# Sustainability Risk Radar

Financial Institutions | January 2024

PRIVATE AND CONFIDENTIAL

# Sustainability

## Overview of trends and recent developments

**Sustainability, including environmental, social and governance factors, presents opportunities for financial institutions to gain a competitive advantage and launch new products and services. However, it can pose significant risks, such as greenwashing and, ultimately, the prospect of enforcement and litigation.**

- As recognized in the Paris Climate Agreement, financial institutions are critical players in the transition to a carbon-neutral economy and, because of their role in allocating capital, they can act as a catalyst in achieving better environmental, social and governance (ESG) outcomes in society generally. Reflecting their role in mediating the allocation of capital and their highly regulated nature, sustainability for financial institutions extends beyond climate change, and even further than wider ESG concerns, to encompass the very nature of their contribution to the economy and society as a whole.

- Sustainability (and ESG more generally) as an issue has seen a tremendous rise in awareness since 2015, with the impetus acquired during the COVID-19 pandemic being maintained, despite recent economic and geopolitical shocks. According to the Glasgow Alliance for Net Zero, "financial institutions worldwide have started to move from ambitious climate goals to action." In fact, financial institutions face increasing commercial and competitive pressure to promote sustainable lending and investments. Market and investor expectations and commitments around sustainable finance and ESG considerations are changing the way global businesses operate and are at the very heart of decision-making. In addition to financing green economic activities, including renewables and recyclables, attention is rapidly turning to the challenge of "transition finance," i.e., transitioning higher-emitting and hard-to-abate sectors in the economy to sustainability or net zero. In North America, while the term ESG has become politicized, and therefore less used, the trend remains clear.

- Sustainability regulation is replacing voluntary standards at pace in major financial centers. The EU remains in the vanguard with its Sustainable Finance Action Plan, which includes a system of classifying (by taxonomy) the impact of economic activity on the environment together with entity-level and product disclosures. 2024 should see continued progress toward greater interoperability with international baseline standards, thanks to the work of the International Sustainability Standards Board. As cross-border investment requires the assessment of investee companies by investors in third countries and vice versa, generally accepted international classification and reporting standards are essential.

- Litigation and enforcement represent a key risk for financial institutions with respect to ESG disclosures and reporting, as they may face exposure where, for example, ESG statements are misleading or incomplete. There is increasing focus on coherent, firmwide approaches to sustainability. Guarding against liability for greenwashing is a major concern. It is vital, therefore, to understand the risks relating to ESG factors and the mitigation strategies available.

# Sustainability

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# Sustainability

## Sustainability framework

**We support financial institutions to move forward, sustainably**

### Litigation and enforcement

- Minimizing potential greenwashing liability from ESG reporting and disclosures
- Engaging with regulators over enforcement action
- Undertaking litigation in a strategic, cost-effective manner

### ESG governance

- Mission, role and composition of boards, and senior individual accountability
- Embed ESG into risk frameworks, product design, pricing and sales decisions
- Nonfinancial reporting under mandatory and voluntary frameworks on ESG impacts, including diversity and gender equality


### ESG debt and equity

- Green, social and sustainable bonds
- Sustainability-linked bonds
- Transition bonds
- Green equity

### Inclusion, diversity and equity in the workplace

- Equality, diversity and inclusion
- Responding to nonfinancial misconduct
- Lawful data collection on diversity

### Finance and loans

- Sustainable loans and sustainability-linked loans
- Transition finance
- Prudential rules and qualitative EU Capital Requirements Regulation disclosures
- Bank climate transition plans

### ESG regulation

- Policies on integration of sustainability risks in the investment decision-making process
- Due diligence processes on sustainability
- Pre-contractual disclosures
- Website and periodic disclosures
- Classification of economic activities

### Responsible investing

- An approach to investing that aims to incorporate ESG factors into investment decisions, to better manage risk and generate sustainable, long-term returns

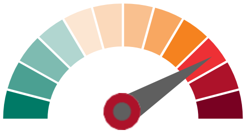
# ESG governance

## Risk profile

### Recent trends and developments

- Corporate governance is increasingly important in improving how businesses operate and holding them accountable to stakeholders. Besides having appropriate measures to meet sustainability requirements, such as over investment decisions and reporting, disclosure is required of governance frameworks themselves (e.g., a description of the board's oversight of climate-related risks and opportunities, as well as the management's role in assessing and managing them).
- Against a background where reporting under TCFD recommendations (and now the International Standards Board (ISSB) standards) is increasingly required, in the EU, the Corporate Sustainability Reporting Directive (CSRD) extends the Non-Financial Reporting Directive, and will improve the quality of reporting by introducing assurance measures. Elsewhere, more mandatory reporting is also likely to be seen.

