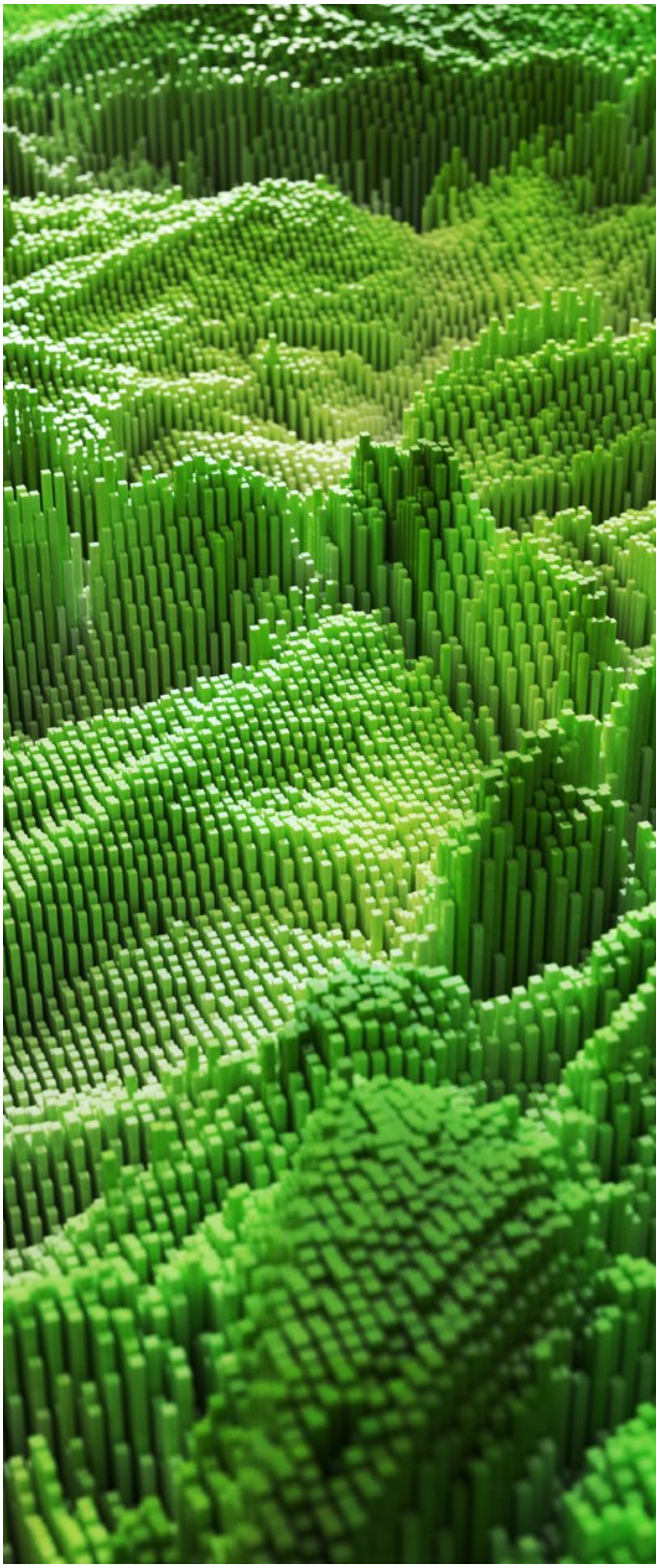
HUNTON

ESG Hot Topics

Winter 2025



Welcome to the winter issue of our ESG Hot Topics newsletter. We have collected articles from thought leaders from across the firm highlighting some of the emerging issues in sustainability and ESG. Should you have any questions about any of the topics discussed herein, please do not hesitate to contact any of the authors of this publication or your regular contact at Hunton.

Hunton's interdisciplinary sustainability and ESG practice provides strategic counseling to boards, management teams and investors on a broad range of ESG issues. We support our clients in setting and meeting their sustainability goals. As a component of this practice, and in coordination with sustainability strategy-setting, we help our clients identify and manage ESG risks associated with regulatory requirements and increasing pressure from investors and private litigants. Rather than advise on isolated legal issues, our team works with our clients on core business strategy and sustainability goals, and we collaborate across practice groups to provide integrated, strategic advice.

Update on Mandatory Sustainability Reporting Requirements

As of early 2025, the landscape of climate disclosure requirements in the United States is shifting. Unsurprisingly, the Trump administration has signaled its intent to rescind or substantially revise the controversial federal climate disclosure rule promulgated by the Securities and Exchange Commission (SEC or Commission) last year. Meanwhile, implementation of California's suite of climate disclosure laws is moving forward, and at least two other states are considering copy-cat legislation. As companies operating in the United States continue to prepare for compliance at the state level, they should consider these developments alongside potential changes to international and voluntary reporting standards and should work to implement corporate processes that ensure consistency and accuracy in reporting across all relevant frameworks.

