Society for Corporate Governance
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Reducing Reporting Requirements, Burdens, and Costs Associated with the EU CSRD, CS3D, and the Taxonomy Regulation

Executive Summary

Founded in 1946, the Society is a professional membership association of more than 3,700 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,600 entities, including 1,000 public, private, and nonprofit organizations of almost every size and industry. Our organization has more than 75 years of experience empowering professionals to shape and advance corporate governance within their organizations, in part through providing the knowledge and tools they need to advise their boards and executive management on corporate governance; regulatory and legal developments; and sustainability issues, including climate-related governance, risk management, and disclosure. Numerous Society members represent companies with substantial EU footprints.

The Society continues to support the EU's overall policy objectives on climate and environmental issues underpinned by transparent disclosures and corporate due diligence, such as the Corporate Sustainability Reporting Directive (CSRD), the Corporate Sustainability Due Diligence Directive (CS3D), and the Taxonomy Regulation. We also very much welcome the simplification drive launched in this term in order to ensure that these EU laws are practical for global businesses to implement and foster a reasonable global playing field for multinational companies.

In this respect, the current paper completes and updates the Society's position paper on the Omnibus Proposal, which was submitted to various EU officials in February 2025.

We have a robust track record of constructive engagement with regulators and other standard setters on climate and other sustainability-related legal frameworks, including the IFRS Foundation and US Federal and state-level regulators. This gives us a comprehensive view of the different legal systems on sustainability reporting and due diligence and their interactions.

In this context, we are delighted to provide our refined perspective specifically with respect to the following three areas encompassed within the Omnibus Proposal: I. **Revisions to European Sustainability Reporting Standards (ESRS)** (p2); II. **Extraterritorial Implications of the Corporate Sustainability Reporting Directive (CSRD)** (p7); and III. **Necessary amendments to the Corporate Sustainability Due Diligence Directive (CS3D)** (p11).

These inputs are based on extensive consultations of the Society's members, including in particular a dedicated survey on the impacts of the EU CSRD and CS3D on US companies and focused interviews with Society members whose companies are in scope of the CSRD and/or CS3D and who volunteered to provide information on their compliance challenges to date.

I. Revisions to European Sustainability Reporting Standards

The below recommendations summarize the Society's response to EFRAG's Questionnaire for Public Feedback on ESRS Set 1 Revision submitted May 5, 2025, via the online questionnaire and electronic mail.[1]

Recommendations

I. Provide clear guidance affirming that reporting entities have discretion to design and structure a materiality assessment appropriate for that enterprise and instructing assurance providers and national enforcement authorities to defer to the reporting entity's judgment as to the appropriate process and resulting materiality determinations so long as the process adopted is reasonable and adequately disclosed.

Rationale: Reporting entities often struggle to appropriately determine their obligations under the ESRS, leading to expenditures of resources and management time that are often disproportionate to the reporting entities' resources, their scope of operations, and/or the relevancy of a particular impact, risk, or opportunity. Additionally, a lack of clarity as to certain aspects of the materiality assessment process and where companies may apply reasonable judgment, together with requirements of assurance providers, leads to disclosure that may be overinclusive, making it less useful to users looking for decision useful information. Targeted revisions to specific aspects of the double materiality assessment process can address these concerns by clarifying ambiguities in ESRS 1 and making clear that a reporting entity can adopt a process appropriate for that entity rather than being required to follow a narrow mandatory path.

Proposals:

- **Clarify the double materiality assessment process.** As the European Commission acknowledges in the Omnibus proposal to amend the CSRD, the current ESRS creates "the risk that assurance service providers inadvertently encourage undertakings to report information that is not necessary or dedicate excessive resources to the materiality assessment process." The ESRS should be amended to, and guidance regarding the assurance process should, make clear that the double materiality assessment process is intended to allow reporting entities to design a process suitable for that enterprise rather than requiring a prescriptive approach.

- **Permit reporting entities to consider the effect of actions to prevent and mitigate risk and negative impacts when performing a double materiality assessment.** ESRS 1 and the published supplemental guidance lack any clear instruction as to how actions that a reporting entity has already taken to mitigate or prevent risks and negative impacts should be considered in the materiality assessment.

  The lack of clarity on the consideration of such mitigating actions in the double materiality assessment creates significant challenges. It promotes a bias to over-include topics due to their perceived unmitigated impact even where the actual risk or negative impact is low due to existing internal and external mitigation measures. This distorts the results of the double materiality assessment and results in disclosure that is not decision-useful, as it is overinclusive.

  Allowing reporting entities to consider mitigation and prevention efforts, including consideration of the effectiveness of such mitigating and preventative measures, in the double materiality assessment, will not suppress disclosure of material risks. A well-mitigated risk or potential negative impact may still be material if mitigation or prevention measures require substantial additional or ongoing investment and attention from management to be effective.

[1] Society Response to EFRAG ESRS Revisions Public Consultation Questionnaire (May 2025).

- **Clarify process for determining which disclosure requirements must be satisfied**. Guidance regarding mapping of material IROs to ESRS requirements and determining the specific disclosure items that need be satisfied, including the differences between "material" and "relevant" information and the import of that distinction, is unclear. Consistent with EFRAG IG 1, ESRS 1 should clearly state that the assessment of the information that needs be disclosed is to be applied at a granular level after a company's material sustainability topics have been determined. The purpose of that assessment is to filter which of the disclosure requirements, datapoints, or components thereof must be disclosed and, in the case of a metric, whether the metric is material information or whether it can be omitted.

