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Editor's Note: ESG

Victoria Prussen Spears

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Randy Benjenk and Emily Hooker

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Editor's Note: ESG Victoria Prussen Spears	237
The Continued Evolution of the Anti-ESG Landscape for Financial Institutions Randy Benjenk and Emily Hooker	240
Fintech Corporations: Defining the Practice and Regulation of Innovative Financial Enterprises – Part II Lerong Lu	259
It's Not Your Fault, But It May Be Your Problem: Increasing Regulatory Scrutiny on Vendor Cybersecurity Risks Kayleigh S. Shuler	270
Looking Ahead to the Federal Trade Commission's Implementation of the Data Breach Notification Rule for Nonbanking Financial Institutions Alexander D. Boyd and Colin H. Black	273
U.S. Office of the Comptroller of the Currency Begins to Revamp Bank Merger Review Process Michael D. Lewis and Matthew S. Katz	277
The Benefits of Term Debt Tranches in Fund Finance Products, and What to Consider When Utilizing Term Debt Kiel A. Bowen, Mark C. Dempsey and Andrew L. Hogan	282
New York Department of Financial Services Adopts Final Guidance on Assessment of Character and Fitness of Directors, Senior Officers and Managers Jarryd E. Anderson, Jessica S. Carey and Roberto J. Gonzalez	286
Declined: Consumer Financial Protection Bureau Proposes Rule to Limit Nonsufficient Funds Fees Andrew E. Bigart, Max Bonici, Michael M. Aphibal, David A. McGee and Brandon Wong	293

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The Continued Evolution of the Anti-ESG Landscape for Financial Institutions

*By Randy Benjenk and Emily Hooker**

In this article, the authors offer insights as to what financial institutions can expect from the growing “anti-ESG” legal movement across the United States during the balance of this year and beyond.

In the past several years, financial institutions have found themselves navigating an increasingly complicated and politically polarized landscape of laws and regulations centered around environmental, social, and governance (ESG) issues. These laws and regulations are pushing and pulling financial institutions in different directions on ESG issues, forcing them to take steps to ensure that their approaches to ESG do not inadvertently expose them to legal liability or reputational harm. This article offers insights as to what financial institutions can expect from the growing “anti-ESG” legal movement across the United States during the balance of this year and beyond.

BACKGROUND TO THE ANTI-ESG LEGAL MOVEMENT

For financial institutions, ESG is often associated with financial products like funds¹ or bonds² that meet certain criteria, as well as policies and initiatives around sustainability, racial equity, and corporate governance and corporate reports covering such policies and initiatives.³ ESG products, policies, and initiatives are often responsive to stakeholder interests and demands. They also can serve as important components of financial institutions’ risk management frameworks.

However, financial institutions’ ESG initiatives and policies have increasingly been caught in the cross-hairs of well-organized efforts by conservative state attorneys generals, state financial officers, and non-governmental organizations

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¹ See NerdWallet, *7 Best-Performing ESG Funds and 7 Cheapest ESG ETFs for March 2024* (Mar. 1, 2024), at <https://www.nerdwallet.com/article/investing/best-esg-funds>.

² See AB: ESG-Labeled Bonds: Are Greeniums Doomed To Dwindle? (Aug. 15, 2023), at <https://finance.yahoo.com/news/ab-esg-labeled-bonds-greeniums-121500209.html>.

³ See, e.g. JPMorgan Chase & Co. *2022 Environmental Social Governance Report*, at <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/documents/jpmc-esg-report-2022.pdf>; Citi *2022 Environmental, Social, and Governance Report*, <https://www.citigroup.com/rcs/citigpa/storage/public/Global-ESG-Report-2022.pdf>.

that have sought to characterize ESG as a political crusade⁴ synonymous with big businesses' adoption of perceived progressive initiatives that may run counter to the interests of sectors such as the fossil fuel and firearm industries.⁵ ESG's critics assert that financial institutions and/or pension funds are using ESG factors in investment strategies to the detriment of financial returns.⁶ Some suggest that allegedly "woke" banks are denying access to financial services (so-called "de-banking") on the basis of customers' industries, political beliefs, or religious affiliations.⁷ Some claim that federal regulators are to blame for pro-ESG policies, pointing to⁸ an Obama-administration Department of Justice and FDIC initiative deemed "Operation Chokepoint" as an early effort to discourage banks from doing business with politically disfavored industries like payday lenders and gun retailers.⁹ Former president Donald Trump even recently invoked the concept of politically-motivated de-banking on the campaign trail.¹⁰

⁴ See WSJ, "An ESG Asset Manager Exodus," (Feb. 15, 2024); Elizabeth Pollman, *The Making and Meaning of ESG*, Research Paper No. 22-23 at p. 25 (ESG as Ideological Preference), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857.

⁵ See, e.g. "Attorney General Ken Paxton Announces Barclays' Ineligibility to Participate in Texas's Bond Market For its Inability to Verify its 'ESG' Policies Do Not Violate Texas Law" (Jan. 26, 2024), at <https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-announces-barclays-ineligibility-participate-texas-bond-market-its>.

⁶ See, e.g. "Tennessee Sues BlackRock in First-of-its-Kind Consumer Protection Suit over ESG Considerations" (Dec. 18, 2023), at <https://www.tn.gov/attorneygeneral/news/2023/12/18/pr23-59.html>; "Governor Ron DeSantis Signs Legislation to Protect Floridians' Financial Future & Economic Liberty" (May 2, 2023), at <https://www.flgov.com/2023/05/02/governor-ron-desantis-signs-legislation-to-protect-floridians-financial-future-economic-liberty/>.

⁷ See, e.g. Karen Pierog, Wells Fargo escapes muni underwriter ban in Texas (Aug. 25, 2023), at <https://www.americanbanker.com/news/wells-fargo-cleared-to-underwrite-municipal-bonds-in-texas>; Letter from Jimmy Patronis, Florida Chief Financial Officer, to CEO Jamie Dimon, JP Morgan Chase Bank (Aug. 1, 2023), at https://myfloridacfo.com/docs-sf/cfo-news-libraries/news-documents/2023/chase-letter.pdf?sfvrsn=25b03a95_2.

⁸ S. 19 (Tex. 2021) House Committee Report, at <https://capitol.texas.gov/tlodocs/87R/analysis/pdf/SB00019H.pdf#navpanes=0>.

