Simpson Thacher

ESG Battlegrounds:

How the States Are Shaping the Regulatory Landscape in the U.S.

Updated as of December 2023

When it comes to ESG in the United States, among the most dramatic developments is an ideological battle unfolding at the state level, pitting liberal-leaning state governments that have embraced ESG-focused investing against conservative-led states that would seek to exclude it.

To date, the general consensus has been that the U.S. is lagging on its ESG focus, particularly in contrast to the EU and UK where investor, political and societal support has generally been strong. U.S. federal agencies have been slower to propose and adopt rules in this area than their European counterparts. As a result, much of the activity on the ESG front remains the subject of private ordering, where companies are offering disclosure and making commitments in response to investor and stakeholder demands rather than regulatory requirements.

But over the past year, the picture has shifted. Federal agencies are placing more focus on ESG disclosure and performance,[1] and federal legislators are debating the merits of ESG and its role in U.S. capital markets.[2] At the state level, the vast majority of U.S. states have stepped up their lawmaking, seeking to define the future of the ESG-related regulatory environment with widely divergent approaches—most recently California with four broad new sustainability disclosure requirements signed into law last month.

1 *See* our previous client alerts discussing the U.S. Department of Labor ESG Rule (here); SEC ESG and Climate Task Force (here); SEC rules relating to cybersecurity risk management, strategy, governance and incident disclosure (here); and the SEC's continued work on additional ESG-related disclosure rules (here). Briefly, the SEC's much anticipated Climate Disclosure Rule is still being finalized, as is the ESG Disclosures for Investment Advisors and Investment Companies Proposed Rule. The FTC will most likely update its Green Guides, having requested public comments for potential changes, but has provided no timeline. Lastly, the CFTC has asked for public assistance reporting potential fraud related to carbon markets and offsetting in an effort to mitigate fraud and increase accountability associated carbon markets.

2 In July 2023, House Republicans of the Financial Services Committee held six hearings and proposed a number of bills targeting the influence of ESG initiatives in the U.S. financial system, addressing the shareholder proposal and proxy voting process and the SEC's proposed Climate Disclosure Rule (among others).

These state measures focus primarily on state-sponsored investment restrictions, though some new laws cover other ESG-related topics. [3] Individually and collectively, these developments are further fracturing an already complicated landscape for financial services companies, including private investment managers that invest money on behalf of state pensions. Meanwhile multistate initiatives are taking aim at individual asset managers, banks and proxy advisory services perceived to be driving ESG growth.[4] In at least two states, financial institutions have fought back.[5]

Much attention has focused on so-called "anti-ESG measures"—those prohibiting the consideration of ESG factors when investing state funds or targeting companies that "boycott" or discriminate against industries such as fossil fuel or firearms companies—and the organizations behind them.[6] Other measures perhaps best described as "ESG-neutral" have emerged.[7]

In some states, more extreme versions of ESG-focused legislation were scaled back or have failed to progress, as a result of powerful opposition constituencies reacting to real or perceived increases to

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3 Arkansas, Iowa, New Hampshire and New Hampshire have enacted legislation rolling back child labor protections; lawmakers in other states have introduced similar bills. Minnesota enacted a law that applies a standard to utilities to supply customers with electricity generated or procured from carbon-free sources. Earlier this year, Alaska's Governor announced a bill package to introduce the state to the emerging carbon markets, under which the state's Department of Natural Resources would be authorized to promote and provide geologic and biologic sequestration. Of that bill package, Alaska SB 48 was signed and became effective on May 24, 2023. Several state bills would seek to prohibit state or local investments in companies that do business with or in certain foreign countries, or in businesses owned or operating by certain foreign governments or non-governmental organizations.

4 Notable examples include:

- Several State AGs and Treasurers have announced the divestment or planned divestment from major asset managers on the basis of ESG investment practices, though in at least one case a "truce" will reportedly allow the asset manager to continue overseeing pension assets.
- In October 2022, 19 State AGs initiated a coordinated investigation by issuing civil investigative demands to the six largest U.S. banks, seeking information relating to the banks' participation in global climate change initiatives such as the Net-Zero Banking Alliance (NZBA) and the Glasgow Financial Alliance for Net Zero (GFANZ), based on purported antitrust and consumer-protection concerns. Five states joined but cannot be named due to state laws or regulations regarding confidentiality.
- In January 2023, 21 State AGs signed a letter to two prominent proxy advisory services, ISS and Glass Lewis, stating that the firms had "potentially violated their legal and contractual duties as proxy advisers, with respect to advocating for and acting in alignment with climate change goals," and seeking responses to questions concerning how ESG considerations affect their proxy voting recommendations.
- Led by Florida Gov. Ron DeSantis, the governors of 19 states formed an alliance on March 16, 2023, to force change in the use of ESG factors in asset managers' investment decisions and limit financial institutions' ability to use social credit scores, among others. The coalition has not taken any formal steps, though various policy points are mirrored in anti-ESG legislation signed into law in Florida (discussed below), and Gov. DeSantis has made an anti-ESG push part of his 2024 presidential campaign.
- On March 30, 2023, 21 State AGs signed and sent a letter to 50 asset management firms claiming a breach of fiduciary duties relating to the inclusion of ESG factors in managers' investment decisions, and antitrust violations implicated by their involvement in climate-related coalitions. At least some of these states have followed up with civil investigative demands seeking information about the asset managers' participation in the Net Zero Asset Managers initiative (NZAM).
- In May 2023, 21 state financial officers signed and sent a letter to 20 asset management firms and two proxy advisors requesting information about how decisions and recommendations regarding ESG-related proxy voting matters are determined. The letter also asked for details regarding how the firms determine which shareholder proposals to support and what their potential impact will be.
- On May 15, 2023, 23 State AGs signed and sent a letter to insurance company members of the Net-Zero Insurance Alliance (NZIA), some of which are also members of the Net-Zero Asset Owner Alliance (NZAOA).
- On May 19, 2023, 22 State AGs signed and sent a letter to several banks targeting their emissions reduction positions.

