legislating a Sustainable Future: The Low Carbon Economy Act of 2022' <https://ccifrance-philippines.org/2024/07/03/icymi-legislating-a-sustainable-future-the-low-carbon-economy-act-of-2022/#:~:text=The%20bill%20also%20promotes%20international,resilient%20and%20low%2Dcarbon%20economy.>.

15 Bangko Sentral ng Pilipinas, 'Philippine Sustainable Finance Taxonomy Guidelines' (Circular No. 1187, 21 February 2024) <https://www.bsp.gov.ph/Regulations/Issuances/2024/1187.pdf>.

16 Securities and Exchange Commission, 'Guidelines on the Philippine Sustainable Finance Taxonomy' (SEC Memorandum Circular No.5, 23 February 2024) <https://www.centralbanking.com/central-banks/financial-market-infrastructure/7960882/philippine-central-bank-launches-sustainable-finance-taxonomy>.

17 Administrative Matter No. 09-6-8-SC, 13 April 2010, hereinafter referred to as "Rules of Procedure for Environmental Cases."

18 Sec. 2 (*Scope*), Rule 1, Part I, Rules of Procedure for Environmental Cases.

protection of human rights, especially in the context of climate change.

- Undertake due diligence to address the negative climate change-related human rights impacts their operations may cause.
- Submit a report of their findings and steps to address the above requirements.

Under Section 21 of the Bill, businesses may be held liable for any observed adverse impacts on the climate through their operations. This is based on Section 32 of the *Civil Code* which provides for the liability for damages of a public officer or employee or private individual who directly or indirectly violates or impedes the rights and liberties of another person. The violation of the human right to the environment satisfies the requirements for damages under Section 32. For example, any act of greenwashing will result in a fine equivalent to 15% of the business' gross income reported in their latest regulatory disclosure. Penalties can also be imposed for climate denialism, breaching the threshold for GHG emissions, and filing SLAPP suits to harass or exert undue pressure on any legal recourse taken in the enforcement of environmental laws.

The Bill proposes a tax credit scheme for businesses that observe the due diligence standard of care and contribute to the clean energy transition.[19]

1.2. Regulatory approaches to climate change

1.2.1. *Climate change as a systemic financial risk*

It is apparent from the developments below that regulators consider that climate change poses material financial and litigation risk in the Philippines.

1.2.2. *Financial regulation and guidance*

Securities and Exchange Commission: The SEC's Codes of Corporate Governance (the **Codes**)[20] encourages publicly-held companies to be socially responsible in their dealings with the communities where they operate by pursuing "*sustainable development*". This requires companies to comply with existing regulations and to voluntarily employ value chain processes that consider economic, environment, social and governance issues (**EESG**) and concerns, which includes climate change.[21]

Bangko Sentral ng Pilipinas: The BSP has approved frameworks requiring financial institutions to embed sustainability principles in their corporate governance framework and incorporate physical and transition climate change risks into their risk management frameworks.[22]

In August 2022, the BSP published a circular requiring banks to establish an environmental and social risk (**E&S risk**) management system and integrate sustainability principles into their investment activities.[23] In September 2022, the BSP published associated guidelines on the implementation of E&S risk management systems in financial institutions pursuant to these frameworks

[19] Climate Accountability Bill (House Bill No. 9609) <https://www.greenpeace.org/static/planet4-philippines-stateless/2023/11/720d51c3-hb09609.pdf>; E Bradeen, T Chan, C Higham, 'Philippines Climate Accountability Bill: loss and damage in domestic legislation', (18 December 2023, Grantham Research Institute on Climate Change and the Environment), <https://www.lse.ac.uk/granthaminstitute/news/philippines-climate-accountability-bill-loss-and-damage-in-domestic-legislation/>.

[20] Code of Corporate Governance for Publicly-Listed Companies (SEC Memorandum Circular No. 19-2016), Code of Corporate Governance for Public Companies and Registered Issuers of Securities (SEC Memorandum Circular No. 24-2019).

[21] *Ibid*, Principle 16 (*Encouraging Sustainability and Social Responsibility*) and underlying Explanation.

[22] Bangko ng Sentral Philippines, Circular No. 1085: Sustainable Finance Framework (2020) <https://www.bsp.gov.ph/Regulations/Issuances/2020/c1085.pdf>; Bangko ng Sentral Philippines, Circular No. 1128: Environmental and Social Risk Framework (October 2021) <https://www.bsp.gov.ph/Regulations/Issuances/2021/1128(Corrected%20Copy).pdf>.

[23] Bangko ng Sentral Philippines, Circular No. 1149: Guidelines on the Integration of Sustainability Principles in Investment Activities of Banks (August 2022) <https://www.bsp.gov.ph/Regulations/Issuances/2022/1149.pdf>.

