January 2025

Half-Yearly AM ESG Roundup

ROPES & GRAY

Table of Contents

Introduction

Ropes & Gray closely monitors the rapidly evolving ESG landscape, helping asset managers and institutional investors navigate the dynamic ESG regulatory environment and keep on top of emerging ESG trends and industry best practices. Our first half-yearly review was published in August 2024. This follow-on edition of the Asset Management ESG Review provides a look-back at ESG-related developments in the asset management space during the second half of 2024. Much of the discussion aims to catch the reader up on what has transpired through the end of the year, while also providing related, forward-looking thoughts from Ropes & Gray attorneys. The document covers a broad range of recent ESG topics, including U.S. and non-U.S. regulatory developments, SEC enforcement trends, state law activity developments, and litigation updates.

Predicting Federal Anti-ESG Legislation and Rulemaking in 2025

Anti-ESG sentiment is not going away and is expected to further intensify in the United States given recent successes. What might federal anti-ESG legislation and agency rulemaking look like in 2025? Bills introduced in the last 118th Congress and Project 2025 policy recommendations provide insight on the likely anti-ESG agenda of the current Congress and federal agencies. For more ESG-related predictions across a wide range of topics, see our recent publication ESG in 2025 for Legal and Compliance Professionals: 25 Predictions for '25.

Congress

The 118th Congress pursued an active anti-ESG agenda. As part of that agenda, bills were introduced – and in some cases passed – in the House addressing, among other things, responsibilities of pension plan fiduciaries, shareholder proposals, public company disclosure requirements and proxy advisory firm practices, as further discussed below. With the House remaining in Republican hands for the next two years – albeit by a small margin – and the Senate flipping Republican, anti-ESG bills introduced in the current 119th Congress may get more traction than those in the 118th. For a more extensive discussion of these and other bills, see ESG in 2025 for Legal and Compliance Professionals: U.S. Federal Anti-ESG Legislation to Watch For.

- ***Businesses Over Activists Act:*** Would have prohibited the SEC from compelling an issuer to include in its proxy statement any shareholder proposal or related discussion, except in connection with the election of directors.

- ***Protecting Americans' Retirement Savings from Politics Act:*** Would have (1) raised the resubmission thresholds for shareholder proposals, (2) permitted the exclusion of proposals that have been substantially implemented, are duplicative or relate to environmental, social or political matters or a significant social policy issue, (3) required registration of proxy advisory firms, (4) required institutional investment managers that engage proxy advisory firms to annually report specified information relating to their voting practices and in some cases provide specific notices to customers, (5) prohibited robovoting, (6) prohibited passively managed funds from voting proxies solicited by U.S. issuers inconsistently with beneficial owner instructions or the issuer's voting recommendation, and (7) amended the Investment Advisers Act to indicate that the best interests of a customer are to be determined using pecuniary factors and that these may not be subordinated to or limited by non-pecuniary factors except with informed customer consent.

- ***Retirement Proxy Protection Act:*** Would have amended ERISA to (1) require a fiduciary to act prudently and solely in the economic interests of pension plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries, (2) require a fiduciary to maintain records of proxy votes and activity or other exercises of shareholder rights, (3) prohibit a fiduciary from subordinating the interests of plan participants and beneficiaries to any non-pecuniary objective or promoting non-pecuniary benefits or goals unrelated to financial interests, (4) impose specified obligations on fiduciaries to monitor the voting of proxies and exercise of other shareholder rights delegated to an investment manager or proxy voting advisory firm and (5) provide a fiduciary responsibility safe harbor for not voting proxies not substantially related to the issuer's business or material or that involve less than 5% of the fiduciary's assets.

- ***No Discrimination in My Benefits Act:*** Would have amended ERISA to require fiduciaries of employee benefit plans to select service providers without regard to race, color, religion, sex or national origin.
- ***Providing Complete Information to Retirement Investors Act:*** Would have amended ERISA to provide that, if a plan participant or beneficiary can choose from designated investment alternatives, they would need to be provided with specific cautionary language.
- ***Protecting Americans' Investments from Woke Policies Act:*** This bill, which passed in the House, incorporated the Retirement Proxy Protection Act, No Discrimination in My Benefits Act and Providing Complete Information to Retirement Investors Act discussed above. It also folded in the **Roll Back ESG To Increase Retirement Earnings Act** ("RETIRE Act"), which would have required that (1) a fiduciary be considered to be acting solely in the interest of plan participants and beneficiaries only if its actions are based only on pecuniary factors, and that the fiduciary not be permitted to subordinate the interests of participants and beneficiaries to other objectives and not be permitted to sacrifice investment returns or take on additional investment risk to promote non-pecuniary benefits or goals, and (2) if a fiduciary is unable to distinguish between investment alternatives or courses of action solely on the basis of pecuniary factors, it would be permitted to use non-pecuniary factors as the deciding factor, subject to specified documentation requirements.