SEC Climate Rule

In March 2024, the SEC narrowly adopted rules it stated would standardize climate-related disclosures by public companies and public offerings. The rules were promptly challenged by multiple stakeholders, on grounds that the SEC had exceeded its statutory authority, had acted arbitrarily and capriciously and without substantial evidence, and had failed to account for the vast costs of the rule. In response to motions by industry plaintiffs, the US Court of Appeals for the Fifth Circuit initially stayed the SEC's rules. The cases were eventually consolidated before the US Court of Appeals for the Eighth Circuit. Not long afterwards, on April 4, 2024, the SEC stayed implementation of the regulations pending judicial review of the legal challenges meaning that the prior Fifth Circuit judicial stay did not need to be relitigated before the Eighth Circuit.

On February 11, 2025, Acting SEC Chair Mark Uyeda issued a statement announcing that he had directed SEC staff to request that the court not schedule the case for oral argument in order to allow time for the Commission to determine next steps in light of certain changes. Specifically, Acting Chair Uyeda cited as changes (1) his views that "[t]he Rule is deeply flawed and could inflict significant harm on the capital markets and the economy" and was promulgated without statutory authority; (2) the recent change in the composition of the Commission; and (3) President Trump's recent memorandum regarding a regulatory freeze.

While next steps on the part of the Eighth Circuit and the SEC are yet to be seen, the SEC will likely seek to rescind or substantially revise the 2024 rule, potentially through a new notice-and-comment rulemaking process.

California Climate Disclosure Laws

Meanwhile, implementation of California's climate disclosure laws is moving forward. In October 2023, California Governor Gavin Newsom signed into law three different bills: (1) SB 253, requiring disclosure of greenhouse gas emissions for companies with at least a billion dollars in revenue that are doing business in California; (2) SB 261, requiring climate-related risk disclosures for companies with at least $500 million in revenue that are doing business in California; and (3) AB 1305, requiring annual substantiation of offset sales and purchases, as well as net zero and emission reduction claims, for companies operating and making claims in California. Unlike the SEC rule, all of these laws apply regardless of whether a company is public or privately held.

In September 2024, Governor Newsom signed into law a set of amendments to SB 253 that, among other things, delayed the rulemaking deadline set for the California Air Resources Board (CARB) until July 1, 2025. The amendments did not, however, delay compliance dates for covered entities. This means that covered entities must continue to plan for the first round of reporting on Scope 1 and Scope 2 emissions in 2026, with reference to FY2025 data, even though a host of questions remain about the scope and mechanics of required reporting. In recognition of this uncertainty, on December 5, 2024, CARB issued an Enforcement Notice indicating that it would not pursue enforcement against entities working in "good faith" toward compliance, and that, for the first reporting year, it would be sufficient to rely on data already in a reporting entity's possession as of the date of the notice. Not long after, CARB announced a public comment period to seek input from stakeholders on a range of implementation-related issues, including how CARB should define "doing business in California" for purposes of defining the universe of entities subject to compliance obligations under SB 253 and SB 261.

While the California statutes have been challenged by trade associations in court, the courts have not provided relief to date. On February 3, 2025, the US District Court for the Central District of California substantially narrowed an ongoing judicial challenge to SB 253 and SB 261 by the US Chamber of Commerce, California Chamber of Commerce, and other industry stakeholders. The court dismissed plaintiffs' claims that these laws violate the Supremacy Clause of the US Constitution and constitute extraterritorial regulation in violation of the Dormant Commerce Clause. The court has preserved, for now, a claim that these laws compel speech in violation of the First Amendment.

Pending Legislation in Other States

During the past several legislative sessions, New York has considered climate disclosure bills similar to California's SB 253 and SB 261. In January 2025, these bills were once again introduced in the New York Senate as S3456 (Climate Corporate Data Accountability Act) and S3697 (Report of Climate-Related Financial Risk). While similar to California's SB 253, New York's S3456 is more explicit on some points—for example, by specifying that the law's applicability be determined with reference to consolidated revenue, including revenues received by all of the business's subsidiaries.

Illinois, Washington and New Jersey legislatures also considered similar legislation in 2024 and may seek to introduce it in 2025.

Changes to International and Voluntary Frameworks

Companies that operate in the European Union (EU) have been preparing in earnest for compliance with the Corporate Sustainability Reporting Directive (CSRD) for well over a year. Nonetheless, the European Commission is considering omnibus legislation that would potentially reduce the scope of CSRD applicability and reporting, as well as make changes to other EU sustainability laws. On February 26, 2025, the European Commission released its initial Omnibus proposal, with fairly significant changes to the CSRD. Below are a few high-level changes proposed for the CSRD:

- The proposal would reduce the scope of reporting companies to companies with more than 1,000 employees (up from 250 employees) and either a turnover above €50 million or a balance sheet total above €25 million. This change will reportedly reduce the number of companies in scope by about 80 percent. Companies outside the scope would be allowed, but not required, to report voluntarily on the basis of a simplified voluntary standard to be adopted by the Commission.
- The proposal would reduce the scope of non-EU reporting companies to those that generated a net turnover within the EU of €450 million in the last two consecutive years (up from €150 million) and have either an EU subsidiary that meets the new standards above or an EU branch that

generates €50 million in turnover (up from €40 million).