(the **E&S Guidelines**).[24] These developments may change the perception of climate risks within financial frameworks in the Philippines which may have impacts for non-financial companies.

1.2.3. *Liability risk: enforcement action by regulators*

The SEC's Codes are based on the 'comply or explain' approach which combines voluntary compliance with mandatory disclosure, thus: "*Companies do not have to comply with the Code, but they must state in their annual corporate governance reports whether they comply with the Code provisions, identify any areas of non-compliance, and explain the reasons for non-compliance*."[25] No penalties are imposed on publicly-held companies for non-compliance with the principles and recommended best practices under the Codes, and the expectation is that it is the market which will vote with their investment decisions on whether they believe in the publicly-held companies' explanation for non-compliance with the principles, recommendation and best practices of the codes.

2. Directors' Duties and Climate Change

2.1. Legal framework for directors' duties

Philippine legal jurisdiction can best be described as a "hybrid legal system" where the *Civil Code* and other statutory provisions are regarded as embodying the mandatory law, but with the decisions of the Supreme Court applying or interpreting the statutory provisions as forming part of the legal system of the Philippines.

The *Revised Corporation Code* of the Philippines and the *Securities Regulation Code*, and most other commercial statutes, have been adapted from American counterpart statutes, and they are treated by the courts as common law statutes. Consequently, the basis for directors' duties, and liabilities arising from the breach of such duties, is based on statutory provisions and common law.

Under Philippine *Corporation Law*, the board of directors is vested directly by law with corporate powers to conduct business and to control properties of the corporation.[26] Consequently, directors are bound by the fiduciary *duty of obedience*—to pursue corporate affairs in accordance with the purpose for which it is constituted and in compliance with the law; and the *duty of diligence*—to exercise corporate powers with the diligence of a prudent person, in good faith and in the best interest of the corporation and its shareholders.

The corporate governance framework for publicly-held companies extends these fiduciary duties to other stakeholders of the company, which includes customers, creditors, employees, suppliers, investors, as well as the Government and the community in which they operate.[27]

Under the *doctrine of centralized management*, directors are constituted as fiduciaries in fulfilling their company's long-term economic, moral, legal and social obligations towards the shareholders and other stakeholders, with a mandate to maximize the organization's long-term success, creating sustainable value for its shareholders, stakeholders and the nation.

2.2. Guidance on interpretation of directors' duties

2.2.1. *Legal guidance*

The 'business judgment rule' applies in the Philippines. Under this common-law doctrine of, the manner of fulfilment of directors' fiduciary duties to the company, its shareholders and other stakeholders is addressed to the board's business

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24 Bangko Sentral ng Philippines, Memorandum No. 2022-042: Guidance on the Implementation of the Environmental and Social Risk Management (ESRM) System (September 2022) <https://www.bsp.gov.ph/Regulations/Issuances/2022/M-2022-042.pdf>.

25 Para. 2 of the Introduction, CG Code for Publicly-held Companies.

26 This embodies the principle of "centralized management" that is provided for under section 23 of the Revised Corporation Code (Rep. Act No. 11232).

27 Principle 14 of the SEC CG Codes: "*The rights of stakeholders established by law, by contractual relations and through voluntary commitments must be respected. Where stakeholders' rights and/or interests are at stake, stakeholders should have the opportunity to obtain prompt effective redress for the violation of their rights.*"

judgment.[28] The exercise of that business judgment, even when it causes damage to the corporation, its shareholders or other stakeholders, does not make directors' personally liable,[29] unless it is shown that the directors' have in the process violated the law, acted with fraud, negligence or bad faith.[30]

In November 2022, the Commonwealth Climate and Law Initiative commissioned a legal opinion on 'Directors' Duties & Responsibilities and Disclosure Obligations under Philippine Law on Climate Change Risks' (the **Legal Opinion**).[31] The Legal Opinion emphasises the case for corporate directors on the board of Philippines companies to consider climate change-related risks in the discharge of their fiduciary duties of obedience and diligence to fulfil their companies' long-term legal, economic, moral and social obligations towards their shareholders and other stakeholders. The Legal Opinion further stated:

> "*Directors play a critical role in managing climate change risks to which the corporate business enterprise is exposed, as well as in fulfilling the companies' social responsibilities towards the protection of the environment.*"

2.2.2. *Regulatory guidance*

Under the 'comply or explain' approach of the Code of Corporate Governance for Publicly-listed Companies (the **PLC Code**),[32] the SEC mandated that a truly competent board of directors should "*foster the long-term success of the corporation, and to sustain its competitiveness and profitability in a manner consistent with its corporate objectives and the long-term best interests of its shareholders and other stakeholders.*"[33]