- **Align the materiality assessment process for human rights impacts with the process for all other topics.** Paragraph 45 of ESRS 1, states that "in the case of a potential negative human rights impact, the severity of the impact takes precedence over its likelihood." EFRAG should eliminate that requirement. While we acknowledge the importance of human rights considerations and the impetus behind that approach, it has proven to be difficult to implement in practice and has led to different approaches between companies. The difficulty in applying this requirement is heightened by the fact that almost every sustainability topic arguably can have human rights impacts, thereby, again, leading to over-inclusive and thus less meaningful disclosure. In the interest of providing for more readily comparable and meaningful disclosure across companies, the requirement should be eliminated.

  Alternatively, if EFRAG chooses to retain that requirement, it should expressly clarify that companies may take their individual circumstances into account and determine the appropriate approach to applying the requirement and thereby reduce any expectations for comparability across companies. Companies should have the flexibility to determine that they will not apply the requirement when evaluating IROs that do not principally concern human rights or, when evaluating impacts they have determined to principally concern human rights, they will take likelihood into account (albeit with a reduced weighting). Additionally, if EFRAG chooses to retain that requirement, it should provide specific guidance as to the definition of "human rights" that companies should use for these purposes and allow reporting entities discretion to determine whether an appropriate nexus exists between a particular "human right" and a relevant impact when evaluating whether such impact is a "negative human rights impact," recognizing that each reporting company's unique facts and circumstances will affect such determinations.

- **Clarify guidance regarding when disaggregated disclosure is required.** EFRAG IG 1 and ESRS 1 should be revised to make express that the double materiality assessment need only be conducted at the level of the consolidated reporting group, and disaggregation of data by entity, country, or site is only required to the extent that providing only aggregated data would obscure information necessary for a user of the sustainability statement to understand impacts, risks, or opportunities that are material to the consolidated group.

- **Revise disclosure requirements related to the value chain**. The definition of the upstream value chain should be amended to be consistent with the Corporate Sustainability Due Diligence Directive (CS3D) requirements (as they may be amended) to provide for a common framework across the reporting and compliance standards. This would ensure that a consistent due diligence standard is applied across both frameworks, particularly if the CS3D is revised to require engagement with only Tier 1 suppliers as proposed. A conflicting definition of the value chain across the frameworks would defeat the purpose of the Omnibus proposal to simplify and streamline compliance with the CS3D and the CSRD.

  Additionally, EFRAG should issue additional guidance that confirms how reporting entities should determine what is "material" in their value chain and that companies need only consider material items in their value chain. Moreover, with respect to purported value chain impacts, a reporting entity should only need to consider as part of its materiality assessment the actual impacts or potential impacts to which it does or can cause, contribute or be directly linked.

Further, ESRS 1 currently requires reporting entities to consider "all reasonable and supportable information" when preparing estimates of value chain information. Inclusion of the word "all" creates a standard that may be impossible to meet to the satisfaction of an assurance provider, resulting in reporting entities having to dedicate excessive resources to developing disclosures. The word "all" should be deleted – reporting entities should only be required to consider reasonable and supportable information available without undue cost and effort.

Finally, ESRS 1 should be amended to make express that the transition relief for value chain disclosures applies to all such disclosures, including Scope 3 disclosures under ESRS E1 and matters addressed in ESRS E2.

II. Clarify disclosure requirements to promote consistency with other reporting regimes.

<u>Rationale</u>: A significant number of companies required to report under the CSRD are or will be required to report sustainability information in accordance with other mandatory disclosure schemes. Additionally, many have historically and will in the future report sustainability information on a voluntary basis. Differences between reporting obligations under the ESRS and other regimes substantially increase the burden of reporting on companies and may lead to confusion among users of sustainability information as reporting entities disclose different information on the same topics. While the Society appreciates the significant work done regarding this topic, additional revisions to the ESRS can further enhance interoperability.

Proposals:

- **Amend the definitions of "financial materiality" and "impact materiality".** The ESRS' approach to materiality varies significantly from other widely used or consulted frameworks, hindering interoperability. With respect to financial materiality, EFRAG should allow companies to use the same standard as is used in the accounting standards that the reporting entity utilizes for financial reporting. Similar changes should be made to the time horizons used by the entity with respect to financial materiality. These changes would enhance the usability of information reported under the CSRD by making it easier for stakeholders to compare and understand differences between sustainability reporting and financial reporting. With respect to impact materiality, the Society believes the definition should be amended to more closely focus on information that reasonable users (in the aggregate) of a company's sustainability disclosure would consider decision-useful. Doing so would better focus the information to the needs of users of sustainability disclosure and would allow companies to better tailor the materiality assessment and disclosure.

- **Align ESRS with ISSB.** There remain known differences between the ESRS and ISSB standards in terms of disclosure requirements, data points, and methodologies. These differences should be reduced and simplified, including with respect to reporting boundaries, with an ultimate aim towards allowing ISSB standards to be deemed equivalent to reporting requirements under the CSRD with respect to financially material matters addressed by an ISSB standard. The ESRS should follow the approach taken by the ISSB and allow entities to choose the appropriate method of determining reporting boundaries, in particular with respect to greenhouse gas emissions.

III. Revise quantitative and qualitative disclosure points to eliminate duplicative, overly prescriptive, and burdensome requirements that provide little value to users.

<u>Rationale</u>: Several disclosure items included in the ESRS call for information that is speculative, provides limited value to users to sustainability information, and is unduly burdensome to produce. Eliminating or revising those items will result in the production of more reliable disclosure while reducing burdens on reporting companies. Generally, the number of disclosure requirements should be substantially reduced and those that remain should be simplified.

