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Sustainability Recalibration: What Insurers and Policyholders Should Know About ESG Under Trump 2.0

Part 2

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I. Introduction

Environmental, social, and governance (ESG) criteria or standards or sustainability issues have impacted all sectors of society, including corporate and professional policyholders and their risk managers, insurance underwriters, and claims personnel. Indeed, for several years, ESG dominated the agendas of C-suite insurers and corporate policyholders.

This two-part commentary explores the components of ESG and its impact on insurers and corporate policyholders. Part one discussed navigating the ESG landscape, including the importance of environmental, social, and governance issues and their impact on insurers and policyholders. It compared the "all of government" approach of the Biden Administration with the "drill baby drill" and "merits-based" employment approach of the second Trump Administration.

Finally, it examined the impact of U.S. Supreme Court jurisprudence on ESG, including decisions directly involving ESG and decisions more broadly addressing the authority of administrative agencies by ending *Chevron* deference, requiring agencies to litigate in federal court in some instances rather than before their internal tribunals, and applying a statute of limitations more friendly to companies challenging agency action. It concluded by looking at a case before the court that may reinvigorate the dormant non-delegation doctrine.

Part two of this white paper explores the countervailing balance of federal rules and policies provided by state law and international law. It also examines the changing landscape with respect to DEI (Diversity, Equity, and Inclusion), which is a significant part of the "S" in ESG, based upon a U.S. Supreme Court decision and the early policies of the second Trump Administration. Finally, the impact of ESG on policyholder risk profiles and on claims activity is discussed.

II. Countervailing Forces Impacting ESG

Federal law and policy are critically important with respect to ESG requirements imposed on companies. Insurers and policyholders also have to comply with applicable state and international laws. Of course, insurance regulators at the state level and political subdivisions also impact ESG.

A. The Role of State Law

States also have a role to play on the speed and direction of ESG. Often, states under the control of governors or legislatures serve as a counterbalance to federal policy. The roiling debate around ESG includes strong pushback at the legislative level in several states. The 2023 legislative season saw roughly 99 bills nationwide aimed at restricting the use of ESG factors – a significant increase from the 39 bills in 2022.

Most of these bills are modeled on resolutions from either the American Legislative Exchange Council or the Heartland Institute and can be characterized as either:

(1) calling for state divestment from financial institutions and other businesses that use ESG factors or that "discriminate" against certain sectors and/or prohibiting contracting with those institutions; or

(2) directly aiming to eliminate the use of ESG factors by private institutions. The former has been dubbed "divestment bills" and the latter "ESG ban bills."

Following the 2023 legislative season, Florida Governor Ron DeSantis signed into law House Bill 3 (entitled "An Act Relating to Government and Corporate Activism"). The law became effective on July 1, 2023, and broadly restricts the use of ESG factors. With few exceptions, the law extends to entities and activities of a financial nature, aiming to restrict both government activity and market activity –bringing it within both categories of anti-ESG legislation and perhaps the furthest reaching to date.

The practical effect of the law varies to some degree among the various types of entities covered, and how many of its terms will actually be applied remains to be seen. It turns, for example, at several instances on the distinction between "pecuniary" and "non-pecuniary" factors as well as distinctions between the use of factors that are "material" and "appropriate" and those that are not. As such, the new law will no doubt raise complex questions about what policies, programs, or practices are within and without its bounds and how those terms are applied in analogous legislation in other states.

Standing out among the many pieces of anti-ESG legislation aimed at financial entities and activities, Texas has zeroed in on insurers. Texas Senate Bill 833 bans most in-state insurance companies from setting or changing rates based on ESG factors. As much as its target is distinct, like other anti-ESG legislation, Texas' new law will also raise questions about its application. The law carves out the use of ESG factors if they can be shown to be "relevant and related to the risk being insured" or based on a list of justifications – namely "ordinary insurance business purpose," "sound actuarial principles," and "financial solvency considerations." Further, the law indicates it is not intended to force any "material change in an insurer's business plans."[i]

Anti-ESG legislative developments extended far beyond Florida and Texas. In fact, in March, Florida Governor Ron DeSantis announced an alliance with 18 other Republican governors targeting using ESG factors in their states. In addition to his home state of Florida, the allied states include Alabama, Alaska, Arkansas, Georgia, Idaho, Iowa, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.[ii]

Added to the debate is activity in some states favoring ESG factors. See, e.g., California Senate Bill 253 requiring large businesses to disclose greenhouse gas emissions reports and Senate Bill 261, requiring the California Air Resources Board to report on climate risks facing the state and summarize climate financial risk disclosures made per Senate Bill 253, both of which were signed into law in October 2023. Specific to insurers, Assembly Bill (AB) 970 requires the California Department of Insurance to develop a Climate and Sustainability Insurance and Risk Reduction Program to expand insurance options for vulnerable and disadvantaged communities. New York's legislative session gave way to some 50 or more efforts favoring ESG. Specific to insurers, Colorado Senate Bill 16 requires insurers that write more than $100 million in premiums annually to submit annual climate financial risk disclosure reports.

The New York State Department of Financial Services (DFS) has taken action to promote diversity, equity, and inclusion in the insurance industry. In a circular letter to all New York-regulated insurers, DFS outlined its expectation that insurers make the diversity of their boards and senior management a business priority and a key element of their corporate governance.[iii] This includes fostering a diverse pipeline of future leaders. The letter follows informal conversations with insurers, trade groups, and diversity experts, as well as input from the committee of New York State's Council on Women and Girls, which was formed in 2019.

With the Trump Administration in the process of rolling back ESG initiatives and regulations, Democrat governors and Democrat-controlled state legislatures are hard at work backstopping ESG efforts and enacting pro-ESG legislation and rules. Once again, California appears to be at the forefront of these efforts.

B. Compliance With International Law and Customs

U.S. companies doing business internationally have to comply with international laws and regulations. For example, the European Union's ESG disclosure requirements mandate U.S.-based company compliance beginning in 2026. The EU disclosure requirements are detailed in twelve standardized metrics for European Sustainability Reporting Standards (ESRS) issued by the European Financial Reporting Advisory Group (EFRAG), which were adopted by the European Commission in 2023.

The standards include a "double materiality" principle, meaning a company is reporting on how sustainability issues affect their business as well as how the company's operations affect the environment and society. The standards span environmental, social, and governance topics and are intended to provide insight into a company's sustainability impacts, risks, and opportunities, including its sustainability strategy, targets and progress, products and services, business relationships, and incentive programs.[iv] These disclosure standards went into effect in January 2023, and the first companies will have to apply the new rules in the 2024 financial year for reports published in 2025.[v]

As discussed in part one of this commentary, European countries, in general, have been ahead of the U.S. in promulgating a pro-ESG agenda and enacting ESG-related regulations, which may continue to play a leading role. However, it is possible that a retraction of ESG regulation and policies in the U.S. could impact other countries in favor of staying the advancement of a pro-ESG agenda and/or retraction of ESG regulation.