When it comes to directors' duty to properly oversee the company's Enterprise Risk Management (**ERM**) system, which would include climate change risks that would undermine the company enterprise value, the PLC Code adopts the principle that "*The Board should oversee that a sound enterprise risk management (ERM) framework is in place to effectively identify, monitor, assess and manage key business risks. The ERM should guide the Board in identifying units/business lines and enterprise-level risk exposures, as well as the effectiveness of risk management strategies*."[34] The PLC Code considers it best practice that every publicly-listed company should have a strong and effective internal control system and ERM framework, to ensure the integrity, transparency and proper governance in the conduct of its affairs.[35] An "*effective enterprise risk management framework typically includes such activities as the identification, sourcing, measurement, evaluation, mitigation and monitoring of risk*."[36]

2.3. Directors' liability and litigation risk

When it comes to climate change, the emerging 'role of directors' — which in turn defines the potential liabilities to which they are exposed in relation to climate change — is a bit nuanced, if not bifurcated.

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28 *Montelibano v. Bacolod-Murcia Milling Co., Inc*., G.R. No. L-15092, 18 May 1962; 5 SCRA 36, 42 (1962); *Gamboa v. Victoriano,* G.R. No. L-40620, 05 May 1979; 90 SCRA 40 (1979).

29 *Western Agro Industrial Corp. v. Court of Appeals*, G.R. No. 82558, 20 August 1990; 188 SCRA 709 (1990); *Rustan Pulp & Paper Mills v. Intermediate Appellate Court*, G.R. No. 70789, 19 October 1992; 214 SCRA 665 (1992).

30 Section 30 of the Revised Corporation Code provides in part: "*Directors or trustees who wilfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons*."

31 For further discussion, please see, Dean Cesar L. Villanueva, Dean Lily K. Gruba, Angelo Patrick F. Advincula and Joyce Anne C. Wong, Legal Opinion on Directors' Responsibilities and Disclosure Obligations under Philippine Law on Climate Change Risks, (18 October 2022),<https://commonwealthclimatelaw.org/wp-content/uploads/2022/10/CCLI-Legal-Opinion-on-Directors-Duties-Disclosure-Obligations-under-Philippines-Law-in-the-context-of-Climate-Risks-18-Oct-2022.pdf>.

32 SEC Memorandum Circular No. 19, series 2016 (22 November 2016), hereinafter referred to as "CG Code for PLCs."

33 Principle 1 (*Establishing a Competent Board*), CG Codes for Publicly-held Companies.

34 Recommendation 2.11, CG Code for Publicly-held Companies.

35 Principle 12, CG Code for Publicly-held Companies.

36 Explanation under Principle 12, CG Codes for Publicly-held Companies.

In the absence of fraud, gross negligence or bad faith, shareholders and other affected stakeholders cannot ascribe a breach of fiduciary duties against directors whose approach on climate change risks is within their business judgment to pursue; much less can they be held personally liable for exercising their business judgment when there is no showing of fraud, gross negligence or bad faith.

The deference to the board's business judgment also means that boards are able to take actions to mitigate the impacts of climate change on their company without exposing themselves to the risk of liability for breaching their duties. For instance, directors that implement a strategy to address climate impacts, to ensure the long-term viability of the company during the energy transition—even where this may risk incurring greater costs in the short term—will be protected from fiduciary liability unless they have violated the law, or acted with fraud, negligence or bad faith.

The emerging 'role of directors in climate change' under the CCA and related environmental laws imposes a duty on directors to refrain from harming the environment and to refrain from committing any of the "*prohibited acts*" laid down by the state in various environmental laws; otherwise, directors could be held both criminally and civilly liable. Unless environmental laws relating to climate change make directors liable for a corporation's violation of prohibited act, the prevailing rule is that when such prohibited acts are committed by the corporation, directors as such do not become criminally punishable, but only those directors, officers and employees who are directly responsible for the commission of the prohibited acts shall be penalized.

While the enumeration of "*prohibited acts*" under the various environmental laws provide for the specified areas when directors may be held criminally liable for corporate offenses, the same may be the legal basis – especially when the commission by the corporation of such prohibited acts is egregious—under Section 30 of the *Revised Corporation Code* for shareholders and other affected stakeholders to pursue legal action to make the directors personally liable (civil) for "*wilfully and knowingly assenting to patently unlawful acts of the corporation,*" or at least for "*gross negligence or bad faith in directing the affairs of the corporation.*"

While the failure of directors to pro-actively consider climate change does not necessarily expose them to personal, criminal or administrative liabilities, the pursuit by non-government organizations and public-interest groups through citizen suits constitute the graver risk to directors as a threat to their professional reputation as the stewards of the private corporate sector's mandate to pursue sustainable development. The Philippines is now experiencing climate change activism, coupled with the very accommodating litigation rules on environmental cases, and the current demand of local and international investors in companies that have a clear and focused policy on ESG matters.