Project 2025

The 2025 Presidential Transition Project – or Project 2025 – is self-described as the conservative movement's unified effort to be ready for the next Presidential administration to govern as soon as it takes office. The Mandate for Leadership 2025: The Conservative Promise contains well over 200 substantive mentions of ESG-related terms and concepts, even though ESG only takes up a small part of the Mandate.

As widely reported, then candidate Trump distanced himself from Project 2025, which was led by prominent conservative think-tank The Heritage Foundation. However, because the Mandate reflects many widely held conservative views, and because some expected members of the Administration had prominent roles in its preparation, it is a certainty that in at least some respects, Trump 2.0 policy will be aligned with the Mandate. It also will be aligned with many Congressional initiatives.

According to The Heritage Foundation, soon after President Trump took office in 2016, his administration began to implement major parts of the 2016 Mandate and, after his first year in office, the administration had implemented 64% of its policy recommendations. There is probably more alignment around ESG-related topics than many other portions of the current Mandate.

Specific to corporate governance, public company disclosure, pension fund investing and enforcement, the Mandate makes the recommendations below. For more than 70 policy recommendations from the Mandate relating to ESG topics, including, energy, climate, the environment and DEI, see [ESG in 2025 for Legal and Compliance Professionals: A Closer Look at Project 2025](). The Mandate provides that

- **Congress should:**
  - Oppose efforts to redefine the purpose of business in the name of (1) social justice, (2) corporate social responsibility, (3) stakeholder theory, (4) ESG criteria, (5) socially responsible investing, (6) sustainability, (7) diversity, (8) business ethics or (9) common-good capitalism. *(Page 832)*
  - Prohibit the SEC from requiring issuer disclosure of social, ideological, political or human capital information that is not material to investors' financial, economic or pecuniary risks or returns. *(Page 832)*
- The Department of Labor should prohibit investing in ERISA plans on the basis of any factors that are unrelated to investor risk and return, permitting only the consideration of pecuniary factors. However, this approach should not preclude the consideration of legitimate non-ESG factors, such as corporate governance, supply chain investment in America or family-supporting jobs. *(Pages 606-607)*
- The Department of Labor should remove mutual fund windows from the federal Thrift Savings Plan ("TSP") that encourage ESG and should clarify the fiduciary duties of the TSP. *(Page 608)*
- The federal government should remove their pension funds from fund managers that are perceived as having a non-pecuniary ESG agenda. *(Page 608)*
- The Department of Labor should consider bringing enforcement actions against fund managers that are perceived as having a non-pecuniary ESG agenda for violations of fiduciary duty while managing the TSP. *(Page 608)*
- Congress should enact legislation authorizing the Federal Retirement Thrift Investment Board ("FRTIB") to exercise its independent business judgment in exercising the proxy votes for its TSP holdings and provide clear proxy voting guidelines for the FRTIB to follow. *(Page 608)*
- Congress should investigate ESG practices as a cover for anti-competitive activity and possible unfair trade practices. *(Pages 873-874)*
- The Federal Trade Commission should set up an ESG/DEI collusion task force to investigate firms—particularly in private equity—to see if they are using the practice as a means to meet targets, fix prices or reduce output. *(Page 873)*

SEC Enforcement

Although we saw the SEC disband its climate and ESG enforcement task force last fall, we saw at the same time an uptick in settlement orders in late 2024 asserting various forms of greenwashing claims against asset managers and even a non-fund-related public company. These orders were announced in parallel with the release of a risk alert by the SEC's Division of Examinations warning industry participants of its observation that certain investment companies and advisers have been mischaracterizing their use of ESG factors in their advertising or fund disclosures over the past four years. While ESG disclosures may no longer be viewed by the SEC as an "emerging trend" warranting a special task force, it is clear that the agency remains focused on ensuring that ESG-related disclosures are consistent with advisers' actual ESG-related investing practices. Likewise, the recent settlement orders underscore the SEC's persistent view that appropriate policies and procedures be in place to ensure any ESG-related disclosures are accurate and compliant with applicable rules and regulations.

As a new administration takes over and a new Chair takes the helm at the SEC, we anticipate continued attention to potentially misleading disclosures, with continued attention to greenwashing and perhaps increasingly to "greenhushing." As advisers become more measured in the way they discuss ESG investing practices in marketing materials and fund filings given the political environment in the U.S., the SEC may focus on whether advisers are fully and accurately disclosing the true nature and extent to which they may be applying ESG considerations in the investing process. These inquiries may include scrutiny of proxy voting and engagement with issuing companies, echoing the recent emphasis placed on these practices by Republican state officials and the House Judiciary Committee. In short, the SEC will continue to focus on ensuring that advisers are adhering to the agency's evergreen mantra of "Do what you say, say what you do."

ESMA Naming Guidelines and Clarificatory Q&A

In May 2024, the European Supervisory Authority ("ESMA") published guidelines on fund names using ESG or sustainability-related terms. The guidance set out requirements for fund managers using these terms in fund names with the aim of reducing greenwashing risk and enhancing investor protection from exaggerated or misleading sustainability claims.

