Simpson Thacher

Sustainability and ESG:

Where Are We Now? Taking Stock of the Latest Legal Developments

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As we near the final quarter of 2024, in a year with global temperatures looking to break new records (again), achievement of various 2025 or 2030 targets set by companies (such as progress against objectives to advance the UN Sustainable Development Goals, which had an initial deadline of 2030, or interim Paris Agreement emissions reductions targets) looking less likely by the day, and a host of seismic political elections around the world inevitably shifting the global sustainability path, we summarize key developments in legal sustainability matters impacting U.S. and multinational corporations, financial institutions and private equity sponsors. In this alert, we discuss:

- The continued rollout of the EU's ambitious, progressive legislative path against the backdrop of continuing regulatory uncertainty in the U.S.;
- The status of both state and federal anti-ESG efforts, including important court decisions impacting those efforts;
- Proxy season results that demonstrate lower-than-ever support for environmental and social shareholder proposals;
- The mix of legal factors impacting corporate diversity, equity and inclusion ("DEI") programs and goals; and
- How various climate-based multi-stakeholder initiatives, meant to convene actors to solve complex global issues, are faring under increased legal scrutiny.

1. Major New Sustainability Reporting Obligations Come Online, While the SEC Rules Remain in Limbo

2024 may be the last year that most of the world's largest companies were not yet required to provide broad-based, mandatory sustainability disclosure. Next year, first reports required by the EU's Corporate Sustainability Reporting Directive ("CSRD") will be issued by the initial wave of in-scope companies, providing disclosure on up to 1,100 discreet sustainability-related data points. Eventually, an estimated 50,000-60,000 multinational companies will be required to report details (including assurance) on topics potentially including pollution, water, biodiversity, natural resources, corporate workforce and workers in the value chain, consumers, and affected communities—and yes, Scope 1, 2 and 3 greenhouse gas emissions (see our alert for detailed information).

Elsewhere, an increasing number of jurisdictions are progressing or considering measures to leverage or implement the IFRS S-1 and S-2 sustainability reporting standards in national regulatory frameworks—according to the IFRS Foundation, 20 jurisdictions together accounting for approximately 75% of global market capitalization excluding the United States. Australia is set to become the first country in the world to incorporate the standards into national reporting requirements for Australia-listed companies. China's Ministry of Finance released draft standards earlier this year that take the standards into consideration and would apply to all enterprises established in China.

In the U.S., two California laws passed last year, SB 253 and SB 261, will require U.S. public and private companies meeting specified revenue thresholds and "doing business" in that state to offer disclosure on greenhouse gas emissions (Scope 1, 2 and 3) and/or to produce climate-based financial risk reports (see our alert for detailed information). The laws have been plagued by uncertainty, including a struggle for state funding required to enact the laws (eventually provided in the finalized 2024 budget signed in June), potential implementation delays, and litigation. But although litigation is still pending, with a hearing on dispositive motions from the plaintiffs and defendants scheduled for October 15, the laws currently look ready to go into effect (in amended form) for the 2025 year, with initial reporting due in 2026. (See Table 1 for a high-level summary of the CSRD and CA SB 253 and 261 reporting requirements.)

Yet the SEC's headline climate initiative—new rules requiring a broad range of climate-related financial disclosures, which were adopted in March after nearly two years of review, revision and stakeholder engagement—is currently on hold. The rules, which had been significantly scaled back from the proposed version, call for disclosure of climate risks, governance and strategy, as well as disclosure of Scope 1 and 2 emissions (but only from the largest public filers, and only when those emissions are deemed to be material). By the time the ink was dry on the 886-page adopting release, more than half a dozen legal challenges had been filed. The cases have been consolidated to the Eighth Circuit with a hearing expected later this year; in the meantime the SEC has voluntarily stayed implementation.

The legal challenge to the climate rules comes at a time when the SEC has suffered a series of rulemaking setbacks, with its new Private Fund Adviser Rules vacated by the Fifth Circuit in June, and its Share Repurchase Disclosure Modernization Rule voluntarily stayed last year following a finding that the rule was "arbitrary and capricious." Now, in a post-*Loper Bright* world where the long-standing *Chevron* standard of deference to be afforded to agency rulemaking has been abolished (see our prior alert here for a more detailed discussion of this issue), the rules face a difficult challenge.

Other ESG-related focus areas for the SEC also seem to have been deprioritized. The agency recently acknowledged that it had disbanded its ESG and Climate Task Force after quietly removing information about the Task Force from its website this summer. ESG is not included on the agency's latest list of examination

priorities. And other ESG-related rulemaking efforts have failed to advance, including: (i) finalizing rules calling for enhanced ESG disclosure required by private funds advisors (proposed more than two years ago in May 2022); (ii) proposing rules for enhanced human capital management disclosure (included on the agenda for proposal since 2021); and (iii) proposing rules for disclosure of corporate board diversity (also included on the agenda for proposal since 2021).