3. Directors' Disclosure Obligations and Climate Change

3.1. Narrative sustainability disclosures

3.1.1. *Sustainability disclosure frameworks*

Under the CCA, private corporations, especially publicly-held companies which control much of the country's productive resources, must pursue sustainable development in their corporate strategies. This means not only complying with existing environmental rules and regulations and disclosing material climate-related risks, but also collaborating closely with the Government and civil society in contributing solutions to the challenges of climate change facing the country.

Under SEC's Codes[37] that adhere to the 'comply or explain' approach, directors of publicly-held companies are encouraged (not mandated) to "*adopt a clear and*

[37] Code of Corporate Governance for Publicly-Listed Companies (SEC Memorandum Circular No. 19-2016), Code of Corporate Governance for Public Companies and Registered Issuers of Securities (SEC Memorandum Circular No. 24-2019).

focused policy on the disclosure of non-financial information, with emphasis on the management of economic, environmental, social and governance (EESG) issues of its business, which underpin sustainability … [and] should adopt a globally recognized standard/ framework in reporting sustainability and non-financial issues."[38]

3.1.2. *Specific sustainability disclosure requirements for listed entities*

The SEC has made sustainability reporting mandatory for publicly-listed companies (**PLCs**).[39]

Under the 'comply or explain' approach of SEC's PLC Code,[40] PLCs are mandated to ensure that material and reportable non-financial and sustainability issues are disclosed.[41] This is under the recommendation that the board have a clear and focused policy on the disclosure of non-financial information with emphasis on the management of economic, environmental, social and governance (**EESG**) issues of its business which underpin sustainability, and to adopt a globally recognized standard/ framework in reporting sustainability and non-financial issues.[42]

The SEC's Sustainability Reporting Guidelines for Publicly Listed Companies[43] are based on, and refer to, the Task Force on Climate-related Financial Disclosures (**TCFD**) recommendations, as well as other global reporting standards (the **Sustainability Reporting Guidelines**). The Sustainability Reporting Guidelines include reporting on environmental risks and impacts, including the board's governance, strategy, risk management and metrics and targets in respect to climate-related risks and opportunities. PLCs must report in accordance with these guidelines on a 'comply or explain' basis and submit the sustainability report as part of its annual reportorial requirements with the SEC.[44]

Under the Sustainability Reporting Guidelines, disclosures in the sustainability report should reflect the PLC's significant economic, environmental, and social impacts, including climate-related risks and opportunities and UN sustainability goals. Disclosures should also consider the reasonable expectations and interests of key shareholders. Such disclosures should be quantifiable and measurable, adequately providing a comprehensive record of the company's non-financial performance for the relevant reporting period.

It is interesting to note that the specific disclosures for climate-related risks and opportunities fall under the category of "*economic disclosures*" for sustainability reporting, which emphasises the recognition by the SEC of climate change as a material financial risk for PLCs. Philippine companies have leeway in determining what may constitute material climate-related risks that arise in the pursuit of the companies' business operations, plans and strategies. This is consistent with the policy of the Philippine Government and its regulators allowing company discretion in determining and disclosing its corporate climate policy, particularly for PLCs subject to the materiality threshold under the Philippine Stock Exchange's (**PSE**) Disclosure Rules (**Disclosure Rules**).

On the other hand, the broad materiality threshold provided under the Disclosure Rules requires PLCs to disclose "*any material fact or event that occurs which would reasonably be expected to affect investors' decisions in relation to trading the securities*"[45] and "*such information [which] may reasonably be expected to*

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[38] Recommendation 10.1, Code of Corporate Governance for Publicly-listed Companies (SEC Memorandum Circular No. 2016-19, 22 November 2016).

[39] Kelvin Lester K. Lee, 'SEC's climate change and sustainable finance initiatives', The Manila Times (21 September 2022) <https://www.manilatimes.net/2022/09/21/business/top-business/secs-climate-change-and-sustainable-finance-initiatives/1859211>.

[40] SEC Memorandum Circular No. 19, series 2016 (22 November 2016), hereinafter referred to as "CG Code for PLCs."

[41] Principle 10, Code of Corporate Governance for Publicly-listed Companies (SEC Memorandum Circular No. 19, 20 November 2016).

[42] *Ibid*, Recommendation 10.1.

[43] SEC Memorandum Circular No. 2019-04 (15 February 2019)

[44] Securities and Exchange Commission Philippines, Memorandum Circular No.4 of 2019 – Sustainability Reporting Guidelines for Publicly-Listed Companies (15 February 2019) <https://www.sec.gov.ph/wp-content/uploads/2019/10/2019MCNo04.pdf>.

