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ESG under attack

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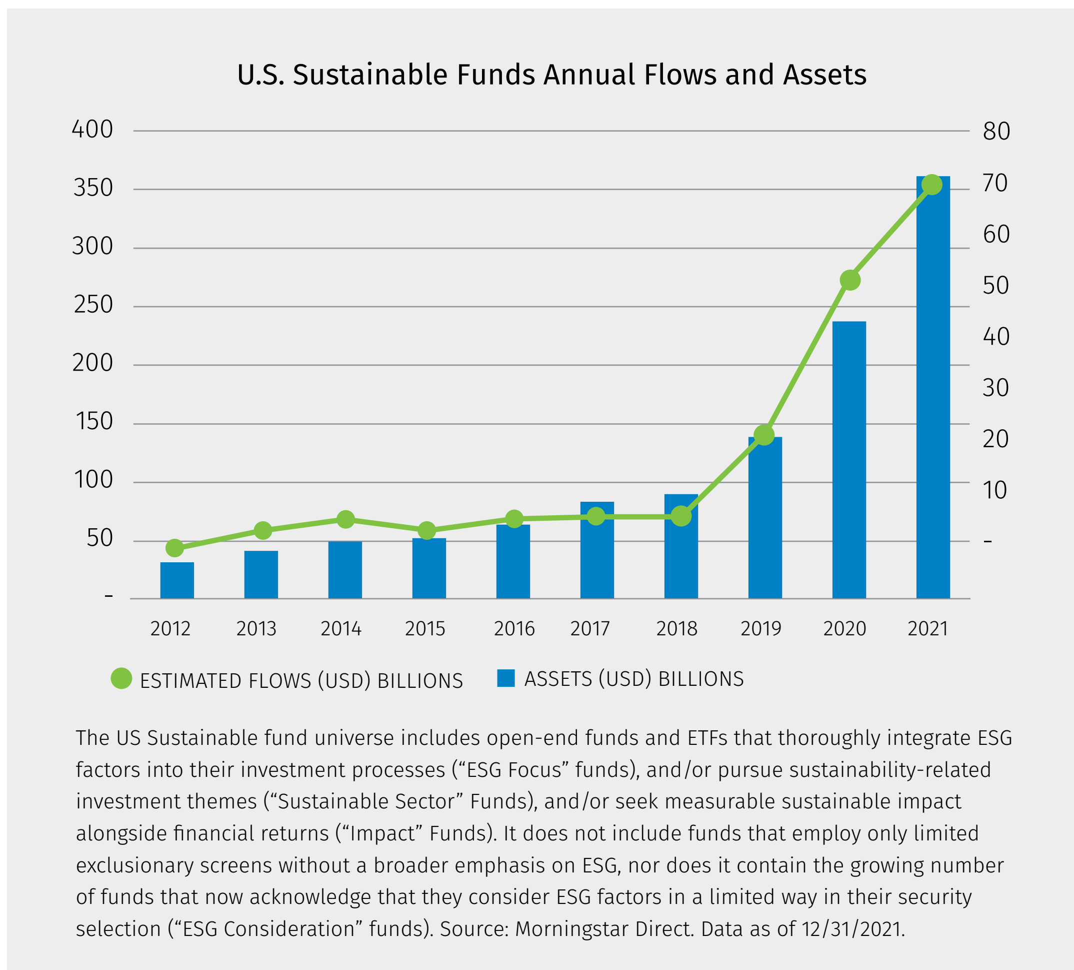
The ESG movement, once surging with seemingly unstoppable momentum, is hitting fierce opposition in the form of fiery rhetoric, legislation, and lawsuits by some corporate leaders, state officials, and conservative advocacy groups.

Over the past few years, investors have been piling into investments that take environmental, social, and governance factors into account, fueling a sharp increase in the sector's popularity. SEC Chair Gary Gensler recently noted that one estimate pegs the U.S. "sustainable investment universe" at $17.1 trillion.