Risk rating: **high**



### Associated risks

#### Governance

Good intentions from leadership are a start, but they must be backed by robust steps across all business operations and have broad engagement throughout the organization. Research on governance factors shows that businesses that rank below average on good governance characteristics are more susceptible to mismanagement and risk their ability to take advantage of business opportunities. They are also likely to see an increased incidence of issues such as tax noncompliance, corruption or bribery with business partners, inappropriate senior management remuneration and a lack of proper assurance regarding data protection. These issues can potentially give rise to regulatory investigations and litigation.

#### Holistic and ethical challenges

Businesses must ensure that their activities do not harm the market or their customers and that financial products add real value rather than representing another cost to financing the economy. Examples of poor behaviors include acquiescing in environments that allow market abuse and mis-selling to occur or working practices that fail to respect diversity and equality. Businesses should seek to deliver positive outcomes that fulfill genuine customer needs, for example, in the retail sphere, protection and investment objectives.

#### Nonfinancial reporting/corporate disclosures

Financial institutions that are also public companies should consider how their public statements about ESG priorities align with their approach to managing sustainable investment strategies, including policies, procedures and transition plans. The EU's CSRD will require large public companies (including third-country companies with EU operations) to disclose sustainability information from a "double materiality perspective," while US public companies make nonfinancial disclosures under the "materiality" threshold. Regulators are increasingly scrutinizing these disclosures, especially with respect to potential greenwashing issues. Where permitted, some businesses are preferring to stay silent on emission reduction goals, referred to as "greenhushing."

### Baker McKenzie green and sustainability solutions for financial institutions

- Advising financial institutions at board level to help keep ahead of the latest ESG policy, regulations and standards, such as the GRI, CDP, ESRS and ISSB, while ensuring that they meet disclosure obligations by effectively incorporating these into their ESG agenda
- Drafting ESG management plans, policies and procedures together with delivering accompanying training
- Advising on specific corporate governance obligations of group entities and their subsidiaries, including on the coming EU Corporate Sustainability Directive and proposed corporate due diligence legislation
- Supporting cross-border risk and materiality assessments and mitigation initiatives by boards of financial institutions conducting cross-border business in various contexts

# ESG debt and equity

## Risk profile

### Recent trends and developments

- The transition to a low-carbon and environmentally sustainable economy is creating many new business opportunities, requiring large amounts of finance.
- The ESG market has been debt-led with green bonds and loans now well established. The financial sector is now trialing green equity as a new class of climate-friendly asset, similar to sustainability-linked bonds channeling funds into general operations as opposed to specific projects. Sustainable loans and linked loans are growing, and now transition finance is gaining traction in relation to higher-emitting sectors.
- Investments into clean energy businesses and associated infrastructure will continue to grow as the clean energy transition and investment in low-carbon and climate-resilient infrastructure accelerate.

Risk rating: **medium high**

### Associated risks

#### Inadequate contractual protection

Central to green bonds are (i) disclosures that the proceeds raised will finance new or existing projects that have positive ESG benefits, (ii) ongoing reporting on the use of those proceeds and (iii) the provision of a second opinion by an independent third party certifying the green nature of the bond. However, given the way the bond market has developed, none of these criteria gives bondholders actionable rights. Even in the case of sustainability-linked bonds that look to shore up the lack of contractual protection inherent in traditional green bonds by tying measurable elements of the issuer's ESG performance to specific terms of the bonds, failure to meet these KPIs is still unlikely to constitute an event of default. At worst, it will result in an increase in the interest margin or redemption price.