45 Sec. 4, Art. VII, PSE Disclosure Rules.

materially affect market activity and the price of its securities".[46] The broad materiality threshold includes the disclosure of climate-related risks particularly when such impacts trading and price of company shares.

The SEC announced in October 2023 that it will revise the Sustainability Reporting Guidelines for PLCs to reflect the latest developments in sustainability frameworks, including the publication of IFRS S1 and IFRS S2.[47] The draft Revised Sustainability Reporting Guidelines require PLCs to include a sustainability report narrative and a sustainability report form (**SuRe Form**) as part of their sustainability reporting. The SuRe Form will cover sustainability and climate-related opportunities and risks exposures, cross-industry standard metrics, and industry-specific metrics. PLCs will be required to submit the SuRe Form starting 2024. The mandated sustainability reporting is proposed to be on a 'comply or explain' basis for two years, after which all mandated disclosures will be obligatory and subject to penalties for non-performance.[48]

Based on a review of current Disclosure Rules for PLCs in the Philippines, the obligation to disclose and submit the sustainability report, including material climate-change disclosures, is primarily a corporate responsibility, as it is the company itself which faces the administrative penalties of reprimand, fine, delisting or revocation of license for failure to do so.

3.1.3. *Specific sustainability disclosure requirements for financial institutions*

Unlike the SEC's 'comply or explain' approach in sustainable reporting for publicly-held companies, BSP's 2020 Sustainable Finance Framework impose on the board of directors (or equivalent management committee in the case of foreign bank branches) the following duties and responsibilities relating to sustainable finance:[49]

- institutionalize the adoption of sustainability principles, including those covering E&S risk areas in the bank, by incorporating such in the corporate governance and risk management frameworks, as well as in the bank's strategic objectives and operations taking into account its risk appetite and ability to manage risk;
- promote a culture that fosters environmentally and socially responsible business decisions, by ensuring that sustainability implications are considered in the overall decision-making process;
- approve the bank's Environmental and Social Risk Management System (**ESRMS**) that is commensurate with the bank's size, nature, and complexity of operations and oversee its implementation, ensuring that the ESRMS is aligned with internationally recognized principles, standards and global practices and forms part of the enterprise-wide risk management system;
- ensure that sustainability objectives and policies are clearly communicated across the institution, and to its investors, clients, and other stakeholders;
- adopt an effective organizational structure to ensure attainment and continuing relevance of the bank's sustainability objectives, by monitoring the bank's progress in attaining sustainability objectives;
- ensure that adequate resources are available to attain the bank's sustainability objectives, by ensuring that the members of the board, senior management, and personnel are regularly apprised of the

46 Ibid, sec. 4.3(c), Art VII.

47 Securities and Exchange Commission, 'Press Release: SEC to issue revised sustainability reporting guidelines for publicly listed companies', (Reference No. 2023-75, 5th October 2023).

48 Securities and Exchange Commission, 'Draft Memorandum Circular on the Revised Sustainability Reporting Guidelines for Publicly Listed Companies and the SEC Sustainability Reporting Form (SuRe Form)', (4 October 2023) <https://www.sec.gov.ph/wp-content/uploads/2023/12/2023Notice_2023RFC_Sure-Guidelines_v2.pdf>.

49 BSP Circular No. 1085, series of 2020 (29 April 2020), as approved in BSP Monetary Board Resolution No. 415 dated 19 March 2020, and originally denominated as "Sustainable Finance Framework".

developments on sustainability standards and practices; and

- ensure that the sustainability agenda is integrated in the bank's performance appraisal system.[50]

The senior management are responsible for the overall implementation of the board-approved strategies and policies in relation to the sustainability objectives of the bank.[51]

In addition, Philippine banks are required to disclose the following information in their Annual Reports:

- sustainability strategic objectives and risk appetite;
- overview of the E&S risk management system;
- products/services aligned with internationally recognized sustainability standards and practices, which include the issuance of green, social or sustainability bonds;
- information on existing and emerging E&S risks and their impact on the bank; and
- other initiatives to promote adherence to internationally recognized sustainability standards and practices.[52]

Banks are also required to disclose in their Annual Report the progress of implementation of initiatives undertaken to integrate sustainability principles in their governance framework, risk management system, business strategy and operations.[53] If these BSP-required disclosure requirements are captured in the Sustainability Report submitted by publicly-listed banks to the SEC, then the Sustainability Report may be submitted together with the bank's annual report to the BSP, in compliance with the BSP's sustainability disclosure requirement.[54]

3.1.4. *Directors' duties regarding sustainability disclosures*

Currently, other than the disclosure obligations for PLCs on ESG matters (see discussions above), there are no regulations specifically providing the requirements or processes by which directors are to monitor, manage and take steps to mitigate climate change risks. The fulfilment of their fiduciary duties is addressed to the exercise of their business judgment.