A Morningstar chart tells the ESG growth story:



The US Sustainable fund universe includes open-end funds and ETFs that thoroughly integrate ESG factors into their investment processes ("ESG Focus" funds), and/or pursue sustainability-related investment themes ("Sustainable Sector" Funds), and/or seek measurable sustainable impact alongside financial returns ("Impact" Funds). It does not include funds that employ only limited exclusionary screens without a broader emphasis on ESG, nor does it contain the growing number of funds that now acknowledge that they consider ESG factors in a limited way in their security selection ("ESG Consideration" funds). Source: Morningstar Direct. Data as of 12/31/2021.

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But some states and conservative advocacy groups are pushing back to protect financial interests and ideological positions potentially threatened by ESG.

- Texas and West Virginia passed laws preventing state entities from investing with firms perceived to boycott the fossil fuel industry.
- Similarly, Texas passed a law preventing state entities from investing with firms perceived to discriminate against the firearms industry—with potential criminal penalties.
- Conservative legal advocacy group Judicial Watch successfully challenged two California laws requiring corporate board diversity.
- A Texas-based alliance is litigating a Nasdaq rule on board diversity.
- Florida passed a law prohibiting discrimination in corporate diversity training, including a provision that could affect instruction on unconscious bias.
- Texas officials have threatened penalties for companies that provide assistance for employees seeking out-of-state abortions.

With an increasing number of anti-ESG tripwires clashing with ESG-related investor and legal demands, companies and funds must steer a careful course.

Big money at stake

Being classified—or not—as ESG can have major financial impact for funds and companies.

In February, Morningstar Inc. removed an ESG label from over 1,200 funds in its classification system. In an emailed comment, a Morningstar spokesperson explained the removal:

> Morningstar has tightened its criteria to tag funds as sustainable investments in the database.
>
> The global sustainable fund universe encompasses open-end and exchange-traded funds that, by prospectus, fact sheet, or other available resource, claim to have a sustainable investment objective and/or use binding ESG criteria for their investment selection.
>
> The sustainable group does not contain funds that employ only limited exclusionary screens, nor does it contain the growing number of funds that now formally integrate ESG considerations in a nondeterminative way for their investment selection.

Companies are also at risk of losing their ESG status. In May, S&P Dow Jones Indices removed Tesla, Inc. from its S&P 500 ESG Index. In a blog post, an S&P official stated that Tesla's ESG score fell to the bottom 25 percent of its global GICS® industry group peers.

At first glance, Tesla's removal was a head scratcher. How could a company whose self-declared mission is to "accelerate the world's transition to sustainable energy" not make the cut in an ESG index?

S&P explained that while Tesla's ESG score has remained fairly stable year-over-year, the company has declined relative to its peers because the Automobiles & Components sector saw an overall ESG

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score increase. Factors contributing to Tesla's exclusion included the lack of a low-carbon strategy and code of business conduct as well as claims of racial discrimination and poor working conditions.

The significant financial effects of ESG classifications are increasingly likely to play out for other funds and companies as well.

Critics: ESG is "woke capitalism"

Critics have slammed ESG in what appears to be a coordinated effort.

Tesla CEO Elon Musk reacted angrily to S&P dropping the company from its ESG index, tweeting that ESG is a scam.

Former Vice President Mike Pence sprang to Musk's defense. In a Wall Street Journal opinion piece, Pence called out S&P, saying the left was likely targeting Musk "because of his commitment to free speech and his criticism of the Biden administration." Pence blasted "this new trend of woke capitalism" and compared ESG ratings to social credit scores issued by the Chinese Communist Party.

Pence urged states to combat ESG in two specific ways:

- "States with large employee pension funds invested in the stock market would be well advised to rein in massive investment firms like BlackRock, State Street and Vanguard, which manage a combined $22 trillion in assets and are pushing a radical ESG agenda."
- "States should also pass model legislation developed by the American Legislative Exchange Council requiring government pension-fund managers to vote the state's shares, rather than delegating that authority to huge Wall Street firms."

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Pence's comments echoed an earlier speech he delivered in Houston on May 10, in which he called for states including Texas to "rein in" ESG. Pence said that President Biden and government regulators were "weaponizing" the financial system through "capricious new ESG regulations that allow left-wing radicals to destroy American energy producers from within."