- The proposal would postpone by two years (until 2028) the reporting requirements for companies currently in the scope of CSRD and which are required to report as of 2026 or 2027.
- The proposal would reopen the first set of European Sustainability Reporting Standards (ESRS) to revise and simplify the existing standards.
- The proposal would remove the Commission's ability to adopt sector-specific ESRS.
- The proposal would remove the Commission's ability to propose moving from a limited assurance requirement to a reasonable assurance requirement.
- Despite rumors that the Commission could remove the double materiality standard to focus on single (financial) materiality, the proposal does not alter the existing double materiality standard.

These changes could be relevant not only to companies with direct reporting obligations under these laws, but also to companies that report under voluntary standards, such as CDP, which have sought to align with the CSRD.

What's Next?

Companies doing business in the United States should continue to monitor this shifting landscape at the US state and international levels. As changes occur, it will be critical to reevaluate data collection and reporting processes to ensure consistency and compliance with all relevant frameworks. The Hunton team is closely following these developments and assisting clients with maintaining and updating compliance plans.

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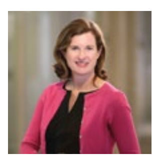

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ESG and Antitrust

ESG principles have gained considerable traction in the business world. In some cases, ESG may raise antitrust questions when it involves coordinated actions by companies to promote shared ESG goals. Recently, opponents of ESG have attempted to use antitrust law as a basis to discredit and promote the investigation of such policies. Political shifts and the potential influence of a Trump presidency could significantly alter the regulatory environment surrounding both antitrust enforcement and ESG practices.

Antitrust Issues with ESG Policies

Antitrust law is designed to promote competition and prevent anti-competitive behavior, such as price-fixing, monopolies, and other unfair practices that limit market choice. ESG policies, on the other hand, are aimed at aligning corporate behavior with broader social and environmental goals. These policies often involve initiatives like reducing carbon footprints, ensuring diversity in the workforce, and promoting corporate transparency. ESG objectives might seem entirely separate from antitrust concerns. However, when companies collaborate or align their ESG efforts, antitrust law is potentially implicated.

Several key issues arise in this context:

1. Collusion and Price-Fixing

ESG policies could indirectly encourage collusion among companies, especially in industries where sustainability is a significant factor in production or pricing. For example, if multiple companies agree to set higher prices for goods that are produced sustainably, it could be seen as price-fixing or market manipulation. Although these agreements may be framed as part of an effort to achieve sustainability, antitrust regulators could view such actions as potentially restricting competition or harming consumers.

2. Market Division or Boycotts

Another potential antitrust issue is the creation of ESG-driven market divisions or the exclusion of certain businesses from key markets. If companies in an industry agree not to purchase from or work with companies that do not adhere to certain ESG standards, it could effectively divide the market along lines of compliance. For example, a group of companies could agree to exclude non-compliant suppliers from the supply chain, which could harm smaller players without resources to meet strict ESG requirements.

3. Mergers and Acquisitions

M&A activity involving ESG-compliant firms could also raise antitrust concerns. If a merger leads to the consolidation of companies that collectively hold significant power over an ESG-driven market, the combined entity could suppress competition or exclude rivals. For instance, when ESG constitutes an important aspect of a firm's competitive standing, regulators may scrutinize whether the merger eliminates substantial competition between the firms or increases the risk of coordination in the industry.

4. Collective Action and Information Sharing

Many companies adopt ESG goals collectively, sometimes through trade associations or industry groups. These collective actions are important to motivating firms to adopt ESG because no one firm wants to be disadvantaged. Collective agreement by a group of firms to adopt ESG standards could be interpreted as anti-competitive behavior. Moreover, when ESG practices are competitively sensitive in the market, exchanging information among firms could raise additional risk.

Political Impact on ESG and Antitrust Policy

The regulatory environment around both antitrust law and ESG practices is deeply influenced by the political climate and the ideology of the Presidential administration. Under the first Trump administration, the Department of Justice Antitrust Division investigated whether automakers illegally coordinated with one another when agreeing to limit auto emissions in California. More recently, Republican attacks on ESG initiatives have occurred on multiple fronts. In September 2023, Republican state attorneys general from 22 states sent a letter to the signatories of the Net Zero Financial Services Provider Alliance, alleging the coalition's goal of net-zero emissions could represent antitrust and consumer protection law violations. In June 2024, a report by the House Judiciary Committee detailed an alleged cartel of left-wing activists and major financial institutions that had colluded to impose initiatives including decarbonization and net-zero emissions. In November 2024, Republican state attorneys general representing 11 states filed a lawsuit against three asset managers, alleging that these companies colluded to reduce coal output through their holdings in coal companies, reducing the supply of electricity and raising electricity prices for consumers. This political pressure, and the advent of the second Trump administration, seemingly influenced several major banks to recently exit the Net-Zero Banking Alliance backed by the United Nations.