Proposals:

- **Eliminate disclosure requirements regarding current and anticipated financial impacts.** Disclosure on anticipated financial effects of sustainability-related risks and opportunities is extremely difficult for companies to quantify, often includes commercially sensitive information, and is unnecessary for an understanding of a company's sustainability-related risks and opportunities. The disclosure requirements in ESRS 2, SBM-3, and related items throughout the ESRS should be eliminated.

- **Eliminate CapEx and OpEx disclosure requirements in the ESRS.** EFRAG should delete the disclosure requirements on CapEx and OpEx spend relating to actions taken by the company to manage material sustainability matters (e.g., MDR-A, paragraphs 66 and 69). Those requirements may result in disclosure of sensitive commercial information that could compromise a company's competitive position by providing insights into cost structures and operational priorities – information that competitors could use unfairly to their advantage.

  Additionally, quantifying, producing, and maintaining the level of detailed financial disclosure currently called for is challenging, placing a substantial administrative burden on companies. Such disclosure is also unnecessary for an understanding of a company's sustainability related IROs, where the action is already described, and would not provide meaningful insight into the efficacy of any actions being taken.

- **Eliminate the requirement to provide a detailed explanation when a reporting entity determines that climate change is not material.** Climate change should be treated in the same manner as other sustainability topics – disclosure should not be necessary if an undertaking concludes that climate change is not material. This special treatment for climate change implies a presumption that climate change is a material topic for all entities reporting under the CSRD, effectively pressuring entities to conclude that climate change is material without regard to the reporting entity's specific facts and circumstances. The unique requirement that a reporting entity disclose a detailed explanation of its materiality analysis and forward-looking analysis with respect to climate change leads companies to incur significant costs, even in cases where the reporting entity reasonably concludes as part of a double materiality assessment that climate change is not material.

- **Remove entity-specific disclosures.** It requires substantial effort and costs to identify matters for which entity-specific disclosures may be required, expand a double materiality assessment to address those topics, prepare disclosures in the absence of any standards, and work with assurance providers to confirm both that no additional entity-specific disclosures are required and that any included are adequate. The level of effort and cost required is disproportionate to any benefit users of sustainability information may obtain from those disclosures, which is limited because the information provided is unlikely to be comparable to that provided by other reporting entities.

- **Provide greater discretion to companies to omit information considered to be commercially sensitive or business secrets.** ESRS 1, section 7.7 currently permits omission of classified and sensitive information, and information on intellectual property, know-how, or results of innovation. However, the definition is overly restrictive, and would not consistently allow companies to omit information even where they reasonably consider this information to be commercially sensitive or a business secret. In cases where information is commercially sensitive or a business secret, reporting entities should be permitted to omit information and provide alternative qualitative disclosures to address the relevant requirement to the extent reasonably possible without making sensitive information publicly available.

- **Other items.** The Society has proposed a number of specific line-item edits to various ESRS requirements and proposed revisions to the EU Taxonomy in its responses to EFRAG's public call for input on ESRS Set 1 Revision. The Society's response is available here.

IV. Clarify the application of certain requirements to non-EU enterprises.

Rationale: The application of assurance requirements and value chain reporting to non-EU enterprises should be clarified to address long-standing areas of uncertainty and reduce the burden of sustainability reporting on non-EU enterprises.

Proposals:

- **Introduce a "reasonable efforts" standard with respect to data from non-EU jurisdictions.** The ESRS can require extensive data collection from non-EU operations of large multinational companies. Existing disclosure requirements, often based heavily on EU regulations, can require data that is unavailable or costly to gather in non-EU locations. A permanent "reasonable efforts" approach to data collection by multinational companies with respect to both their own operations and value chain in non-EU jurisdictions is crucial to avoid excessive costs.

- **Clarify qualifications for assurance providers for reporting companies in non-EU jurisdictions.** Many parent companies organized outside of the EU that have EU subsidiaries required to report as part of "Wave 2" are planning to satisfy reporting obligations under the CSRD through a single consolidated report at the ultimate parent company level. The language of the CSRD creates ambiguity as to who can serve as an assurance provider for those consolidated reports by non-EU parent companies. It should be made clear that a non-EU parent company can use any independent assurance provider with sufficient expertise to provide assurance over its consolidated CSRD reporting.

II. Extraterritorial Implications of the Corporate Sustainability Reporting Directive (CSRD)

The extraterritorial reach of the CSRD and CS3D raises unique concerns for non-EU companies. According to a recent survey of Society members,[2] nearly one-quarter of respondents indicated they expect their companies to experience a moderate or significant increase in litigation or risk of liability due to the CSRD and/or CS3D. Society members have explained that the CSRD requires in-scope non-EU companies to make disclosures on topics that may have limited relevance to their businesses and on which they have not previously disclosed, potentially creating legal liability risk if stakeholders (e.g., regulators, shareholders, NGOs, business partners) are able to demonstrate a disconnect between a company's CSRD report and its other disclosures. Even if stakeholders are unable to demonstrate such a disconnect, the greater ability for them to bring lawsuits or initiate regulatory investigations (even those without merit) can result in negative attention and divert significant company resources that could be better spent advancing sustainability initiatives aligned with the company's core business. This challenge is particularly acute for US companies in the current political environment, and leaving it unaddressed could risk further fragmentation of the political and regulatory landscape. Such fragmentation would only make it more challenging to do business and potentially undermine the ability of multinationals to contribute positively to sustainability.

Based on Society member feedback,[3] addressing the following points would promote the continuation of cross-border operations by US companies with a significant EU presence without incurring prohibitive compliance costs or significant liability risks, and thereby support the political and regulatory stability and openness that fosters competitiveness.