The guidelines have applied to new funds from November 21, 2024 and will apply to existing funds from **May 21, 2025.**

A reminder of the key recommendations:

- All funds with ESG or sustainability-related terms in their name must ensure 80% of the fund's investments meet the environmental or social characteristic or sustainable investment objectives promoted by the fund.
- In scope funds will also need to apply an exclusion criterion dependent on the ESG terms used, as follows:
  - Funds that use sustainability-related, environment or impact-related terms within its name will have to apply the Paris-aligned Benchmarks exclusion criteria and exclude investment in companies such as companies that derive 1% or more of their revenues from exploration, mining, extraction, distribution or refining of hard coal and lignite.
  - Funds that use transition-, social- and governance-related terms within their names will have to apply the Climate Transition Benchmark exclusion criteria and exclude investment in companies such as companies involved in any activities related to controversial weapons and companies involved in the cultivation and production of tobacco.
  - In addition: (i) funds using the term "transitioning" and "impact" should ensure that the investments used to meet the 80% threshold are on a clear and measurable path to social or environmental transition, and (ii) funds using a "sustainability"-related term should commit to invest meaningfully in sustainable investments referred to in Article 2(17) of SFDR.

In addition, pre-contractual disclosures should disclose how the fund complies with the exclusions criteria applied under the guidelines.

In December 2024, ESMA issued Q&As making the following clarificatory points:

1. Investment restrictions related to the exclusion of companies do not apply to investment in European Green Bonds. For other green bonds, fund managers may use a look-through approach to assess whether the activities financed are relevant for the exclusions.

2. Funds may not be "meaningfully investing in sustainable investments" if they contain less than 50% of sustainable investments.

3. When complying with the PAB/CTB exclusions, the term "controversial weapons" should be understood to be the term referred to in SFDR principal adverse impact indicator 14, which includes "anti-personnel mines, cluster munitions, chemical weapons and biological weapons".

Fund Names in the U.S.

We've also seen minor developments on the U.S. Names Rule side. On September 20, 2024, the SEC adopted significant amendments to Rule 35d-1 under the 1940 Act (the "U.S. Names Rule") with a compliance date of December 11, 2025 for large fund complexes and June 11, 2026 for small fund complexes. With a little under a year to go before the SEC begins its enforcement of the U.S. Names Rule, the Investment Company Institute ("ICI"), an association representing the asset management industry, sent a letter on December 23, 2024 to the SEC requesting longer lead time for compliance with the U.S. Names Rule. Specifically, the ICI asked that the SEC extend the compliance dates by a minimum of 18 months and base the compliance date on a fund's fiscal year-end. According to the ICI, extending the compliance date will "provide funds with adequate time to complete implementation in an orderly manner...allow the incoming administration the opportunity to appropriately determine whether and how to address the substantive challenges and complexities the [U.S. Names Rule presents]; and allow all funds—irrespective of their fiscal year-ends—a full compliance period to update their disclosures while avoiding costly and disruptive off-cycle filings, all to the ultimate benefit of investors." This was followed in early 2025 with an executive order suggesting (but not requiring) that federal agencies consider delaying implementation of newer rulemakings before requiring compliance. Whether the SEC is receptive to these pressures for delay remains to be seen. In the meantime, disclosure staff remain as active as ever reviewing ESG-related fund names.

CSSF Enforcement Action

The CSSF conducted a thematic review that resulted in the regulator imposing a fine of EUR 56,000 against an asset manager. The fine related to a fund classified as Article 8 under SFDR.

The issues identified by the CSSF related to:

- lack of controls in the application of exemptions to exclusions; and
- failing to comply with certain of the fund's promoted characteristics.

The CSSF therefore concluded that the Manager was in breach of the requirement to have sound administrative procedures and adequate internal control mechanisms and failed to act in the best interests of the fund.

Expected impact for other managers:

- There will be an increasing focus on the compliance frameworks in place at the AIFM level to ensure compliance with SFDR.
- Pre-investment considerations are likely to be brought under greater scrutiny, and managers should ensure that pre-investment frameworks are robust and adopted stringently before an investment is made.
- Alternative investment fund managers and how they ensure that their funds are complying with SFDR are likely to come more into the spotlight, which will require them to ask greater questions of U.S. managers.

In addition, other European regulators are increasingly focused on SFDR compliance and disclosures, including:

1) Norway's FSA has assessed 87 actors on their SFDR disclosures ranking them from excellent to average or fail.

2) French AMF has confirmed that it was stepping up its enforcement of asset managers that fail to comply with its recommendations. It is investigating some asset managers that were found to be in breach of the regulation.

3) Italy's CONSOB called for clear and concise sustainable finance disclosures following an investigation of good and bad market practice.

Will 2025 See a Steep Change in SFDR?