⁹ See Victoria Guida, Politico, "Justice Department to end Obama-era 'Operation Choke Point'" (Aug. 17, 2017), at <https://www.politico.com/story/2017/08/17/trump-reverses-obama-operation-chokepoint-241767>; Letter from Stephen E. Boyd, Assistant Attorney General to The Honorable Bob Goodlatte, Chairman, Committee on the Judiciary (Aug. 16, 2017), at <https://alliedprogress.org/wp-content/uploads/2017/08/2017-8-16-Operation-Chokepoint-Goodlatte.pdf>.

¹⁰ Ja'han Jones, MSNBC, "Trump's rant about 'debanking' serves as a message to far-right extremists," (Jan. 18, 2024), at <https://www.msnbc.com/the-reidout/reidout-blog/trump-speech-debank-extremists-jim-jordan-rcna134524>; Lindsay Kornick, Fox News, "'SNL' mocked for

Against this backdrop, critics of ESG in statehouses across the United States have increasingly adopted laws and policies designed to crack down on the ability of governments and businesses to incorporate ESG considerations into their decision-making, investments, and corporate policies. As these anti-ESG laws and policies have proliferated at the state level in recent years, some companies have retreated from or deemphasized ESG or rebranded their ESG initiatives using more neutral terminology.¹¹

At the same time, pro-ESG laws and policies that require, encourage, or at least permit entities to take note of factors like climate risk, carbon offsets, or a customer's industry have also gained significant support. This is true not only in states like California and New York, but also at the federal level with the SEC's recently proposed climate risk disclosure rule. Outside the United States, the European Union has recently passed a range of groundbreaking ESG regulatory initiatives, including the Corporate Sustainability Reporting Directive (CSRD), which in many cases have extraterritorial effect. In certain situations, anti-ESG and pro-ESG laws in different jurisdictions may come into tension or even direct conflict with each other.¹²

To assist financial institutions as they navigate this rapidly-evolving landscape, this article offers trends to watch in the anti-ESG movement for the balance of 2024 and beyond.

PREDICTIONS FOR THE ANTI-ESG MOVEMENT

1. State-Level Anti-ESG Laws Will Increasingly Fit into Familiar Patterns That Target Various Business Lines and Activities of Financial Institutions

Early anti-ESG laws were heterogenous efforts, with different states taking widely differing approaches to the applicability and scope of their anti-ESG laws. These laws impact a variety of distinct business lines, ranging from payment systems, retail banking, and government contracting to asset management. While newer legislation continues to target various parts of financial institutions operations, states are increasingly harmonizing their approaches within

their 'woke smugness' after claiming Trump made up the term 'de-banking.'" (Jan. 28, 2024), at <https://www.foxnews.com/media/sn1-mocked-woke-smugness-claiming-trump-made-up-term-de-banking>.

¹¹ WSJ, "An ESG Asset Manager Exodus," (Feb. 15, 2024); WSJ, "Step Aside, ESG. BlackRock Is Doing 'Transition Investing' Now." (Mar. 3, 2024).

¹² Compare Cal. Fin. Code § 110001, at https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=FIN&division=26.&title=&chapter=&article=, with Florida Statutes § 790.335, at http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0790/Sections/0790.335.html.

different categories of anti-ESG laws. While not every bill fits neatly into these classifications – and we have not cited every active law or proposed bill falling under each – the categories below should serve as a general guide to the patterns we see continuing in 2024. Of course, state legislatures each operate with different legislative calendars, some of which adjourn early in the year. As such, some of the proposed bills described below may no longer be viable in 2024, though we believe they are helpful to understanding nationwide trends.

A. Merchant Category Codes and Financial Privacy

Merchant category codes (MCC) used in card payment networks are a particularly active area of anti-ESG legislation. In 2022, the Geneva-based International Organization for Standardization (ISO), the entity that manages global ISO MCC,¹³ approved a code specifically for firearms retailers.¹⁴ While political pushback reportedly slowed implementation of the firearm code last year, major payment networks are now said to be moving ahead with the use of the code.¹⁵ California law will require payment card networks to make the firearms merchant category code available for merchant acquirers that provide payment services for firearms merchants beginning July 1, 2024,¹⁶ and will require merchant acquirers to use the code beginning May 1, 2025.¹⁷ However, the use of the firearm code remains controversial and has caught the attention of conservative politicians who have alleged, among other things, that banks have used MCCs to search and disclose private financial data as part of the January 6 Capitol attack investigations.¹⁸ The interest in firearm MCCs is

¹³ Kate Fitzgerald, American Banker, “Card networks halt plans for firearms merchant code” (Mar. 9, 2023), at <https://www.americanbanker.com/payments/news/card-networks-halt-plans-for-firearms-merchant-code>.

¹⁴ Ross Kerber, Reuters, “Global standards body approves new merchant code for gun sellers” (Sept. 9, 2022), at <https://www.reuters.com/world/exclusive-global-standards-body-approves-new-merchant-code-gun-sellers-2022-09-09/>.

¹⁵ John Adams, “Will California’s gun law place a target on card networks?” (Feb. 12, 2024), at https://www.americanbanker.com/payments/news/will-californias-gun-law-place-a-target-on-card-networks?utm_source=newsletter&utm_medium=email&utm_campaign=V3_AB_Daily_2023%2B%27-%27%2B02132024&bt_ee=UpQ2pVFKtU3nZsKl4RTIwbcEgAFGHXkw5aaAbRKZvE%3D&bt_ts=1707830766902.

¹⁶ Cal. Fin. Code § 110001, at https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=FIN&division=26.&title=&chapter=&article=.

¹⁷ *Id.*

¹⁸ Letter from Ranking Member Scott to the Honorable Janet Yellen, U.S. Treasury, and Director Gacki, FinCEN (Jan. 19, 2024), at <https://www.banking.senate.gov/imo/media/doc/rmscottlettertofincen11924.pdf>; “CFO Jimmy Patronis: Florida is Fighting Back Against Feds for Flagging Americans on Political Beliefs” (Jan. 25, 2024), at <https://myfloridacfo.com/news/>

intertwined with a desire to limit the capacity of financial institutions to disclose private financial information related to firearm transactions. Regulation of MCCs that tag firearms transactions is an area of particular political interest at both the state and federal levels and may result in conflicting laws going forward.

- *Enacted Legislation.* A number of states have enacted anti-ESG laws governing the use of MCCs. For example, in Florida, financial institutions and other entities involved in payment card transactions are prohibited from assigning to a seller of firearms or ammunition an MCC that classifies the merchant as a firearms or ammunition retailer.¹⁹ Idaho,²⁰ Indiana,²¹ Iowa,²² Mississippi,²³ Montana,²⁴ North Dakota,²⁵ Tennessee,²⁶ Texas,²⁷ Utah²⁸ and Wyoming²⁹ have all enacted similar restrictions around the use of the firearms codes. Some

pressreleases/press-release-details/2024/01/25/cfo-jimmy-patronis--florida-is-fighting-back-against-feds-for-flagging-americans-on-political-beliefs; “New Report Exposes Massive Government Surveillance of Americans’ Financial Data” (Mar. 6, 2024), at <https://judiciary.house.gov/media/press-releases/new-report-exposes-massive-government-surveillance-americans-financial-data>.