"Standing against ESG." The same week, Utah State Treasurer Marlo Oaks slammed S&P in a Wall Street Journal opinion piece. Oaks' criticism focused on S&P's incorporation of ESG factors in credit ratings of states including Utah. According to Oaks, the ratings were "subjective" and unfairly downgraded states with a larger percentage of their economy tied to natural resource extraction, like Texas, Alaska and Louisiana.

"It's easy to see that those beliefs are left-wing," wrote Oaks. "States like Utah value our constitutional republic, which has ensured freedom, and free markets, which have fostered innovation and generated prosperity for generations. Any states, governmental jurisdictions, corporations, individuals, and investors who also hold those beliefs should join us in standing against ESG."

Oaks added he and Utah's governor and federal lawmakers sent a letter to S&P objecting to the ESG indicators and ratings it assigned to Utah, and called on S&P to withdraw them.

Around the same time, West Virginia State Treasurer Riley Moore denounced S&P's ESG ratings scheme for states as politically motivated.

"This new ESG rating system is just the beginning of a new wave of judging states—and their people—not by valid financial metrics, but by the preferred political views and outcomes of a select global elite," wrote Moore. "The ESG movement is nothing but a slippery slope whereby our states and our people will be forced to bend the knee to the woke capitalists or suffer financial harm."

ESG critics within financial services. ESG opponents found an unexpected ally in Stuart Kirk, former global head of responsible investing at HSBC Asset Management.

In a conference presentation in May titled "Why investors need not worry about climate risk," Kirk painted climate concerns as dramatically overblown.

"Twenty-five years in the financial industry, there's always some nut job telling me about the end of the world. Who cares if Miami is six meters underwater in 100 years? Amsterdam has been six meters underwater for ages. And that's a really nice place. We will cope with it," said Kirk.

Kirk acknowledged that there was an apparent contradiction in the head of responsible investing stating that investors do not need to worry about climate risk.

"You probably don't expect a speech title like this at a conference like this. I take a very, very financial and investment view of the topic," said Kirk.

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Kirk was subsequently suspended by HSBC and on July 7 announced in a LinkedIn post that he had resigned.

“A cancel culture destroys wealth and progress. There is no place for virtue signaling in finance,” wrote Kirk.

Five days later, Kirk’s post had attracted almost 10,000 positive reactions.

From talk to action

Some ESG activity is driven by financial interests and some by ideological beliefs, as noted in a blog post by Ann Lipton, a professor at Tulane University Law School.

Lipton agreed with Pence that ESG is “an attempt to accomplish what cannot be achieved at the ballot box.”

But unlike Pence, Lipton does not see that as bad.

“[I]ncreasingly, our political leaders fail to adopt policies that the populace supports; the ballot box is simply not an available tool. It’s no wonder, then, that voters turn to corporations as a source of power that at least appears to be more responsive to public pressure,” wrote Lipton. “Far from a distortion of free markets, though, it is the ultimate expression of them, because the entire theory is that investment dollars can be used to force social change.

> Some say ESG is “an attempt to accomplish what cannot be achieved at the ballot box.” Is that bad?

Like ESG, anti-ESG positions can be driven purely by financial interests, ideological beliefs, or both.

And like pro-ESG actors, ESG opponents are moving beyond colorful rhetoric to concrete action.

Environmental clashes

One of the biggest areas of clashing financial interests is climate change, which has spawned battles on multiple fronts.

Investor demand. The arguments over mandated climate disclosures starts with a disagreement about the scope of investor demand for environmental information about issuers.

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A group of 22 law professors led by Lawrence Cunningham of George Washington University wrote in an April 25, 2022 comment letter that the SEC's move to mandate and standardize climate-related disclosures is driven by a "small but powerful cohort of environmental activists and institutional investors."

The size of that group seems to have been read differently by SEC Chair Gary Gensler, who has called investor demand for climate disclosures a central justification for the rulemaking.