2. Anti-ESG Lawmaking Efforts Slow in the U.S.

While 2023 delivered a raft of new state-level anti-ESG laws, with 16 states passing 24 anti-ESG laws during the year, the trend has diminished significantly in 2024. This year, just six states passed new anti-ESG laws (see our alert for a full description of anti- and pro-state-level laws and measures in place). One notable legislative failure included efforts to advance a bill in New Hampshire that would have criminalized the use of ESG factors in investing decisions regarding state assets.

In addition to the slowing of new legislative activity in 2024, previously enacted anti-ESG laws have suffered key blows. Oklahoma's anti-ESG law, which required the state treasurer to create a blacklist of financial institutions that "boycott" energy companies, and also required any party entering into a contract with the state to verify that they do not "boycott" such companies, was struck down by a court in July on the basis that it violated the state constitution and was impermissibly vague.[1] While Oklahoma continues efforts to appeal the court's ruling, a similar law in Texas is currently being challenged by the American Sustainable Business Council for unconstitutional restrictions on speech, freedom of association and due process.[2] In Missouri, a judge blocked enforcement of a pair of administrative rules that required advisers and broker-dealers to inform clients about the incorporation of any "social objectives or other non-financial objective" into investment decisions, including seeking specific client consent, by reason of federal law pre-emption as well as for unconstitutional vagueness and violation of the First Amendment.[3]

At the federal level, anti-ESG lawmaking has met with little success. The House Republicans' ESG Working Group released its final report in August to little notice; the report called for reforms including changes to the proxy voting system. A hearing held by the U.S. House Subcommittee on Oversight and Investigations (Subcommittee) of the Committee of Financial Services on the proxy voting system, as well as the changing narrative around sustainable fund flows, generated little attention. House Republicans did successfully pass a bill in September seeking to restrict ESG investing (after at least seven other anti-ESG legislative initiatives failed to advance), but it is unlikely to pass in the Senate.

Meanwhile, litigation concerning the Department of Labor's investing rule, which provides that ERISA fiduciaries may (but need not) consider the economic effects of ESG factors when competing investment options "equally serve the financial interests of the plan" continues to simmer. The rule was the subject of President Biden's first veto in March 2023, and in July, the Fifth Circuit vacated a lower court decision and remanded the case for reconsideration following the Supreme Court's *Loper Bright* decision.

Taken together, these developments could indicate a decline in the effective use or enforcement of anti-ESG measures, at both the state and federal level. The result of this year's U.S. presidential election, as well as determination of control of the House and Senate in the next Congress, will no doubt have significant impacts on the course of both state and federal ESG-related (and anti-ESG) lawmaking.

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[1] *Don Keenan v. The State Of Oklahoma And Todd Russ*, In His Capacity As The Treasurer Of The State Of Oklahoma, No. CV-2023-3021 (D.C. Ok.)

[2] *American Sustainable Business Council v. Hegar*, 1:24-cv-01010 (W.D. Tex.)

[3] *Securities Industry and Financial Markets Association v. Ashcroft et al.*, Case No. 23-cv-04154-SRB (W.D. Mo.)

3. Proxy Season Doldrums as E&S Proposals Continue to Falter

During the 2021 proxy season, 36 shareholder proposals relating to environmental or social ("E&S") issues received majority support—most of which sought either enhanced workforce diversity disclosure, or reports on climate change transition plans, greenhouse gas emissions or targets. During the 2024 proxy season, just three such E&S proposals passed—two seeking disclosure of emissions reductions targets, and one calling for political lobbying disclosure. It's not for lack of trying: the volume of E&S proposals submitted by shareholders nearly matched prior years. Yet many of the proposals were viewed as overly specific and prescriptive, or covering matters that companies were already addressing—factors that were cited by the largest institutional investors, which voted in favor of very few, if any, E&S proposals in 2024.

Meanwhile proposals registering opposition toward ESG efforts continue to increase. Proponents this year submitted twice as many such proposals as in 2022 (114 compared to 57). Many focused on civil rights audits and DEI efforts, seeking for example, reports on the risk relating to alleged discrimination from DEI policies. Anti-ESG proposals related to environmental issues included requests for reports of the risks arising from voluntary carbon reduction goals. Average support for anti-ESG proposals has never achieved double digits, and in 2024 registered a new low at just 2%.