With the dawn of the new year, the question on everyone's mind is whether 2025 will see a steep change in SFDR. The Platform on sustainable finance (the "Platform"), an advisory board to the European Commission (the "Commission"), seems to think so with their proposal to overhaul the current regime and replace it with a new categorization system.

The Platform has recommended categorizing products with the following sustainability strategies:

SUSTAINABLE	TRANSITIONING	ESG COLLECTION
1. Under the sustainable category, a minimum proportion of the fund's assets must contribute positively through Taxonomy-aligned investments or sustainable investments. The fund cannot hold any assets that undermine the sustainability objective of the Fund. Importantly, if an economic activity falls under the EU Taxonomy, the more stringent requirements of the EU Taxonomy must be met for it to be considered a sustainable investment. SFDR's more flexible definition of sustainable investment will only be permitted to be used if the economic activity does not fall under the EU Taxonomy. This means that the bar to fall within this category is likely to be higher than the traditional Article 9 SFDR requirements, which only require a fund to have sustainable investments as its objective (using the more flexible SFDR definition).	1. The transition category covers investments or portfolios supporting the transition to a net zero and sustainable economy, avoiding carbon lock-ins, per the Commission's recommendations on facilitating financing for the transition to a sustainable economy.	1. Funds falling under this category will be required to exclude significant harmful investments/activities, investing in assets with better environmental and/or social criteria or applying various sustainability features.
2. Non-taxonomy investments must pass the Do No Significant Harm test through consideration of the PAIs relevant to the sustainability features of the fund.	2. A minimum proportion of the assets or portfolio of the fund must be transitioning, measured with credible transition pathways or plans on portfolio and/or investment level.	2. Investments must be committed to one or more "material sustainability features" including, but not limited to, year-on-year improvement on specific sustainability indicators, effective reduction of investment universe, investing in funds that are themselves sustainable, and transition of ESG collection.
3. The EU Paris Aligned Benchmark ("PAB") exclusions must be complied with.	3. Any other assets held by the fund must not undermine the transition benchmark.	3. All other assets must not undermine the ESG characteristics/features.
4. Firms may also determine additional binding elements, for example, engagement.	4. The exclusions set out in the Climate Transition Benchmarks ("CTB") must be met.	4. The exclusions set out in the Climate Transition Benchmarks ("CTB") must be met.
		5. Firms may also determine additional binding elements.

It is proposed that products that do not fall within any of the aforementioned categories will be considered "unclassified" and must include a disclaimer stating that:

- The product is unclassified.
- It does not fulfil the standards required for a categorized product; and
- Any ESG characteristics or sustainable or transition features must only be described in the legal documentation.

In addition, managers will no longer be able to opt-out of Taxonomy alignment consideration and disclosure with the proposals suggesting that all products (even unclassified products) are required to report on the following:

- Taxonomy alignment (Revenues and CapEx); and
- PAIs: GHG emissions (1), carbon footprint (2), GHG intensity of investee companies (4) and UNGPs (10)

What is next?

The Platform proposals are not binding but are similar to opinions provided by the European Supervisory Authorities earlier in 2024. The timeline for SFDR 2.0 is still not set in stone, but the proposals presented by the Platform give the Commission some additional food for thought and potentially a new direction for SFDR in 2025.

State Law Activity Update

1. **Ohio Adopts Law Banning ESG Considerations by the State Retirement System Boards**

    1. At the end of December 2024, Governor Mike DeWine signed into law SB 6, which provides that in accordance with their fiduciary duties, the state retirement system boards shall make investment decisions with the sole purpose of maximizing the return on investments, and they are prohibited from making an investment decision with the primary purpose of influencing any social or environmental policy or attempting to influence the governance of any corporation. SB 6 additionally prohibits the boards from adopting or promoting a policy with the primary purpose of influencing ESG. These prohibitions also apply to any person or entity to which the board has delegated the management of part or all of its portfolio.
    2. SB 6 is scheduled to take effect on March 20, 2025.

U.S. Department of Labor (“DOL”) Update

2. **End of the Road for the DOL’s 2022 ESG Rule?**

    1. The 2022 ESG Rule provides that fiduciaries to ERISA plans (and asset managers designing funds for plans to invest in) should base investment decisions on factors that the fiduciary reasonably determines are relevant to a risk and return analysis. The rule clarifies that ESG factors can be part of those investment decisions, but they should generally be treated like any other economic factor. The 2022 ESG Rule reversed the more stringent, ESG-skeptical standard adopted during the first Trump administration and reinstated the DOL’s historically neutral posture on specific investments and the relevant considerations that impact such decision-making.
    2. The 2022 ESG Rule has been the subject of attack on a number of fronts since its adoption over two years ago. Republican members of Congress have introduced multiple resolutions under the Congressional Review Act to withdraw the 2022 ESG Rule, and the DOL has been sued in federal court by plaintiffs seeking to invalidate the 2022 ESG Rule, including attorneys general from 26 states in a suit filed in the Northern District of Texas. The district court granted the DOL’s motion for summary judgment in September 2023, and after review by the Fifth Circuit last summer (Utah v. Su, 23-11097, 5th Cir.), the case has been remanded back to the district court for further consideration now that the Supreme Court’s decision in Loper Bright Enterprises v. Raimondo overturned the longstanding Chevron deference doctrine for agency interpretations.
    3. There is speculation that the Trump administration will stop defending the 2022 ESG Rule in the Texas litigation and/or rewrite or amend the rule to make it more challenging for ERISA plans to invest in products that consider ESG factors. If a rewrite occurs, the DOL may be emboldened to bring back the more stringent version of the rules that it initially proposed in 2020 (which expressed a clear skepticism that ESG factors could ever qualify as pecuniary in nature)—variations of which some Republican-led states have enacted over the last few years in the governmental plan context. Any new rule is likely to present challenges for plan sponsors and the asset management industry.