¹⁹ Florida Statutes § 790.335(2)(b), (c), at http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0790/Sections/0790.335.html.

²⁰ Second Amendment Financial Privacy Act, H. 295 (Idaho 2023), at <https://legislature.idaho.gov/sessioninfo/2023/legislation/H0295/>; Idaho Code Ann. § 18-3326A, at <https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch33/sect18-3326a/>.

²¹ Indiana House Bill 1084 (Ind. 2024), at <https://iga.in.gov/legislative/2024/bills/house/1084/actions>.

²² H. 2464 (Iowa 2024), at <https://www.legis.iowa.gov/legislation/BillBook?ga=90&ba=HF2464>.

²³ Second Amendment Financial Privacy Act, H. 1110 (Miss. 2023), at <https://billstatus.ls.state.ms.us/documents/2023/pdf/HB/1100-1199/HB1110SG.pdf>, Miss. Code Ann. §45-9-207.

²⁴ S. 359 (Mont. 2023), at [https://laws.leg.mt.gov/legprd/LAW0210W\\$BSIV.ActionQuery?P_BILL_NO1=359&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20231](https://laws.leg.mt.gov/legprd/LAW0210W$BSIV.ActionQuery?P_BILL_NO1=359&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20231), Mont. Code Ann. § 30-14-160.

²⁵ H. 1487 (N.D. 2023), at <https://ndlegis.gov/assembly/68-2023/regular/bill-overview/bo1487.html>, N.D. Century Code Ann. § 6-15-02.

²⁶ S. 2223 (Tenn. 2024), at <https://publications.tnsosfiles.com/acts/113/pub/pc0773.pdf>.

²⁷ Second Amendment Financial Privacy Act (Tex. 2023), at <https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB02837F.pdf#navpanes=0>; Texas Bus. & Comm. Code Ann. tit. 12, ch. 610, at <https://statutes.capitol.texas.gov/Docs/BC/pdf/BC.610.pdf>.

²⁸ H.B. 406 (Utah 2024), at <https://le.utah.gov/~2024/bills/static/HB0406.html>.

²⁹ S. 105 (Wyo. 2024), at <https://www.wyoleg.gov/Legislation/2024/SF0105>.

states – like Mississippi,³⁰ West Virginia,³¹ Idaho,³² Indiana,³³ Iowa,³⁴— have included provisions in their laws that further protect privacy by restricting the ability of financial institutions to disclose financial records identifying transactions as involving firearms. Some laws also include provisions outlawing discriminatory conduct when processing transactions involving firearms.³⁵ In contrast, Colorado Senate Bill 66, signed by the governor on May 1, 2024, follows California’s pro-ESG lead.

- *Proposed Legislation.* New legislative proposals could further complicate the compliance landscape for banks participating in the payment networks bills introduced in Louisiana, Missouri, New Hampshire, New Jersey, and Oklahoma,³⁶ would adopt more critical approaches toward the firearms MCC. Additionally, Florida Chief Financial Officer Patronis recently promised “new consumer protection legislation that will . . . prohibit financial institutions from sharing Floridians’ private financial and transaction information.”³⁷

³⁰ Second Amendment Financial Privacy Act, H. 1110 (Miss. 2023), at <https://billstatus.ls.state.ms.us/2023/pdf/history/HB/HB1110.xml>, Miss. Code Ann. §45-9-207.

³¹ The Second Amendment Financial Privacy Act, H. 2004 (W. Va. 2023), at https://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=2004&year=2023&sessiontype=RS&btype=bill, W. Va. Code §31A-2B-4.

³² Second Amendment Financial Privacy Act, H. 295 (Idaho 2023), at <https://legislature.idaho.gov/sessioninfo/2023/legislation/H0295/>; Idaho Code Ann. § 18-3326A, at <https://legislature.idaho.gov/statutesrules/idstat/title18/t18ch33/sect18-3326a/>.

³³ Indiana House Bill 1084 (Ind. 2024), at <https://iga.in.gov/legislative/2024/bills/house/1084/actions>.

³⁴ H. 2464 (Iowa 2024), at <https://www.legis.iowa.gov/legislation/BillBook?ga=90&ba=HF2464>.

³⁵ See, e.g., The Second Amendment Financial Privacy Act, H. 2004 (W. Va. 2023), at https://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=2004&year=2023&sessiontype=RS&btype=bill, W. Va. Code §31A-2B-7.

³⁶ See, e.g. S. 301 (La. 2024), at <https://www.legis.la.gov/legis/BillInfo.aspx?s=24rs&cb=SB301&sbi=y>; H. 2778 (Mo. 2024), at <https://house.mo.gov/Bill.aspx?bill=HB2778&year=2024&code=R>; H. 1186 (N.H. 2024), at <https://legiscan.com/NH/bill/HB1186/2024>; S. 1886 (N.J. 2024), at <https://www.njleg.state.nj.us/bill-search/2024/S1866>; H. 3221 (Okla. 2024), at <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb3221&Session=2400>.

³⁷ “CFO Jimmy Patronis: Florida is Fighting Back Against Feds for Flagging Americans on Political Beliefs” (Jan. 25, 2024), at <https://myfloridacfo.com/news/pressreleases/press-release-details/2024/01/25/cfo-jimmy-patronis--florida-is-fighting-back-against-feds-for-flagging-americans-on-political-beliefs>.

B. Fair Access

In 2021, the OCC adopted though ultimately halted official publication³⁸ of a rule governing “Fair Access to Financial Services”³⁹ that would have required covered banks to (1) make each financial service they offer available to all persons in the geographic market served by the covered bank on proportionally equal terms; (2) not deny any person a financial service the covered bank offers unless the denial is justified by such person’s quantified and documented failure to meet quantitative, impartial risk-based standards established in advance by the covered banks; and (3) not deny, in coordination with others, any person a financial service the covered banks offer.⁴⁰ Legislation that follows the general model of this halted rule is often referred to as “fair access” legislation, and sometimes is styled as an anti-discrimination law.