III. Diversity, Equity, and Inclusion

Diversity, equity, and inclusion programs have been subject to both considerable praise and criticism. They have been hailed for promoting fairness and opportunity and eliminating discrimination in the employment arena. Concerns were expressed about DEI itself being discriminatory and that demographics were often displacing merits and skill in hiring and retention decisions, which could adversely impact the performance of companies and consumers' health, safety, and welfare.

A. The Supreme Court Dealt a Powerful Blow to DEI Programs

It was not political events but rather a U.S. Supreme Court decision that started a major rollback on corporate DEI initiatives and programming. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[vi] and the companion case *Students for Fair Admissions, Inc. v. University of North Carolina,*[vii] the Court issued its seminal decision on DEI.

In a 6-3 decision issued on June 29, 2023, the Court struck down affirmative action admissions policies used by both Harvard and UNC, effectively barring the consideration of race as an independent factor in university admissions. The decision raises questions regarding efforts aimed at increasing diversity in the application and hiring processes for other public and private institutions alike.

Plaintiff in both cases, the Students for Fair Admissions, Inc., filed the cases against Harvard and UNC in 2014, challenging both universities' use of race as a factor in admissions decisions. The case against Harvard asserted that the policy in place discriminated against Asian Americans, and the case against

UNC asserted that the policy in place discriminated against white and Asian Americans. Lower courts upheld the policies, and the matter was taken up on *certiorari*.

Per Title VI of the 1964 Civil Rights Act,"[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Both Harvard and UNC receive forms of federal funding. The Equal Protection Clause, in turn, forbids discrimination on the basis of race by state and federal governments. As a state university, UNC comes within the Equal Protection Clause.

Chief Justice Roberts authored the 40-page majority opinion, concluding that, while "commendable," Harvard's and UNC's goals, as stated with respect to their policies, are not "sufficiently coherent" to clear the "strict scrutiny" threshold required for any exception to the Equal Protection Clause. As outlined by Justice Roberts, [t]hose interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens." However, in the majority's estimate, "[i]t is unclear how courts are supposed to measure any of those goals, or if they could, to know when they have been reached so that racial preferences can end."

The Chief Justice further concluded both universities' policies "unavoidably employ race in a negative manner" and "involve racial stereotyping." As he put it, "[c]ollege admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter." Finally, his opinion pointed out that the admissions programs' lack a "logical end point." On both of these additional points, Chief Justice Roberts concluded that Harvard's and UNC's admissions policies "cannot be reconciled with the guarantees of the Equal Protection Clause."

Chief Justice Roberts was joined in the opinion by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Notably, the opinion stated that nothing therein "should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life," leaving a possible opening in what would otherwise appear to be a wholesale prohibition. The decision further left open the possibility that military academies might continue their affirmative action programs given "distinct interests" at issue in those circumstances.

Justice Thomas issued a concurring opinion expressing his own criticism of the actual impact of admissions policies like those at issue, contending that "[f]ar from advancing the cause of improved race relations in our Nation, affirmative action highlights racial differences with pernicious effect." Justice Gorsuch also issued a concurring opinion, in which Justice Thomas joined, concluding that the admissions policies at issue violate Title VI's prohibitions against discrimination on the basis of race. And lastly, Justice Kavanaugh concurred, emphasizing the need for a sunset provision on any admissions policies like Harvard's and UNC's.

Justice Sonia Sotomayor dissented from the court's holding, issuing a 69-page opinion, joined by Justices Elena Kagan and Ketanji Brown Jackson – the latter as to UNC only as she had recused herself from the matter as to Harvard. Justice Jackson issued her own dissenting opinion on the UNC matter, in which Justice Sotomayor and Justice Kagan joined.

Justice Sotomayor's dissent celebrated admissions policies like those at issue as advancing "the constitutional guarantee of racial equality." In her view, the majority's decision "stands in the way and rolls back decades of precedent and momentous progress" on that guarantee. That said, Justice Sotomayor's dissent anticipates that "[a]lthough the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's need for diversity in education." Likewise, Justice Jackson criticized the majority's decision as "arrest[ing] the noble generational project that American universities are attempting."

The decision on affirmative action has had a significant impact on private employer diversity initiatives, even though private companies are generally not subject to the Equal Protection Clause. Instead, companies are generally governed by Title VII of the Civil Rights Act (as opposed to Title VI), but the language of Title VII is very similar. Courts have been confronted with arguments by private claimants and advocacy groups that the decision applies in other contexts where race is a factor in decision-making, including employment, vendor and supplier contracting, and investment. Courts may, in turn, analogize to the decision and its rationale in those contexts.

Numerous lawsuits have challenged supplier diversity programs and state-funded programs that take race into account. Companies have been reviewing their ESG and DEI programs, assessing potential challenges, reviewing internal and external communications and policies, and revising practices and messaging as appropriate. Companies recognized they were subject to reverse discrimination claims. Yet, curtailing or eliminating DEI programs and practices could increase traditional discrimination lawsuits and even shareholder suits challenging these decisions and could present reputational and operational risks.

Many companies have ended DEI programs, scaled back DEI programs, and downsized or eliminated employees focused on DEI. Indeed, since the Supreme Court decision, several companies have announced they are eliminating or cutting back on DEI programs. These key companies include:

- **JP Morgan Chase** (rolling back DEI commitments);
- **Goldman Sachs** (dropping requirement that a company it takes public must have at least two diverse members on its board of directors based on Fifth Circuit ruling in December that Nasdaq could not impose rules designed to increase diversity in corporate America by requiring companies listed on the exchange to have women and minority directors on their boards or explain why they do not);
- **Disney** (shifting from DEI to talent strategy);
- **Deloitte** (telling U.S. employees working with government clients to remove pronouns from their email signatures, rolling back its DEI goals, and ceasing issuing diversity reports);
- **PBS** (closing DEI office and those in DEI roles have left the company to make sure it complies with Trump's anti-DEI executive orders);
- **Google** (cutting DEI hiring goals and no longer marking the start of cultural observances like Pride Month and Black History Month);
- **Pepsi, GM, Google, Disney, GE, Intel, PayPal, Chipotle, and Comcast** (paring back or removing references to DEI in their 2024 annual reports to investors);
- **Accenture** (no longer using diversity targets in hiring and promoting);
- **Amazon** (annual report omitted a section included in prior annual reports indicating it has a focus on inclusion and diversity in hiring);
- **Amtrak** (rolling back DEI programs and policies).
- **Smithsonian Institution** (closing its diversity office);
- **Target** (curbing LGBTQ Pride merchandise line and pulling back on racial hiring targets);
- **FBI** (closing its DEI office);
- **Meta** (ending several programs intended to increase its hiring of diverse candidates);

- **Mcdonald's** (abandoning specific diversity targets and ceasing participation in external surveys that measure company demographics);
- **Walmart** (abandoning its DEI commitments, including winding down a Center for Racial Equity nonprofit it had founded);
- **Boeing** (dismantling its global DEI department);
- **Molson Coors** (abandoning supplier diversity quotas and shifting DEI training sessions to focus on business objectives);
- **Loews** (ceasing participating in HRC surveys and participating in external events like Pride parades);
- **Ford Motor Co.** (ending participation in external diversity surveys);
- **Brown-Forman** (no longer linking executive compensation to DEI progress, removing workforce and supplier diversity goals, and ending participating in the HRC index);
- **Harly Davidson** (abandoning its DEI function and use of diversity quotas for hiring or suppliers); and
- **John Deere** (no longer supporting cultural awareness events and removing "socially-motivated messages").