With regard to financial institutions, the E&S Guidelines (referred to above) state that boards and senior management are expected to understand the linkages between E&S risk (including climate risks) and their bank's operations, should institutionalise the adoption of E&S risk management at the bank, and should integrate E&S risks into their stress testing.

3.1.5. *Liability risk arising from narrative sustainability disclosures*

Directors are not directly and personally liable for corporate disclosures, unless they make false or misleading statements of material fact in required SEC filings which are tantamount to "*market manipulation,*"[55] or "*fraudulent transactions,*" as defined under the *Securities Regulation Code*.[56]

Under SEC's Sustainability Reporting Guidelines (*see discussions above)*, the non-attachment of the Sustainability Report to the Annual Report is subject to the same penalty for an 'Incomplete Annual Report',[57] with corresponding scales of fines:[58]

- *First Offense*: Reprimand/Warning.
- *Second Offense*: PhP30,000 (approximately US$600) plus PhP500 (approximately US$10) per day of delay of filing the amended report.

50 Page 2, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.
51 Page 3, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.
52 Page 4, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.
53 Page 5, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.
54 Page 5, BSP Sustainable Finance Framework, amending Sec. 153 of the MORB.
55 Sec. 24 (d), Securities Regulation Code.
56 Ibid, sec. 27.
57 Para. 7, Sustainability Reporting Guidelines for Publicly-listed Companies.
58 Sec. 17.1 Rule 17 of the Securities and Regulations Code (SRC), as cited in SEC Memorandum Circular No. 6, Series of 2005 (Consolidated Fines)

- *Third Offense*: PhP60,000 (approximately US$1,200) plus PhP1,000 (approximately US$20) per day of delay of filing the amended report.
- *Fourth Offense*: Ground for the suspension/ revocation of the erring company's registration or secondary license which shall be made after notice and hearing, in accordance with the above-mentioned procedures. Erring companies which are primarily regulated by other government agencies shall be endorsed accordingly.[59]

Continued non-payment of the assessed fine and/or failure to comply with the requirement, despite notice and hearing for a period of fifteen (15) days, shall be a sufficient ground for the SEC to take other appropriate action or remedies available under the *Securities Regulation Code* and other related laws.[60] Further, the imposition of the said penalties shall be without prejudice to the imposition of other administrative sanctions or to the filing of criminal charges against the person(s) responsible.[61]

Under PSE's Disclosure Rules (*see discussions above)* the Annual Report is required to be signed by the company's principal executive officer, its principal operating officer, its principal financial officer, its comptroller, its principal accounting officer, its corporate secretary or persons performing similar functions.[62] This is an exhaustive listing of signatories which does *not* include the board of directors of the company.

Should the PLC fail to submit the Annual Report or any other required structured report, the PSE will impose a basic fine between PhP5,000 to P50,000 (approximately US$100 to $1,000) depending on the total assets of the PLC, based on its latest financial statements.[63] In addition, the PSE will commence imposing the daily fine of PhP500 to P5,000 (approximately US$10 to $100) for each day of delay or non-compliance.[64] The PSE has set the maximum fine per year/per violation between PhP50,000 to PhP500,000 (approximately US$1,000 to $10,000).[65]

Under PSE's Disclosure Rules (*see discussions above)* on unstructured corporate disclosure, publicly-listed companies are required to disclose to the PSE once they become aware of any material information or corporate act, development or event, within ten (10) minutes from the receipt of such information or the happening or occurrence of said act, development or event, and such disclosure must be made to the PSE prior to its release to the news media.[66]

The penalty for non-compliance with unstructured disclosure requirements, including the violation of the terms and conditions of the PSE listing agreement and of any other provisions of the PSE rules and regulations committed within a twelve-month period, is as follows:[67]

- *First Violation:* PhP50,000 (approximately US$1,000)
- *Second Violation of a similar nature:* PhP75,000 (approximately US$1,500)
- *Third Violation:* Suspension of trading for a period of one (1) month
- *Fourth Violation:* Ground for delisting

3.2. Climate-related disclosures in financial statements

3.2.1. *Climate-related disclosures in financial statements*

The Philippines is in the process of adaptation of the International Sustainability Standards Board (**ISSB**)

59 SEC Memorandum Circular No. 6, Series of 2005 (Consolidated Fines)
60 Id.
61 Id.
62 SEC Form 17-A Template accessed at https://www.sec.gov.ph/investment-companies/reportorial-requirements/.
63 Sec. 1, Art. VIII – Scale of Fines for Non-compliance with Structured Continuing Disclosure Requirements, PSE Consolidated Listing and Disclosure Rules.
64 Sec. 17.8(2), Art. VII, PSE Disclosure Rules.
65 Id.
66 Sec. 4.1, Art. VII, PSE Disclosure Rules.
67 Sec. 2, Art. VIII – Scale of Fines for Non-Compliance with Unstructured Disclosure Requirements, PSE Consolidated Listing and Disclosure Rules (PSE Scale of Fines).