- *Enacted Legislation.* Approved by Governor Ron DeSantis on May 2, 2023,⁴¹ Florida House Bill 3 enacted a sweeping set of anti-ESG measures applicable to certain financial institutions. Alongside requirements governing state government investment practices and prohibitions related to ESG bonds, the law requires qualified public depositories⁴² and state-licensed financial institutions,⁴³ consumer finance licensees,⁴⁴ and money services licensees⁴⁵ to follow certain business practices. On May 2, 2024, Governor DeSantis approved amendments to the requirements established by Florida House Bill 3.⁴⁶ As amended by House Bill 989, the law generally requires that the provision of services or the denial of services be based on an analysis of risk factors unique to each customer and that a qualified public depository or a financial institution not engage in the unsafe and unsound practice of denying, canceling, suspending, or terminating services or otherwise discriminating against a person in making available such services or in

³⁸ OCC, “OCC Puts Hold on Fair Access Rule,” News Release 2021-14 (Jan. 28, 2021), at <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html>.

³⁹ OCC, “Fair Access to Financial Services,” at <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8a.pdf>.

⁴⁰ OCC, “Fair Access to Financial Services,” 12 C.F.R. § 55.1, at <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8a.pdf>.

⁴¹ Florida House Bill 3 (2023), at <https://www.flsenate.gov/Session/Bill/2023/3>.

⁴² Florida House Bill 3 (2023) at Sec. 14; Florida Statutes Ch. 280.

⁴³ Florida House Bill 3 (2023) at Sec. 25; Florida Statutes Ch. 655.

⁴⁴ Florida House Bill 3 (2023) at Sec. 21; Florida Statutes Ch. 516.

⁴⁵ Florida House Bill 3 (2023) at Sec. 22; Florida Statutes Ch. 560.

⁴⁶ H. 989 (Fla. 2024), at <https://www.flsenate.gov/Session/Bill/2024/989>.

the terms or conditions of such services, on the basis of certain prohibited factors including:

- A person’s political opinions, speech, or affiliations;
 - A person’s religious beliefs, religious exercise, or religious affiliations, except as permitted by the statute;
 - Any factor if not a quantitative, impartial, and risk-based standard, including any such factor related to the person’s business sector; or
 - The use of any rating, scoring, analysis, tabulation, or action that considers a social credit score.⁴⁷
- *Proposed Legislation.* Governor DeSantis has expressed hope that House Bill 3 could serve as “a blueprint” that members of the Governor’s anti-ESG alliance, which unites Florida with 18 other states’ governors opposed to ESG,⁴⁸ could use to implement similar measures in their own states.⁴⁹ Several bills that would have required that institutions to act based on quantitative, impartial, risk-based financial standards (and required that such standards be established in advance) failed to proceed to final legislation in 2023.⁵⁰ But in the early months of states’ 2024 legislative sessions, a number of new bills have emerged that seek to establish Fair Access requirements echoing elements of Florida House Bill 3. For example, several newly proposed bills⁵¹ – some of

⁴⁷ Florida House Bill 3 (2023).

⁴⁸ “Governor Ron DeSantis Leads Alliance of 18 States to Fight Against Biden’s ESG Financial Fraud” (Mar. 16, 2023), at <https://www.flgov.com/2023/03/16/governor-ron-desantis-leads-alliance-of-18-states-to-fight-against-bidens-esg-financial-fraud/>.

⁴⁹ “Governor Ron DeSantis Signs Legislation to Protect Floridians’ Financial Future & Economic Liberty” (May 2, 2023), at <https://www.flgov.com/2023/05/02/governor-ron-desantis-signs-legislation-to-protect-floridians-financial-future-economic-liberty/>.

⁵⁰ See, e.g., S. 1091 (Tenn. 2023), at <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1091&GA=113>; H. 1283 (N.D. 2023), at <https://ndlegis.gov/assembly/68-2023/regular/bill-overview/bo1283.html>; S. 672 (Okla. 2023), at <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb672&Session=2300>; L.D. 1546 (Maine 2023), at https://legislature.maine.gov/bills/display_ps.asp?snum=131&paper=HP0998; S. 637 (W. Va. 2023), at https://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=637&year=2023&sessiontype=RS&btype=bill.

⁵¹ See, e.g., H. 1205 (Ga. 2024), at <https://www.legis.ga.gov/legislation/66831>; H. 560 (Idaho 2024), at <https://legislature.idaho.gov/sessioninfo/2024/legislation/H0560/>; H. 669 (Idaho 2024), at <https://legislature.idaho.gov/sessioninfo/2024/legislation/H0669/>; S. 1167 (Ariz. 2024), at <https://apps.azleg.gov/BillStatus/BillOverview/80624/>; S. 1337 (Ariz. 2024), at <https://apps.azleg.gov/BillStatus/BillOverview/80853/>; S. 28 (Ind. 2024), at <https://iga.in.gov/legislative/2024/>

which would be titled the “Equality in Financial Services Act” – would seek to prohibit discrimination in the provision of financial services, with such discrimination defined to include the use of a “social credit score.” Additionally, some similarly-themed bills from 2023 may be carried over⁵² or re-introduced for consideration in 2024. A new “Fair Access to Financial Services Act” was reintroduced in West Virginia⁵³ after one failed to advance in 2023.

C. Procurement

Another common form of anti-ESG legislation seeks to disqualify companies from contracting with a state or local governmental entity if they engage in economic boycotts or discriminatory behavior, such as boycotts of the firearms or energy industries or against companies that refuse to meet certain emissions standards. Some laws require government contractors to verify that they are in compliance, and some laws require state regulators to maintain lists⁵⁴ of non-compliant firms that face limitations on their ability to contract with governmental entities.

- *Enacted Legislation.* There are already a number of anti-ESG procurement laws on the books across the country. Key examples include Texas

bills/senate/28/actions; S. Study Bill 3094 (Iowa 2024), at <https://www.legis.iowa.gov/legislation/BillBook?ga=90&ba=SSB3094>; H. File 2409 (Iowa 2024), at <https://www.legis.iowa.gov/legislation/BillBook?ga=90&ba=HF2409>; H. 452 (Ky. 2024), at <https://apps.legislature.ky.gov/record/24RS/hb452.html>; S. 2560 (Tenn. 2024), at <https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB2560&ga=113>; H. 2669 (Tenn. 2024), at <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2669&GA=113>.

⁵² See, e.g. L.B. 730 (Neb. 2023), at https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=50676.

⁵³ S. 214 (W. Va. 2024), at https://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=214&year=2024&sessiontype=RS&btype=bill; S. 637 (W. Va. 2023), at https://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=637&year=2023&sessiontype=RS&btype=bill.