Not all companies have abandoned their DEI programming. Some organizations, including Costco, Apple, Delta Airlines, Cisco, and Deutsche Bank, have publicly announced that they are standing behind their DEI policies. The ultimate impact of this decision will continue to play out over time, but the U.S. Supreme Court decision has been impactful.

B. The Impact of the 2024 U.S. Election on DEI

The election of President Trump in 2024 was another major DEI-limiting event. President Trump made it clear during the presidential campaign that a second Trump Administration would move away from DEI and return to a merits-based hiring and retention system.

In the early days of his Administration, President Trump has been delivering on that campaign promise. On his first day in office in his second term, President Trump signed two executive orders taking aim at DEI. The first, entitled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," provides:

> **Section 1. Purpose.**
>
> Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women's domestic abuse shelters to women's workplace showers. This is wrong. Efforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and well-being. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system. Basing Federal policy on truth is critical to scientific inquiry, public safety, morale, and trust in government itself.
>
> This unhealthy road is paved by an ongoing and purposeful attack against the ordinary and longstanding use and understanding of biological and scientific terms, replacing the immutable biological reality of sex with an internal, fluid, and subjective sense of self unmoored from

biological facts. Invalidating the true and biological category of "woman" improperly transforms laws and policies designed to protect sex-based opportunities into laws and policies that undermine them, replacing longstanding, cherished legal rights and values with an identity-based, inchoate social concept.

Accordingly, my Administration will defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male.

Sec. 2. Policy and Definitions.

It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality, and the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy:

(a) "Sex" shall refer to an individual's immutable biological classification as either male or female. "Sex" is not a synonym for and does not include the concept of "gender identity."

(b) "Women" or "woman" and "girls" or "girl" shall mean adult and juvenile human females, respectively.

(c) "Men" or "man" and "boys" or "boy" shall mean adult and juvenile human males, respectively.

(d) "Female" means a person belonging, at conception, to the sex that produces the large reproductive cell.

(e) "Male" means a person belonging, at conception, to the sex that produces the small reproductive cell.

(f) "Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.

(g) "Gender identity" reflects a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex.

Sec. 3. Recognizing Women Are Biologically Distinct From Men.

(a) Within 30 days of the date of this order, the Secretary of Health and Human Services shall provide to the U.S. Government, external partners, and the public clear guidance expanding on the sex-based definitions set forth in this order.

(b) Each agency and all Federal employees shall enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes. Each agency should therefore give the terms "sex", "male", "female", "men", "women", "boys" and "girls" the meanings set forth in section 2 of this order when interpreting or applying statutes, regulations, or guidance and in all other official agency business, documents, and communications.

(c) When administering or enforcing sex-based distinctions, every agency and all Federal employees acting in an official capacity on behalf of their agency shall use the term "sex" and not "gender" in all applicable Federal policies and documents.

(d) The Secretaries of State and Homeland Security, and the Director of the Office of Personnel Management, shall implement changes to require that government-issued identification documents, including passports, visas, and Global Entry cards, accurately reflect the holder's sex, as defined under section 2 of this order; and the Director of the Office of Personnel Management shall ensure that applicable personnel records accurately report Federal employees' sex, as defined by section 2 of this order.

(e) Agencies shall remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology, and shall cease issuing such statements, policies, regulations, forms, communications or other messages. Agency forms that require an individual's sex shall list male or female, and shall not request gender identity. Agencies shall take all necessary steps, as permitted by law, to end the Federal funding of gender ideology.

(f) The prior Administration argued that the Supreme Court's decision in *Bostock v. Clayton County* (2020), which addressed Title VII of the Civil Rights Act of 1964, requires gender identity-based access to single-sex spaces under, for example, Title IX of the Educational Amendments Act. This position is legally untenable and has harmed women. The Attorney General shall therefore immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities. In addition, the Attorney General shall issue guidance and assist agencies in protecting sex-based distinctions, which are explicitly permitted under Constitutional and statutory precedent.

(g) Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.

Sec. 4. Privacy in Intimate Spaces.

(a) The Attorney General and Secretary of Homeland Security shall ensure that males are not detained in women's prisons or housed in women's detention centers, including through amendment, as necessary, of Part 115.41 of title 28, Code of Federal Regulations and interpretation guidance regarding the Americans with Disabilities Act.

(b) The Secretary of Housing and Urban Development shall prepare and submit for notice and comment rulemaking a policy to rescind the final rule entitled "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs" of September 21, 2016, 81 FR 64763, and shall submit for public comment a policy protecting women seeking single-sex rape shelters.

(c) The Attorney General shall ensure that the Bureau of Prisons revises its policies concerning medical care to be consistent with this order, and shall ensure that no Federal funds are expended for any medical procedure, treatment, or drug for the purpose of conforming an inmate's appearance to that of the opposite sex.

(d) Agencies shall effectuate this policy by taking appropriate action to ensure that intimate spaces designated for women, girls, or females (or for men, boys, or males) are designated by sex and not identity.

Sec. 5. Protecting Rights.

The Attorney General shall issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964. In accordance with that guidance, the Attorney General, the Secretary of Labor, the General Counsel and Chair of the Equal Employment Opportunity Commission, and each other agency head with enforcement responsibilities under the Civil Rights Act shall prioritize investigations and litigation to enforce the rights and freedoms identified.

Sec. 6. Bill Text.

Within 30 days of the date of this order, the Assistant to the President for Legislative Affairs shall present to the President proposed bill text to codify the definitions in this order.

Sec. 7. Agency Implementation and Reporting.

(a) Within 120 days of the date of this order, each agency head shall submit an update on implementation of this order to the President, through the Director of the Office of Management and Budget. That update shall address:

(i) changes to agency documents, including regulations, guidance, forms, and communications, made to comply with this order; and

(ii) agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order.

(b) The requirements of this order supersede conflicting provisions in any previous Executive Orders or Presidential Memoranda, including but not limited to Executive Orders 13988 of January 20, 2021, 14004 of January 25, 2021, 14020 and 14021 of March 8, 2021, and 14075 of June 15, 2022. These Executive Orders are hereby rescinded, and the White House Gender Policy Council established by Executive Order 14020 is dissolved.