"Large and small investors, representing literally tens of trillions of dollars, are looking for this information to determine whether to invest, sell, or make voting decisions one way or another," Gensler said in July 2021. He cited a report from the Governance & Accountability Institute that found 90 percent of the 500 largest companies in the Russell 1000 Index voluntarily published sustainability reports in 2019.

Critics question the extent of investor demand for ESG.

As the battle over a climate reporting mandate heats up, the number of companies voluntarily reporting seems to indicate that investors are in fact calling the shots. They have after all driven demand for and presumably absorbed the cost of all the glossy sustainability reports to date. But it is an "elite global subset" of institutional investors that is driving this trend at the expense of the ordinary individual American investor, according to the comment letter, pointing to a study that found one-fourth of individual investors think the acronym stands for "earnings stock growth."

Companies in the business of selling ESG ratings, model portfolios, and indexes, meanwhile, see an opportunity to reanimate active investing and expand into the millennial market where ESG values are favored, they wrote, while the average individual investor does not necessarily share their enthusiasm for such disclosure. Now, in a down market in the middle of 2022, it seems likely that the question about demand for ESG products, and ESG's success as an investment strategy, may be tested at the same time the SEC's climate disclosure mandate comes under attack.

Authority of the SEC. In remarks after the March open SEC meeting, Commission Hester Peirce laid out a map of attack lanes on the SEC's authority to mandate climate disclosures:

1) the further afield the disclosures are from financial materiality, the more likely it is that they exceed statutory authority;
2) SEC rules already require disclosure of material climate risk;
3) the disclosure mandates are compelled speech;
4) the rules require companies to disclose information that may not be material;
5) Congress should speak clearly if it wishes to assign an agency to review decisions of vast economic and political significance.

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Since the Supreme Court handed down its decision in *West Virginia v. EPA*, (No. 20-1530, June 30, 2022, Roberts, J.), it has been expected that this last line of attack, the "major questions doctrine," will be applied to the SEC's climate rulemaking in litigation.

The SEC would likely counter any argument that it was overstepping its bounds by pointing out that the EPA does not have exclusive jurisdiction over greenhouse gas emissions (GHG) and requiring climate disclosure is solidly within its traditional statutory authority to protect the public interest or for the protection of investors.

Additionally, the EPA data cannot be disaggregated into scopes and doesn't serve to help investors understand the climate-related risk posed by an individual company. The SEC's purpose is also wholly different from the EPA's since the SEC is concerned with investor protection, capital formation, and fair and efficient markets.

A competing group of 30 professors led by Jill Fisch of the University of Pennsylvania Carey Law School and George Georgiev of the Emory University School of Law submitted a comment letter that countered the positions taken by the group of 22, arguing that there is clear authority for the SEC to promulgate climate-related disclosure rules.

The authority to protect investors through disclosure mandates includes not only information relative to the trading decision but the power to vote shares also, which anticipates corporate governance issues, they said. No court has invalidated a commission rule for overstepping its disclosure authority, and even a narrow reading of this authority includes the power to require information on the value of a security. The professors asserted, "climate-related matters impact the most important aspect of any securities transaction—the price at which investors buy or sell."

In contrast to the group of professors led by Professor Cunningham, the group led by Professors Fisch and Georgiev see standardized reporting as a way to clean up the mess of competing reporting standards and introduce climate-related risk accurately to the market. It helps long-term retail investors by evening the information field and benefits institutional investors by allowing them to more accurately describe their investment portfolio to customers.

They also asserted that the climate-related disclosure rules promote competition in capital formation by increasing the quality of the data used for sustainability investing, which the professors referred to as "a significant phenomenon in the U.S. capital markets in recent years."

Anti-boycott laws. A new animal has developed in the states and the world of public finance, namely the anti-boycott law.

An example from West Virginia (Senate Bill 262) authorizes the state treasurer to create a list of institutions engaged in boycotts of energy companies, and to refuse to do business with these institutions. It was reported by several news outlets in June that six large financial institutions received letters from West Virginia State Treasurer Riley Moore indicating that they made the list. All objected to the designation in responses, claiming flatly that they do not boycott energy companies, with Wells Fargo telling Moore that it was a leading provider of financing to the energy sector.