⁵⁴ West Va. Code Art. 1c, at <https://code.wvlegislature.gov/12-1C/>; The Oklahoma Energy Discrimination Elimination Act of 2022, at http://webserver1.lsb.state.ok.us/OK_Statutes/CompleteTitles/os74.pdf#page=1230; Texas Office of the Attorney General, Letter to All Bond Counsel re “Additional Requirements for Statutory Representations and Covenants, Standing Letters, and Public Work Descriptions” (Nov. 1, 2023) (“Although not binding on this Office, a determination by the Comptroller that a company is a boycotter under chapters 808 or 809 will be given great weight and this Office will likely reach the same conclusion and rely on the Comptroller’s determination until we have finalized our review.”), at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/public-finance/ABCLetter-11-01-2023.pdf>.

Senate Bill 19⁵⁵ and Senate Bill 13,⁵⁶ which require entities to certify that they do not discriminate against firearm entities or boycott energy companies, respectively. Texas Senate Bill 13 has been the subject of particular interest over the past year, as the Texas Office of the Attorney General commenced a review of whether companies that are members of a Net Zero Alliance were boycotting energy companies in violation of the law.⁵⁷ West Virginia recently made news with a potential expansion of its fossil fuel boycotter restricted institutions list.⁵⁸ Kentucky has a similar law addressing boycotting of energy companies.⁵⁹ Alabama Senate Bill 261, enacted last year, addresses a variety of types of boycotts, including but not limited to boycotts of the energy, timber, mining, and agriculture industries, as well as boycotts of businesses that do not commit to facilitate access to abortion or sex or gender change surgery or therapy.⁶⁰ Meanwhile, Idaho House Bill 190 requires the state's public depositories not to engage in certain boycott behavior.⁶¹

- *Proposed Legislation.* More proposed procurement laws have been presented for consideration. These proposals include Missouri House Bill 1699⁶² and Missouri Senate Bill 1142,⁶³ which would address

⁵⁵ S. 19 (Tex. 2021), Tex. Gov. Code Ch. 2274, at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2274.htm>.

⁵⁶ S. 13 (Tex. 2021), Texas Gov. Code Ch. 2276, at <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2276.htm>.

⁵⁷ See Letter to All Bond Counsel re: "Review Status of Net Zero Alliance Members" (Oct. 17, 2023), at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/public-finance/ABC%20Letter%20Draft%20Net%20Zero%20Alliance%2010.17.23.pdf>.

⁵⁸ West Va. Code Art. 1c, at <https://code.wvlegislature.gov/12-1C/>; "Treasurer Moore Warns Six Additional Institutions of Potential Inclusion on Fossil Fuel Boycott List" (Feb. 26, 2024), at <https://wvtreasury.com/About-The-Office/Press-Releases/ID/595/Treasurer-Moore-Warns-Six-Additional-Institutions-of-Potential-Inclusion-on-Fossil-Fuel-Boycott-List>.

⁵⁹ Ky. Rev. Stat. Ann § 41.480, at <https://apps.legislature.ky.gov/law/statutes/statute.aspx?id=52809>.

⁶⁰ Act 409, S. 261 (Ala. 2023), at <https://arc-sos.state.al.us/cgi/actdetail.mbr/detail?page=act&year=2023&act=409>. This Alabama measure includes an important exemption applying to contracts related to financial products or financial advisory services.

⁶¹ H. 190 (Idaho 2023), at <https://legislature.idaho.gov/sessioninfo/2023/legislation/H0190/>.

⁶² H. 1699 (Mo. 2024), at <https://house.mo.gov/Bill.aspx?bill=HB1699&year=2024&code=R>.

⁶³ S. 1142 (Mo. 2024), at https://www.senate.mo.gov/24info/BTS_Web/Bill.aspx?SessionType=R&BillID=396.

several types of economic boycotts, and legislation in Nebraska⁶⁴ and West Virginia⁶⁵ that would protect the firearms industry from boycotts.

D. Divestment

Other anti-ESG legislation requires state entities to divest from companies deemed to be engaged in impermissible boycotting or discriminatory behavior, generally of energy companies. These anti-ESG divestment laws and bills contrast with pro-ESG divestment bills that require divestment from fossil fuel companies.⁶⁶

- *Enacted Legislation.* Existing anti-ESG divestment statutes instruct state regulators in Kentucky,⁶⁷ Oklahoma,⁶⁸ Texas,⁶⁹ to compile lists of financial institutions deemed to boycott energy companies that will face divestment from state entities (as well as potential restrictions on procurement in some cases). Arkansas' blacklist is intended to cover entities that are deemed to discriminate against energy companies or firearms entities or otherwise refuse to deal based on environmental, social justice, and other governance-related factors.⁷⁰ In some of these states, a blacklisted financial institution can also be subject to restrictions on its ability to contract with governmental entities.⁷¹
- *Proposed Legislation.* In Oklahoma, the proposed "Firearm Industry

⁶⁴ L.B. 925 (Neb. 2024), at https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=54888.

⁶⁵ S. 275 (W. Va. 2024), at https://www.wvlegislature.gov/Bill_Status/Bills_history.cfm?input=275&year=2024&sessiontype=RS&btype=bill.

⁶⁶ See, e.g. H. 4083 (Oregon 2024), at <https://olis.oregonlegislature.gov/liz/2024R1/Measures/Overview/HB4083>; S. 198 (N.J. 2024), at <https://www.njleg.state.nj.us/bill-search/2024/S198>.

⁶⁷ Ky Rev. Stat. Ann. § 41.474, at <https://apps.legislature.ky.gov/law/statutes/statute.aspx?id=52807>.

⁶⁸ Energy Discrimination Elimination Act of 2022, at <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb2034&Session=2200>, Okla. Stat. Ann. tit. 74 § 12003.

⁶⁹ S. 13, Tex. Gov't Code Ann. Ch. 809, at <https://statutes.capitol.texas.gov/DocViewer.aspx?DocKey=GV%2fGV.809&Phrases=%22809.054%22&HighlightType=1&ExactPhrase=True&QueryText=%22809.054%22>.

⁷⁰ Ark. Code § 25-1-1002.

⁷¹ For example, the Texas Office of the Attorney General recently indicated that placement on Texas's divestment list will be "given great weight" in the Office's assessment of whether a particular institution should also be subject to contracting restrictions. Letter to All Bond Counsel re "Additional Requirements for Statutory Representations and Covenants, Standing Letters, and Public Work Descriptions" (Nov. 1, 2023), at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/public-finance/ABCLetter-11-01-2023.pdf>.