#### Reporting standards, metrics and transparency

Despite the risk of greenwashing, an analysis of what use of proceeds will be considered green lies in any event with an issuer, its advisers and the third-party reviewer, with the ICMA Green Bond Principles being silent. Current practice is to assert compliance with a broad category of "eligible green projects" in respect of which an issuer will use their own criteria or definition with varying levels of specificity and detail. There are also often issues with the frequency of ongoing post-issuance reporting. While the European Green Bond Standard is expected to be the new "gold standard" for green bond issuance, demonstrating EU Taxonomy alignment is a considerable usability challenge that is expected to impede its uptake in the near-term.

#### ESG ratings

Performing quality due diligence is always important. For ESG-driven investments, the stakes are particularly high. ESG rating products can spot risks not identified with conventional financial analysis that nonetheless could affect financial performance because of additional operational costs or litigation liabilities. The dilemma is that ESG ratings are still open to interpretation, being only as good as the methodology and the data employed, potentially lacking independent verification. Ratings also rely on public information, so their outputs will necessarily be subject to data gaps. Some jurisdictions have now introduced regulation on ESG ratings while others are actively contemplating this step.

### Baker McKenzie green and sustainability solutions for financial institutions

- Providing advice on structuring and issuing ESG-related offerings as well as structuring innovative financial instruments
- Advising issuers/underwriters on research and publicity restrictions at the outset and on an ongoing basis
- Performing due diligence on issues, accounts and auditors, including the sustainability attributes of contemplated transactions, and liaising with third-party ESG reviews
- Preparing and managing transactional and regulatory documentation and notifications, such as the prospectus and content of specific ESG reports and annual filings
- Reviewing, commenting on and agreeing on conditions precedent (e.g., legal opinions and auditor comfort letters) and drafting own opinions

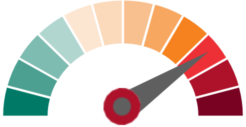
# Finance and loans

## Risk profile

### Recent trends and developments

- There is increasing pressure on lenders, including banks, to reduce emissions from their lending and investment portfolios. Under the UNEP Finance Initiative Guidelines for Climate Target Setting for Banks, signatories must set and publicly disclose long- and medium-term targets to support the Paris Agreement. Specifically, the industry-led, UN-backed Net-Zero Banking Alliance has committed to transition emissions from their portfolios to align with pathways to net zero by 2050 or sooner.
- Supervisors expect banks to address climate risk challenges (including developing transition plans). While many have taken initial steps toward incorporating climate-related risks, few are close to meeting all supervisory expectations (e.g., integrating climate and environmental risks into their business strategies).

Risk rating: **high**



### Associated risks

#### Interoperability of standards

Questions on the interoperability of global taxonomies and other standards hinder taxonomy-aligned financing solutions and pose obstacles to sustainable development, especially cross-border. To tackle this issue, Singapore's monetary authority is mapping its regional taxonomy to the International Platform on Sustainable Finance's Common Ground Taxonomy, which covers the EU Taxonomy and the People's Bank of China's Green Bond Endorsed Project Catalogue. A common set of definitions will assist lenders and borrowers alike. The ISSB's standards, which replace the TCFD recommendations, should further help, assuming they receive the necessary endorsement by supervisors, although they are not fully interoperable with the EU's ESRS standards (e.g., on double materiality).

#### Transitioning risk

According to the OECD, transition finance "is the dynamic process of becoming sustainable or reaching net zero, rather than for already sustainable or net-zero activities based on a point in time assessment." The main obstacle to assessing whether a borrower has a credible transition plan is incomplete information together with a lack of comparable data. According to an OECD industry survey, 80% of financial market respondents cited the lack of detailed information from corporates in their transition plans. Only slightly fewer (76%) identified a lack of comparability in data and the content of transition plans. Where transition plans lack credibility, the financing of high emitters and hard-to-abate sectors in the economy can expose lenders to greenwashing allegations and, in consequence, reputational risk.

#### Just transition impact

Among the key elements for a credible corporate transition plan is the requirement to support a "just transition." Steps must be taken to mitigate any negative impacts on workers, suppliers, local communities and consumers that arise from the adoption of the transition pathway to net zero. Robust plans should consider using International Labour Organization and OECD principles and guidelines. The importance of a just transition is rapidly increasing as the emphasis grows on the "S" and "G" in ESG.