Recommendations

I. Limit application of CSRD to non-EU companies to those with a significant nexus to the EU.

Rationale: Several Society member companies are in-scope of the CSRD due to a relatively small EU subsidiary or holding company with limited EU employees. The significant compliance costs and burdens and risks of liability associated with the CSRD are prompting these companies to reevaluate the costs and benefits associated with their EU operations in a manner that is consistent with and necessitated by their boards of directors' exercise of their fiduciary duties to shareholders to assess and manage the costs associated with their companies' operations and strategic initiatives.

Proposals:

- **Revise the scope of the CSRD so that large undertakings must have a minimum number of EU employees (in addition to meeting significant EU revenue and balance sheet thresholds) to fall in scope.** The Society supports raising the CSRD employee threshold to at least 3,000 for large undertakings coming into scope in "Wave 2" (Article 5(2)(b)) as has been suggested by representatives of the European Parliament. In addition, it believes the turnover, balance sheet, and employee thresholds applied to large undertakings and large groups under Article 3 of the Accounting Directive should all be mandatory (as opposed to two out of three) and apply specifically to EU, not global, operations. Conversations with Society members highlighted that for in-scope holding companies or subsidiaries with only a handful of EU employees, developing compliant reporting is particularly challenging and not cost-effective. For example,

2 Society for Corporate Governance Survey: *Impacts of the EU CSRD and CS3D on US Companies* (Society Survey) (April – June 2025) (on file with author). Respondent demographics consisted of publicly traded US-listed companies: 60% large-/mega-caps ($10 billion market cap or larger); 38% mid-caps ($2 billion to $10 billion market cap); and 2% small-/micro-/nano-cap (less than $2 billion market cap) across a wide variety of industries. The top four industries represented are industrials (e.g., industrial products and construction; mining and metals; oil, gas, and chemicals; power and utilities) (28%); consumer (17%); tech, media, and telecom (17%); and life sciences and health care (15%).

3 In addition to the Society Survey, this paper was informed by focused interviews with Society members whose companies are in scope of the CSRD and/or CS3D and who volunteered to provide additional information, as well as periodic member working group meetings.

disaggregating EU data may not be practicable and can raise concerns (e.g., privacy concerns for workforce data), but significant work — often disproportionate to the scale of the company's EU operations — may be required to prepare global reporting to the CSRD's standards. Requiring large undertakings to have at least 3,000 (if not more) EU-based employees would help ensure that only those non-EU companies who have a significant EU presence and, as such, are most likely to have resources available to address compliance with the CSRD, are in scope.

- **Make the non-EU parent scoping criteria in the CSRD consistent with the criteria for large undertakings.** The Society supports the European Commission's proposal to raise the EU turnover threshold to €450 million for non-EU parents coming into scope in "Wave 4" (Article 40a), which requires global reporting. It furthermore believes such parent entities should fall in scope of global reporting only if they have a large undertaking meeting the "Wave 2" scoping requirements. In the current proposal, there is misalignment between the scoping criteria for Wave 2 and Wave 4, meaning non-EU parents could be in scope even where they have no in-scope subsidiaries, which would present considerable challenges notwithstanding that the non-EU parent obligations are somewhat less onerous than the large undertaking obligations.[4] Aligning the thresholds would help ensure the extraterritorial impact of the CSRD is targeted at only those entities with a significant EU presence.

II. Focus CSRD requirements on those matters that are germane to a company's business and be sensitive to compliance obligations in other jurisdictions.

Rationale: Society members have expressed that the current CSRD framework provides limited value from a business standpoint but is extremely resource-intensive. In the Society Survey, of those representing in-scope companies that had evaluated compliance costs, 60% with respect to the CSRD, and more than half with respect to the CS3D, indicated their companies faced initial compliance costs in excess of $1 million.[5] Additionally, 61% of those surveyed indicated they have had to redirect staff/internal resources to reporting and other matters immaterial to their companies' business, and 42% said this redirection has reduced their companies' ability to have a positive sustainability impact.[6] One-third said they expect their companies' financial position, cash flow, and/or business operations to be negatively impacted by CSRD and/or CS3D, suggesting considerable anticompetitive outcomes from the current approach.[7]

Proposals:

- **Limit CSRD reporting obligations to EU operations but allow use of global data.** Society members have expressed that there are considerable challenges associated with attempting to include non-EU operations — in jurisdictions with competing policy priorities and different regulations and norms — into their CSRD reporting framework, because of, for example, difficulties in data collection, which include in certain instances the complete absence of systems and controls to collect data on an entity by entity basis, and disaggregation. Companies should be given flexibility to limit their CSRD reporting obligations to EU operations only, with the option to use global data for reporting if a particular topic is managed at the global level.

- **Enhance flexibility to use data from non-EU reporting frameworks and processes to meet CSRD requirements.** In the Society Survey, 48% of respondents said the inability to leverage

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4 For example, the EU subsidiary of a non-EU parent that falls within the scope of the CSRD can publish and make available a sustainability report on behalf of the non-EU parent instead of the non-EU parent preparing the fulsome sustainability statement required of EU companies.

5 On a base of 37 respondents representing companies in scope of the CSRD, nearly 19% of respondents with respect to the CSRD respondents indicated that they had not yet evaluated costs or were unsure; of 34 in scope of the CS3D, 56% of respondents indicated that they had not yet evaluated costs or were unsure.

6 The question asked respondents to identify the main operational burdens their company has faced or expects to fact in relation to the CSRD and/or CS3D (respondents = 33).