Litigation Update

1. **Anti-ESG Legal Theory Spotlight: Fiduciary Duty Claims and *Spence v. American Airlines, Inc.***

    1. On January 10, 2025, Judge Reed O’Connor of the Northern District of Texas issued a much anticipated ruling in Spence v. American Airlines, Inc., 23-cv-00552 (N.D. Tex.), marking the first time that a federal judge has written an on-the-merits decision on the controversial topic of ESG and the duties of retirement plan fiduciaries under ERISA. In his opinion, Judge O’Connor found that

American Airlines and the American Airlines Employee Benefits Committee ("EBC") breached their ERISA duty of loyalty by including funds on the American Airlines 401(k) Plan lineup that were not ESG-focused funds but were managed by a non-party investment manager ("Investment Manager") that the judge determined to have engaged with issuer companies on ESG-related issues and on occasion voted proxies in support of ESG-related proposals. At the same time however, the judge did not find a breach of the duty of prudence under ERISA, because the defendants' monitoring practices with respect to the Investment Manager were in line with the prevailing standards among other large plan fiduciaries.

1. No Breach of the Duty of Prudence. Judge O'Connor concluded that the plaintiff failed to prove the defendants breached their duty of prudence under ERISA in connection with evaluating investments, selecting and retaining managers and overseeing proxy voting. According to Judge O'Connor, the defendants had not breached their duty of prudence under ERISA because the defendants demonstrated a robust process for assessing and scrutinizing investment performance, and any perceived shortcomings with respect to monitoring the Investment Manager's proxy voting activities were consistent with the industry practices of fiduciaries to large plans.

2. Defendants' Breached Duty of Loyalty. In a surprising turn, Judge O'Connor concluded that the plaintiff had proved the defendants had violated their duty of loyalty under ERISA because American Airlines's "incestuous relationship" with the Investment Manager and their own corporate goals disloyally influenced the defendants in their administration of the Plan. The court explained how the Investment Manager had an "outsized influence" on the defendants, which impacted their decision-making for the Plan as evidenced by the fact that (i) the Investment Manager was the Plan's largest manager, (ii) the Investment Manager was one of American Airlines's largest shareholders, and the Investment Manager provided much needed financing for American Airlines's corporate debt during a particularly challenging time for the company. The ruling also suggests that the defendants' lack of monitoring and oversight of the Investment Manager's proxy voting activities reflected a "shared belief" between the defendants in their corporate capacity and the Investment Manager that "ESG is a noble pursuit" and that this alignment demonstrates how the defendants did not act with an "eye single" toward maximizing the financial benefits of participants and beneficiaries.

2. While the news headlines suggest the case is about ESG investing, none of the funds on the Plan menu were actually ESG funds. The ruling is solely focused on the Investment Manager's proxy voting practices and alleged pro-ESG shareholder engagement. From that perspective, the case can be viewed as another battle in the broader crusade to derail ESG investing practices in the United States. But Judge O'Connor's ruling is also concerning because it deals with the nearly universal practice of delegating proxy voting authority to an ERISA plan's external managers. This decision, especially if its reasoning is upheld on appeal and adopted by other courts, could cause ERISA plan fiduciaries to consider changes to their longstanding practice of delegating proxy voting to their investment managers, which could potentially include (i) implementing certification/attestation protocols with respect to voting, (ii) conducting more robust due diligence of managers' voting records prior to selection or (iii) assessing the possible use of pass-through voting, where votes are passed on to the participants and beneficiaries directly.

2. Legal Challenge to Texas's Fossil Fuel Anti-Boycott Statute

1. On August 29, 2024, the American Sustainable Business Council ("ASBC"), an organization that promotes sustainable investing and manufacturing, sued Texas state officials (American Sustainable Business Council v. Hegar et al., 24-cv-01010 (W.D. Tex.)), seeking to block enforcement of another anti-boycott statute in favor of energy companies. The law, SB 13, which took effect in 2021, requires the state comptroller's office to maintain a list of all financial companies that, in the comptroller's opinion, refuse to deal with, terminate business activities with, or otherwise take any action that is intended to penalize, inflict economic harm on, or limit commercial relations with fossil fuel companies, without an ordinary business purpose for doing so. The law applies to investments by state pension funds as well as state government contracting. The suit was filed in the Western District of Texas, and names Texas Comptroller Glenn Hegar and Texas Attorney General Ken Paxton as defendants. It seeks to have SB 13 declared unconstitutional and the officials permanently enjoined from enforcing it. The plaintiffs filed an amended complaint on November 4, 2024.