### Baker McKenzie green and sustainability solutions for financial institutions

- Advising lenders on cross-border and domestic sustainable financing across a wide range of industry sectors with an extensive and award-winning track record
- Providing advice on a broad range of bilateral loans, syndicated loans and loan participations by using our extensive experience in this area
- Advising financial institutions on the legal and market terms of green and sustainability-linked loans, including appropriate metrics and key performance indicators
- Working with financial institutions to navigate the developing transition finance market, including advising on what constitutes a credible and achievable borrower transition plan

# Responsible investing

## Risk profile

### Recent trends and developments

- We are seeing a growing appetite from institutional investors like sovereign wealth funds, public and private pension funds, and philanthropic foundations, as well as from financial sponsors looking to increase their exposure to sustainable and ethical investments that align with established ESG goals.
- Currently, the demand for sustainable assets that meet established ESG criteria outstrips the scale of existing opportunities. In the area of clean energy and low-carbon infrastructure assets, for example, institutional investors consistently cite the lack of better-pooled investment vehicles that will enable them to deploy significantly greater amounts of capital. Transition financing of higher-emissions sectors should help, but they may potentially carry higher risks around greenwashing.

Risk rating: **medium high**

### Associated risks

#### Managing investment risk

ESG rating products can potentially spot risks not identified with conventional financial analysis that could affect financial performance because of additional operational costs or litigation liabilities. While matters are improving (and regulation is developing), there is often a lack of independent verification of their accuracy and few regulatory requirements, although levels of scrutiny are rising. Moreover, existing ESG disclosure regimes and standards are still in their infancy. Recent incidents have seen individual corporate constituents of sustainable funds experiencing, for example, controversies over their supply chains, with their market value impacted accordingly. Additionally, high volumes of capital searching for ESG investments can pose risks where there is a lack of investment rigor and discipline. Asset prices could over-inflate as investors overpay, risking an ESG bubble bursting, similar to the tech and property markets before.

#### Shareholder, NGO and political pressure

NGOs and activist shareholders are calling for the publication of strategies with targets to reduce exposure to fossil fuel assets on timelines set out in the Paris Agreement. Additionally, NGOs and investors are lobbying governments and regulators with the aim of imposing further ESG disclosure and reporting requirements. Meanwhile, in the US, there is growing politicization over the compatibility of ESG policies with the fiduciary duties of those charged with the stewardship of assets to maximize economic returns. For this reason, there is a need to demonstrate that returns are driving investment strategy.

#### Reputational risk

Much confusion has arisen over the designation of assets under management according to various standards and criteria, leaving fund managers at risk of investor complaints and regulatory action, should investments be categorized in a manner thought to be inappropriate. This is especially the case where institutional and retail investors are increasingly ESG focused. In the EU, many Article 9-labeled funds (under the Sustainable Finance Disclosure Regulation) were downgraded to less green Article 8 labels due to uncertainty and differences over the regulation's interpretation. Hard-won reputations can be seriously damaged and hard to repair.

### Baker McKenzie green and sustainability solutions for financial institutions

- Working with you to formalize governance by creating a centralized investment stewardship function that is responsible for setting ESG standards and ensuring consistency in investment processes across ESG-related investment strategies and products (We also advise on defining and disclosing ESG criteria and methodologies for responsible investing and impact investing.)
- Undertaking due diligence on the sustainability attributes of contemplated transactions
- Preparing and managing transactional and regulatory documentation and notifications (We also provide guidance and counsel onthe content of specific ESG reports and annual filings.)

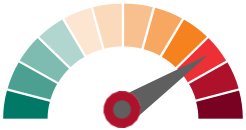
# ESG regulation

## Risk profile

### Recent trends and developments

- Until recently, voluntary standards and frameworks have predominated, but this is changing quickly with new regulation in many jurisdictions. The EU, however, remains in the vanguard with its Sustainable Finance Plan, which centers around rules on the classification of activities (taxonomy), corporate reporting, disclosures and due diligence. While the US has focused to date on enforcement under existing disclosure rules, new rulemaking is underway.
- As more jurisdictions require mandatory disclosure, reporting and classification of activities, these rules may not always be consistent or comparable, creating barriers or obstacles to cross-border financial services, for example, to the marketing of funds. The replacement of the TCFD recommendations with global minimum standards from the ISSB should bring greater interoperability.