(c) Each agency head shall promptly rescind all guidance documents inconsistent with the requirements of this order or the Attorney General's guidance issued pursuant to this order, or rescind such parts of such documents that are inconsistent in such manner. Such documents include, but are not limited to:

(i) "The White House Toolkit on Transgender Equality";

(ii) the Department of Education's guidance documents including:

(A) "2024 Title IX Regulations: Pointers for Implementation" (July 2024);

(B) "U.S. Department of Education Toolkit: Creating Inclusive and Nondiscriminatory School Environments for LGBTQI+ Students";

(C) "U.S. Department of Education Supporting LGBTQI+ Youth and Families in School" (June 21, 2023);

(D) "Departamento de Educación de EE.UU. Apoyar a los jóvenes y familias LGBTQI+ en la escuela" (June 21, 2023);

(E) "Supporting Intersex Students: A Resource for Students, Families, and Educators" (October 2021);

(F) "Supporting Transgender Youth in School" (June 2021);

(G) "Letter to Educators on Title IX's 49th Anniversary" (June 23, 2021);

(H) "Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families" (June 2021);

(I) "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County" (June 22, 2021);

(J) "Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students" (June 9, 2021); and

(K) "Back-to-School Message for Transgender Students from the U.S. Depts of Justice, Education, and HHS" (Aug. 17, 2021);

(iii) the Attorney General's Memorandum of March 26, 2021 entitled "Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972"; and

(iv) the Equal Employment Opportunity Commission's "Enforcement Guidance on Harassment in the Workplace" (April 29, 2024).

Sec. 8. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

The second executive order entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing," also dated January 20, 2025, provides:

Section 1. Purpose and Policy.

The Biden Administration forced illegal and immoral discrimination programs, going by the name "diversity, equity, and inclusion" (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military. This was a concerted effort stemming from President Biden's first day in office, when he issued Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."

Pursuant to Executive Order 13985 and follow-on orders, nearly every Federal agency and entity submitted "Equity Action Plans" to detail the ways that they have furthered DEIs infiltration of the Federal Government. The public release of these plans demonstrated immense public waste and shameful discrimination. That ends today. Americans deserve a government committed to serving every person with equal dignity and respect, and to expending precious taxpayer resources only on making America great.

Sec. 2. Implementation.

(a) The Director of the Office of Management and Budget (OMB), assisted by the Attorney General and the Director of the Office of Personnel Management (OPM), shall coordinate the termination of all discriminatory programs, including illegal DEI and "diversity, equity, inclusion, and accessibility" (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear. To carry out this directive, the Director of OPM, with the assistance of the Attorney General as requested, shall review and revise, as appropriate, all existing Federal employment practices, union contracts, and training policies or programs to comply with this order. Federal employment practices, including Federal employee performance reviews, shall reward individual initiative, skills, performance, and hard work and shall not under any circumstances consider DEI or DEIA factors, goals, policies, mandates, or requirements.

(b) Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM, as appropriate, shall take the following actions within sixty days of this order:

(i) terminate, to the maximum extent allowed by law, all DEI, DEIA, and "environmental justice" offices and positions (including but not limited to "Chief Diversity Officer" positions); all "equity action plans," "equity" actions, initiatives, or programs, "equity-related" grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees.

(ii) provide the Director of the OMB with a list of all:

(A) agency or department DEI, DEIA, or "environmental justice" positions, committees, programs, services, activities, budgets, and expenditures in existence on November 4, 2024, and an assessment of whether these positions, committees, programs, services, activities, budgets, and expenditures have been misleadingly relabeled in an attempt to preserve their pre-November 4, 2024 function;

(B) Federal contractors who have provided DEI training or DEI training materials to agency or department employees; and

(C) Federal grantees who received Federal funding to provide or advance DEI, DEIA, or "environmental justice" programs, services, or activities since January 20, 2021.

(iii) direct the deputy agency or department head to:

(A) assess the operational impact (*e.g.*, the number of new DEI hires) and cost of the prior administration's DEI, DEIA, and "environmental justice" programs and policies; and

(B) recommend actions, such as Congressional notifications under 28 U.S.C. 530D, to align agency or department programs, activities, policies, regulations, guidance, employment practices, enforcement activities, contracts (including set-asides), grants, consent orders, and litigating positions with the policy of equal dignity and respect identified in section 1 of this order. The agency or department head and the Director of OMB shall jointly ensure that the deputy agency or department head has the authority and resources needed to carry out this directive.

(C) To inform and advise the President, so that he may formulate appropriate and effective civil-rights policies for the Executive Branch, the Assistant to the President for Domestic Policy shall convene a monthly meeting attended by the Director of OMB, the Director of OPM, and each deputy agency or department head to:

(i) hear reports on the prevalence and the economic and social costs of DEI, DEIA, and "environmental justice" in agency or department programs, activities, policies, regulations, guidance, employment practices, enforcement activities, contracts (including set-asides), grants, consent orders, and litigating positions;

(ii) discuss any barriers to measures to comply with this order; and

(iii) monitor and track agency and department progress and identify potential areas for additional Presidential or legislative action to advance the policy of equal dignity and respect.

Sec. 3. Severability.

If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected.

Sec. 4. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The foregoing demonstrates that the second Trump Administration will move away from DEI and toward merits-based employment decisions. Time will tell the extent to which states and courts may push back in favor of DEI.

IV. The Impact of ESG and ESG Regulation on Risk Profiles and Claims

Risk managers and insurers alike must consider the impact of ESG on corporate risk profiles and claims. Indeed, ESG has given rise to new claims. For example, insurers and policyholders must be aware of the potential for greenwashing claims. As *Business Insurance* reporter Shane Dilworth pointed out:

> Increased scrutiny of companies accused of engaging in so-called greenwashing – or falsely conveying that their products are more environmentally friendly than they really are – will likely lead to insurance coverage disputes as federal regulators zero in on environmental, social, and governance issues this year. Companies such as Exxon Mobil Corp., Suncor Energy and Chevron Corp. came under fire for greenwashing in lawsuits brought by local governments that claim they suffered increased infrastructure costs as a result of rising sea levels and severe weather events.
>
> The plaintiffs in those cases accuse the energy giants of intentionally misrepresenting their knowledge about the association between burning fossil fuels and climate change. Another theory on greenwashing, experts say, involves whether companies are being properly managed or clearly representing to investors information about their societal governance and efforts to operate in an environmentally friendly manner. [viii]

Indeed, Greenwashing may have severe reputational, financial, and legal consequences for companies.

The SEC and other regulators have been reviewing public statements and disclosures surrounding ESG issues, as are investors and securities lawyers. In *Commonwealth v. Exxon Mobil Corp.*[ix] Massachusetts initiated an enforcement action alleging that Exxon's communications with investors and consumers related to climate change by representing that its motor oil products were clean, greenhouse-gas reducing and beneficial to the environment. The action alleges greenwashing and unfair and deceptive practices.

Previously, in 2019, two consumer nonprofit groups sued Tyson Foods, Inc., alleging it misled consumers with false statements claiming their chicken products are produced in an environmentally responsible way. *Organic Consumers Ass'n v. Tyson Foods, Inc.*[x] The plaintiffs assert that Tyson Foods marketed its company as "stewards of the environment" while that actually contaminates the environment and treats animals cruelly. The trial court denied a motion to dismiss filed by Tyson Foods, ruling that its statements that its products were a humane choice and that it was committed to excellence in animal welfare were detailed and concrete enough to be actionable under the D.C. Consumer Protection Procedures Act.