President Trump's first round of executive orders in January 2025 included sweeping changes to sustainability and diversity commitments and efforts by the government. In addition, President Trump directed the heads of agencies, in cooperation with the attorney general, to submit a report with recommendations to encourage the private sector to end illegal discrimination and preferences, including DEI. Expansion into the private sector of the administration's objectives to eliminate ESG practices could implicate antitrust law as a potential tool for investigation and enforcement. Although the second Trump administration is generally expected to prioritize deregulation, including antitrust enforcement, it is possible that selective enforcement could result in ESG initiatives facing greater scrutiny as potential antitrust violations. Notably, this is in contrast to the European Union where competition authorities appear to want to provide guidance to companies on how they can pursue ESG goals without raising antitrust risk.

The implications of these shifts are complex and difficult to predict. Keeping antitrust considerations in mind when developing ESG goals is an important measure to ensure ESG practices do not raise undue antitrust risk.


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Partner


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SEC Developments of Note

The change in presidential administrations means a changing of the guard at the US Securities and Exchange Commission (SEC). With the recent resignations of two Democratic commissioners, Republicans now hold a 2-1 majority. President Trump has nominated Paul S. Atkins, a former SEC commissioner, as chairman of the agency, and he is currently working through the Senate confirmation process. We anticipate a shift in SEC policy on a number of key areas, including ESG.

Climate Reporting Rule

In March 2024, the SEC adopted a far-reaching set of climate disclosure rules for public companies. The rulemaking amended Regulation S-K to require disclosure of Scope 1 and Scope 2 greenhouse gas emissions, as well as a range of issues related to climate targets, goals, risks and governance. The rules also took the unusual step of overriding Generally Accepted Accounting Principles (GAAP) through amendments to Regulation S-X that require disclosure of various climate metrics in the financial statements.

A series of petitioners brought judicial challenges around the country to the SEC's climate rules, and the cases were consolidated before the federal Eighth Circuit Court of Appeals. The SEC voluntarily stayed compliance with the rules while the litigation remains pending.

The ascendant SEC majority does not support the current climate rule. The two sitting Republican commissioners each dissented when the SEC adopted the rules, and they have called for the SEC to return to traditional notions of financial materiality when undertaking future rulemaking. Acting SEC Chair, Mark T. Uyeda, released a statement on February 11, 2025 reiterating his position that the rule is "deeply flawed and could inflict significant harm on the capital markets and our economy." Paul Atkins has in the past also been skeptical of the SEC's efforts in the climate area.

The case challenging the climate rule is now fully briefed, but the Eighth Circuit has not yet scheduled oral argument. In his recent statement, Acting SEC Chair Uyeda announced that he had directed the SEC staff to notify the Eighth Circuit of recent changed circumstances (i.e., recent change in the composition of the SEC and President Trump's recent memorandum regarding a regulatory freeze) and to request that the Court hold off on scheduling oral argument to provide time for the SEC to deliberate and determinate the appropriate next steps in these cases. The SEC could abandon defense of the rule, but a group of Democratic state attorneys general has intervened in the case and would likely seek to continue to defend the current rule.

Because of the uncertainty surrounding the ultimate outcome of the litigation process, the SEC is instead likely to commence a process to repeal the rule through notice-and-comment rulemaking. Prior judicial precedent makes clear that an agency may repeal a rule in this manner, and lays out the procedure to do so. Thus, the SEC has a clear roadmap to proceed.

A repeal of the SEC's climate rule does not mean that US public companies are off the hook from reporting on greenhouse gas emissions and related topics. California has adopted several climate reporting statutes (also subject to judicial challenge) for larger companies, and the California Air Resources Board has begun a process to write rules implementing the statutory mandate. The European Union has also adopted a series of climate and ESG reporting directives with extraterritorial effect, and many US multinationals doing business in Europe are subject to those directives. Many companies elect to comply with voluntary climate reporting standards as well, which are likewise unaffected by any future SEC action.

Rule 14a-8 Staff Guidance

On February 12, 2025, the staff of the Division of Corporation Finance released Staff Legal Bulletin No. 14M (SLB 14M), which addresses various aspects of the Rule 14a-8 shareholder proposal process. Most notably, SLB 14M rescinds Staff Legal Bulletin No. 14L (SLB 14L), issued in 2021, which had imposed a higher burden on public companies seeking to exclude shareholder proposals, particularly those related to environmental and social matters. Additionally, SLB 14M reinstates guidance that was previously rescinded by SLB 14L. The new guidance highlights a significant shift in the SEC's approach to shareholder proposals and shareholder engagement under the Trump administration. Companies may once again more easily exclude shareholder proposals on the grounds of "ordinary business" especially for those proposals raising issues of social or ethical significance.

ESG Enforcement

The change in SEC leadership will also lead to a potential shift in SEC enforcement priorities. Under the prior administration, the SEC brought several greenwashing enforcement cases, and the two incumbent Republican commissioners were also skeptical of those efforts, frequently dissenting. They were especially critical of greenwashing cases that focused on alleged failures in corporate controls or other technical violations of the law without clear fraud. Over the next four years, we expect the SEC to bring fewer greenwashing cases unless there is clear evidence of material misstatements or omissions to investors.