Risk rating: **high**



### Associated risks

#### Physical and transition risks

Transition risks arise when moving toward a lower-carbon economy when carbon-intensive financial assets are revalued. These transitions could mean that some sectors of the economy face significant changes in asset values or higher costs of doing business. The Paris Climate Agreement is not in itself damaging the economy, rather the risk arises from the speed of transition to a greener economy — and how this affects certain sectors and financial stability. This is especially relevant for insurers that invest over the long term, where sustainability risks can have material implications on their investment and underwriting activities. Supervisors are increasingly focusing on these issues.

#### Senior manager responsibilities

Senior manager regimes generally specify an individual's responsibilities with greater particularity, requiring them to take reasonable steps to avoid a regulatory contravention by the part of the business for which they are responsible. Sanctions range from fines to industry bans. These regimes are considered to have been a success and, therefore, key executives are increasingly likely to be held accountable by regulators for governance failures that occur on their watch. In the UK, the prudential regulator has, for example, flagged up its supervisory expectations of senior management to show "appropriate oversight and control of the firmwide climate agenda."

#### Enforcement and regulatory risk

ESG-related enforcement and litigation against financial institutions include the following: (1) inadequate due diligence around ESG statements in public company disclosures; (2) proxy voting practices that are inconsistent with ESG disclosures and marketing materials; (3) inaccurate disclosure and inappropriate sales practices over ESG investments; (4) claims that ESG-related investments are not suitable, or that financial intermediaries failed to conduct appropriate due diligence on the investments they promote and sell; and (5) claims for a breach of fiduciary standards in relation to selecting and monitoring retirement plan investments. In short, these all represent forms of greenwashing.

### Baker McKenzie green and sustainability solutions for financial institutions

- Providing in-depth advice to financial institutions on compliance with sustainability-linked financial services regulatory reforms, including precontract and public disclosures as well as conduct considerations
- Advising on the conduct of business requirements (sustainability conflicts, due diligence requirements and information to clients) and internal governance requirements, taxonomy compliance and definitional issues, as well as the interaction of regulatory reform with international standards, including the UNPRI, the TCFD/ISSB, the TNFD and the ESRS
- Advising on the cross-border marketing of funds requirements and compatibility of standards and on ESG regulatory considerations for transactional product offerings (e.g., green bonds, sustainable financings, etc.)

# Inclusion, diversity and equity

## Risk profile

### Recent trends and developments

- Inclusion, diversity and equity (ID&E) is a key social factor within ESG and requires careful navigation by firms. Regulators are increasingly asking difficult questions of the diversity of the sector's workforce and whether their culture is open and inclusive for all employees. Research suggests that misconduct is often intertwined with governance failures. Greater gender diversity improves the risk management culture, and studies show a decrease in the frequency of fines for misconduct.
- In the US, employers must contend with recent Supreme Court decisions striking down race-conscious admission programs. This is making employers nervous about how to move forward with diversity without becoming the target of groups trying to minimize or eliminate ID&E advancements in the workplace.

Risk rating: **medium high**

### Associated risks

#### Diversity and effective outcomes

Research undertaken by London's CASS Business School suggests that much of misconduct is often strictly intertwined with governance failures. The researchers argue that greater gender diversity improves the risk management culture in financial institutions, and they point to studies that show a decrease in the frequency of fines for misconduct. Thus, ID&E is seen as a driver toward improved conduct outcomes. Senior management and boards must take stock and consider what steps they need to take to achieve such cultures across their business. They should also be prepared to be challenged and subject to regulatory scrutiny in this area of increasing focus.

#### Inclusive workplaces

Financial institutions generally have duties to promote and create an inclusive workplace. This encompasses a range of duties, including addressing the well-being and health and safety of their employees — mental well-being being particularly brought to the fore during the pandemic, with individuals working from home and having less of a distinction between office work and home life. The focus on ID&E is also relevant for nonfinancial misconduct in the regulatory sector. Financial institutions and their senior managers may be held responsible for cultures that tolerate serious personal misconduct, bullying, racism, sexual discrimination or sexual misconduct. Creating a "speak up" culture is now the ID&E top priority for businesses and this requires manager support.