Discrimination Elimination Act of 2024”⁷² would create a list of institutions that boycott firearm companies and subject those institutions to divestment by state governmental entities and to restrictions on those institutions’ ability to contract with governmental entities.

E. Investment Strategies, Asset Management, and Related Topics

Another category of anti-ESG laws governs the way that investment advisers and other asset managers invest public pension fund assets, and sometimes even how asset managers handle private funds. These anti-ESG laws sometimes require asset managers to consider solely “pecuniary” or financial factors in their investment decisions, and often regulate proxy voting decisions, as well.

- *Enacted Legislation.* One recently enacted example is the South Carolina ESG Pension Protection Act, which governs how the state Retirement System Investment Commission addresses proxy voting, among other issues.⁷³ Another prominent example is in the landmark Florida House Bill 3, which establishes requirements for how certain investment managers may handle public funds.⁷⁴ While the focus of this type of laws has often been on public funds, recently adopted *regulations* in Wyoming and Missouri have also targeted the way that investment advisers and broker-dealers conduct business with private clients.⁷⁵
- *Proposed Legislation.* Among other anti-ESG investment strategy and asset management laws up for consideration in 2024, proposed Louisiana Senate Bill 5,⁷⁶ New Hampshire Senate Bill 520,⁷⁷ and Missouri House Bill 1700⁷⁸ would seek to regulate how public entities manage and invest funds, including requiring a fiduciary or proxy advisor to act based only on financial factors.

⁷² H. 3222 (Okla. 2024) at <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB3222&Session=2400>.

⁷³ H. 3690 (S.C. 2023), at <https://www.scstatehouse.gov/billsearch.php?billnumbers=3690&session=125&summary=B>.

⁷⁴ Florida House Bill 3 (2023), at <https://www.flsenate.gov/Session/Bill/2023/3>; Florida Statutes 215.4755, 215.855.

⁷⁵ “Governor Gordon Issues Line-Item Vetoes to Secretary of State’s ESG Investing Rules” (Feb. 27, 2024), at <https://governor.wyo.gov/news-releases/governor-gordon-issues-line-item-vetoes-to-secretary-of-state-s-esg-investing-rules>; <https://www.sos.mo.gov/cmsimages/adrules/csr/current/15csr/15c30-51.pdf>.

⁷⁶ S. 5 (La. 2024), at <https://www.legis.la.gov/legis/BillInfo.aspx?s=24rs&b=SB5&sbi=y>.

⁷⁷ S. 520 (N.H. 2024), at https://gencourt.state.nh.us/bill_status/legacy/bs2016/billText.aspx?id=1959&txtFormat=html&sy=2024.

⁷⁸ H. 1700 (Mo. 2024), at <https://house.mo.gov/Bill.aspx?bill=HB1700&year=2024&code=R>.

2. For National Banks, Doctrines of Federal Preemption That Can Serve as Defenses to Enforcement of State-Level ESG Laws May Come Under Pressure

National banks may be able to avail themselves of federal preemption to avoid complying with certain types of state ESG laws. However, the applicability of preemption to state-level ESG legislation is largely untested, and the relevant doctrines of preemption may themselves soon evolve.

Generally speaking, under *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (U.S. 1996),⁷⁹ a state law that significantly interferes with a national bank's exercise of its federally-granted powers is preempted by the National Bank Act. Further, under the National Bank Act,⁸⁰ only the OCC or an authorized representative of the OCC is permitted to exercise "visitorial powers" with respect to a national bank.⁸¹ Visitorial powers include the examination of a bank; inspection of a bank's books and records; regulation and supervision of activities authorized or permitted pursuant to federal banking law; and enforcing compliance with any applicable federal or state laws concerning those activities.⁸²

The viability of these principles as impediments to states enforcing particular anti-ESG and pro-ESG laws against national banks requires case-by-case analysis, and may be put to the test as banks face continued enforcement under growing anti-ESG regimes. Moreover, there are practical limits to the use of preemption, including that national bank preemption generally does not extend to affiliates of national banks that are incorporated under state law.

Additionally, the law of preemption may soon change. On February 27, 2024, the Supreme Court heard arguments in the case *Cantero v. Bank of America, N.A.*, a case that will address whether the standard of National Bank Act preemption as articulated in *Barnett Bank* and codified in the Dodd-Frank Act prevents the application of state escrow-interest laws to national banks.⁸³ The Court's decision in *Cantero* may have knock-on effects in the ESG context.

⁷⁹ *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (U.S. 1996).

⁸⁰ See 12 U.S.C. 484.

⁸¹ 12 C.F.R. § 7.4000(a)(1).

⁸² 12 C.F.R. § 7.4000(a)(2).

⁸³ See *Cantero v. Bank of America*, ScotusBlog, at <https://www.scotusblog.com/case-files/cases/cantero-v-bank-of-america/>.

3. Non-Governmental Organizations Will Continue to Weigh in on and Seek to Shape the Development of State-Level Anti-ESG Policies

Politically-oriented non-governmental organizations will likely continue to engage actively in advocacy campaigns to shape the development of anti-ESG policies at the state level.

Model legislation has been a popular tool for these groups in the past. The American Legislative Exchange Council (ALEC) published, though ultimately did not adopt, a draft model policy⁸⁴ titled the “Energy Discrimination Elimination Act.”⁸⁵ A final model policy, the “State Government Employee Retirement Protection Act” is currently available on the ALEC website.⁸⁶ A draft anti-boycott bill, the “Eliminate Economic Boycotts Act”⁸⁷ is currently available on the website of the Heritage Foundation, along with a draft “State Pension Fiduciary Duty Act.”⁸⁸ One can see parallels between some of these model laws and laws that have been enacted across the country over the past few years.⁸⁹

Non-governmental organizations will likely engage in other forms of advocacy, as well. Several large financial institutions have received shareholder proposals that would require these institutions to report on how they oversee the risks of de-banking customers based on religious or political views. Additionally, conservative think tanks such as the Heartland Institute have

⁸⁴ See Thomas Savidge, ALEC, Liability Trap? Harvard Paper on ALEC Model Policy Gets Debunked (June 1, 2023) (“[T]he proposed ‘Energy Discrimination Elimination Act’ . . . was not adopted as ALEC model policy. . . .”), at <https://alec.org/article/liability-trap-harvard-paper-on-alec-model-policy-gets-debunked/>.

⁸⁵ See Energy Discrimination Elimination Act accessible through the Internet Archive Wayback Machine, at <https://web.archive.org/web/20211204022222/https://www.alec.org/model-policy/energy-discrimination-elimination-act-2/>.