Future Rulemaking

Over the next four years we expect the SEC to also change direction on rulemaking. It is doubtful whether many items on the SEC's Fall 2024 rule list under the Regulatory Flexibility Act involving ESG topics will see further action. For example, the rule list includes placeholders for proposals on topics such as "Corporate Board Diversity," "Human Capital Management Disclosure," and "Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices," and we do not expect the SEC to take further action on these matters. Instead, we expect the SEC to focus its rulemaking resources on other topics, including capital raising, reform of the shareholder proposal process under SEC Rule 14a-8, cryptocurrency, and matters related to capital market structure.

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Partner

Navigating the Challenges of Missed Climate and Sustainability Targets

In recent years, many companies have made ambitious commitments and set goals to address environmental and social issues. This year will be an important year in monitoring these goals, as 2025 marks either a deadline or the halfway point for many companies' voluntarily adopted climate and other ESG targets. Reports indicate that many large companies are encountering challenges with meeting their climate and sustainability goals and targets.

Adjusting Climate and Sustainability Commitments

As a result of setbacks, an increasing number of companies are scaling back or adjusting their climate and sustainability commitments and timelines. These rollbacks can be explained by a variety of factors, both within and beyond the companies' control. Recently, several large corporations have publicly announced that their performance has fallen short of their climate goals. For example, one company disclosed that external factors beyond its control prevented them from meeting their targets and it will continue working toward those goals. Another company rolled back its commitments after acknowledging it would not meet its net-zero emissions pledge, clarifying that the target had always been aspirational rather than an absolute promise.

A company may miss its climate goals due to various factors. These could include, among others, the lack of clear plans and strategies, complex supply chains, financial pressures to prioritize short-term profits, uncertainty surrounding regulations, technology availability, expanding operations, difficulties in measuring emissions accurately, a reaction to political backlash against ESG initiatives, or many companies may have underestimated the scale and complexity of the goals they initially set and are having trouble handling them.

There is also a divide in how companies approach the issue of missing climate goals. Some have opted for transparency, openly acknowledging missed targets, while others have stopped discussing their climate goals altogether.

Key Considerations

While backtracking on climate and sustainability commitments may be seen as a setback, it can also be viewed as a positive sign, indicating that companies are taking a closer look at their goals and the necessary actions to achieve them. For companies concerned about meeting certain targets, there are several key considerations to keep in mind.

First, companies may consider adopting more disclosures, particularly in ESG or sustainability reports and when addressing risk factors related to the specific targets. It is important for companies to evaluate the current status of their climate goals and carefully weigh the risks and benefits of acknowledging setbacks. Companies that do disclose climate-related goals should consider using more aspirational language to emphasize that these goals are targets, not guarantees. Given the evolving nature of climate goals and the numerous factors that influence them, companies should be mindful in how they communicate their climate-related efforts.

If a company does choose to disclose or announce any changes to its goals, it is also important to think about how and when to disclose this information. Some companies have already disclosed modifications to their climate or sustainability goals, with a variety of approaches, such as disclosing the challenges faced in meeting the current goals, the process of re-evaluating goals, the development of new goals to replace the existing ones, and the process of scaling back original goals.

Second, companies should reconsider the feasibility of their current targets. Issues may arise when ambitious goals lack a clear strategy or when no meaningful actions have been taken. In some cases, companies may find it necessary to adjust their targets based on a more realistic assessment of what can be achieved. If a target no longer appears achievable, companies may consider amending or retracting it to reflect a more practical approach.

In conclusion, while some companies may fall short of their climate and sustainability goals, the process of reevaluating and adjusting these targets can be ongoing. Companies should thoughtfully evaluate their goals and adopt meaningful strategies moving forward.

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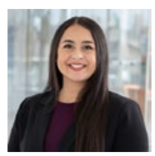

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The Whirlwind of DEI Headwinds: What Companies Need to Know

On January 20, 2025, Donald J. Trump was sworn in as the 47th President of the United States. Fulfilling one of his major campaign promises, he issued a series of executive orders on his first two days in office. Two of these orders represent a significant shift regarding gender and diversity, equity, and inclusion (DEI) initiatives.

One order declares that the federal government only recognizes two immutable sexes: male and female. Executive Order 14168, entitled, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," rejects gender identity as a basis for policy decisions and emphasizes that sex is a fixed biological characteristic. It directs federal agencies to use clear, sex-based language in all official documents and communications, and seeks to ensure that facilities and programs meant for one sex are not accessed based on gender identity. Specifically, the Order requires government-issued identification documents, including passports, visas, and Global Entry cards, to reflect the holder's sex assigned at birth. The Order also calls for revisions to policies concerning women's spaces, healthcare, and legal protections.

Another order, Executive Order 14151 entitled, "Ending Radical and Wasteful Government DEI Programs and Preferencing," aims to end allegedly discriminatory DEI initiatives implemented by the Biden administration. In this Order, federal agencies are mandated to terminate these initiatives, including terminating DEI-related positions, training, and programs, under whatever name they appear (including in relation to "environmental justice"). Federal agencies are directed to revise employment practices to focus solely on merit, performance, and skills, without considering DEI factors. The stated aim of this Order is to ensure equal treatment for all Americans, reducing federal spending on "wasteful" and "discriminatory" policies.