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In Texas, a similar strike at financial firms went into effect last September in the form of a law prohibiting investment in financial companies that boycott energy companies. Texas governmental entities may not invest in any such companies and may in fact be required to divest from them.

A letter sent to financial firms says Texas Government Code Chapter 809 requires it to create a list of financial companies that boycott energy companies, and the recipient has 61 days to provide written verification that it does not boycott energy companies. The letter asks specific questions about restrictions on investments in energy companies, including fossil-fuel based energy companies, and whether the company has committed or pledged to meet environmental standards beyond applicable federal or state law.

Texas Comptroller Glenn Hagar said the purpose of the letter is to "prepare and maintain a list of all financial companies that boycott energy companies." The letter follows an initial letter in March, bringing the total number of targeted firms to 158. The firms include major financial entities such as JPMorgan Chase & Co., Goldman Sachs Asset Management LP, and Blackrock Inc.

Pro and anti-ESG constituents dispute the benefits of a proposed SEC rule on climate disclosures.

The aggressiveness we have seen from state legislatures, and the attacks waged by Utah State Treasurer Marlo Oaks and West Virginia State Treasurer Moore on S&P's ESG ratings scheme as "politics" seems to be an indication that war over ESG in public finance will continue. The battle over climate and sustainability ratings seems likely to produce more winners and losers across the country, with states containing high-emissions businesses highly incentivized to fight back against higher capital costs.

Cost of capital. Paradoxically, as some states act to protect businesses threatened by ESG, they may end up increasing their own capital costs.

A new Wharton study found that Texas cities will pay an additional $303 million to $532 million in interest on $32 billion in bonds, according to data from the first eight months of the Texas fossil fuels anti-boycott law.

The law has raised the cost of capital Texas municipalities because five of the largest underwriters in the bond market – JPMorgan Chase, Goldman Sachs, Citigroup, Bank of America, and Fidelity – exited the market after Texas passed the law. These five banks previously underwrote about 35 percent of debt in the market. After their exit, municipalities had to negotiate borrowing terms with other financial institutions – which suddenly had less competition.

But now Citibank and JPMorgan Chase are looking to reenter the market, asserting that their policies comply with the law, according to study author and Wharton assistant finance professor Daniel Garrett.

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This is where there's work for lawyers. In both ESG and anti-ESG laws, the devil is in the details. Companies may be able to achieve their ESG goals legally while avoiding anti-ESG penalties.

Are ratings firms advisers? In perhaps a nod to some of the concerns about ratings providers, Chair Gensler issued a request for comment in June on information providers that provide indexes, model portfolios and pricing services. These indexes have grown in influence, and this raises the question, he said, about whether an index provider is providing investment advice and should be subject to registration under the Investment Advisers Act. He said indexes have evolved to such a degree that they can influence the buy or sell decision, and the public should be protected.

Broad-based stock ownership in the age of 401(k), not to mention an until-recently booming market, brought strong gains and high hopes to ESG investors, but what happens to demand if their portfolios underperform is not clear.

What does seem to be clear is that there is growing demand for solutions to problems government has failed to solve. One driver of demand for ESG products can be seen in the Edelman Trust Barometer 2022, which found declining trust in government, media, widening political chasm in the U.S., and other growing "trust gaps." These are turning societal leadership into a core business function, the firm says, because it is perceived that government has abdicated the role.

Social skirmishes

Turning to the social arena, areas that have seen major anti-ESG litigation and legislation are diversity, guns, and abortion.

California courts strike down two statutes requiring diverse corporate boards. The conservative legal advocacy group Judicial Watch recently scored historic victories where California courts separately struck down two statutes mandating diverse board composition for California corporations.

On April 1, 2022, a judge in the Superior Court of California in Los Angeles granted summary judgment in *Crest v. Padilla,* No. 20STCV37513*,* ruling that Corporations Code §301.4 enacted by Assembly Bill 979, the state's requirement for board diversity based on race, ethnicity and sexual orientation, violated the Equal Protection Clause of the California Constitution.