5 Following passage of a Kentucky bill that targets banks that engage in deemed energy company boycotts (discussed below), Kentucky's AG issued subpoenas and civil investigative demands to various banks and announced plans to investigate their involvement with the NZBA. The Kentucky Bankers Association sued the State AG, alleging freedom of speech and freedom of association violations, among others. *See* Ron Lieber, "The E.S.G. Fight Has Come to This: Bankers Suing Lawyers; your money," *The New York Times* 2/24/23, available here. The State AG responded by removing the lawsuit to federal court; but the federal district court remanded the case back to state court. Separately, a leading trade organization has sued the Missouri Secretary of State following the passage of a new Missouri securities rule (discussed below) that requires broker-dealers to disclose to customers in cases where they consider a nonfinancial objective when purchasing or selling an investment product. *See* Niket Nishant, "Top Trade Group Mounts Legal Challenge Against Missouri after ESG Backlash," *Reuters* 8/10/23, available here.

6 Several bills and certain laws in force are reported to have been patterned on model bills drafted by the American Legislative Exchange Council (ALEC), a national policy organization known for drafting conservative model legislation with key industries and encouraging their introduction in state legislatures. *See* David J. Berger, David H. Webber and Beth M. Young, "The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions," 2/15/23, available here. Notably, following a unanimous vote by ALEC's energy task force in December 2022 to adopt one of the bills (the anti-boycott bill), ALEC's board declined to approve the measure in January and sent it back to the task force for reconsideration. *See* ABA Banking Journal, "ALEC board rejects model anti-ESG bill," 1/23/23, available here. *See also* Julie Bykowicz, "Conservatives Have a New Rallying Cry: Down with ESG," *Wall Street Journal*, 2/27/23, available here (describing a new, multimillion dollar initiative led by a former Federalist Society member to drive anti-ESG legislation and communications).

7 For example, in June 2022 Louisiana enacted a taskforce by law to issue recommendations regarding the regulation of ESG factors in lending and investment practices, and also an ESG Criteria Study Group to issue recommendations regarding the regulation of the use of ESG factors in lending and investment practices. Four months later, the state removed $794 million in funds from a major asset manager on the basis of ESG investing strategies it employed. Massachusetts lawmakers, having already established an ESG committee to serve the state pension reserves investment management board, and having proposed various pro-ESG bills, are pursuing a bill to establish a committee to consider climate risk associated with state pension reserves investments and to assess divestment readiness.

the cost of capital,[8] or to compliance-related challenges.[9] According to one report, at least 165 anti-ESG bills and resolutions were introduced in 37 states from January to June 2023, despite legislative reports citing potential state losses in the billions, but only a handful of these bills became law or resolutions passed.[10]

The number of pro-ESG bills that have become law is also small.[11] More extreme measures on both sides, anti- and pro-ESG, have prompted some observers to sound the alarm that the United States may be straying from the fundamental purpose of ESG factors—as a valuation metric to gauge corporate success.[12]

Whether, how long and to what extent the shift in ESG regulatory power remains with the states is yet to be seen, as federal actors are beginning to be more attentive to ESG issues. For now, in the United States, the term "ESG" continues to be remarkable in its political divide. Below, we unpack current state-level developments focused on ESG investing and contracting. We offer the following high-level takeaways:

- We expect the stream of anti- (and-pro) ESG initiatives to continue, with failed or pending measures possibly reintroduced in future legislative sessions, particularly as the 2024 U.S. presidential election approaches and the global ESG regulatory framework, including a growing web of EU-related ESG measures, comes into greater focus. We also anticipate that where bills fail (or look likely to do so), some state actors may seek to pursue anti-(or pro-) ESG initiatives through administrative rules.[13]
- The scope and nature of such measures will continue to evolve in reaction to the success or failure of similar measures, the availability of data on the financial and non-financial impact of such measures,[14] the continuing debate as to the opportunities and challenges associated with ESG (including with respect to ESG and investor returns, ESG ratings methodologies and measurement challenges, and inconsistencies in current reporting standards), voter interest,[15] organizational influence over lawmaking in state legislatures, and activities at the federal level relating to how fiduciaries can consider ESG factors in investment decisions.[16]

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8 At least two reports have addressed the impacts of anti-ESG measures on state municipal bond markets. *See* Daniel Garrett and Ivan Ivanov, "Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies," U. Penn. 5/30/22, available here (reporting that Texas' enactment of two laws, described below, has led five large banks that underwrote 40% of Texas' municipal debt to exit the state, which has decreased competition and increased costs for stakeholders, specifically adding $300 to 500 million to borrowing costs on debt issued in the first eight months after the laws were enacted); and "ESG Boycott Legislation in States: Municipal Bond Market Impacts," The Sunrise Project, 1/12/23, available here (leveraging the U. Penn. study and anticipating potential costs to six states that have passed or are considering similar legislation and directives as those implemented in Texas). In some states, public entities are pushing back against proposed legislation on the basis of calculated economic losses. *See* Debra Kahn, "Want to go anti-ESG? It'll cost you," Politico 3/17/23 available here.

9 The predecessor to California's climate disclosure bill, discussed below, failed to pass the California Assembly, reportedly owing to a reporting requirement that extends well beyond the climate disclosure rule proposed by the SEC. *See* also Ross Kerber, "Business fights back as Republican state lawmakers push anti-ESG agenda" Reuters (4/24/23), available here.

10 *See, e.g.*, Pleiades Strategy, "2023 Statehouse Report Anti-ESG State Legislation Tracker & Analysis," available here (tracking the status of and analyzing state ESG-related bills).

11 *See, e.g.,* Joan Michelson, "Wave of 'Anti-ESG' Investing Legislation, New Study Found," *Forbes* 8/29/23, available here (citing policy tracking firm Plural, which reports that in 2023, 42 pro-ESG bills have been introduced in 11 states with only one becoming law).

12 *See, e.g.*, Daniel F.C. Crowley and Robert G. Eccles, "Rescuing ESG from the Culture Wars," *Harvard Business Review* 2/9/23, available here. *See also* Robert G. Eccles, "It's Time to Call a Truce in the Red State / Blue State ESG Culture War," *Harvard Law School Forum on Corporate Governance* 5/29/23, available here.

13 For example, on June 1, 2023, Missouri's Republican Secretary of State issued an administrative rule after a similar bill failed to pass in the 2023 Missouri legislative session. The new rule (discussed below) requires broker-dealers to disclose to any customer or prospective customer that they considered a nonfinancial objective when deciding whether to buy or sell a commodity or security on the customer's behalf. Such disclosure requirement is satisfied with the customer's written consent.