President Trump also issued an order that reverses several executive orders from the Biden administration. Executive Order 14148 focuses particularly on issues of DEI, border control, and climate-related regulations. The Order asserts that these policies from the Biden administration created divisiveness, inflated costs, and strained public resources. Among the revoked orders are:

- Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government;

- Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation;
- Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government; and
- Executive Order 14069, Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency.

Additionally, this Order creates a broad review process, wherein the Domestic Policy Council and National Economic Council have been tasked with reviewing federal actions from the Biden administration to determine which additional policies should be rescinded or amended to "increase American prosperity."

On January 21, 2025, President Trump issued Executive Order 14173 entitled, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," addressing the suspension of DEI staff in government positions and also revoking a number of prior executive orders, including Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity).

The primary intent of this Order is to eliminate what it describes as "illegal preferences" based on race, sex, or other identity categories. It stresses the importance of civil rights laws that protect against discrimination as well as the importance of merit-based hiring practices. The Order directs federal agencies to end policies or programs that prioritize DEI in hiring or contracting, as well as in other activities, and encourages the private sector to align with this approach. As written, the Order appears to set the stage for potential enforcement actions against federal contractors initiated by private parties through the *qui tam* provisions of the False Claims Act (FCA).

Specifically, the Order requires the head of each federal government agency to include in each of its contracts and grant awards "[a] term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code." §3(a)(iv) (emphasis added). It also requires "[a] term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." *Id*. (emphasis added). The referenced legislative provision—USC Title 31, section 3729(b)(4)—is the definition of "material" in the FCA. The Order does not appear directly to impact federal contractors operating under existing contractual arrangements. Furthermore, the Order specifies that "[f]ederal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025" for 90 days from the date of the Order—i.e., until April 21, 2025.

For those unfamiliar, the FCA imposes liability on individuals and entities who knowingly present to the government a false or fraudulent claim for payment or approval or who knowingly make or use a false record or false statement material to a false or fraudulent claim.[1] FCA liability also may attach where a person knowingly makes or uses a false record or statement material to an obligation to pay or transmit money to the government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.[2]

A unique aspect of the FCA is its *qui tam* provision[3] allowing private citizens (relators) to file lawsuits on behalf of the government against alleged offenders. Under current law, suits filed by relators may be prosecuted by the government through intervention or, where intervention is declined following an investigation by the Attorney General[4], by relators themselves. Recoveries under the FCA may include treble damages, civil money penalties, and attorneys' fees and costs, which is a powerful incentive for potential whistleblowers. Over the last decade, the U.S. Department of Justice has recovered more than $25 billion under the FCA.[5]

Of additional import, this Order directs the Attorney General, in consultation and coordination with agency heads, to submit a report "containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI." §4(b). Such report is to include a "strategic enforcement plan" that, among other things, identifies "[l]itigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest."

In compliance with this Order, on February 5, 2025, Attorney General Pam Bondi issued a series of memos to various divisions of the Department of Justice (DOJ). One memo

1 See 31 U.S.C. §3729(a)(1)(A)-(B).
2 *See* 31 U.S.C. §3729(a)(1)(G). Such violations are sometimes referred to as "reverse false claims."
3 *See* 31 U.S.C. §3730(b).
4 *See* 31 U.S.C. §3730(a) which requires the Attorney General to investigate FCA violations.
5 In certain industries (e.g., healthcare), the potential for recovery of treble damages plus per claim penalties under the FCA has led to multi-million dollar settlements.

asserted that the DOJ will take action to enforce President Trump's efforts to eliminate illegal DEI initiatives.

This memo, titled "Ending Illegal DEI and DEIA Discrimination and Preferences," tasks DOJ's Civil Rights Division with investigating, eliminating, and penalizing illegal DEI "preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds." By March 1, 2025, the Civil Rights Division and the Office of Legal Policy were to submit a report containing recommendations to "encourage the private sector to end illegal discrimination and preferences" related to DEI. That report is also supposed to identify the most "egregious and discriminatory DEI and DEIA practitioners in each sector of concern." One big takeaway from this memo is the implication that some private companies may face potential criminal penalties for DEI initiatives deemed to be illegal.

Bondi also directs the DOJ to work with the Department of Education to eliminate DEI programs at universities, based on the Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

Notably, the memo itself does not purport to prohibit educational, cultural, or historical observances that "celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination." Examples of these types of observances include Black History Month and International Holocaust Remembrance Day.

While there have been several Orders flowing from the new administration, there have also been a number of legal challenges. With the increased risk exposure and target on "illegal DEI," companies should stay informed about the evolving landscape and carefully review their employment policies and initiatives with outside counsel to assess risk and ensure compliance with employers' nondiscrimination obligations.

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Is Plastics the Next Big Thing?

2024 marked a significant increase in legal risk related to plastics. Major changes in both the regulatory and litigation landscapes are affecting companies up and down the supply chain, including retail companies that sell products contained in plastic packaging, product manufacturers and brand-owners, suppliers of plastic resins, and manufacturers of packaging products. Since most of these changes are happening at the state level, they are likely to continue intensifying in 2025, notwithstanding the change in federal administration.