Standards through the Financial and Sustainability Report Standards Council (**FSRSC)**.

The Philippine *Professional Regulatory Board of Accountancy's Resolution No. 11*, dated 12 March 2024, supported the move to enhance the quality and consistency of sustainability-related financial information disclosed to investors and other stakeholders. The adoption of the ISSB Sustainability Disclosure Standards (**ISSB Standards**), currently comprise of:

- IFRS S1 *General Requirements for Disclosure of Sustainability-related Financial Information*; and
- IFRS S2 *Climate-related Disclosures.*

The Philippines has adopted the ISSB Standards as Philippine Financial Reporting Standards (**PFRSs**). The PFRS align with the International Financial Reporting Standards (**IFRS**) to ensure consistent and comparable financial reporting within the Philippines and on a global scale, with a particular emphasis on sustainability. Considering the capacities and capabilities of the reporting entities, entities are required to prepare and present sustainability-related financial disclosures in accordance with the PFRS, subject to the adoption timeline and transition reliefs described in proposed roadmap that is currently under consideration by the FSRSC.

The adoption shall take effect for reporting entities with the timeline outlined below:

- *Tier 1. Publicly listed companies, and universal and commercial banks (including government-owned banks)*[68] – Mandatory annual reporting shall commence covering data for the year 2025 with reporting due the following year or in 2026.
- *Tier 2. Large corporations with revenue equal to or greater than [Ph₱10-15 billion], and other types of banks (including government-owned banks)*[3] – Mandatory annual reporting shall commence covering data for the year 2027 with reporting due the following year or in 2028. Large non-bank corporations which are subsidiaries of a Tier 1 or Tier 2 company are exempt from preparing and issuing a separate report.
- *Tier 3. Government corporations classified as CPSEs and IC-regulated entities* – Mandatory reporting shall commence following separate guidelines and timeline that will be issued by regulators for supervised entities.

Covered companies must disclose sustainability-related financial disclosures following the PFRS for the same reporting entity as with its related general purpose financial statements. Entities may also provide information on, or may choose voluntarily to report on, sustainability matters intended to meet the information needs of stakeholders other than investors. Such additional disclosures are permitted if the disclosures do not obscure information required by the PFRS to meet the needs of investors.[69]

Furthermore, companies are encouraged to begin early adoption of the PFRS. A transition period commencing from the issuance of the roadmap until the mandatory reporting date is provided to allow entities to prepare for full compliance.

3.2.2. *Directors' duties regarding climate-related disclosure in financial statements*

Currently, there are no Philippine regulations that imposes an obligation on companies and their directors regarding climate-related disclosure in financial statements.

Once the FSRSC formally approves the Roadmap for the Adoption of the ISSB Standards, and the regulatory agencies, including the BSP and SEC, will have issued their respective regulations adopting the ISSB Standards that will address scope, timeline, location and

68 Tier 1 and Tier 2 exclude other CPSEs.

69 IFRS S1, paragraphs 62, B27 and B31; Inaugural Jurisdictional Guide for the adoption or other use of the ISSB Standards, May 2024, IFRS Foundation, paragraphs 39 to 40.

timing of disclosures and disclosure content, including transition reliefs, then the directors' duties to ensure that the financial statement reflects the "*true and fair view*" of the company, will the financial statements of covered companies doing organized or doing business in the Philippines include proper disclosure of climate and nature-related risks.

3.2.3. *Liability risk arising from financial statements*

Section 177 of the Revised Corporation Code requires all corporations organized or doing business in the Philippines to submit to the SEC annual audited financial statements and a general information sheet. In turn, Section 161 of the Revised Corporation Code, the "*unjustified failure or refusal by the corporation, or by those responsible for keeping and maintain corporate records*" to comply with Section 177 shall be punished with:

- Fine ranging from Ph₱10,000.00) to Ph₱200,000.00, at the discretion of the court, taking into consideration the seriousness of the violation and its implications;
- When the violation "is injurious or detrimental to the public," the penalty is a fine ranging Ph₱20,000.00) to Ph₱400,000.00.

Section 163 of the Revised Corporation Code provides that an independent auditor who, *in collusion with the corporation's directors or representatives,* certifies the corporation's financial statements despite its incompleteness or in accuracy, its failure to give a fair and accurate presentation of the corporation's condition, or despite containing false or misleading statements, shall be punished with:

- Fine ranging from Ph₱80,000.00 to Ph₱500,000.00
- When the statement or report certified is fraudulent, or has the effect of causing injury to the general public, the auditor or responsible officer may be punished with a fine ranging from Ph₱100,00000 to Ph₱600,000.00.