For 2025, some observers fear a chilling effect on the submission of E&S proposals following a high-profile lawsuit filed against a shareholder proponent in January of this year. The suit argued that the shareholder's proposal, which called for accelerated emissions reductions targets and timetables, was excludable and sought declaratory relief from the court on that basis. The shareholder proponents withdrew the proposal shortly after the suit was filed, but the litigation continued until a judge ruled in June that the case was moot. The risk of a similarly lengthy battle in federal courts could spur some proponents to reconsider their tactics for the next proxy season, particularly as most E&S topics have seen declining support from shareholders.

4. Corporate DEI Efforts in Flux

The Supreme Court's decision overturning race-based affirmative action in universities in the Students for Fair Admissions ("SFFA") cases in June 2023 sparked a re-consideration of corporate efforts surrounding DEI. Although the decision was narrowly focused on higher education, the case and subsequent developments have led to a shift in the conversation and heightened concerns around DEI programs.

Since the *SFFA* decision, conservative activist groups such as the American Alliance for Equal Rights (overseen by Edward Blum, the strategist behind the *SFFA* suit) and America First Legal (run by former Trump advisor Stephen Miller) have brought lawsuits against a host of corporations, law firms, and other organizations for DEI-related programs and practices. In June, the U.S. Court of Appeals for the Eleventh Circuit gave these groups a significant win when it authorized a preliminary injunction on a program run by venture capital group Fearless Fund. Fearless Fund's program had focused on providing funding grants to women of color building new companies (see our memo for detailed information). Following that decision, the Fearless Fund has agreed to close down its grant program as part of a settlement with the plaintiffs announced this September. Civil rights attorney Benjamin Crump, who represented the Fearless Fund in this litigation, emphasized the need to agree to a settlement to avoid setting a harmful precedent stating that "by strategically avoiding a Supreme Court ruling that could have eliminated race-based funding, we protected vital opportunities for the entire Black and brown community."

Outside of the courts, activists are pushing back on corporate DEI efforts as well. In recent weeks, a number of Fortune 500 companies announced changes to their diversity initiatives (including decisions to cease providing workplace data to the Human Rights Campaign for purposes of scoring on its Corporate Equality Index) following targeted campaigns. Meanwhile others have resisted the retreat from DEI efforts and hastened to

reassure investors of their continued commitments. Other companies are looking to stay out of the fray, rebranding efforts while preserving the substance behind them.

This quickly-shifting environment presents challenges for companies looking to find their legal footing within the approach best calibrated to their key stakeholders (including employees), and we are likely to continue to see rapid shifts in the legal landscape as various lawsuits on the topic continue to advance.

5. Multi-Stakeholder Climate Initiatives Feel the Heat

One of the biggest challenges in addressing major, worldwide crises such as climate change and its knock-on social effects is, by some accounts at least, one of collective action—the concept of a shared role of states, corporations and individuals in impacting the sustainability of our future, and the shared burden of action. In response, a large number of industry associations and multi-stakeholder and other collaborative initiatives have formed, some dating back decades, with the goal of spurring joint action and increasing corporate transparency and accountability as to sustainability issues.

As the anti-ESG movement in the United States began gathering steam starting in 2022, membership in certain initiatives attracted unwelcome attention from conservative lawmakers and regulators, leading to some significant departures of corporate members from these groups. In one notable example, the UN-backed Net Zero Insurance Alliance disbanded in April of this year following significant departures, spurred in part by a May 2023 letter sent from 23 state attorneys general expressing concern about anti-competitive activity. The bank-led and UN-convened Net Zero Banking Alliance ("NZBA"), which calls for signatories to commit to transitioning lending and investment portfolios toward a path to net-zero by 2050 or sooner, has attracted similar scrutiny. Six of its members received civil investigative demands in October 2022 from a group of 19 state attorneys general, which requested documents related to the members' involvement with NZBA. The Texas's Comptroller also explicitly uses NZBA membership as a criterion by which to identify financial companies that "boycott" energy companies in violation of its statute (discussed in Section 1 above). NZBA has acknowledged at least two membership departures in 2024.

Climate Action 100+ ("CA100+"), an investor-led initiative with over 600 investor signatories that commit to engage with stakeholders and companies to implement transition plans, has also experienced some recent notable membership departures. The House Judiciary Committee has led a campaign against CA100+, including a December 2022 letter to CA100+ leaders, a June 2023 subpoena of CA100+ leaders and a hearing on "decarbonization collusion," a June 2024 report alleging "ESG collusion," and additional July 2024 demand letters to over 130 CA100+ members. The Texas Comptroller has also indicated that CA100+ membership, like NZBA membership, may serve as a means to identify financial companies that "boycott" energy companies.