Regulatory Landscape

Plastics are primarily being regulated under state extended producer responsibility (EPR) programs targeting single-use packaging. Since 2021, five states have passed EPR programs, and more are considering similar legislation. These programs target "producers," typically defined as the manufacturer or brand owner for packaged products sold in the relevant state. Producers are generally required to join a Producer Responsibility Organization (PRO), which is responsible for collecting data regarding the volume of single-use packaging being sold into the state, charging producer fees based on their contribution, and using the funds to improve recycling infrastructure across the state.

Circular Action Alliance (CAA) has now been selected as the PRO in Oregon, Colorado, California, and Minnesota, and rulemaking processes are at various stages across the states. Implementation is moving forward most quickly in Oregon, where producers are required to pre-register with the PRO and submit data on covered products sold into the state by March 31, 2025. The third and final draft of CAA's implementation plan, was approved by the Oregon Department of Environmental Quality in February, sets forth a base fee schedule encompassing 60 material categories. Importantly, CAA's fee-setting methodology allocates estimated material management costs to each category based on supply quantities, revenue benefit, and recycling rates, such that producers of materials recycled at high rates pay a lower share of overall program costs. In addition, CAA will offer fee adjustments to producers that make changes to the way in which they produce, use, and market covered products, leading to lower fees for covered products with a lower environmental impact.

Litigation Landscape

At the same time that retailers and other companies across the supply chain are facing expanding regulatory pressures and changing market dynamics, the litigation landscape is also in flux. 2024 saw a significant increase in filings, with approximately 30 plastics-related lawsuits pending as of December 1. With respect to litigation involving allegations of environmental pollution, state attorneys general (including California Attorney General Rob Bonta and New York Attorney General Letitia James) and municipalities are leading the charge, with various NGOs asserting similar claims. These lawsuits have primarily targeted producers and manufacturers of plastics, as well as companies that manufacture single-use consumer products sold in plastic packaging, alleging that these companies have deceived the public over the recyclability of plastics. They further allege that this deception led to inflated sales and corresponding environmental harms, pollution, and natural resource impacts. Following similar playbooks to those deployed in climate change and PFAS litigation, causes of action have centered on broad theories of public nuisance, negligence, and trespass, as well as violations of state consumer protection and environmental laws. Relatedly, in Fall 2024, Connecticut Attorney General William Tong, in partnership with NYU Law's State Energy and Environmental Impact Center, co-hosted a national forum on "plastics pollution," which he called a "crisis" and "a growing threat to human health and our environment."[6] Forum attendees included over twenty state attorney general offices (and several attorneys general) and more than a hundred academics, NGOs, and industry representatives. Increased plastics lawsuit filings by municipalities may likewise cause state attorneys general to more closely examine their role.

Throughout 2024, we also observed notable momentum in the consumer class action space. Plaintiffs in these cases have targeted a variety of consumer products, alleging that certain recyclability representations on the products were untrue, that the alleged presence of microplastics in products rendered "pure," "natural," "BPA-free," or similar claims untrue, or that other plastics-related "greenwashing" was misleading or deceptive. To date, these lawsuits are still largely in the pleadings stage. Of motions to dismiss that have been decided, Defendants have seen mixed success, with some securing early dismissal and others moving into discovery. The overall trajectory of these claims is likely to be more clearly revealed as the litigation progresses in 2025.

Opportunities to Manage Risk

All of these dynamics have substantial potential to affect producers, retailers, and markets for plastic products. Companies that sell products covered under state EPR programs must gain a detailed understanding of those programs in order to make strategic business decisions about product development and collect the data necessary to demonstrate improvement to the PRO. Packaging suppliers will in turn need to be responsive to changing demand so that they can position themselves to fulfill their clients' needs. And material suppliers, such as manufacturers of plastic resins, must identify and focus on supplying the types of materials that can help with downstream compliance. Notably, at the direction of the governor, California recently scrapped its draft rules, which would have made it difficult for "chemical recycling" methods to qualify under the program.

Additionally, given the increasing focus on plastics by state attorneys general and municipal plaintiffs, retailers may have opportunities for proactive messaging and engagement with government and other stakeholders as part of a broader risk management strategy.

Finally, litigation preparedness is key. Retail and other companies affected by these issues should be tracking litigation trends and assessing company-specific risk and mitigation opportunities. Aggressive defense grounded in sound science will be critical for managing the reach of this tort litigation wave.

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6 https://portal.ct.gov/ag/press-releases/2024-press-releases/attorney-general-tong-to-convene-national-forum-on-plastics

Texas Federal Court Finds ESG Aspects of American Airlines' Retirement Plans Breached ERISA Duty of Loyalty

We wrote in our Spring 2024 newsletter about litigation against American Airlines (American) relating to alleged ESG investing in its retirement plans. The Plaintiff, an American Airlines pilot, alleged that American and its Employee Benefits Committee tasked with overseeing the investment of its retirement plans (collectively referred to as the "Defendants") violated ERISA's duties of prudence and loyalty[7] by including in his retirement plan funds managed by a manager that pursued ESG goals, allegedly to the detriment of Plaintiff's investments.