14 *See* n. 9.

15 *See, e.g.*, Debra Kahn and Jordan Wolman, "Cracks in the anti-ESG foundation," *Politico*, 1/24/23, available here (reporting that two-thirds of major clean energy projects announced as a result of the Biden Administration's signature climate change law, the Inflation Reduction Act, are anticipated to be located in Republican-held congressional districts).

16 Half of U.S. states have sued to block the U.S. Department of Labor's (DOL) new rulemaking applicable to ERISA plans related to ESG factors, which we described here. However, the Texas district court judge denied the states' motion for summary judgement, finding that the new DOL rule did not violate the Administrative procedure Act nor run afoul of ERISA. The plaintiff states filed a notice to appeal this decision. *See* Daniel Wiessner "Republican-led US states appeal ruling allowing Biden ESG investing rule." Reuters, 10/26/23, available here. That rulemaking provides that an ERISA fiduciary's consideration of ESG factors may, under certain circumstances, be consistent with ERISA's stringent fiduciary duties. As we reported here, on 3/20/23, President vetoed the Congressional resolution—the first veto of his presidency. House Republicans have introduced legislation that would modify ERISA and ban retirement plan fiduciaries from considering ESG factors when investing in retirement accounts.

- The surge of anti-ESG measures poses significant legal, operational, reputational, political and financial concerns for funds, asset managers and companies that integrate ESG investment into their policies, procedures and disclosures, threatening state contracts and the removal of state funds from investment portfolios and the reinvestment of assets in the first instance. These laws include a variety of different applications and carve-outs, and whether a company is in scope will depend on varied analysis in each state. Monitoring these measures and understanding the nature of conflicting requirements and associated risk will be essential.
- As a general matter, these measures are still relatively untested, resulting in considerable uncertainty about their ultimate interpretation and implementation. In some cases, carve-outs may potentially be used to protect investments and avoid compliance violations (at least in respect of entities not yet subject to blacklisting), but should be approached with caution.

Simpson Thacher continues to maintain and update[17] the following charts, available in two different formats, measures by type and measures by state. These charts will also be available on our ESG Practice Page.

1. State Measures Restricting the Consideration of ESG Factors in State Investment Strategies

As of December 2023, at least 20 states have enacted laws or adopted regulatory action in the form of resolutions, policy statements or directives that seek to prohibit or discourage public entities from considering ESG factors when investing state resources (as set out in the table below). These measures prohibit the consideration of "non-pecuniary" factors by public pension funds or state and local government authorities and their investment managers as being inconsistent with the exercise of fiduciary duties. The measures define this concept differently, but ultimately capture the use of factors other than those that seek specifically to maximize investment returns.

Some measures contain important exceptions that would allow public entities and their fund managers to incorporate ESG factors into investment decisions in certain circumstances. Whether these carve-outs are motivated by a desire to protect against economic losses, or a recognition of ESG's relevance to many investors, is unclear.

The prohibitions generally apply to state pension and/or state and local government entities' fiduciaries, proxy advisors and service providers. They essentially prohibit in-scope entities from considering certain ESG factors in evaluating or managing an investment or, in some cases, in proxy voting and portfolio company engagement. Some attach significant penalties for noncompliance and/or address what information state enforcement entities may rely on as indicia of an investment manager's prohibited use of ESG factors.

Here again, certain measures contain exceptions that would theoretically permit in-scope companies to comply with the laws, while continuing to safeguard investments made on the basis of investing strategies that incorporate ESG factors. However, the definitions and provisions that the carve-outs employ are often ambiguous and, in nearly all cases, untested.[18] As a result, entities seeking to leverage potential exceptions are likely to encounter difficulties in determining what their precise legal obligations are. We finally note at least one case in which a state ended investigations into financial institutions' ESG investing practices, although the state's policy prohibiting considering ESG factors when investing state resources remains in place.[19]

17 While most state legislatures are now either out of session or in recess, a few remain in session, and we may continue to see bills being passed until the end of the year. The in-session states are Illinois, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont and Wisconsin. *See e.g.*, National Conference of State Legislatures, "2023 State Legislative Session Calendar" available here (tracking the status of state legislative schedules).

18 For example, several measures introduce a distinction between pecuniary and nonpecuniary factors but acknowledge circumstances in which nonpecuniary factors may be pecuniary, and as such, would be evaluated in the context of a public investment or in exercising rights relating to the investment. However, the definitions of pecuniary and nonpecuniary are vague, over-broad and not mutually exclusive, such that entities will likely struggle to reasonably anticipate what their obligations are and/or could result in a situation where a factor could be both pecuniary and non-pecuniary simultaneously. Certain measures that impose enhanced obligations on fiduciaries who have concluded that ESG factors are pecuniary outline requirements that are vague and unclear (*e.g.*, requiring them to examine the level of diversification, degree of liquidity and potential risk-return as compared to available alternative investments, but without delimiting the population of alternative investments to evaluate).

19 Press release, "Arizona Attorney General Kris Mayes Announces Exit from Investigation into ESG Investment Practices," 2/13/23.