Thereafter, on May 13, 2022, and after a 28-day trial, another judge in the Los Angeles County Superior Court issued a verdict in favor of the very same plaintiffs in a different matter, *Crest v. Padilla,* No. 19STCV27561, which challenged Senate Bill 826, a California statute mandating women representation on corporate boards. Similarly, that court found the law violated the state constitution's Equal Protection Clause. Both contested laws that imposed penalties of up to $300,000 for noncompliance.

After the May verdict was issued, Judicial Watch President Tom Fitton trumpeted, "This is the second California court decision finding that quotas for corporate boards are unconstitutional. The radical Left's unprecedented attacks on anti-discrimination law has suffered another stinging defeat. Thankfully, California courts have upheld the core American value of equal protection under the law."

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No compelling interest shown for mandating board members from underrepresented communities. Assembly Bill 979 required public companies with five directors to have a minimum of one director from the underrepresented communities by the end of 2021. The bill defined "director from an underrepresented community" as an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.

The court found that the law "violates the Equal Protection Clause of the California Constitution on its face," elaborating: "The difficulty is that the Legislature is thinking in group terms. But the California Constitution protects the right of *individuals* to equal treatment. Before the Legislature may require that members of one group be given certain board seats, it must first try to create neutral conditions under which qualified individuals from *any* group may succeed. That attempt was not made in this case."

The court further reasoned that, "The statute treats similarly situated individuals—qualified potential corporate board members—differently based on their membership (or lack thereof) in certain listed racial, sexual orientation, and gender identity groups. It requires that a certain specific number of board seats be reserved for members of the groups on the list—and necessarily excludes members of other groups from those seats." The court concluded that the defendant, the Secretary of State, had not identified a compelling interest to justify this classification.

Gender diversity mandate fails to satisfy strict scrutiny. Senate Bill 826 required publicly held corporations to have a minimum number of female directors depending on the size of their boards by December 31, 2021. In its 23-page verdict, the court found that the plaintiffs carried their burden proving that men and women are similarly situated for the purposes of S.B. 826's gender-based quota and demonstrated that S.B. 826 is presumptively unconstitutional. Accordingly, the court shifted the burden to the defendants to prove that S.B. 826 satisfied strict scrutiny.

> A California court found no compelling state interest for board diversity mandates.

To meet that strict scrutiny test, the California Secretary of State was required to show (1) a compelling state interest, (2) that S.B. 826 is necessary and (3) that S.B. 826 is narrowly tailored. In determining that the Secretary of State failed to meet its heavy burden, the court determined the following:

- The Secretary of State failed to demonstrate that S.B. 826 furthered a compelling state interest because it would increase gender diversity on boards, thereby boosting "the economy, improving work opportunities for women, protecting taxpayers, public employees and retirees" and "improving corporate governance." Moreover, the state offered insufficient evidence quantifying these benefits or proving any causal link between those benefits and the gender diversification of boards;

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- The Secretary of State failed to demonstrate that S.B 826 furthered a compelling state interest because it "was passed to eliminate and remedy discrimination in the director selection process for publicly held corporate boards in California." To show that a law remedies past discrimination, the defendant was required to show "purposeful or intentional, unlawful discrimination by the entity employing the suspect classification," not general discrimination in a particular region or industry. The court noted that the text of S.B. 826 did "not reference discrimination nor remedying discrimination" as a reason for its enactment; and
- Even if remedying past discrimination were a compelling state interest, the law was not narrowly tailored because the defendant "failed to show the Legislature considered gender-neutral alternatives … or that gender-neutral alternatives were not available." The Legislature did not consider amending existing anti-discrimination laws or enacting new anti-discrimination laws pertinent to the board selection process.

Both court rulings are in the process of being appealed.

Nasdaq board diversity rule in the crosshairs. Another board diversity requirement under attack from politically conservative opponents is the Nasdaq stock exchange's Rule 5605(f), which took effect in August 2021.

While the Nasdaq diversity rule resembles the successfully challenged California diversity statutes, it differs in one key respect: it contains a comply-or-disclose component rather than a monetary fine for noncompliance.