Cases like these testing whether ESG representations are sufficiently detailed and supported – or whether they are mere "greenwashing" – were on the rise. Accusations include ones that firms are making unsubstantiated or misleading claims about the environmentally friendly credentials of their products or services, that they are making highly selective disclosures about the environmental impacts of their business practices, and that they are misleading and/or overstated claims about their performance in the context of halting climate change (sometimes referred to as "climate-washing").

Another outcome of the rise in accusations of greenwashing or climate-washing is the related phenomenon of "green hushing," where companies seek to hide their climate strategies from wider scrutiny. A report by consultancy firm South Pole found that nearly a quarter (23 percent) of 1200 "sustainability-minded organisations" surveyed about their "science-aligned climate targets" had decided not to publish details of their plans.[xi] This highlights the sense of nervousness felt by some business leaders around the potential downside of climate change commitments.

There has been an increase in greenwashing cases, including in shareholder derivative suits and securities cases. Some of those have also included actions against officers and directors for breach of fiduciary duty. The cases generally claim that statements by senior executives are materially false and misleading and, in turn, result in inflated share prices. Issues have covered a broad range, including the biodegradability of plastics, recycling processes, and the demand and production capabilities of electric trucks, to name a few.[xii]

There has also been an increase in consumer litigation in ESG representations. Consumer-based cases center around misstatements about products and processes, ranging from labor conditions of workers who produce cocoa beans, to the environmental sustainability of shoes, to whether juice is organic, to whether tuna is "dolphin safe," to the labeling of products as recyclable, biodegradable, and eco-friendly. The cases point to representations about products or processes in product labels, websites, social media, marketing materials, and environmental reports.

The overall theory of the cases is that the consumer would not have purchased the product "but for" the representation. These cases can be costly. For example, Keurig Green Mountain agreed to settle a class action lawsuit against it regarding the recyclability of its coffee pods for $10 million.[xiii] Recently, cases have extended to claims about overall sustainability and carbon neutrality, albeit with mixed outcomes.[xiv]

A United States Securities and Exchange Commission (SEC) Risk Alert stated that companies should engage in clear and simple disclosures that are precise and tailored to firms' specific approaches to climate and ESG investing, that accurately convey the material aspects of the firms' approaches to ESG investing, and that align with the firms' actual practices.[xv] In 2021, the SEC announced the formation of the Climate and ESG Task Force, with an initial focus on identifying any material gaps or misstatements in disclosures of climate risks under existing rules and proactively identifying related misconduct.[xvi]

Treasury Secretary Janet Yellen charged the Financial Stability Oversight Council with assessing the financial risks associated with climate and sharing that information with regulators and private investors.[xvii] This increased regulatory focus comes as investors have turned their attention and funds to ESG issues. A 236-page final rule was submitted by the Department of Labor's Employee Benefits Security Administration, which set out amendments to regulations under the Employee Retirement Income Security Act that "spell out how managers meet fiduciary duties of prudence and loyalty when it comes to ESG."[xviii]

In February 2023, the SEC announced that Activision Blizzard, Inc. would pay $35 million to settle charges related to the alleged governance failures around workplace harassment.[xix] In March 2023, the SEC announced that Vale, S.A. had agreed to settle charges brought against it stemming from its allegedly false and misleading disclosures about the safety of its dams prior to the January 2019 dam collapse that killed 270 people. Vale agreed to pay $55 million.[xx]

In addition to SEC enforcement actions, there has been enforcement on behalf of the Federal Trade Commission. The FTC used its Penalty Offense Authority to level $5.5 million in penalties against Kohl's, Inc. and Walmart, Inc. based on claims that bamboo textiles were made using eco-friendly processes (despite the use of toxic chemicals and hazardous substances).[xxi]

The United States is not alone in its attention to greenwashing. For example, the United Kingdom Advertising Standards Authority has concluded statements in advertising by various entities to be unsubstantiated and/or insufficiently qualified. Those instances have included an airline advertising itself as "Connecting the World. Protecting its Future," a bank advertising itself as transitioning to net zero despite fossil fuel investments; a laundry soap manufacturer advertising itself as "kinder to our planet" and a non-dairy milk manufacturer advertising itself as "good for the planet." And a French court ruled in

May that Greenpeace France's case against Total may proceed. The case alleges that Total's decarbonization representations and commitments are misleading.

In November 2021, the New York State Department of Financial Services (DFS) announced that it formed a climate division. Late that month, DFS issued final guidance to insurers subject to the department's regulation regarding their management of the financial risks from climate change. DFS claims to be the first U.S. financial regulator to issue a holistic set of expectations on managing the financial risks from climate change. As described in the guidance, DFS expects insurers to take a strategic approach to managing climate risks that consider both current and forward-looking risks and identify actions required to manage those risks in a manner proportionate to the nature, scale, and complexity of insurers' businesses.[xxii]

DFS states that insurers should: integrate the consideration of climate risks into its governance structure at the group or insurer entity level; when making business decisions, consider the current and forward-looking impact of climate-related factors on its business using time horizons that are appropriately tailored to the insurer, its activities and the decisions being made; incorporate climate risks into the insurer's existing financial risk management, including by embedding climate risks in its risk management framework and analyzing the impact of climate risks on existing risk factors; use scenario analysis to inform business strategies and risk assessment and identification; and disclose its climate risks and engage with the Task Force on Climate-related Financial Disclosures and other initiatives when developing its disclosure approaches.[xxiii]

Acting Superintendent of Financial Services Adrienne A. Harris stated, "[c]limate change is an urgent issue that poses wide-ranging and material risks to the financial system. Insurers, which are uniquely impacted as climate change affects both sides of their balance sheets, also play a critical role in managing climate risks."

On August 6, 2021, the SEC approved the diversity rule proposed by the Nasdaq Stock Market (Rule 5605(f)). Nasdaq is the second largest exchange in the United States, with over 3,700 public companies listed and a total market capital of $19 trillion. Nasdaq-listed companies will generally be required to either have (or explain why they do not have) at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+, as those terms are defined in the rule.[xxiv]

On December 11, 2024, in *Alliance for Fair Board Retirement v. SEC*[xxv], the United States Court of Appeals for the Fifth Circuit struck down the rule proposed by Nasdaq and approved by the U.S. SEC that would have required most Nasdaq-listed companies to disclose statistical information relating to board diversity and to have, or explain why they do not have, at least two diverse directors. By a 9-8 vote, the majority of the Circuit court held that the disclosure requirements were not related to the goals of protecting investors from speculative, manipulative and fraudulent practices and promoting competition in the market for securities transactions—which the majority considered the primary purposes of the Securities Exchange Act of 1934 (the "Exchange Act")—and that the SEC's determination that the proposed rule was consistent with the requirements of the Exchange Act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

There already have been diversity-related lawsuits filed, including cases against businesses such as Facebook, Oracle, and Monster Beverages. One common charge against the directors and officers of the sued companies is that they breached their fiduciary duties and violated Section 14(a) of the Securities Exchange Act by failing to include diverse directors on their boards and in their senior executive ranks while touting their commitment to diversity, equity, and inclusion in the company's proxy statements/other publications. Suits are seeking a wide range of relief, including disgorgement of compensation, attorney fees, forced resignations, termination of auditors and vendors, diversity training programs, and the establishment of hiring committees focused on diverse hiring.