Measure	Description	Exceptions / Notes
Laws		
Arkansas HB 1253, in effect 8/1/23	Requires public pension benefit plan fiduciaries to consider only pecuniary factors in investment decisions Introduces requirements with respect to shareholder and proxy voting	Acknowledges circumstances in which ESG considerations may be pecuniary and evaluated in public investment decisions Exception re. proxy voting advisor requirements where no economically practicable alternative available
Florida HB 3, in effect 7/1/23	Requires all state and local investment decisions to be made on the basis of pecuniary factors only Prohibits state and local entities from issuing ESG bonds Requires shareholder rights like proxy voting to be exercised only on the basis of pecuniary factors Requires retirement systems and plans to offer annual reporting to state governmental bodies on their governance policies, voting decisions and adherence to fiduciary standards Requires any communications between an investment manager to a company in which the manager invests public funds on behalf of a governmental entity that discuss ESG interests, or advocate for an entity other than shareholders, to include a conspicuous disclaimer that the views are the sender's and not the state's	Wide-ranging law that includes other provisions. *See* previous client memo for additional information
Idaho SB 1405, in effect 7/1/22	Prohibits public entities including state investment boards from considering ESG characteristics in investment decisions in a manner that could override the prudent investor rule Requires notification by investment agents where they adopt or revise a policy related to disfavored investments or investment limitations identified as against the public policy of the state, and applicable to state investments Introduces requirements with respect to proxy voting	Public entities serving as fiduciaries to select investment options for investors may offer ESG-preferred investments to participants if they are optional and sufficient alternatives are offered
Indiana HB 1008, in effect 7/1/23	Prohibits state public retirement system board from making an investment decision to influence social or environmental policy, or attempting to influence the governance of any corporation for nonfinancial purposes, and prohibits system from making an ESG commitment with respect to system assets Prohibits board from contracting with a service provider that has made an ESG commitment Introduces requirements with respect to proxy voting	Does not apply to a bank holding company or a subsidiary of a bank holding company, defined contribution plans, annuity savings plan or a private market fund Exception to service provider contracting prohibition where it would violate the board's fiduciary duty or there is no comparable replacement service provider Provides examples where a service provider may be determined to have made an ESG commitment
Kansas HB 2100, in effect 7/1/23	Requires state public employees retirement system assets to be entrusted to a fiduciary with a practice of following guidelines when engaging with portfolio companies to act solely on financial factors Introduces requirements with respect to proxy voting	Alternative or real estate investments as defined in state law exempted Exception to investment restriction where no economically practicable alternative available Provides examples where a fiduciary may be determined to have taken an action or considered a factor with a purpose of furthering social, political or ideological interests Exception re. proxy voting advisor requirements where no economically practicable alternative available

Measure	Description	Exceptions / Notes
Kentucky HB 236, in effect 6/29/23	Requires state-administered retirement system fiduciaries to consider only pecuniary factors in investment decisions, and prohibits the consideration of or actions with respect to ESG interests Introduces requirements with respect to proxy voting	Provides examples where a fiduciary may be determined to have considered or acted on a nonpecuniary interest
Montana HB 228, in effect 4/19/23	Requires state board of investments to consider only pecuniary factors in public investment decisions Introduces requirements with respect to proxy voting	Acknowledges circumstances in which ESG considerations may be pecuniary and evaluated in public investment decisions Exception re. proxy voting advisor requirements where no economically practicable alternative available
New Hampshire HB 457, in effect 8/29/23	Requires state retirement system independent investment committee and board of trustees to file quarterly reports regarding compliance with duty to make all investment decisions solely in the interest of the participants and beneficiaries of the state retirement system	Report must include the existence of any investment funds that may have mixed, rather than sole, interest investment motivations
North Carolina HB 750, in effect 6/27/23	Restricts the State Treasurer and state pension plan fiduciaries' investment decisions, and the evaluation or exercise of rights appurtenant to investments, to pecuniary factors	May consider environmental or social considerations as pecuniary factors only if qualified investment professionals would treat these risks and opportunities as material economic considerations May in evaluating or exercising any right appurtenant to an investment reasonably conclude that not exercising such a right is in the best interest of the fund's beneficiaries
North Dakota SB 2291, in effect 3/24/21	Prohibits investment of state funds for purpose of social investment	Does not apply where state investment board can demonstrate that a social investment has an equivalent or superior rate of return as compared to a similar non-social investment with a similar time horizon and risk
North Dakota HB 1429, in effect 8/1/23	Introduces requirements with respect to proxy voting Prohibits insurers from refusing to insure or charging a different rate based on ESG criteria, DEI policies, or political and ideological factors Requires state bank to study ESG trends, laws and policies that impact businesses in the state, and to issue a report of its findings and recommendations	Same as North Dakota SB 2291 above Insurance prohibition does not apply in cases where the refusal or different rate is the result of the application of sound underwriting and actuarial principles
Tennessee SB 955, in effect 5/17/23	Restricts State Treasurer to investment decisions based on financial factors as opposed to ESG interests Introduces requirements with respect to proxy voting	Acknowledges circumstances where ESG interests may be material to the financial analysis of the investment and evaluated in public investment decisions
Utah SB 96, in effect 5/3/23	Requires public entities to invest public funds in accordance with the prudent investor rule Introduces requirements with respect to proxy voting	Exempts certain funds
West Virginia HB 2862, in effect 6/8/23	Introduces requirements with respect to shareholder and proxy voting	Includes an exception where "reasonable efforts" have been made; does not require the board to divest from any private market funds or from indirect holdings in actively or passively managed investment funds

Measure	Description	Exceptions / Notes
Resolutions / Policies / Statements		
Alabama, Attorney General Written Testimony, 5/10/23	Establishes that ESG policies threaten America's democratic system, and that ESG must be stopped	
Arizona, State Treasurer's Office investment policy statement, adopted 8/30/22	Prohibits consideration of non-pecuniary factors when evaluating state investments or discharging duties Introduces requirements with respect to shareholder and proxy voting Prohibits lending securities to any borrower with a practice of or a commitment to engaging with companies or voting shares based on non-pecuniary factors	On 2/13/23, the State AG announced that Arizona would end investigations into financial institutions pursuing ESG investing, which were initiated under the state's previous AG; it is unclear how and to what extent the statement affects implementation of the revised investment policy
Florida State Board of Administration revised investment policy, in effect 8/23/22	Restricts state board evaluation of retirement system investment decisions to pecuniary factors	
Florida CFO Directive, 1/23/23	Prohibits asset managers from investing income of participants in state's deferred compensation program in financial products associated with ESG standards	
Georgia General Statement of Investment Policy, 9/15/22	Prohibits state employee retirement system trustees from sacrificing investment returns or increasing risk to promote non-pecuniary interests, including furtherance of social, political or ideological interests	
Indiana Attorney General Opinion, 9/1/22	Establishes ESG investing in the context of the state public retirement system as a violation of fiduciary duties	
Kentucky Attorney General Opinion, 5/26/22	Establishes that stakeholder capitalism and ESG investment practices are inconsistent with state law governing fiduciary duties owed by investment management firms to state public pension plans	
Louisiana HCR 59, in effect 6/4/23	Requests U.S. Securities and Exchange Commission to withdraw proposed Climate Disclosure Rule	
Louisiana HCR 110, in effect 6/7/23	Urges and requests state retirement system boards of trustees not to allow ESG policies to influence their investment decisions	
Mississippi Treasurer letter to Public Employees' Retirement System Board Members, 11/14/22	Urges board to reject ESG policies and formally prohibit the use of nonpecuniary factors in investment policy	
Missouri HR 12, in effect 5/12/23	Urges the state and its executive officers, state agencies and officials to oppose (i) a forced imposition of ESG policies, (ii) costs on state citizens related to the imposition of ESG policies, (iii) any action based on the assumption that net zero is likely to occur, (iv) any SEC regulations or other climate-related rules, (v) any private governmental agency discussion on climate-change risk and ESG policies and (vi) any policies of federal banking regulators that require ESG to be used in the decision-making process	
Missouri 15 CSR 30-51.170 6/1/2023 Amendment, in effect 7/30/23	Requires a broker-dealer or agent to disclose to a customer or potential customer the incorporation of any social objective or other nonfinancial objective when buying or selling a security or commodity	