⁸⁶ See State Government Employee Retirement Protection Act (finalized Apr. 5, 2022; amended Aug. 28, 2023), at <https://alec.org/model-policy/state-government-employee-retirement-protection-act/>.

⁸⁷ See Eliminate Economic Boycotts Act, at <https://www.heritage.org/article/eliminate-economic-boycotts-act>.

⁸⁸ See State Pension Fiduciary Duty Act, at <https://www.heritage.org/article/state-pension-fiduciary-duty-act>.

⁸⁹ See S. 13 (Tex. 2021), at <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB13>; The Oklahoma Energy Discrimination Elimination Act of 2022; S. 205 (Ky. 2022), at <https://apps.legislature.ky.gov/law/acts/22RS/documents/0120.pdf>; H. 2100 (Kan. 2023), at https://kslegislature.org/li/b2023_24/measures/hb2100/.

published articles in support of several anti-ESG bills under consideration in various states.⁹⁰

4. While Anti-ESG Legislation May Move Quickly Through State Houses, It Is Far From Inevitable That Each New Anti-ESG Bill Will Be Adopted as Originally Proposed

Given the lack of political consensus regarding ESG, and fissures between pro-business and anti-ESG conservatives, anti-ESG measures will likely continue to encounter resistance at the state level. Bills may stall out or otherwise evolve in significant ways after introduction, and financial institutions should take note of prior successful efforts to make state legislation more workable.

For example, the final version of the economic boycotts procurement bill, Alabama Senate Bill 261, enacted last year, includes an important exemption applying to contracts “related to the issuance, incurrence, or management of debt obligations, to the deposit, custody, management, borrowing, or investment of funds, or to the procurement of insurance or other financial products, or financial advisory services.”⁹¹ The scope of this exemption is much broader than as it was originally proposed.⁹²

Governors have also pushed back on anti-ESG measures that have passed the legislature, with varying levels of success:

- Last year, Governor Katie Hobbs of Arizona vetoed a proposed government procurement contract measure, Senate Bill 1096⁹³ that would have required public entities to obtain written certifications from contractors that they do not discriminate against firearm entities or trade associations. She explained: “This bill is unnecessary and, if enacted, could result in banks leaving Arizona’s market. This would limit competition and increase costs for local governments, costs which ultimately fall on taxpayers.”⁹⁴ This measure has, however, recently been re-introduced in a proposal to add the requirement through a

⁹⁰ Addressing H. 4 (Ohio 2023), S. 6 (Ohio 2023), H. 1699 (Mo. 2024), H. 1700 (Mo. 2024), S. 266 (Ga. 2023), S.F. 507 (Iowa 2023), L.B. 743 (Neb. 2023), H. 2777 (Okla. 2023).

⁹¹ Alabama Senate Bill 261, enrolled, at <https://alison.legislature.state.al.us/files/pdfdocs/SearchableInstruments/2023RS/SB261-enr.pdf>.

⁹² Alabama Senate Bill 261, introduced, at <https://alison.legislature.state.al.us/files/pdfdocs/SearchableInstruments/2023RS/SB261-int.pdf>.

⁹³ S. 1096 (Ariz. 2023), at <https://apps.azleg.gov/BillStatus/BillOverview/78692>.

⁹⁴ Veto Letter regarding Senate Bill 1096 (Mar. 28, 2023), at <https://www.azleg.gov/govletter/56leg/1r/sb1096.pdf>.

ballot initiative.⁹⁵

- Kansas House Bill 2100 became law last year without Governor Laura Kelly’s signature, with the governor releasing a message citing “reservations about the potential unforeseen consequences of House Bill 2100 for the state and for local governments.”⁹⁶
- North Carolina House Bill 750 ultimately became law over Governor Roy Cooper’s veto.⁹⁷ Governor Cooper’s veto message explained: “This bill does exactly what it claims to stop. For political reasons only, it unnecessarily limits the Treasurer’s ability to make decisions based on the best interest of state retirees and the fiscal health of the retirement fund.”⁹⁸

Additionally, policies may continue to evolve even after legislation is ratified. For example, several new bills have proposed alterations to the Oklahoma Energy Discrimination Elimination Act of 2022.⁹⁹ Meanwhile, California Governor Gavin Newsom raised questions regarding the upcoming implementation process for new pro-ESG California disclosure laws, Senate Bills 253 and 261, when his signing statements cited concerns with implementation deadlines and described plans to work with the Legislature to address concerns with the laws.¹⁰⁰ Wyoming Governor Gordon recently used line-item vetoes to pare back the scope of ESG regulations governing investment advisers and broker-dealers.¹⁰¹

⁹⁵ Senate Concurrent Resolution 1007 (Ariz. 2024), at <https://apps.azleg.gov/BillStatus/BillOverview/80103>.

⁹⁶ Message from the Governor regarding Kansas House Bill 2100, at https://kslegislature.org/li/b2023_24/measures/documents/hb2100_enrolled.pdf.

⁹⁷ H. 750 (N.C. 2023), at <https://ncleg.gov/BillLookup/2023/H750>.

⁹⁸ Governor Cooper veto message regarding House Bill 750 (June 23, 2024), at <https://webservices.ncleg.gov/ViewBillDocument/2023/6478/0/H750-BD-NBC-11016>.

⁹⁹ See, e.g. S. 1510 (Okla. 2024), S. 1536 (Okla. 2024), H. 3222 (Okla. 2024), H. 3541 (Okla. 2024), H. 4014 (Okla. 2024). Draft bills are available on the Oklahoma State Legislature website at <http://www.oklegislature.gov/BasicSearchForm.aspx?>.

¹⁰⁰ Signing statement for Senate Bill 253, Senate Bill 261 (Oct. 7, 2023), at <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-253-Signing.pdf> and <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-261-Signing.pdf>.

¹⁰¹ “Governor Gordon Issues Line-Item Vetoes to Secretary of State’s ESG Investing Rules” (Feb. 27, 2024), at <https://governor.wyo.gov/news-releases/governor-gordon-issues-line-item-vetoes-to-secretary-of-state-s-esg-investing-rules>.