On June 28, 2022, a plaintiff shareholder filed a securities class action in the Northern District of California against Wells Fargo and certain of its directors and officers, alleging that the defendants made false or misleading statements regarding its commitment to diversity in the workplace and conducted fake job interviews to meet its Diverse Search Requirement, thereby subjecting the company to an increased risk of regulatory enforcement and negatively impacting the company's reputation.[xxvi]

On May 13, 2022, a Los Angeles County Superior Court ruled in *Robin Crest et al. v. Alex Padilla*[xxvii] that California's statute (S.B. 826) requiring California-based public companies to have one to three women on their boards of directors, depending on their board size, violated the equal protection clause of the state constitution. Although the decision, which followed a bench trial, does not specifically address the related requirement in S.B. 826 that companies disclose board member information to the secretary of state, the court's decision enjoins enforcement of the entire law. This decision follows the decision of another Los Angeles County Superior Court in April 2022, striking down a similar law requiring companies to include at least one member of an "underrepresented community" on their boards, concluding the law violated the equal protection clause in California's constitution.

Many insurers believe that policyholders with ESG awareness have a better risk profile than those not focused on ESG or policyholders with poorly conceived ESG policies or strategies. Understandably, insurers are reviewing policyholder ESG policies and performance with increasing frequency and in greater depth. Insurers should also recognize that when a policyholder's ESG awareness becomes ESG activism, it could result in additional risks, resulting in claims against the policyholder. ESG activism could present risks similar to those of insurers in their own business strategies and policies. This applies to the components of ESG.

Ben & Jerry's Ice Cream provides an example in the context of D&O Claims. On June 15, 2022, U.K. consumer products company Unilever was sued by a shareholder alleging that the company mishandled the decision by its Ben & Jerry's unit to stop selling ice cream in Israeli-occupied Palestinian territories. Unilever acquired Ben & Jerry's ice cream in 2000, but Ben & Jerry's retained an independent board. In July 2020, the independent Ben & Jerry's board passed a resolution to end Ben & Jerry's sales of its products in areas the board considered to be Palestinian territories illegally occupied by Israel.

The newly filed securities class action complaint in the Southern District of New York against Unilever and some of its executives alleges that the defendants made "false and misleading representations" as "Unilever acknowledged the importance of maintaining successful customer relationships with existing customers but omitted discussing that the B&J board had already decided to end sales to existing Israeli customers, which risked reduced sales and a customer backlash."

According to the complaint, Unilever acknowledged that its brands and reputation are "valuable assets that could be impacted by unethical conduct but omitted to discuss Ben & Jerry's boycott decision, which risked damage to Unilever's brands, reputation, and business results." The complaint also states that "Unilever acknowledged that complying with all applicable laws and regulations was important but omitted to discuss Ben & Jerry's boycott decision, which risked adverse governmental actions for violations of Anti-BDS Legislation." As seen above, it was Ben & Jerry's social activism that gave rise to the lawsuit.[xxviii]

Another example is Disney's handling of The Parental Rights in Education Act, dubbed by some as the "Don't Say Gay" legislation, in Florida. The company's handling of the issue seemed to anger people on both sides of the issue and had adverse consequences for the company in terms of legislative action and stock price.[xxix]

The National Basketball Association's stand or failure to take a stand with respect to policies in China may also present issues. Simply stated, different people view many policies differently, and individuals may be impacted differently by the policies even within the same constituency. The foregoing illustrates the importance of not mishandling ESG issues as well as the difficulties ESG issues can present to companies. Taking a position – or not taking a position – can impact a company.

Another example is the consumer backlash faced by Bud Light as a result of its affiliation with transgender actor and social media influencer Dylan Mulvaney.

The outcome in the matter regarding Disney in Florida is of particular consequence. Although taking a position on Florida legislation had business consequences that were not positive for Disney in terms of political reprisal, stock price, and market positioning, Disney officers and directors prevailed in a stockholder action seeking books and records based upon an alleged breach of fiduciary duty. On June 27, 2023, *Simeone v. Walt Disney Co.* held that the determination by Disney directors and officers to publicly oppose Florida's HB 1557 – the bill limiting instruction on sexual orientation or gender identity in Florida classrooms – did not constitute a breach of fiduciary duty.

Initially, Disney was silent on the bill. After receiving criticism from employees and collaboration partners, however, the Disney board convened a special meeting at which it decided to publicly criticize the bill.

The court denied the stockholder's records demand, concluding he failed to establish a proper purpose and that the demand was overly broad. First, the court determined the purposes described in the records demand were not the plaintiff's own purposes but were those of his counsel. Plaintiff had been solicited to submit the demand by an attorney from a public interest law firm noted to be advancing the litigation costs of the case.

The court recognized that investigating potential wrongdoing, mismanagement, and breaches of fiduciary duties certainly may be a proper purpose. Yet, second--and perhaps more notably--the court found the plaintiff had failed to show "evidence to suggest a credible basis for wrongdoing" in the case. Also, the court noted that Disney had, in fact, provided some records to the stockholder, which the court deemed to be sufficient insofar as plaintiff wanted to know the persons responsible for making the decision to oppose the bill.

At its core, the plaintiff's theory was that Disney's board and officers had breached their fiduciary duties when they decided to publicly oppose HB 1557. According to the court, deciding whether or not to speak publicly on policy issues is an ordinary business decision. Vice Chancellor Will stated:

> Delaware law vests directors with significant discretion to guide corporate strategy—including on social and political issues. Given the diversity of viewpoints held by directors, management, stockholders, and other stakeholders, corporate speech on external policy matters brings both risks and opportunities. The board is empowered to weigh these competing considerations and decide whether it is in the corporation's best interest to act (or not act). This suit concerns such a business decision by the Disney board – a decision that cannot provide a credible basis to suspect potential mismanagement irrespective of its outcome. There is no indication that the directors suffered from disabling conflicts. Nor is there any evidence that the directors were grossly negligent or acted in bad faith. Rather, the board held a special meeting to discuss Disney's approach to the legislation and the employees' negative response. Disney's public rebuke of HB 1557 followed.

The court noted that a board's:

> consideration of employee concerns was not, as the plaintiff suggests, at the expense of stockholders. A board may conclude in the exercise of its business judgment that addressing interests of corporate stakeholders – such as the workforce that drives a company's profits--is

> 'rationally related' to building long-term value. Indeed, the plaintiff acknowledges that maintaining a positive relationship with employees and creative partners is crucial to Disney's success. It is not for this court to 'question rational judgments about how promoting non-stockholder interests – be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture – ultimately promote stockholder value.'

The court went one step further, noting that, even if a board's defiance of a political threat could provide a credible basis to suspect wrongdoing, there was no factual support for that conclusion here as plaintiff failed to demonstrate that Disney was warned of financial repercussions or dissolution of Florida's Reedy Creek Improvement Act (which granted self-governance to Disney) before its public opposition of the bill.