2. Among other arguments the plaintiffs raise, SB 13:

   1. Violates First Amendment free speech rights because, on its face and as interpreted and applied by the comptroller, it discriminates against financial companies and would-be government contractors on the basis of the content and viewpoint of their speech (moreover, SB 13 unconstitutionally compels other speech by requiring companies to verify agreement with Texas's preferred position regarding fossil fuels as a condition of managing investments for or contracting with state entities);

   2. Amounts to an unconstitutional infringement on First Amendment freedom of association rights because being a member of climate coalitions such as the Net Zero Asset Managers Initiative, Climate Action 100, or the Net Zero Banking Alliance potentially represents a

form of "boycott[ing] energy companies," resulting in state entities being unable to invest or contract with ASBC members;

3. Is unconstitutionally vague and overbroad because it does not adequately define "action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company" is in the fossil fuel industry or does business with a company in the fossil fuel industry; and

4. Violates Fourteenth Amendment due process rights because it encourages arbitrary enforcement and fails to give regulated entities fair notice of prohibited conduct.

3. Plaintiffs also allege that two ASBC members had their flagship investment funds placed on a state blacklist but the state comptroller did not provide any of the alleged research or materials it used for deciding to place these funds on the blacklist, nor did he provide an explanation regarding why the funds were placed on the blacklist. In summary, the plaintiffs claim that SB 13 prevents ASBC's members from contracting with state entities unless they sign a verification that they do not "boycott energy companies" and while SB 13 is in effect, ASBC members are unable to compete for business with Texas entities, no matter their qualifications and suitability for contracts, solely due to the content and viewpoint of their speech and the associations they choose to make.

3. Multiple State AGs Assert Coal Antitrust Claims

1. On November 27, 2024, the Republican attorneys general of Texas and 10 other states filed suit in the U.S. District Court for the Eastern District of Texas against three large asset managers, alleging violations of federal and state antitrust laws relating to the coal industry, based largely on the managers' membership in Climate Action 100+ ("CA100+") and the Net Zero Asset Managers ("NZAM") initiative. The states' core theory appears to be that "Defendants effectively formed a syndicate and agreed to use their collective holdings of publicly traded coal companies to induce industry-wide output reductions." Certain of the states have also asserted violations under their respective consumer fraud statutes.

2. We anticipate the states' legal theories will face significant challenges under the established precedent governing the elements of such claims. For example, the states' Clayton Act Section 7 and Sherman Act Section 1 claims are based on an alleged horizontal agreement among the defendants. Beyond circumstantial evidence of parallel conduct and participation in initiatives like CA100+ and NZAM, there is no specific allegation that the defendants agreed among themselves to coordinate their conduct. Participation in these initiatives does not imply an illegal agreement to reduce coal output, as these initiatives are broad, voluntary frameworks and do not mandate specific actions. Moreover, the states' allegations of concerted behavior are consistent with independent business judgment. The reliance on public commitments and proxy voting patterns is likely insufficient under established precedent to establish an agreement in violation of antitrust laws without more concrete evidence of an explicit agreement to collude.

3. The complaint also alleges that the defendants' action directly caused a reduction in coal production and an increase in price. Setting aside the fact that the defendants are passive investors with no ability to directly control or coordinate the business decisions of the coal companies in which they hold shares, the states rely on the defendants' public statements and voting patterns as supposedly causing the alleged decrease in coal output and the increase in prices. But beyond conclusory assertions that the defendants' conduct resulted in reduced production and increased prices, there is no plausible causal link. Numerous external factors could have influenced coal production and prices during the relevant period, such as regulatory changes, market conditions, technological advancements, and global events like the COVID-19 pandemic and geopolitical conflicts.

4. Tennessee Consumer Protection Act Litigation Settlement

1. On January 17, 2025, the attorney general of Tennessee announced a settlement of claims the state asserted in a December 2023 complaint against a large asset manager under the state's Consumer Protection Act. The Tennessee provision is fairly typical of many state consumer protection statutes. Subsection 104(a) broadly declares that "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices and are Class B misdemeanors." Subsection 104(b) then itemizes a list of specific acts that comprise such unfair or deceptive acts, including a catch-all provision that the attorney general invokes in this case: "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." (TN Code 47-18-104(b)(27)).

2. The state's allegations appeared to be entirely based on public statements – including fund-offering materials on the manager's website, its sustainability and proxy voting reports, and publications of climate-related initiatives – rather than on any internal materials obtained via investigative efforts. The complaint did not allege any marketing efforts or other conduct specifically targeted at Tennessee investors, but instead essentially asserted that the manager's statements to the market generally are seen by and potentially relied upon by consumers in Tennessee.