These actions from lawmakers and state officials highlight the challenge for some U.S.-based members in particular in managing anti-competition risk within the context of addressing climate concerns. Elsewhere around the globe, this tension has been eased, at least in part, through regulatory action. The European Commission's Horizontal Guidelines, which were revised in 2023, contain a section on sustainability agreements, detailing when sustainability agreements do or do not raise competition concerns. Similarly, the U.K.'s Competition & Markets Authority published its Green Agreements Guidance in 2023, explicitly stating that the U.K. will not enforce competition law against sustainability agreements that "reduce the negative externalities arising from greenhouse gases." The Australian Competition and Consumer Commission also published draft guidelines in July that are designed to assist businesses to understand how they can collaborate on sustainability initiatives without breaching competition laws.

The lack of similar guidance in the U.S. may have led some organizations to determine that the benefits of membership do not outweigh the additional scrutiny they attract in the near-term. As this year's political cycle heats up, and as the pressing need identified by many businesses to address climate concerns increases, some

of these groups will likely be looking to ensure and rearticulate the compatibility of their missions and positions with relevant competition regimes—and adjust when needed.

Conclusion

The days of ESG and sustainability-related developments advancing in a coordinated, linear fashion have evaporated—if they ever existed at all. EU lawmakers march on, including with the finalization earlier this year of the Corporate Sustainability Due Diligence Directive (“CSDDD”)—a significant next step in the Continent’s sustainability agenda, but one that itself encountered powerful resistance and required extensive 11th-hour negotiations to get to finalization. Meanwhile lawmakers across the U.S. have shown little consensus around the way forward for sustainability, and key court decisions have upended or created uncertainty around what measures have been achieved. As we face a deeply consequential—and difficult to predict—U.S. election this November, the next step for ESG and sustainability is less clear than ever.

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At a Glance: Major Climate Reporting Requirements Applicable to U.S. Companies

	United States				European Union	
	California State Laws[i]			SEC Climate Rule[ii] ****Subject to voluntary stay pending litigation**	CSRD[iii]	CSDDD[iv]
	SB 253	SB 261	AB 1305			
Scope	U.S. companies doing business in CA with >$1B annual revenue	U.S. companies doing business in CA with >$500M annual revenue	Business entities (i) marketing or selling voluntary carbon offsets ("VCOs") in CA, (ii) purchasing or using VCOs and making certain carbon emission-related claims (if the entity operates within CA or purchases or uses VCOs sold within CA), or (iii) operating in CA and making certain carbon emission-related claims, or making such claims within CA	*U.S. registrants*	Certain large EU companies (and groups), EU listed issuers, and non-EU companies with a significant EU nexus	EU and non-EU companies that meet employee and/or revenue thresholds
Implementation Timeline	Staggered disclosure requirements beginning in 2026 (date to be determined)	First reports due by January 1, 2026	Effective date of statute Jan. 1, 2024; disclosure date not specified; bill's author expressed his intent that the statute does not take effect until Jan. 1, 2025[v]	*Staggered implementation based on filer size, beginning in 2026*	Phase-in from 2025 to 2029 based on company status and EU presence	Phase-in from 2027 to 2029 based on EU employee and/or revenue figures
Requirements	Disclose Scope 1, 2 & 3 emissions (with assurance) 2026: Scope 1&2 w/ limited assurance 2027: Scope 1&2 w/ limited assurance; Scope 3 (no assurance) 2030: Reasonable assurance over Scope 1&2; limited assurance over Scope 3	Biennially disclose climate-related financial risk and measures taken aligned with TCFD	Annually disclose information on website about carbon credits purchased; how net-zero emissions (or similar) claim was determined to be accurate or accomplished and how interim progress is being measured	*Disclose governance, climate-related risks and impacts on strategy, business model and outlook* *Disclose financial statement impacts* *For large accelerated and accelerated filers only: Disclose Scope 1-2 emissions (if material) with phased-in assurance*	Disclose Scope 1, 2 & 3 emissions (with assurance) Disclose risks, impacts and opportunities related to a broad range of sustainability practices, with a particular focus on the impact of activities on people and the environment	Adopt a Paris-aligned climate transition plan using science-based time bound targets Conduct due diligence to identify, prevent and mitigate adverse human rights and environmental impacts within the "chain of activities," including company operations, upstream and limited downstream activities

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[i] *See* our alert "California's Flurry of ESG Lawmaking" (available here) for more detailed information.

[ii] *See* our alert "SEC Finalizes Landmark Climate-Related Disclosure Rules" (available here) for more detailed information.

[iii] *See* our alert "EU Corporate Sustainability Reporting Directive (CSRD): 5 Key Considerations for U.S. Companies" (available here) for more detailed information.

[iv] *See* our alert "CSDDD—EU Delivers Mandatory Sustainability Due Diligence Regime Despite Political Pressure" (available here) for more detailed information.

[v] *See* letter reprinted in the California's Assembly Daily Journal here. Legislation (AB 2331) subsequently introduced to formally clarify the reporting date was not adopted by the California legislature.