Measure	Description	Exceptions / Notes
Missouri 15 CSR 30-51.172 6/1/2023 Amendment, in effect 7/30/23	Same as Missouri 15 CSR 30-51.170 above, but applied to investment advisers and their clients or prospective clients	
Montana HJ 11, in effect 4/14/23	Joint resolution urging (i) state congressmen to compel the U.S. Senate Banking Committee, as well as the committees it oversees, to withdraw or modify ESG investment policies for financial institutions and (ii) the state division of banking and financial institutions to avoid implementing examination policies or guidelines beyond the scope of traditional "safety and soundness" risk assessments	
New Hampshire Executive Order 2023-03	Establishes restrictions on ESG factors in state investments and associated reporting	
Utah SCR 9, in effect 3/14/23	Encourages State AG to furnish legal advice to the State Treasurer and investment managers on various topics, to take legal action to protect the state's investments when necessary, to implement investment policies that restrict the use of ESG criteria, and to conduct audits of state investments	
Utah, Attorney General Statement before the U.S. House Committee on Oversight and Accountability, 5/10/23	Urges committee to undertake various ESG-related investigations, including on the role of proxy advisors and the U.S. Department of Labor ESG Rule	
Wyoming State Treasurer's Statement on its updated ESG Policy, 5/3/23	Prohibits State Treasurer from considering factors that further social, political or ideological interests in state investment decisions	

2. State Anti-Boycott Measures Targeting Companies Doing Business with State Governmental Entities

As set out in the table below, at least 15 states have enacted laws restricting the ability of state entities to do business with companies that "boycott," or "discriminate" against certain industries disfavored by the ESG movement (and in some cases other factors). In at least two cases, states have established committees or commissioned studies to consider such measures.

With respect to the former, several measures require or authorize state regulators to develop and maintain a blacklist of financial entities that engage in boycotts of fossil fuel companies. Some laws compel companies entering into contracts with state entities to attest, as a condition of doing business with public entities, that they do not and will not engage in boycotts against companies in, for example, fossil fuel energy production or firearms manufacturing, during the life of the contract. A law in Texas limits state insurers' ability to incorporate ESG factors into pricing;[20] according to a letter the state's governor sent to President Biden earlier this year, the intention of the law is to ensure that insurance companies do not hinder energy companies in order to appease ESG advocates.[21]

Here again, certain key terms and concepts are defined in vague terms,[22] raising questions as to what actions by an in-scope entity would qualify as an economic boycott or discrimination.

Certain measures contain important (but untested) exceptions such as excluding decisions based on an "ordinary business purpose" from the definition of a "boycott," and allowing public entities to avoid divestment from blacklisted entities if contrary to their fiduciary duties.

Measure	Description	Exceptions / Notes
Alabama SB 261, in effect 8/1/23	Contracting Prohibits state governmental entities from entering into contracts for goods or services (value at $15K or more) absent written verification that the company does not and will not engage in an economic boycott against fossil fuel, timber, mining, agriculture or firearms companies, companies that do not meet or commit to meet environmental standards or make DEI disclosures, or companies that do not facilitate or commit to facilitate access to abortion or sex or gender change treatments, during the term of the contract	Exception Does not apply to a contract relating to the issuance, incurrence or management of debt obligations or the deposit, management, borrowing or investment of funds Anti-boycott requirement may be waived in situations where the governmental entity determines it would significantly increase costs or limit the quality of options or services available, and a waiver would be in the best interest of the public

20 *See* our previous client memo for additional information.

21 *See* Governor Greg Abbott's Letter to President Biden stating that, "Texas will expand [its] anti-ESG efforts even further with legislation to ensure that insurance companies do not hinder companies from [its] energy sector to placate ESG advocates."

22 Applicable measures define "economic boycott" broadly, namely as "without an ordinary purpose" either "refusing to deal with," terminating business activities with, or otherwise taking any action intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company is in the fossil fuel industry, does business with such companies, or does not commit or pledge to meet environmental standards beyond applicable federal and state law. Applicable measures also define "discrimination" broadly, as "refusing to engage in the trade of any goods or services" with an entity or association, to refrain from continuing a business relationship with the entity or association, or to terminate an existing business relationship based solely on its status as a specific type of entity or trade association. As referenced above, following Kentucky's enactment of a law that requires the State Treasurer to maintain a list of financial firms that have engaged in energy company boycotts, the state AG launched an investigation of national banks "for alleged antitrust and consumer protection law violations related to ESG investment practices," focusing chiefly on their involvement with the United Nations' Net-Zero Banking Alliance.