3. The complaint's legal theory of unfair and deceptive conduct was that the manager misled investors in describing its consideration and use of ESG factors and goals in both ESG-focused funds and non-ESG funds. For example, according to the state's allegations:

1. It is misleading for a non-ESG fund's disclosures to state that the fund "does not seek to follow a sustainable, impact, or ESG investment strategy" when in fact (i) the manager leverages the voting power of all assets under management when it pursues pro-ESG goals in its engagement efforts with portfolio companies; and (ii) the manager has committed, as part of climate-related initiatives (e.g., net zero commitments), to implement sustainable, impact or ESG strategies across all assets under management.

2. The climate risk disclosures in non-ESG funds are misleading in asserting that the manager is only focused on financially material climate risks when in fact it (as a member of climate-related initiatives) seeks to force companies to make climate-related disclosures regardless of financial materiality, seeks to force companies to reduce emissions, and seeks to drive the world's economy to net zero, while misleadingly representing the current level of country support for such commitments.

3. The manager's memberships in climate-related initiatives (and its resulting activist proxy votes on climate-related shareholder proposals) render misleading its "2030 Net Zero Statement," which states: "Our role is to help [companies] navigate investment risks and opportunities, not to engineer a specific decarbonization outcome in the real economy."

4. Perhaps unsurprisingly, the state pieced together a narrative featuring selective quotation and aggressive inferences – including imputing to the manager all statements of the third-party initiatives of which it is a member.

5. The settlement announced on January 17 involves no fine or other monetary payment whatsoever by the manager, nor any concession of wrongdoing. Tennessee agreed to drop the claims in exchange for process adjustments at the manager that the press release describes as (i) greater transparency as to the manager's rationales for the proxy-voting decisions; (ii) implementation of compliance measures to ensure adherence to the agreement's terms; (iii) a commitment by the manager that its communications with investors are consistent with laws and its fiduciary duties; and (iv) for funds with solely financially based objectives, the manager will cast votes solely to further the financial interests of investors.

Asset Managers Stepping away from Industry Initiatives

The last months have been replete with announcements from asset managers that they are exiting voluntary ESG initiatives, chief among them Climate Action 100+ and the Net Zero Asset Managers initiative ("NZAMI").

The impact of these high-profile departures is particularly evident in NZAMI's January 13, 2025 announcement that it has suspended its activities tracking signatory implementation and reporting to undergo a review. NZAMI has removed its commitment statement, list of signatories, and targets and related case studies from its website, pending the outcome of the review. Following this announcement, at least one further major asset manager has confirmed its exit from NZAMI.

One trigger for the uptick in departures was the announcement in June 2023 of Phase 2 of Climate Action 100+, which, on its face, encourages asset managers to shift the focus from corporate climate-related disclosure to the implementation of climate transition plans. The announcement was met with particular focus and outrage from corners of the industry that are less receptive to ESG.

As asset managers react to pressures across the industry to deemphasize their commitment to climate-focused initiatives, managers are careful in the way in which they message their exit. For instance, a large asset manager expressed that its membership in NZAMI had "caused confusion regarding [the manager's] practices and subjected [the manager] to legal inquiries from various public officials."

Another stated that its membership in NZAMI had created "confusion" and explained that the decision to withdraw from the initiative was motivated by the desire to "provide the clarity our investors desire about the role of index funds and about how we think about material risks, including climate-related risks—and to make clear that [the manager] speaks independently on matters of importance to our investors."

An emerging theme among statements from departing asset managers is that, while the initiatives are consistent with the managers' existing investment processes, they create confusion for clients and shareholders about the independence of the firm's approach to climate risk. It's clear from recent statements that asset managers are seriously considering how they message their rationale for stepping out of voluntary ESG initiatives.

2024 Rulemaking Trends

The second half of 2024 witnessed a slow-down and stalling on SEC ESG-related rulemaking.

- Operating Company Climate Rules. The SEC's climate-related disclosure rules (the "Operating Company Climate Rules"), which would require public companies to disclose certain climate-related information in registration statements and annual reports, were adopted in March 2024, but their implementation was voluntarily stayed by the SEC in light of litigation challenging the rulemaking in the Court of Appeals for the Eighth Circuit.

- Based on prior precedent, the case is likely to go on for some time. For instance, the litigation concerning the SEC's conflict minerals rule went on for more than four years (see our Client Alert post here). The current stay order contemplates that the challenges to the Operating Company Climate Rules may extend beyond 2025. So, it's likely pencils down for now on compliance with the SEC's Operating Company Climate Rules.