As the court recognized, this case exemplifies:

> the challenges a corporation faces when addressing divisive topics – particularly ones external to its business. Individual investors have diverse interests – beyond their shared goal of corporate profitability – and viewpoints that may not align with the company's position on political, religious, or social matters. Yet stockholders invest with the understanding that the board is empowered to direct the corporation's affairs.

Governmental entities and regulators are weighing in with various pieces of legislation and regulations to implement their policy agendas. One recent example aimed directly at insurers is the State of Washington's removal of insurers' right to use credit scores in pricing despite its close correlation with risk. More broadly, property and casualty insurance are being pressed to alter their premium pricing structures.

Insurance rating agencies across the globe have become increasingly aware of ESG risk factors and their potential impacts on their investment portfolios and lending policies. Since March 2020, when AM Best began disclosing whether ESG factors were key rating drivers, roughly 10 percent of rating movements have been a result of ESG factors. Environmental and governance factors have been the most frequent drivers of these rating movements. DBRS Morningstar reports that large institutions are facing greater pressure from external shareholders to better manage their exposures to environmental risks.

This has become more important than ever for property and casualty insurers after several years of heightened natural catastrophe losses. DBRS Morningstar announced it is taking a more formal approach to incorporating ESG factors into its rating process across all rating groups worldwide, including in rating insurance companies and financial institutions. It identified 17 significant ESG factors - five environmental, seven social, and five governance--that will now be considered when rating companies.[xxx]

AM Best is a signatory to the United Nations' Principles for Sustainable Insurance (PSI), a framework designed to embed ESG issues in decision-making. The PSI is a voluntary sustainability framework launched by the United Nations Environment Programmed Finance Initiative in 2012. It requires insurers to demonstrate their adoption of sustainable insurance practices and make transparent disclosures to the public around ESG issues. AM Best Rating Services CEO Matthew Mosher said the move forms part of the agency's focus on insurance and its continued belief that ESG elements play an important role in the financial strength of an insurance company. According to PSI:

> ESG issues are increasingly influencing traditional risk factors and can have a significant impact on the industry's viability. Therefore, a resilient insurance industry depends on holistic and far-sighted risk management in which ESG issues are considered. As risk managers, risk carriers and investors, the insurance industry has a vital interest and plays an important role in fostering sustainable economic and social development. We believe that better management of ESG

> issues will strengthen the insurance industry's contribution to building a resilient, inclusive and sustainable society.
>
> However, many ESG issues are too big and complex and need widespread action across society, innovation and long-term solutions. Therefore, it is our aspiration to build on the foundation the insurance industry has laid in supporting a sustainable society. The future we want is a society in which people are aligned and incentivized to adopt sustainable practices. To realize this aim, we will use our intellectual, operational and capital capacities to implement the Principles for Sustainable Insurance (the 'Principles') across our spheres of influence, subject to applicable laws, rules and regulations and duties owed to shareholders and policyholders. [xxxi]

ESG has a major impact on insured and uninsured losses. Apart from claims based upon climate change, the environmental component of ESG has substantially impacted what were traditionally called losses from natural disasters. Global losses from natural disasters in 2020 were $210 billion, according to Munich Re, of which only $82 billion was insured.[xxxii] Both overall losses and insured losses were significantly higher than in 2019, which experienced a total loss of $166 billion, of which US $57 billion was insured.

Climate change will play an increasing role in all of these hazards, requiring property and casualty insurers to manage their environmental exposures appropriately. The assessment of environmental risks is a major component of DBRS Morningstar's analysis for the property and casualty insurance business. It explained, "[t]his includes the impact of insured catastrophes on an insurance company's financial strength, as well as considerations regarding claims predictability, frequency, and severity."[xxxiii]

The London School of Economics and Political Science reports the global number of climate change-related cases has more than doubled since 2015, with over 800 cases filed between 1986 and 2014 and over 1,000 cases filed between 2015 and 2021. Not surprisingly, 1,387 of the 1,841 ongoing or concluded cases of climate change litigation from around the globe were filed in the U.S. It notes the number of cases challenging government inaction in climate goals continues to grow. Cases are targeting a wider variety of private sector and financial actors, and there is more diversity in the arguments being employed. It warns three areas to look out for are "value chain litigation, cases of government support to the fossil fuel industry (e.g., through subsidies or tax relief), and cases focused on the distribution of the burdens associated with action, which may be classed as 'just transition' cases."[xxxiv]

According to the report,

> (1) cases against private parties continue to be brought, and the arguments and strategies continue to develop;
>
> (2) some seek to establish corporate liability and seek billions of dollars in damages to pay for infrastructure investments for climate adaptation; and
>
> (3) An increasing number of claims focus on financial risks, fiduciary duties, and corporate due diligence, which directly affect not only fossil fuel and cement companies but also banks, pension funds, asset managers, insurers, and major retailers, among others.

Examples include claims raising issues around deliberate disinformation (*e.g.*, "greenwashing" cases), failure to disclose and manage climate change risk, cases seeking the recognition of corporate human rights responsibilities (*e.g.*, corporate duty of care and the alignment of major emitters' activities with climate change targets), and cases that challenge specific projects or developments (*e.g.*, carbon-intensive projects or technologies).[xxxv] Although the momentum is overwhelming on the side of advancing ESG, there is some pushback.

McKinsey & Company pointed to the four major objections associated with ESG:

(1) ESG is a distraction from what businesses are supposed to do;

(2) ESG is not feasible because it is too difficult to strike the balance needed to implement in a way that resonates among multiple stakeholders;

(3) ESG is not measurable, at least to any practicable degree; and

(4) even when ESG can be measured, there is no meaningful relationship with financial performance.[xxxvi]

According to McKinsey:

> The fundamental issue that underlies each of the four ESG critiques is a failure to take adequate account of social license--that is, the perception by stakeholders that a business or industry is acting in a way that is fair, appropriate, and deserving of trust ... But what some critics overlook is that a precondition for sustaining long-term value is to manage, and address, massive, paradigm-shifting externalities. Companies can conduct their operations in a seemingly rational way, aspire to deliver returns quarter to quarter, and determine their strategy over a span of five or more years. But if they assume that the base case does not include externalities or the erosion of social license by failing to take externalities into account, their forecasts--and indeed, their core strategies--may not be achievable at all. Amid a thicket of metrics, estimates, targets, and benchmarks, managers can miss the very point of why they are measuring in the first place: to ensure that their business endures, with societal support, in a sustainable, environmentally viable way.
>
> Accordingly, the responses to ESG critics coalesce on three critical points: the acute reality of externalities, the early success of some organizations, and the improvement of ESG measurements over time. And the case for ESG cannot be dismissed by connections between ESG scores and financial performance and changes in ESG scores over time.[xxxvii]

Social risk factors may similarly have a significant impact on an insurance organization's customer and employee base, as well as its financial strength. Weak corporate governance and unethical conduct may have a detrimental impact on financial performance and reputation and could result in fines, damages, or loss of operating licenses. Increases in costs associated with recruitment and retention of women and workers from ethnic minorities, poorer socio-economic backgrounds, and employees with disabilities and ensuring equal pay are expected.