#### Diversity data and targets

A key tool to drive forward ID&E is the collection of data on diversity and its reporting. This can relate to gender and ethnicity pay reporting and extend to sex or gender identity, socioeconomic background, religion, etc. An increasing number of businesses are being encouraged and even mandated to collect and disclose data by supervisors. While building trust between employers and employees is vital (frequently their consent is required), the collection and processing of personal data must comply with local data privacy laws, which vary considerably. In some jurisdictions, targets to address underrepresentation are unlawful and can be no more than mere aspirational goals. Moreover, failure to achieve a goal can open up a business to scrutiny.

### Baker McKenzie green and sustainability solutions for financial institutions

- Providing the policies and best practices necessary to achieve inclusion and diversity program objectives
- Counseling you on developing and implementing effective and compliant ID&E strategies that protect the corporate brand and reputation, expand business opportunities and create a competitive advantage by strengthening relationships with customers, employees, stockholders, regulators and the general public
- Conducting independent and thorough investigations for employers facing serious allegations of workplace misconduct, as well as related regulatory issues such as fitness and propriety
- Undertaking litigation where necessary, whether defending individuals and class actions or engaging with regulators over enforcement action

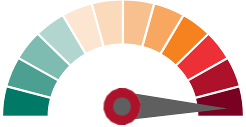
# Litigation and enforcement

## Risk profile

### Recent trends and developments

- Inventive theories are being put forward to attack businesses for alleged ESG-related performance and operational deficiencies. The expanding incidence of misstatement and performance litigation signals a heightened need to carefully manage ESG programs, performance and statements.
- Supervisors and enforcement staff, especially in the US where regulation is enforcement-led, will likely focus their efforts on identifying what they view to be inaccurate or incomplete disclosures of ESG-related issues, and on misconduct involving the management and sale of ESG investment products by asset managers and financial intermediaries.
- While greenwashing cases are still infrequent, and most are brought in the US, the position is beginning to change internationally as awareness grows.

Risk rating: **high**



### Associated risks

#### Greenwashing

Although the term is now frequently used, there is no general authoritative definition of greenwashing, although some regulations do refer to it in specific contexts. In the EU, the European Supervisory Authorities refer to it as "a practice where sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial service." As a consequence, consumers, investors and other market participants may be misled. Examples include cherry-picking, omission, ambiguity, exaggeration and misleading terms. Financial institutions and issuers will be exposed in such circumstances to regulatory action and potentially litigation. While to date there have only been a few cases brought, for example, in the US and Australia, the topic is high up in supervisors' priorities.

#### General litigation risk

ESG litigation poses an increasing risk to financial institutions. Claims can be grouped into broad categories: disclosure-based litigation, mass tort litigation, strategic litigation (that seeks to influence strategy), contractual litigation and claims on the basis of an alleged breach of directors' duties. Currently, the risk exposure for financial institutions mainly lies with disclosure-based and strategic litigation. With the adoption of the EU Corporate Sustainability Due Diligence Directive, the risk of strategic litigation and even potentially mass tort litigation against financial institutions could increase significantly. In addition, as referenced by the Network for Greening the Financial System, claims against directors are also expected to increase globally. It's vital for managers to verify all ESG-related claims, have robust due diligence processes, put in place good governance processes and review contractual protections.

#### ESG and antitrust claims

Like other businesses, financial institutions risk potential antitrust claims where they come together to collaborate over ESG commitments. Care and advice are required over competition law compliance to avoid unintended consequences, especially as rules may vary from country to country. Helpfully, the authorities are increasingly providing guidance to businesses.

### Baker McKenzie green and sustainability solutions for financial institutions

- Providing guidance and practical advice on steps to minimize potential liability from ESG disclosures
- Engaging with regulators over possible enforcement action with a view to resolving any contraventions and settling any consequent enforcement action on as favorable terms as possible or guiding you through the regulatory processes advocating your case
- Undertaking litigation where necessary, whether defending an individual or class actions
- Acting for financial intermediaries facing misselling claims over ESG-related investments and trustees with respect to claims for a breach of fiduciary standards over retirement plan investments

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## Baker McKenzie delivers integrated solutions to complex challenges.

Complex business challenges require an integrated response across different markets, sectors and areas of law. Baker McKenzie's client solutions provide seamless advice, underpinned by deep practice and sector expertise, as well as first-rate local market knowledge. Across more than 70 offices globally, Baker McKenzie works alongside our clients to deliver solutions for a connected world.

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