- Fund/Adviser ESG Disclosure Rules. In its Spring 2024 Regulatory Flexibility Agenda, the SEC messaged the intention that final rules regarding enhanced disclosures by certain investment advisers and investment companies about ESG investment practices (the "Final Fund/Adviser ESG Disclosure Rules") would be adopted in October 2024. In its Fall Regulatory Flexibility Agenda, the SEC pushed back the anticipated final rule release date to October 2025. This suggests that while it may be taking longer than anticipated for the Staff to adopt a final rule, as of September 2024 when the Staff submitted their Fall Regulatory Flexibility agenda to the Office of Management and Budget, the Staff intended to get the Final Fund/Adviser ESG Disclosure Rules across the finish line.

  It remains to be seen whether the Final Fund/Adviser ESG Disclosure Rules will stay on the Spring 2025 Regulatory Flexibility Agenda under the current administration. While it's conceivable that the Staff may keep the Final Fund/Adviser ESG Disclosure Rules on the agenda, any final rule is unlikely to incorporate the full list of elements in the draft rule as currently proposed. It's possible that the current administration could choose to pare back the Final Fund/Adviser ESG Disclosure Rules to target greenhushing by funds and investment advisers that incorporate ESG considerations into their investment-making decisions, with concerns about greenwashing taking a backseat. For instance, a final rule could mandate a narrower set of disclosure triggers, effectively requiring clear warning to investors if E or S or G could influence investment decision-making – this could, in turn, set up a basis for SEC examinations staff to probe whether ESG factors were considered for strategies without clear warnings as to ESG influence.

Disclosure rulemaking aside, asset managers will (and should) continue to devote time and resources to assessing and addressing the appropriateness and proportionality of their public ESG statements under general principles of full and fair disclosure.

Compliance Takeaways from SEC Enforcement and Exam Activity

In the later half of 2024, we noticed that routine examinations of funds and advisers increasingly omitted some of the previously standard ESG-focused requests from their initial exam request letters, even where the firms being examined offer ESG-specific products and strategies. The decreased emphasis on ESG-related requests appears to coincide with other actions taken by the SEC in recent months, discussed in further detail below.

In 2023, the SEC removed ESG as a topic of focus in its 2024 exam priorities and, as of September 2024, the SEC has quietly disbanded its Climate and ESG Task Force in its Division of Enforcement (the "ESG Task Force"), which had formed in early 2021 under then Acting Chair Allison Lee and continued under Chair Gary Gensler.

The SEC reported that the disbanding of the ESG Task Force reflects the ESG Task Force's success, with an SEC spokesperson telling Bloomberg that "[t]he strategy has been effective, and the expertise developed by the [ESG] task force now resides across the Division [of Enforcement]." While there is credibility to the SEC's narrative regarding the disbanding of the ESG Task Force, it is also true that in the later half of 2024, the Commission and its staff began publicly deemphasizing the role of "ESG" in actions they are taking.

For example, on September 19, 2024, the SEC announced an action against an investment adviser for allegedly making misleading statements and alleged compliance failures relating to its "biblically responsible investing" strategy. The SEC's press release does not mention ESG (much less the ESG Task Force), and the settlement order's only mentions of ESG are (a) a registrant's name and (b) a direct quote taken from a white paper written by the relevant investment adviser. The SEC and its staff had theretofore typically attributed greater prominence to the ESG-related components of the analogous actions.

Although there is no longer a formal ESG Task Force and the SEC has seemingly been publicly downplaying the role of ESG in its actions, that does not mean issues relating to ESG are off the SEC's radar. ESG remains on the SEC's rulemaking agenda, and the SEC continues to litigate on behalf of its operating company climate disclosure rules, as discussed in previous Viewpoints posts (see, e.g., here). SEC staff and spokespersons have indicated that the disbanding of the ESG Task Force should not be viewed by the industry as a change in substantive regulatory approach.

The October 21, 2024 settlement between the SEC and WisdomTree Asset Management Inc. ("WisdomTree") demonstrates the continuity in SEC ESG enforcement. In the action, the SEC charged WisdomTree with making certain misstatements and compliance failures regarding its management of three ETFs (the "ESG Funds") registered under the Investment Company Act of 1940 (the "1940 Act"). In particular, the ESG Funds' prospectuses stated that WisdomTree's investment model would exclude the securities of companies with involvement in fossil fuels and tobacco "regardless of revenue measures," and presentations to the ESG Funds' board of trustees included representations regarding WisdomTree's ESG investment approach vis-à-vis the ETF Funds' screening out investment in fossil fuels and tobacco. In part because WisdomTree contracted with third-party data vendors with data sets that allegedly did not screen for ESG in a manner consistent with the ESG Funds' prospectus statements and WisdomTree's board presentation materials, each of the ESG Funds held securities of companies involved in both fossil fuel production and tobacco. WisdomTree agreed to pay a civil penalty of $4 million to settle the charges.

Given the above, notwithstanding the public-facing deemphasis on ESG coming out of the SEC, we would recommend that clients continue to consider their ESG-related risks and applicable disclosures for accuracy, ensure applicable compliance policies are adopted (as appropriate) and followed with relevant testing conducted, and continue to monitor SEC announcements, alerts, and rulemaking initiatives for further regulatory developments.

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