7 Another 30% indicated they were unsure (respondents = 33).

other reporting their companies are already undertaking (on a voluntary or mandatory basis) is burdensome.[8] For example, US companies cannot easily use US Occupational Safety and Health Act (OSHA) data to report under ESRS S1 and they may also face unique liability risks reporting diversity data in a form not aligned with US law. Giving in-scope US companies maximum flexibility to use existing global reporting standards and frameworks, such as the International Sustainability Standards Board (ISSB) and/or Sustainability Accounting Standards Board (SASB) standards, as well as other non-EU-specific reporting standards and frameworks, would significantly reduce the compliance burdens associated with CSRD and promote companies' ability to operate in the global marketplace.

III. Reconsider assurance requirements by eliminating them or, alternatively, making them voluntary or limiting them to a few discrete metrics.

Rationale: One of the key challenges for in-scope non-EU companies is the large number of data points required that are, in many cases, not covered by other reporting frameworks. This requires these companies to not only develop and implement new processes and systems to collect this information but also to make significant investments to prepare for assurance of this information, such as building controls for required data, training teams, and implementing new technologies. This challenge is compounded by the lack of harmonization among different EU member states and the inconsistency between the CSRD and other pieces of EU legislation that create duplicative reporting structures using different methodologies. Preparing for assurance in an inconsistent manner is challenging, burdensome, and costly. Many Society members cited external costs, most notably for audit and assurance services, as the most significant costs to implement CSRD.[9]

Proposals:

- **Eliminate assurance requirements.** Given the significant number of data points encompassed within the CSRD, including data points that are not covered by other reporting frameworks and are not harmonized among various pieces of EU legislation, US companies have already spent and are continuing to anticipate spending significant costs to comply with the CSRD. These costs do not take into account audit and assurance requirements, which have proven difficult for third-party assurance providers to estimate and for US companies to quantify. Moreover, as provided for in the current legislation, it may not be possible for a non-EU parent to be able to rely on its EU subsidiary's assurance statement. If a separate assurance statement is needed, this could significantly increase the cost of compliance. Given the above, we recommend the elimination of assurance requirements in the CSRD.
- **Allow for voluntary limited assurance.** If mandatory assurance requirements are not removed from the CSRD, the assurance requirement should be voluntary for reporting that is done at a global level, where the ultimate parent company is a non-EU company. While many reporting entities already have sophisticated audit and assurance processes in place, the CSRD requires considerable amounts of new information, which not only significantly increases costs but also requires new process and systems for compliance. As these audit and assurance requirements will be new to many reporting entities and difficult for smaller companies to put in place given their already limited resources, requiring non-EU companies to comply with assurance requirements introduces additional significant financial costs (e.g., hiring new staff and implementing new processes and systems) and operational costs (e.g., redirecting staff and internal resources to reporting and other matters nonmaterial to company business). In particular, US companies are

8 The question asked respondents to identify the main operational burdens their company has faced or expects to fact in relation to the CSRD and/or CS3D (respondents = 33).

9 Respondents to the Society Survey identified external audits, assurance, and assessments (97%), sustainability consultants (91%), staffing (79%), sustainability platforms and software (79%), and legal services (64%) as the primary areas of their company's operations where they have experienced or expect to experience increased compliance costs due to the CSRD, and sustainability consultants (76%), legal services (64%), staffing (55%), external audits, assurance, assessments (55%), sustainability platforms and software (42%), and supplier contract modifications (39%) as the primary areas of their company's operations where they have experienced or expect to experience increased compliance costs due to the CS3D (respondents = 33).

already subject to liability and face legal and regulatory risk for reporting incorrect or misleading information or omitting material information, which already incentivizes them to have in place strong internal process and controls for reporting the information required pursuant to the CSRD without the need for mandatory assurance requirements.

- **Limit assurance to a few discrete metrics.** If assurance is not voluntary under the CSRD, the assurance requirement should be limited to a few discrete metrics. Given the large amount of data required to be reported under the CSRD, it is difficult for non-EU companies to comply with mandatory assurance requirements. Limiting mandatory assurance to a few discrete data points related to climate that are considered the most significant or important data points – and for which assurance practices are established and available at a reasonable cost -- will enable non-EU companies to better estimate these compliance costs while also putting in place strong internal controls and procedures for reporting these specific data points.

III. Necessary amendments to the Corporate Sustainability Due Diligence Directive (CS3D)

The Society supports a significant reduction in compliance burdens associated with the CS3D. If the CS3D remains in place, we request that the EU decision-makers consider a number of sensible and pragmatic modifications that would relieve some of the heavy burden of CS3D obligations on EU and non-EU companies.

The Society also notes other commentators who have stated that the CS3D, if implemented in its current form, would have a number of significant unintended consequences.[10] These consequences could reduce EU competitiveness and global supply chain security. Therefore, the CS3D as a whole should be analyzed in this context and seek to limit the potential detrimental impact on EU companies, non-EU companies, and low-income country suppliers that may lose business or withdraw from the EU due to the CS3D requirements.

Recommendations

I. Reduce the list of specific human rights and environmental matters (Art. 3(1)(b) and (c) CS3D).

Rationale: Based on the current Annex to the CS3D, the list of potential adverse impacts is too long and burdensome for companies to appropriately diligence.

Proposals:

- **Revise the scope of the CS3D due diligence obligations as regards the matters subject to diligence**. To reduce the impact of these provisions, consider revising the definitions of "adverse impacts" to refer not to the Annex, but rather to a few, key and well-defined principles that already apply to companies, such as the requirements not to discriminate based on specified protected characteristics such as gender, origin, race, or sexual orientation, and omitting more abstract concepts such as "the right to life".