Insurers have insurance and risk management products that are useful to corporate policyholders in managing risks and addressing ESG issues. Insurers have expertise and capabilities in risk assessment, management, response, and loss control that could benefit corporate policyholders. Sustainable insurance products are already being marketed. For example, in a sustainable household insurance policy, policyholders can expect compensation for additional costs if appliances need to be replaced with new ones that meet the highest energy efficiency class. In the automotive sector, better differentiation can be achieved through the use of telematics, or discounts could be considered for the purchase of an electric car.

Various insurers have and are developing methodologies, applications, and platforms for their use and the use of their policyholders. Some insurers have been providing readiness questionnaires, guidance, and best practices based on objective criteria for environmental compliance, assessments, and readiness.

Notwithstanding the foregoing, it is generally expected that regulatory risks and administrative action related to ESG will be sharply reduced under the second Trump Administration.

V. The Role of Shareholders, Rating Agencies, and Others

As previously suggested, numerous internal and external stakeholders factor into a company's ESG policies and practices. In addition to employees and management, customers, vendors, distribution chain partners, markets, and communities in which companies are located and do business are among the various stakeholders that can impact the ESG policies of insurers and policyholders.

Shareholders can have a profound impact on ESG policy and practices. This can take place through shareholder resolutions, institution of shareholder derivative actions, and voting on management.

Insurance rating agencies across the globe have become increasingly aware of ESG risk factors and their potential impacts on their investment portfolios, lending, and underwriting policies. Since March 2020, when AM Best began disclosing whether ESG factors were key rating drivers, roughly 10 percent of rating movements have been a result of ESG factors. Indeed, environmental and governance factors have been the most frequent drivers of these rating movements.

DBRS Morningstar announced it was taking a more formal approach to incorporating ESG factors into its rating process across all rating groups worldwide, including rating insurance companies and financial institutions. It identified 17 significant ESG factors – five environmental, seven social, and five governance – that it considers when rating companies.

Many of the traditional tools and practices of insurers have been under assault due to ESG-related considerations. Insurance scoring, which is a type of credit-based analysis used by insurers for a long time, is now prohibited in several states, including California, Hawaii, Maryland, Massachusetts, Michigan, Oregon, Washington, and Utah. Several other states have introduced bills that would ban the use of credit-based scoring.

Additionally, gender has been an element of automobile insurance pricing for a long time. Some states do not allow gender to be a factor or require pricing to be gender-neutral. The use of zip codes and educational levels in underwriting and pricing is also under attack. Insurers' use of zip codes and levels of education in underwriting and pricing are considered by some to be discriminatory, as this practice may result in impoverished and minority communities experiencing higher insurance rates or less insurance availability.

VI. Artificial Intelligence

Companies are increasingly using artificial intelligence (AI) in various facets of their businesses. Insurers are using AI in a variety of ways, including underwriting, pricing, fraud investigation, claims evaluation and handling, and other activities. As insurers have turned to AI and modeling with greater frequency to address the complex challenges confronting them, the use of algorithms and predictive modeling is itself being subject to increased scrutiny. AI and algorithms may create or amplify biases, result in discrimination toward members of protected classes, and infringe upon intellectual property rights.

AI is subject to specific regulations in many states, and the use of AI does not afford insurers a shelter for violating generally applicable regulations. The New York State Department of Financial Services (NYSDFS) adopted a final circular about the "Use of Artificial Intelligence Systems and External Consumer Data and Information Sources in Insurance Underwriting and Pricing," signaling the department's enforcement priorities.[xxxviii]

The NYSDFS circular follows the Colorado Division of Insurance release of its Algorithm and Predictive Model Governance Regulation (AI regulation) governing life insurance;[xxxix] the California Insurance Commissioner's Bulletin 2022-5 on Allegations of Racial and Unfair Discrimination in Marketing, Rating, Underwriting, and Claims Practice by the Insurance Industry;[xl] and the Texas Department of Insurance Commissioner's Bulletin #B-0036-20 entitled "Insurer's use of third-party data."[xli] Additionally, at least fifteen states have adopted the NAIC Model Bulletin entitled "Use of Artificial Intelligence Systems by Insurers," issued in December 2023.[xlii] The use of AI and its regulation is a rapidly evolving area.

VII. Conclusion

Insurers and corporate risk managers will continue to confront and be confronted by the challenges and opportunities associated with environmental, social, and governance issues. It appears that the next few years will afford them an increased opportunity and more latitude to manage these issues with greater autonomy, in the interests of their businesses, and with less federal regulation.

[i] *See* Abraham Gross, *Texas* "ESG Ban Strains Insurance Industry, Climate Action," *Law360* (June 26, 2023), available at https://www.law360.com/insurance-authority/articles/1692232/texas-esg-ban-strains-insurance-industry-climate-action.

[ii] *See* "Governor Ron DeSantis Leads Alliance of 18 States to Fight Against Biden's ESG" *Financial Fraud* (March 16, 2023), available at https://www.flgov.com/2023/03/16/governor-ron-desantis-leads-alliance-of-18-states-to-fight-against-bidens-esg-financial-fraud/.

[iii] Letter, *New York DFS, Diversity and Corporate Governance* (Mar. 16, 2021).

[iv] Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, 2023 O.J., L, 2023/2772, 22.12.202; Ally Rich, et al., *Amid SEC Rule Limbo, US Cos. Subject To ESG Regs In EU*, Law360 (Aug. 29, 2024, 4:51 PM EDT), https://www.law360.com/articles/1873962/amid-sec-rule-limbo-us-cos-subject-to-esg-regs-in-eu (last visited 1/15/2025).

[v] European Commission, Corporate Sustainability Reporting, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (last visited 1/15/2025).

[vi] 600 U.S. 181, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023).

[vii] *Id*.

[viii] S. Dilworth, "Greenwashing Claims Likely To Kick-Start Coverage Battles," *Law360* (March 16, 2022), https://www.law360.com/insurance-authority/articles/1466262.

[ix] 2021 WL 3488414 (Mass. Super. Ct. 2021), *aff'd on other grounds*, 489 Mass. 724, 187 N.E.3d 393 (2022),

[x] 2021 WL 1267807 (D.C. Super. Ct. 2021).

[xi] *See* Alastair Marsh, "Companies Keep Climate Goals Secret as 'Green Hushing' Takes Off," *Bloomberg* (Oct. 17, 2022), available at https://www.bloomberg.com/news/articles/2022-10-17/companies-keep-climate-goals-secret-as-green-hushing-takes-off?in_source=embedded-checkout-banner#xj4y7vzkg.

[xii] *See e.g. DANIMER Scientific Investigation Initiated by Former Louisiana Attorney General: Kahn Swick & Foti, LLC Investigates the Officers and Directors of Danimer Scientific, Inc.*, Business Wire (Feb. 17, 2023), available at https://www.businesswire.com/news/home/20230217005391/en/DANIMER-SCIENTIFIC-INVESTIGATION-INITIATED-by-Former-Louisiana-Attorney-General-Kahn-Swick-Foti-LLC-Investigates-the-Officers-and-Directors-of-Danimer-Scientific-Inc.

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