4. Biodiversity Risk

The Philippines is one of 17 mega-biodiverse countries in the world, hosting two-thirds of the earth's biodiversity and between 70% and 80% of the world's plant and animal species.[70] The estimated total economic value of Philippine reefs and coastal marine resources was USD 3.65 billion/year in 2018.[71] However, the country faces severe threats from deforestation, illegal logging, urbanisation, and climate change.[72] It is estimated that there are at least 200 threatened species in the Philippines (although some sources estimate the figure to be closer to 700[73]), which could have a severe impact on economic sectors dependent on biodiversity. This may be financial materially for several industries that depend on these sectors for business success.[74] The CCLI has published a report on how companies in the Philippines and other jurisdictions may depend on biodiversity for the functioning of their business models.[75] In particular, biodiversity risks may constitute material financial risks which boards are required to consider within the purview of directors' duties.

The Government of the Philippines recognises the importance of its biodiversity to the national economy and the wellbeing of its people. It has enshrined the right to a "*balanced and healthful ecology*" in the national constitution of the Philippines[76] and, in 2019, for the first time, national rights to nature legislation was introduced into the Filipino Congress.[77] The proposed legislation recognises the rights of nature to exist; to the maintenance of nature's vital cycles and functions, and to the conditions necessary for nature's renewal and restoration. The proposed legislation empowers the Filipino people themselves to act on behalf of nature and it protects their individual right to defend nature from being targeted by 'Strategic Lawsuits against Public Participation'. This proposed legal shift may impact businesses operating in the Philippines as stakeholder pressure to protect nature increases alongside evolving litigation risk.

The importance of biodiversity to the Philippines has been upheld by the Philippine courts in the landmark Tañon Strait Ruling.[78] The ruling, which should prevent any project that the destroys the ecological integrity of a protected landscape has significant implications for business communities operating in sectors such as oil and gas drilling.

Whilst reporting on nature-related risks and opportunities remains nascent in the Philippines, the Securities and Exchange Commission Philippines has developed a framework, 'Sustainability Reporting Guidelines For Publicly-Listed Companies' which aims to promote the importance of reporting with the internal and external benefits to businesses.[79] Directors should be aware that this has been integrated into the requirements within annual reports to increase awareness of the importance for monitoring impacts of business activities.

5. Practical Implications for Directors

With the increased climate change activism and continued public interest litigation on the environment prevailing in the Philippines, directors of private corporations are potentially exposed to the following actions: (a) criminal and civil prosecution by the Philippine Government for engaging their companies to violate prohibited acts under various environmental laws; (b) citizen suits for violating the right of the people to a healthful environment or violation of environmental laws; and (c) administrative penalties for failure to properly quantify and disclose climate change risks.

[70] Convention on Biological Diversity, Philippines - Country Profile. (last accessed on 22 September 2024)
[71] Bayangos, V et al., The Impact of Biodiversity Loss on the Philippine Banking System: A Preliminary Analysis, June 2023
[72] The Philippine Clearing House Mechanism, Biodiversity, n.d.
[73] Convention on Biological Diversity, Philippines - Country Profile.
[74] Bayangos, V et al., The Impact of Biodiversity Loss on the Philippine Banking System: A Preliminary Analysis, June 2023
[75] CCLI, Biodiversity Risk: Legal Implications for Companies and their Directors, December 2022.
[76] Senate of the Philippines, S.B No.2543, August 2013
[77] Centre for Democratic and Environmental Rights, Philippines, n.d
[78] Client Earth, 10 Landmark Cases for Biodiversity, September 2021
[79] Securities and Exchange Commission Philippines, Sustainability Reporting Guidelines For Publicly-Listed Companies, 15 February 2019

In order to ensure that they are fulfilling their fiduciary duties to their companies, and to reduce litigation exposure (*e.g.,* by citizen suits), directors of Philippine companies, especially those of publicly-held companies, must ensure that they act on a fully informed basis, with due diligence and care in addressing the physical, transition and reputational risks facing their company by:

a) putting in place and overseeing a sound enterprise risk management framework that identifies key risks exposures relating to economic, environmental, social and governance factors consonant with achieving the company's strategic objectives;

b) devoting time and attention in board meetings necessary to developing climate risk mitigation plan, including monitoring and evaluating the effectiveness of the company's climate change risk management processes; and

c) communicating to the various stakeholders climate change risks and opportunities facing their company and the status of implementation of risk management strategies.

For large publicly-held companies, it is additionally recommended for their boards to constitute a Sustainability Committee with a clear charter to mandate and oversee sustainability principles and climate action.

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