Measure	Description	Exceptions / Notes
Arkansas HB 1307, in effect 8/1/23	Anti-Boycott – Listed Entities Creates ESG Oversight Committee Requires State Treasurer to maintain a list of financial services providers (determined by the ESG Oversight Committee) that discriminate against energy companies or firearms entities or otherwise refuse to deal with companies based on environmental, social justice, and other governance-related factors Prohibits public entities from investing cash funds with a listed financial services provider; requires State Treasurer and public entities to divest state assets from all direct or indirect holdings with a listed financial services provider	Exception An investment subject to divestment but locked into a maturity date such that an early divestment would result in a financial penalty and cause negative financial impact to the state is exempt from divestiture
Arkansas HB 1845, in effect 8/1/23	Anti-Boycott – Listed Entities Clarifying what information the ESG Oversight Committee may consider and rely on when determining whether or not to list a financial services provider for divestment purposes	
Arkansas SB 62, in effect 8/1/23	Contracting Prohibits public entities from entering into contracts for goods or services (value at $75K or more) absent written verification that the company does not and will not engage in boycotts of energy, fossil fuel, firearms and ammunition industries during the term of the contract	Exception Does not apply to companies that offer to provide goods or services for at least 20% less than the lowest certifying business
Idaho HB 190, in effect 7/1/23	Anti-Boycott Prohibits banks and credit unions designated as state depositories from boycotting companies/individuals engaged in the fossil fuel or firearms industries; requires state depositories to file affidavits with the state treasurer, including an anti-boycott certification; noncompliance is subject to revocation of the QPD designation	Exception Anti-boycott certification requirement does not apply to state depository designation if it would be inconsistent with the constitutional or statutory duties of the state treasurer or would negatively impact the business needs of the state
Idaho HB 191, in effect 7/1/23	Contracting Prohibits public procurement decisions from being based on ESG standards	
Kansas HB 2100, in effect 7/1/23	Contracting Prohibits state and state agencies from discriminating based on ESG factors in procurement decisions	
Kentucky SB 205, in effect 4/8/22	Anti-Boycott – Listed Entities Requires (i) State Treasurer to prepare and maintain a list of publicly-traded financial companies that have engaged in energy company boycotts and (ii) state governmental entities to divest from listed financial companies that do not cease energy company boycotts within established timeframes; applies to state governmental entities involved in state investment, deposits or transactions above a specified threshold Contracting Prohibits state governmental entities from entering into contracts for goods or services (value at $100K or more) with a company absent written verification that the company does not and will not engage in energy company boycotts during the term of the contract	Divestment Exception Allows a state governmental entity to cease divesting where reasonable evidence shows that it has suffered or will suffer a material financial loss Does not apply where the state governmental entity determines the requirements are inconsistent with the entity's fiduciary responsibility Not required to divest from any indirect holdings in actively or passively managed investment funds or private equity funds *Notes*: An initial list of financial companies was released on 1/3/23 Contracting Exception Does not apply if inconsistent with constitutional, statutory or fiduciary duties relating to the issuance, incurrence or management of debt obligations or the deposit, management, borrowing or investment of funds

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Measure	Description	Exceptions / Notes
Louisiana HCR 70, in effect 5/30/23	Anti-Boycott – Listed Entities Requires state, statewide retirement systems and the state treasurer to submit a report to the legislature that includes the names of (i) any investment management company, investment advisor, mutual fund, or other entity in contract with the state that uses ESG factors not directly related to risk-adjusted returns, and (ii) any entity under contract known to boycott energy companies	
Montana HB 356, in effect 10/1/23	Contracting Prohibits state governmental entities from entering into contracts for goods or services (value at $100K or more) with a company absent written verification that the company does not and will not engage in firearm entity/firearm trade association boycotts during the term of the contract	Exception Does not apply where the governmental entity contracts with a sole-source provider or does not receive bids from a company that is able to provide the required written verification
New Hampshire HB 1469, in effect 6/17/22	Anti-Discrimination Committee Establishes committee to study the need for anti-discrimination legislation in the state's financial services industry	
North Dakota SB 2291, in effect 3/24/21	ESG Report Requires state Department of Commerce study on ESG-related investment policies, state involvement with companies that consider ESG factors in their decisions, and the implications of total divestment from companies that boycott energy or commodities	
Oklahoma HB 2034, in effect 11/1/22	Anti-Boycott – Listed Entities Same as Kentucky SB 205 above; applies to all state retirement systems Contracting Same as Kentucky law above	On November 20, 2023, an Oklahoma pensioner filed a lawsuit to block enforcement of HB 2034 alleging HB 2034 is unconstitutional and violates the First Amendment Exception Essentially the same as Kentucky law above, though applies a clear and convincing as opposed to a reasonable evidence standard with respect to determining financial loss, and describes such loss as a loss in the value of assets under management as opposed to material financial loss An initial list of financial companies was released on 5/3/23 and updated on 8/15/23 Oklahoma Public Employee Retirement System, which holds over $10 billion in assets, voted to take the financial exemption to avoid divesting from a listed asset manager
Tennessee SB 2649, in effect 7/1/22	Contracting Prohibits State Treasurer from entering into contracts or amendments with a state depository for the state's primary cash management banking services where the entity has a policy prohibiting financing to fossil fuel companies	Exception Does not apply where the governmental entity determines the state depository's services are necessary for it to perform its functions and/or services may not be obtained elsewhere

Measure	Description	Exceptions / Notes
Texas SB 13, in effect 9/1/21	Anti-Boycott – Listed Entities Same as Kentucky and Oklahoma laws above; applies to multiple state retirement systems and the permanent school fund Contracting Same as Kentucky and Oklahoma laws above	Divestment Exception Same as Oklahoma law above *Notes*: An initial list of financial companies was released on 8/24/22, updated on 3/20/23, and most recently updated again on 11/1/23 The Comptroller published updated FAQ related to the methodology used in the creation and publication of the list in March The Texas Comptroller has sent a letter warning state pension funds and an entity that manages money for the public school systems to sever all relationships with listed companies A bill to repeal the law was filed, but failed to pass
Texas SB 19, in effect 9/1/21	Contracting Prohibits state governmental entities from entering into contracts for goods or services (value at $100K or more) with a company absent written verification that the company does not and will not discriminate against a firearms entity or trade association during the term of the contract	Exception Does not apply where the governmental entity contracts with a sole-source provider or does not receive bids from a company that is able to provide the required written verification Certain other contracts exempted
Texas SB 833, in effect 9/1/23	Anti-Discrimination - Scoring Prohibits state insurers from using an ESG model, score, factor or standard to charge a rate different than the rate charged to another business or risk in the same class for a similar hazard	Exception An insurer does not violate the statute if its actions are based on an ordinary insurance business purpose, including the use of sound actuarial principles, or financial solvency considerations reasonably related to the type of risk
Utah SB 97, in effect 5/3/23	Contracting Prohibits public entities from entering into contracts for goods or services (value at $100K or more) with a company absent written verification that the company does not and will not engage in, among others, an economic boycott against fossil fuel, timber, mining, agriculture or firearms companies, companies that do not meet or commit to meet environmental standards (including standards for eliminating, reducing, offsetting or disclosing GHG emissions, beyond applicable state and federal law requirements), or companies that do not facilitate or commit to facilitate access to abortion or sex characteristic surgical procedures, during the term of the contract	Exception Permits public entities to contract with restricted companies where there is no economically practicable alternative, or to comply with federal law
Utah HB 449, in effect 7/1/23	Anti-Boycott – Coordination Prohibits companies from coordinating to eliminate viable options for firearms companies to obtain a product or service	
Utah HB 281, in effect 5/2/23	Anti-Discrimination - Scoring Requires state consumer protection division to establish and operate a system to receive consumer reports regarding a company's or financial institution's use or creation of a social credit score, and to submit a report to the appropriate state agency regarding reports indicating that a company or financial institution has used a social credit score to discriminate against, advocate for or cause adverse or preferential treatment of a person	