- **Review, revise and potentially delete the international treaties included in the Annex to the CS3D to avoid violating important tenets of international law and EU practice.** The extraterritorial extension of various international treaties associated with the CS3D due diligence scheme, including those which have not been ratified by a large number of non-EU (and EU) nations[11], are far-reaching and extremely burdensome, reaching well beyond the scope of any country's current national law, including in the EU.[12] According to various third-party experts[13],

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[10] Banca d 'Italia, *The Corporate Sustainability Due Diligence Directive (CS3D): an analysis of the potential economic and legal impacts* (2024), pp.11-13. These impacts could include, for example, (i) the delocalization from doing business with EU entities and business to avoid "generating" revenue in the EU and avoid the knock-on effects of CSRD reporting and CS3D due diligence questions and requirements, (ii) offshoring of suppliers away from EU entities to avoid generating revenue from EU entities, and (iii) sheltering to "safe" business partners and avoiding suppliers that are unable to certify to compliance with the CS3D adverse impacts requirements.

[11] For example, only four of the twenty-seven EU member states have ratified the International Labour Organization's Indigenous and Tribal Populations Convention—an international treaty that is associated with the CS3D's due diligence scheme. *See* Ratifications of ILO Convention No. 169.In terms of non-EU nations, Annex 1 lists the following international treaties to which the United States has declined to either sign or ratify:

- UN Declaration on the Rights of Indigenous People – Non-binding resolution (U.S. opposed).
- International Convention on the Elimination of All Forms of Racial Discrimination – U.S. signed and ratified but subject to reservations.
- Convention on the Elimination of All Forms of Discrimination Against Women – U.S. not ratified.
- Convention on the Rights of Persons with Disabilities – U.S. not ratified.

[12] For a country to be bound by a treaty and its provisions, it must both sign and ratify the treaty. A country's signature signals an agreement with the terms, whereas ratification signals the intent to be formally bound by the treaty. The United States (and other countries) has either not signed or not ratified many of the international treaties referenced in the CS3D and, therefore, is not bound by these treaties.

[13] Dr. Jennifer A. Zerk, Harvard Corporate Social Responsibility Initiative, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, 2010.

international law places limits on the use of direct extraterritorial jurisdiction.[14] In this vein, we believe it is unreasonable to bind US -incorporated companies to these treaties through CS3D's incorporation of the same when these companies chose to be incorporated in a country that itself is not in agreement or bound to these treaties. Therefore, the EU should review, revise, and potentially delete the Annex to the CS3D and replace with either (i) breaches of relevant national law of the non-EU country company or (ii) a limited selection of matters, such as—for non-EU companies—those found to be material under local (non-EU) law or—for EU companies—matters found to be material under the CSRD.

- **Limit the definition of adverse impacts to matters that are in the hands of covered companies and not national governments.** The treaty clauses contained in the Annex do not apply directly to companies, as the relevant obligations and prohibitions arising from these provisions would be incorporated into national law of a ratifying country or, in the case of other rules such as the International Covenant on Civil and Political Rights, as part of "steps" or "progress" by national legislatures[15] (not directly applicable to companies). Several of these treaty clauses are generally not targeted at companies, but remain within the responsibility of the implementing states, e.g., the right to social security under the International Covenant on Economic, Social and Cultural Rights. Such provisions should be removed from the Annex.

II. Simplify due diligence and reporting obligations (Art. 8-11 CS3D and Art. 16 CS3D).

Rationale: The current due diligence obligations require in-scope companies to identify and assess actual and potential adverse impacts, prioritize identified actual and potential adverse impacts, prevent potential adverse impacts[16], and take "appropriate measures" to bring identified actual adverse impacts to an end.[17] The CS3D requires in-scope companies to, based on the results of a "mapping" of their operations and chain of activities, carry out an "in-depth assessment" of operations and business partners. These measures require in-scope companies to conduct costly and complex due diligence of the full value chain, force in-scope companies to impose significant restrictions and potential liability upon their business partners, and could require in-scope companies to significantly reduce and weaken the resilience of their supply chains.

Proposals:

- **Revise the scope of the CS3D due diligence obligations in terms of the process requirements**. Consider revising and rewording Arts. 8-11 of the CS3D to be less burdensome and complex. We suggest changing the requirement to identify, assess, prioritize, and prevent any "potential" adverse impacts of the subject companies, their subsidiaries, or their business partners to "severe adverse impacts," which would alleviate significant and costly predictive guesswork.

- **Adopt a Tier 1, risk-based approach to due diligence requirements.** The Society supports maintaining a risk-based approach at the level of direct business partners (Tier 1) to identify areas where adverse impacts are most likely to occur and to be most severe rather than the proposed Omnibus requirement to assess human rights and environmental risks at Tier 1 business partners subject to extending full due diligence obligations beyond direct business partners where a company has plausible information suggesting potential or actual adverse

[14] As well as having to rely on one or more established jurisdictional principles (i.e. relevant territorial connections, nationality connections, or the more controversial passive personality, protective or universality principles), it is generally agreed that the use of direct extraterritorial jurisdiction is subject to an overarching "reasonableness" requirement.
[15] International Covenant on Civil and Political Rights, Art. 40(1).
[16] Adverse impacts are defined as environmental adverse impacts and human rights adverse impacts, which are themselves respectively ambiguously defined as an "adverse impact on the environment" and an "abuse" of a number of human rights treaties and provisions, each as set forth in Annex 1 to the CS3D. *See* CS3D, Art. 3(b)-(d). This creates circular logic that requires covered companies to make these judgment determinations.
[17] CS3D, Arts. 8-11.