5. Financial Institutions Will Need to Ensure Compliance With Emerging Anti-ESG Measures Along With Emerging Pro-ESG Measures, Even Where Such Measures May Come into Tension With Each Other

Financial institutions will need to adapt their infrastructures to comply with new landmark pro-ESG policies and prepare for other pro-ESG measures on the horizon:

- As noted above, by July 1, 2024, California will require a payment card network to make the firearms MCC available for merchant acquirers that provide payment services for firearms merchants.¹⁰² Merchant acquirers will be required to use such codes beginning May 1, 2025.¹⁰³
- California Senate Bill 253¹⁰⁴ and Senate Bill 261¹⁰⁵ enacted landmark climate change disclosure laws that will require certain covered entities to prepare emissions disclosures and climate-related financial risk reports in the coming years to accompany required carbon offset disclosures under California Assembly Bill 1305.¹⁰⁶ Other climate disclosure measures have been proposed in Illinois¹⁰⁷ and New York.¹⁰⁸
- The Securities and Exchange Commission finalized climate-related disclosure rules on March 6, 2024.¹⁰⁹

Some pro-ESG and anti-ESG requirements may pose compliance challenges. For example, institutions making disclosures related to their management of climate risks will need to ensure that their statements cannot be misconstrued to indicate that they are energy boycotters in violation of an anti-boycott law

¹⁰² Cal. Fin. Code § 110001, at [https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FIN&division=26.&title=&chapter=&article=.](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FIN&division=26.&title=&chapter=&article=)

¹⁰³ Cal. Fin. Code § 110001, at [https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FIN&division=26.&title=&chapter=&article=.](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FIN&division=26.&title=&chapter=&article=)

¹⁰⁴ S. 253 (Cal. 2023), at https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240SB253.

¹⁰⁵ S. 261 (Cal. 2023), at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB261.

¹⁰⁶ A. 1305 (Cal. 2023), at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1305.

¹⁰⁷ H. 4268 (Ill. 2023), at <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=4268&GAID=17&DocTypeID=HB&SessionID=112&GA=103>.

¹⁰⁸ A. 4123A (N.Y. 2023), at <https://www.nysenate.gov/legislation/bills/2023/A4123/amendment/A>.

¹⁰⁹ SEC “SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors” (Mar. 6, 2024), at <https://www.sec.gov/news/press-release/2024-31>.

such as Texas Senate Bill 13.¹¹⁰ States often look to entities' public disclosures in making such determinations.¹¹¹

6. While Republicans in Congress Have Demonstrated an Interest in Anti-ESG Policies, It Is Unlikely That There Will Be Federal Anti-ESG Policy Unless and Until There Is a Change in the Presidential Administration

Republicans have introduced several anti-ESG bills in Congress.¹¹² Beyond legislation, a Republican ESG Working Group in Congress published an interim report regarding efforts to “protect . . . investors from progressive activists” in June 2023¹¹³ and the Republican-controlled House Financial Services Committee led an “ESG month” in July 2023 that involved several different hearings.¹¹⁴ Most recently, Republican Chairman of the House Committee on Oversight and Accountability James Comer has raised questions concerning the ESG practices of asset managers and the potential application of federal banking laws to such entities.¹¹⁵ Some members of Congress have also claimed that certain ESG practices may constitute an antitrust violation.¹¹⁶

Currently, opposition from the executive branch is stifling anti-ESG efforts in Congress. For example, in the summer of 2023, President Biden vetoed a

¹¹⁰ S. 13 (Tex. 2021), at <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB13>.

¹¹¹ See West Va. Code Art. 1c, at <https://code.wvlegislature.gov/12-1C/>.

¹¹² Press release: “Committee Republicans Introduce Measures to Combat the Influence of ESG Initiatives in America’s Financial System” (July 25, 2023), at <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408927>.

¹¹³ “Republican ESG Working Group Releases Interim Report” (June 23, 2023), at <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408886>.

¹¹⁴ Zachary Warmbrodt, Politico, “GOP rage tamed for House ‘ESG month’” (July 10, 2023), at <https://www.politico.com/newsletters/morning-money/2023/07/10/gop-rage-tamed-for-house-esg-month-00105368>.

¹¹⁵ Letter from Chairman of the House Committee on Oversight and Accountability James Comer to Mark E. Van Der Weide, General Counsel, Board of Governors of the Federal Reserve System (Feb. 26, 2024), at <https://oversight.house.gov/wp-content/uploads/2024/02/022624-Van-Der-Weide-Federal-Reserve-letter.pdf>; Representative Comer’s concerns echo remarks from Republican-nominated FDIC Director Jonathan McKernan. “Remarks by Jonathan McKernan, Director, FDIC Board of Directors, at the Session on Financial Regulation at the Annual Meeting of the Association of American Law Schools” (Jan. 5, 2024), at <https://www.fdic.gov/news/speeches/2024/spjan0524.html>.

¹¹⁶ “Grassley, Cotton, Colleagues Warn Law Firms About ESG Initiatives” (Nov. 11, 2022), at <https://www.grassley.senate.gov/news/news-releases/grassley-cotton-colleagues-warn-law-firms-about-esg-initiatives>.

Republican-led attempt to overturn a Department of Labor Rule permitting the consideration of ESG factors in investment decisions.¹¹⁷ The rule has since been challenged in court.¹¹⁸ Similarly, the OCC “Fair Access” rule, described above, was tabled during the transition to the Biden Administration in 2021. If President Biden is re-elected, the federal government will continue to resist anti-ESG initiatives, while advancing pro-ESG policies.

However, a change in administration could rapidly reverse the fortunes of anti-ESG policies at the federal level. Recently, former president Trump promised on the campaign trail that if re-elected, he would “place strong protections to stop banks and regulators from trying to de-bank you from your . . . your political beliefs, what they do.”¹¹⁹ These statements underscore the anti-ESG movement’s traction in the past few years, and its potential for an even greater regulatory impact in the years ahead.

¹¹⁷ Karin Rives, S&P Global, “Biden vetoes GOP-led effort to overturn Labor Department ESG rule” (Mar. 20, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/biden-vetoes-gop-led-effort-to-overturn-labor-department-esg-rule-74245723>.

¹¹⁸ Covington, “26 State Attorneys General Appeal Biden ESG Rule” (Jan. 19, 2024), at <https://www.cov.com/en/news-and-insights/media-mentions/2024/01/26-state-attorneys-general-appeal-biden-esg-rule>.

¹¹⁹ Ja’han Jones, MSNBC, “Trump’s rant about ‘debanking’ serves as a message to far-right extremists,” (Jan. 18, 2024), at <https://www.msnbc.com/the-reidout/reidout-blog/trump-speech-debank-extremists-jim-jordan-rcna134524>; Lindsay Kornick, Fox News, “‘SNL’ mocked for their ‘woke smugness’ after claiming Trump made up the term ‘de-banking,’” (Jan. 28, 2024), at <https://www.msnbc.com/the-reidout/reidout-blog/trump-speech-debank-extremists-jim-jordan-rcna134524>.