Measure	Description	Exceptions / Notes
West Virginia SB 262, in effect 6/10/22	Anti-Boycott – Listed Entities Authorizes State Treasurer to prepare and maintain a list of financial companies that have engaged in energy company boycotts, to exclude listed companies from the selection process for state banking contracts, to refuse to enter into banking contracts with listed companies, and to require, as a term of banking contracts, an agreement by a financial institution not to engage in energy company boycotts for the duration of the contract	An initial list of financial companies was released on 7/28/22
Wyoming HB 0236, in effect 7/1/21	Anti-Discrimination Prohibits financial institutions from discriminating against firearms businesses or trade associations	Exception Does not apply where a financial institution opts not to provide services to firearms businesses for business or financial reasons or pursuant to a regulation or written company policy prohibiting discrimination against these entities

3. State Measures Promoting the Consideration of ESG Factors in Investment Strategies

As set out in the table below, five states have laws in force that require or promote the consideration of ESG factors by private and public entities. Some require the development of sustainable investment policies. Others require reporting on how ESG factors are integrated into investment decision-making, analysis, portfolio construction and ownership, or cover proxy voting. Several states and/or state pension funds (notably, the Texas Teacher Retirement System) have also introduced policy changes in this vein.

Measure	Description	Exceptions / Notes
Laws		
California, SB 54, in effect 1/1/24	Requires qualifying "venture capital companies" with ties to CA to annually survey and report specified information relating to the diversity of the founding team members of businesses in which the venture capital companies have invested[23]	Key questions include how broadly the definition of "venture capital company" will be applied
Colorado, SB 23-016, in effect 8/8/23	Requires public employees' retirement system to provide annual report on climate change risk assessments, anticipated impact on investment strategy, use of climate-related reporting and actions taken to manage climate risk Requires certain insurers to participate in a climate risk disclosure survey	
Illinois, PA 101-473, in effect 1/1/20	Requires state and local government entities managing public funds to develop, publish and implement policies outlining how they consider ESG factors in relation to their overarching goals of achieving sustainable returns Requires entities to prudently integrate sustainability factors into investment decision-making, investment analysis, portfolio construction, due diligence and investment ownership	Does not apply to financial institution time deposits or processing services

[23] Please see our client memo for additional information.

Measure	Description	Exceptions / Notes
Illinois, SB 2152, in effect 9/1/23	Requires state pension board to publish its guidelines for voting proxy ballots and a detailed report on its website describing how the board is considering sustainability factors as defined in the state's sustainable investing act (PA 101-473 above)	
Illinois, HB 1471, enacted 7/12/19	Identifies environmental and social considerations and governance policies among circumstances that a trustee managing a trust may consider in making investment decisions	
Illinois, SB 653, enacted 8/6/21	Requires State Treasurer to develop, publish and implement an investment policy covering the management of all state funds under its control	Policy must include material, relevant and decision-useful sustainability factors to be considered
Illinois, HB 2782, in effect 1/1/24	Requires public entity investment managers to disclose a description of any process through which they integrate sustainability factors into investment decision-making, analysis, portfolio construction, diligence and investment ownership in order to maximize risk-adjusted financial returns	
Maryland HB 740 / SB 566, in effect 6/1/22	Requires state retirement and pension board to consider climate risks in its investment policy and associated with its investment portfolio across certain sectors and asset classes, to identify investment opportunities in certain energy sectors, to develop a process to regularly assess certain impacts of climate risk, and to report annually on climate risk levels across the portfolio Requires fiduciaries to consider the potential systemic risks of the impact of climate change on the assets of several systems, including monitoring net-zero aligned investments and climate solutions to ensure a path to a long-term sustainable portfolio	
New Hampshire, SB 49, enacted 7/1/21	Allows trustees to engage in investing strategies that align with interested persons' social, environmental, or governance objectives or other values or beliefs, regardless of investment performance	
Resolutions / Policies / Statements		
Illinois State Treasurer Statement before the House Committee on Oversight and Accountability, 5/10/23	Describes ESG investing as necessary for responsible investing and critical for managing and mitigating risk	
New Mexico Permanent Funds Environmental, Social, and Governance Policy, approved by the New Mexico State Investment Council in August 2021	Establishes guidelines for the incorporation of ESG considerations into state investment office and council state investment management process	
Oregon Investment Council approval of an amendment to the state investment policy for Oregon Public Employees Retirement Fund, 9/9/20	Formally integrates ESG factors into fund management policy	

Measure	Description	Exceptions / Notes
Texas Teacher Retirement System ESG policy, in effect 9/16/21	Formally incorporates ESG statement into investment policy	

4. State Measures Prohibiting Public Investment in Certain Industries

Seven states have laws or policy initiatives that prohibit investment in ESG-disfavored industries. All target fossil fuel producers and firearms businesses.