impacts within its full supply chain.[18] The proposed plausible information approach could easily be manipulated and otherwise abused by NGOs and others and should be eliminated.[19] In the alternative, the definition of "indirect" business partners should be more narrowly tailored to those in a contractual agreement with direct business partners (i.e., only second-tier business partners). Finally, the limitation of the chain of activities of financial institutions should be replicated from the preamble and added to the body and operational sections of the CS3D. The Society further supports a risk-based scoping approach based on reasonably available information to identify areas of likely adverse impact in lieu of a full mapping requirement.[20]

- **Reject the last resort "enhanced prevention action plan" proposed in the Omnibus, as it is costly and burdensome.** The current draft Omnibus would require covered companies to adopt an "enhanced prevention action plan" in lieu of the current obligation to terminate contractual relationships in the event mitigation is impossible. An "enhanced prevention action plan" would increase already significant expenses by requiring companies to take action based on the success of "reasonable expectation." The reasonable expectation standard and the plan itself are likely to expose companies to heightened liability based on hindsight scrutiny and actual developments that may differ from reasonable expectations, despite a company's' good faith actions. The "enhanced prevention action plan" requirement should thus be removed, providing greater flexibility to companies as to which measures are appropriate in their respective circumstances.

- **Extend due diligence statement carveout for CSRD reporting company to CSRD reporting via artificial consolidation.** We note that the exemption for due diligence statements under CS3D does not include companies that report pursuant to the artificial consolidation provision of Art. 48i of the CSRD. This omission, which appears inadvertent, should be addressed in the Omnibus revisions.

III. Remove or revise the current transition plan requirement, as it is unclear and fails to account for current scientific consensus (Art. 22 CS3D).

Rationale: The CS3D requires in-scope companies to "adopt and "put into effect" (or, under Omnibus, take "implementation actions"[21]) a transition plan that aims to ensure through best efforts that the business model and strategy of the company is compatible with the transition to a sustainable economy and with limiting global warming to 1.5° Celsius in line with the Paris Agreement.[22] We support deleting this requirement given the implausibility of the 1.5° C requirement and challenges and concerns associated with a "best efforts" standard, as discussed below. In the alternative, the obligation should be clarified and reduced as described below.

Proposals:

- **Remove the 1.5° C requirement as it is not currently achievable.** Scientific consensus currently holds that it is almost inevitable that the world will at least temporarily exceed the1.5°

[18] Proposal for a Directive amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM/2025/81, Feb. 26, 2025 ("Omnibus 2"), Art. 8(2a).
[19] United Nations Office of the Commissioner of Human Rights, *Commentary on the Omnibus Proposal*, May 2025, available at https://www.ohchr.org/sites/default/files/documents/issues/business/mhrdd/ohchr-commentary-omnibus.pdf (accessed May 25, 2025), section 1.B.
[20] *See, e.g.,* Council of the European Union, *Presidency compromise text*, Interinstitutional File: 2025/0045, No. 9533/25, May 29, 2025, p.18 ("[C]ompanies are not required to identify and assess every single entity or risk where that would not be reasonable taking into account the circumstances of the specific case. In the same vein, it should be clarified that companies are only required to take reasonable measures in gathering the necessary information").
[21] Omnibus 2, Art. 4(10).
[22] CS3D, Art. 22(1).

Celsius threshold above pre-industrial levels.[23] The UN Secretary General recently stated that the 1.5° goal is "a limit for the long-term – measured over decades, not months or years."[24] CS3D sets a nearly impossible challenge for in-scope companies to "adopt and put into effect" a transition plan. This evolving scientific consensus supports elimination of the transition plan, or at the least removal of the reference to 1.5° Celsius.

- **Remove or re-define the requirement to make "best efforts".** The CS3D requires companies to use "best efforts" to ensure business model and strategy are compatible with the abovementioned climate goals. However, "best efforts" are not defined in the CS3D, and could be interpreted to be overbroad and costly with little value to stakeholders, especially for U.S. companies where U.S. law generally defines best efforts to mean taking all possible action, regardless of cost, to achieve an intended outcome. We suggest removing the "best efforts" requirement from the transition plan provision or, in the alternative, using "reasonable efforts" or "commercially reasonable efforts," and/or providing a defined term and guidelines or examples of such efforts being proportionate, reasonably available, adapted to the circumstances, and not unreasonably burdensome.

IV. Ensure that only a single EU member state will be responsible for enforcement and remove civil liability regime, which is ambiguous and could lead to a heavily litigious legal landscape, reducing EU competitiveness (Art. 24 CS3D and Art. 29 CS3D).

Rationale: Currently, CS3D determines which EU member state is competent to appoint a supervisory authority to enforce CS3D against a covered company based on whether the company is an EU- or non-EU entity, where the in-scope company has the highest revenue, and whether the in-scope company has one or more EU "branches."[25] This determination is likely to be complex and variable across companies, and initial coordination amongst EU member state regulatory bodies may be low, exposing in-scope companies to multiple countries' regulators claiming jurisdiction and "forum shopping" by potential plaintiffs.

Proposals:

- **Clarify EU member states enforcement authority to ensure only a single regulating country.** The enforcement authority of EU member states should be clarified to ensure that only a single EU member state will have authority to enforce CS3D over a covered company/group at any given time. In-scope companies should be allowed to voluntarily elect the relevant EU member state based on objective criteria, such as the EU subsidiary with the highest net revenue or the number of employees as defined in the CSRD and CS3D.