As discussed in our article, the Texas federal court hearing the case denied the Defendants' motion to dismiss, and the case proceeded to discovery. The court thereafter held a four-day bench trial, and recently issued a decision finding that the Defendants had violated ERISA's duty of loyalty, but not its duty of prudence. The ruling is notable because, as discussed below, the Defendants were found to have violated ERISA, even though none of the investments at issue were pursuing ESG goals.

The Court's Ruling

No Breach of Duty of Prudence

The court first considered the duty of prudence claim. The prudence standard is "inherently comparative" and considers "prevailing fiduciary practice and standards."[8] The court found that the Defendant's investment monitoring practices, which included regular quarterly performance review meetings and engagement of outside experts to review and monitor the plan's investment options and managers, was consistent with normal fiduciary practices.[9] The court though clearly felt constrained by controlling authority regarding the comparative nature of the prudence standard and, in a preview of its finding on the loyalty claim, noted that it was "within the province of the legislature to change ERISA's legal landscape to avoid future unconscionable results like those here."[10]

7 Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.
8 Findings of Fact & Conclusions of Law, *Spence v. Am. Airlines, Inc.* (N.D. Tex. Jan. 10, 2025) (4:23-cv-00552-O), at 46.
9 *Id.* at 46-54.
10 *Id.* at 54.

Breach of the Duty of Loyalty

The crux of Plaintiff's claim was that the combination of American's corporate ESG goals and its investment manager's support of ESG goals in managing investments resulted in administration of American's retirement plans impermissibly pursuing collateral goals rather than focusing solely on pecuniary interests. American, according to the Court, "proudly expressed a corporate commitment to ESG goals—specifically climate change initiatives."[11] Those goals were echoed by the investment manager, whose "activism" included public statements in support of ESG goals, support of ESG proposals at major energy companies, and implementation of proxy voting guidelines to favor ESG proposals.[12]

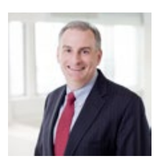
The confluence of these goals led to "cross-pollination" of American's corporate goals and fiduciary obligations. The alleged outsize influence the investment manager had on American seemingly had a significant effect on the Court's findings. The investment manager was one of American's shareholders and also financed $400 million of American's corporate debt.[13] The employee responsible for day-to-day fiduciary oversight of the investment managers for the retirement plans was the same person managing the corporation financial relationship with the investment manager.[14] This led to what the Court referred to as an "incestuous" relationship between American and the investment manager, resulting in American breaching its loyalty duty either "because of the shared belief that ESG is a noble pursuit or because of the 'circular' relationship with a large shareholder."[15] Taken together, "Defendants' undeniable corporate commitment to ESG *plus* the endorsement of ESG goals by those responsible for overseeing the Plan *plus* the influence of and conflicts of interests with [investment manager] *plus* the lack of separation between the corporate and fiduciary roles [] reveals Defendants' disloyalty."[16]

11 *Id.* at 58.
12 *Id.* at 28-34.
13 *Id.* at 57.
14 *Id.* at 59
15 *Id.* at 66.
16 *Id.* at 68 (italics original).

Takeaways

American has not yet indicated whether it will appeal the Court's decision, which may depend to a large extent on the amount of any damages award. The parties were directed to file supplemental briefing on that issue. But regardless of whether the decision is appealed, it bears repeating that the plan fiduciaries had not offered plan investment options with stated ESG goals. Hence, this was not a case where the Defendants offered a fund with an ESG goal (e.g., decarbonization) that lagged the performance of other funds and caused losses to the retirement plan participants. The Defendants instead were found to have violated ERISA's duty of loyalty by not acting solely in the best interests of the retirement plans and beneficiaries. Exactly how that disloyalty resulted in losses, and the amount of those losses, will be determined by the judge after further briefing by the parties. An expert for Plaintiff testified at trial that the short-term losses to the class were over $15 million. The point though is that ESG goals were scrutinized, even though no ESG-focused funds were part of the investments at issue. The fact that a company does not have investments with ESG goals in its retirement plans thus does not mean that it has no risk when it comes to ERISA's duty of loyalty.

The case highlights the importance of maintaining separation between a company's own programs and goals, on the one hand, and its fiduciary duties under ERISA on the other. A company may continue to have its own corporate policies on ESG, but should proceed with caution to ensure that its corporate goals do not influence how it exercises its fiduciary duties. Those duties under ERISA require fiduciaries to act solely in the best financial interests of retirement plan funds and the fund beneficiaries, regardless of a company's own goals and how worthy it believes them to be.



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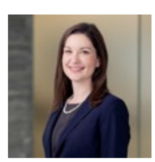

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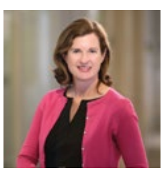

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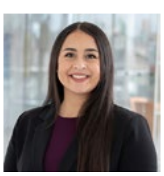

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