Measure	Description	Exceptions / Notes
Laws		
California SB 185, in effect 4/8/15	Prohibits boards of the California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS) from making new investments in thermal coal companies Requires boards to divest investments in existing thermal coal companies by 7/1/17, to report to the state legislature by 1/1/18 on divestment activities, and in conjunction with the California Environmental Protection Agency to report on the feasibility of divesting from fossil fuel investments	
Maine HP 65 / LD 99, in effect 6/16/21	Prohibits State Treasurer from investing in any prime commercial paper or corporate bonds issued by a fossil fuel company Requires divestment of fossil fuel companies by state permanent funds held in trust by employees retirement system to divest from the fossil fuel industry by 1/1/26, and specifically identifies the 200 largest public fossil fuel companies as determined by carbon in their reserves Requires the public employees retirement system board to (i) post information detailing all holdings in the public market and private equity investments on a quarterly basis to the publicly accessible board website and (ii) annually report on its ESG investment policy, including a disclosure of commonly available environmental performance metrics on the environmental effects of the board's investments	Does not preclude *de minimis* exposure of funds
Resolutions / Policies / Statements		
California Public Employees' Retirement System ("CalPERS") initiatives	In November 2023, CalPERS announced its 2030 Sustainable Investment Strategy to accelerate the fund's goal of reaching net-zero by 2050. Commits $100B to climate solutions by 2030, commits to more selective investments in high-emitting sectors and commits to developing a process to exit certain securities for companies without credible net zero plans	
Connecticut State Treasurer's Responsible Gun Policy, adopted and in effect 12/3/19	Prohibits state retirement plans and trust funds investment in civilian firearm manufacturing companies Requests banks and financial institutions to disclose their gun policies to the Office of the Treasurer, and requires that office to consider such policies when contracting for financial services	Notes flexibility to invest in gun-safe technologies
Massachusetts PRIM Board proxy voting guidelines, in effect 3/1/22	Permits state pension funds to vote against directors at companies targeted by the Climate Action 100+, and vote on a case-by-case basis on directors at companies not included on the Climate Action 100+ action list, that have failed to align their business plans with the goals of limiting global warming to 1.5 degrees Celsius, as set forth in the Paris Climate Agreement, and/or that have failed to establish a plan to achieve net zero emissions by 2050	

Measure	Description	Exceptions / Notes
Nevada Treasurer Announcement, 6/3/22	Announced state divestment from businesses that sell or manufacture assault-style weapons	
New York State Teachers' Retirement System divestment, 12/28/21	Announced end to further investment in 20 oil and gas and thermal coal reserve holdings and divestment of $66 million of thermal coal holdings	
New York State Pension Fund sets 2040 Net Zero Carbon Emissions Target	New York State Common Fund adopted a goal to transition its portfolio to net zero emissions by 2040, including (i) a review of investments in energy sector companies, (ii) an assessment of transition readiness and climate-related investment risk and (iii) divestment of companies that fail to meet minimum standards	
New York City Teachers' Retirement System initiatives	2015 - divested from thermal coal 2017-2022 - conducted climate risk assessments and divested from fossil fuel reserve owners and increased investments in climate solutions 2021 - committed to reach net zero by 2040 2023 - announced four strategies whereby system will achieve net zero emissions by 2040: (1) disclose emissions and set interim targets; (2) engage portfolio companies and asset managers to be net zero-aligned; (3) invest in climate change solutions and (4) divest to reduce risk	In May 2023, four public employees, who are future pension beneficiaries, supported by an Oklahoma anti-union advocacy group, sued the New York City Teachers' Retirement System, Employees' Retirement System and Board of Education Retirement System for breaching their fiduciary duties in the process of divesting from fossil fuel companies. On August 7, 2023, the pension funds filed a motion to dismiss on the grounds that the decision will have no impact on the employees' retirement benefits, and the employees therefore lack standing
New York City Employees' Retirement System initiatives	2015 - divested from thermal coal 2017-2022 - conducted climate risk assessments and divested from fossil fuel reserve owners and increased investments in climate solutions 2021 - committed to reach net zero by 2040 2023 - announced four strategies whereby system will achieve net zero emissions by 2040: (1) disclose emissions and set interim targets; (2) engage portfolio companies and asset managers to be net zero-aligned; (3) invest in climate change solutions and (4) divest to reduce risk	See discussion of lawsuit above
New York City Board of Education Retirement System initiatives	Divested from fossil fuel reserve owners in 2021	See discussion of lawsuit above
Rhode Island State Pension Initiative, in effect 1/22/20	Requires state investment commission to divest the public pension fund from companies that manufacture assault-style weapons for civilian use or operate private for-profit prisons	

5. State Measures Requiring Corporations to Disclose GHG Emissions or Climate-related Risks to the State

Finally, lawmakers in California and other states[24] have introduced bills that would require corporations to track and disclose regularly the GHG emissions they generate through their business activities or issue climate-related risk disclosures. California Governor Gavin Newsom recently signed three bills into law that will require covered companies to disclose their Scope 1, 2 and 3 greenhouse gas ("GHG") emissions, their climate-related risk management processes, and/or details related to selling/purchasing of voluntary carbon offsets.

Senate Bill 253, the Climate Corporate Data Accountability Act ("SB 253"), requires an estimated 5,300 public and private in-scope companies to disclose the annual GHG emissions from across their operations and value chains in line with the Greenhouse Gas Protocol standards and related guidance. Senate Bill 261, the Climate-related Financial Risk Act ("SB 261"), applies to a larger number of public and private companies and mandates the filing of an annual climate-related financial risk report in accordance with the framework recommended by the Task Force for Climate-related Financial Disclosures ("TCFD").[25]

SB 253 and SB 261 have been compared to the SEC's proposed rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors ("SEC proposed rule") but contain important differences. Assembly Bill 1305 requires covered entities to disclose on their websites details relating to voluntary carbon offsets marketed, sold purchased, or used to support carbon reduction or net zero claims made within California.

For further discussion on these measures, please see our client memo.

Conclusion

As regulatory oversight of ESG tightens elsewhere in the world, the U.S. landscape is becoming increasingly fractured. States are moving in opposite directions, while ESG serves as a political fight at the federal level. This puts companies and investment managers in the difficult position of navigating business and politics while seeking to protect their interests and investments. Given the vast number and intricacy of these state measures, and the rapidity with which they are being introduced and implemented, companies are wise to monitor developments in this space closely, and to assess what steps may be prudent, given potential impacts associated with such measures. such measures.

Visit our ESG Practice Page to stay informed about developments in this area.

[24] *See e.g.* New York's Senate Bills, S 897, S 5437, S 7704 and S 7705, which like California SB 253 and SB 261, would require disclosures in line with the Greenhouse Gas Protocol and the Task Force on Climate-related Financial Disclosures. *See also* Minnesota's SF 2744 which went into effect on July 1, 2023 and requires banking institutions and credit unions with more than $1 billion in assets to complete a climate risk disclosure survey.

[25] Similarly, Minnesota passed a law, SB 2744, requiring banking institutions and credit unions with more than $1 billion in assets to complete a climate risk disclosure survey.

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