- **Remove the civil liability regime or, in the alternative, introduce additional procedural protections and the ability to harmonize multi-jurisdictional litigation.** If Article 29 (establishing a private right of action) remains, the liability standard would likely be leveraged by individual activists and NGOs (including climate lobbyist groups) to bring further litigation against multinational companies, whether or not related to an alleged violation of CS3D. Sustainability- and climate change-related litigation is notoriously complex, costly, and long-lasting, and there is increasing precedent for the assertion of spurious or agenda-driven claims that distract company management for extended periods, drain company resources, and ultimately fail. This could have

[23] Copernicus, *Hottest May on record spurs call for climate action* (2024), available at: https://climate.copernicus.eu/hottest-may-record-spurs-call-climate-action (accessed Feb. 20, 2025); World Meteorological Organization, *Global Annual to Decadal Climate Update* (2024), p.7; Scientific American, *We're Approaching 1.5 Degrees C of Warming, but There's Still Time to Prevent Disaster* (2024), available at: https://www.scientificamerican.com/article/were-approaching-1-5-degrees-c-of-global-warming-but-theres-still-time-to/ (accessed Feb. 20, 2025).

[24] A. Guterres, *Secretary-General's special address on climate action "A Moment of Truth"* (2024), available at : https://www.un.org/sg/en/content/sg/statement/2024-06-05/secretary-generals-special-address-climate-action-moment-of-truth-delivered (accessed Feb. 20, 2025) (also stating that "stepping over the threshold 1.5 for a short time does not mean the long-term goal is shot.").

[25] CS3D, Art. 24(1).

a knock-on impact on market stability. In addition, various legal scholars have discussed Article 29 insofar as CS3D does not address the applicable law or jurisdictional matters relating to this private enforcement mechanism.[26] Therefore, we support the elimination of Article 29 or, in the alternative, (i) limiting claims to existing procedures and causes of action under national law, (ii) including additional language to ensure a minimal level of procedural fairness in the relevant national proceedings, including additional standard, notice, and confidentiality protections that would apply throughout the EU, and (iii) adding provisions allowing consolidation of different civil litigations into a single process and/or jurisdiction.

V. Clarify the CS3D's scoping provisions to ensure legal certainty as to which non-EU companies must comply with CS3D (Art. 2 CS3D).

<u>**Rationale**</u>**:** Some of our members have encountered difficulties determining whether CS3D applies to them. These scoping issues, which do not appear to be covered by the current Omnibus proposal, address whether and when a company is in scope of CS3D, and should be clarified to create stability and legal certainty.

Proposals:

- **Clarify the threshold lookback period.** The CS3D should provide that applicability is triggered only when a company has met the applicable threshold for two consecutive years as measured on, for example, the end of the second quarter after the relevant financial year.[27] This would also avoid the potential for a "springing obligation" upon the approval of new financial statements. Finally, many non-EU countries (including the US) do not require "adoption" of financial statements (although publication or filing may be required).

- **Extend the employee thresholds to Non-EU Companies (Extraterritoriality).** Ironically, non-EU companies are more likely to be in scope of CS3D. Unlike EU companies, which must pass a revenue and employee thresholds, non-EU companies must comply with CS3D if they pass <u>only</u> a single test: global net revenue "generated" in the EU.[28] This unfairly prejudices non-EU companies and breaches the principles of extraterritoriality. At a minimum, the playing field between EU and non-EU companies should be level in this respect. The CS3D should also apply the employee threshold to non-EU companies.

- **Definition of "net turnover…in" the EU is ambiguous and difficult to apply.** For non-EU companies, the CS3D defines "net turnover" as "revenue as defined by or within the meaning of the financial reporting framework on the basis of which the financial statements of the company are prepared." However, this definition does not clarify what it means to have revenue generated "in" the EU and opens the door to varying interpretations. We recommend clarifying that this term refers to "net turnover comprising products sold, and services provided within the Union to undertakings or consumers."

- **Remove or clarify franchising and licensing triggers.** The Society believes the additional trigger relating to royalties in the EU arising from intellectual property arrangements should be eliminated because (i) it is unclear what the "common identity" and "common business concept" conditions require and (ii) many royalty or licensing agreements cover multiple EU and non-EU territories, making revenue tracing difficult, if not impossible, to assess.

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[26] Selin Parlak de Oliveira Serra, European Union Law Working Papers No 105, Corporate Governance and Due Diligence Analysis Under the Corporate Sustainability Due Diligence Directive (CS3D): Legal and Extraterritorial Challenges, Stanford – Vienna Transatlantic Technology Law Forum 2025.

[27] *Compare* CS3D, Arts. 2(2) and (5) (which for the revenue test refer to "the financial year preceding the last financial year" but also requires threshold met in "two consecutive financial years") and CS3D, Art. 37 (which refers to "the last financial year preceding 26 July 2027 for which annual financial statements have been or should have been adopted").

[28] CS3D, Art. 2(2).

Conclusion

While the foregoing comments reflect the Society's specific suggestions, we strongly encourage the EU to consider additional ways to streamline and simplify its sustainability disclosure and compliance directives. The private sector has vast potential to help society achieve greater environmental and social sustainability, but the most effective and durable way to do so is in a manner that is tied to each company's business strategy and views sustainability not as a regulatory obligation, but as a source of potential competitive advantage that is pursued by each firm individually and, often, through commercial arrangements with other firms. Thus, we encourage the EU to take into account the existing and emerging regulatory obligations companies are facing in other jurisdictions, to minimize the additional regulatory and reporting burdens on companies, to focus its mandates on those areas with a strong cost/benefit rationale, and to construct its requirements in such a way that it fosters, rather than impedes, the ability of companies to integrate sustainability into their business strategy and operations.