The rule requires that a Nasdaq-listed company have at least one diverse board member by August 2023, and at least two diverse board members by August 2025, or explain the company's reasons for not meeting this diversity objective. Companies with five or fewer board members can meet the board diversity objective by having only one instead of two diverse directors.

The Nasdaq rule is also being opposed based on claims that it violates civil rights laws and the Constitution. In August 2021, the Alliance for Fair Board Recruitment (AFFBR), a nonprofit membership organization incorporated in Texas, filed a Petition for Review in the United States Court of Appeals for the Fifth Circuit seeking a review of the SEC's approval of Nasdaq's corporate board diversity requirements.

AFFBR contends that the Nasdaq rule will compel many of the nation's largest publicly traded corporations "to illegally discriminate on the basis of gender, race, and sexual orientation in selecting directors," and argues that "Nasdaq tries to shame companies into compliance by requiring that any company failing to meet these quotas must publicly "explain why."

AFFBR concludes, "It is not only investors who will suffer if Nasdaq's virtue signaling rule is allowed to take effect. AFFBR has members who, because of their race, sex, and sexual orientation are forced to compete on an uneven playing field because of Nasdaq's quota requirements."

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A board diversity advocate weighs in. While the recent court rulings on the California board diversity law are unfortunate, these are minor stumbling blocks on the road to increased board diversity according to Doug Harris, a longtime recognized expert on governance and internal controls in the financial industry.

"The largest corporations are now more aggressively diversifying their boards, primarily because some of their major stakeholders—their employees, their business partners and the institutional funds that invest in their securities—are demanding it, but also because numerous academic studies have shown a positively correlation between diversity and the performance and decision-making of corporate boards and investment committees," Harris observes.

Moreover, Harris notes, "we are seeing continued enhancement of corporate diversity programs; the number of major corporations undertaking racial equity audits (which can better help identify inequity and it sources, whether with respect to internal operations or a firm's external activities), though still small, is continuing to grow—JPMorgan being one of the most recent."

In Harris' view, the greatest impact of the recent rulings will likely be on smaller corporations that feel less pressure from their stakeholders and that have smaller boards.

Florida acts against "corporate wokeness." In April, Florida Gov. Ron DeSantis signed new HB 7 into law, calling it "the first [legislation] of its kind in the nation to take on both corporate wokeness and Critical Race Theory in schools in one act." The law became effective July 1.

"No one should be instructed to feel as if they are not equal or shamed because of their race," said DeSantis. "In Florida, we will not let the far-left woke agenda take over our schools and workplaces."Styled previously as the "Stop the Wrongs to Our Kids and Employees Act (Stop W.O.K.E. Act)," the statute "deems Critical Race Theory (CRT) training to be an unlawful employment practice" and "ensures Florida's K-20 students and employees are not subject to Critical Race Theory indoctrination," according to a fact sheet.

The statute provides that it is discrimination to subject any student or employee to training or instruction that "espouses, promotes, advances, inculcates, or compels such student or employee to believe" seven prohibited concepts. Among others, the prohibited concepts include:

- That a person's status as privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex;
- That a person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion; and
- That a person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

Any of these can potentially come into play in corporate diversity trainings.

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In particular, a common element of diversity training is that all people carry unconscious or implicit biases—often negative—against members of other groups, without even realizing it.

Along with diversity and inclusion, several other social issues are seeing anti-ESG backlash: guns and abortion.

Guns. Increasingly, backlash is directed toward investments related to firearms dealers.

In 2021, Texas Gov. Greg Abbott signed a raft of legislation relating to firearms. Of particular relevance for the financial sector, Senate Bill 19 prohibits any Texas governmental entity from contracting with any business that discriminates against firearm and ammunition businesses or organizations.

The law also effectively requires contracts to contain a written verification that a contracting company:

(1) does not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association; and
(2) will not discriminate during the term of the contract against a firearm entity or firearm trade association.

As a New York Times piece explains, the law creates tremendous stakes for banks. A bank could face criminal prosecution if it states it is in compliance with the law and is found to be otherwise. It could also be shut out of Texas's enormous bond market, which according to Bloomberg data generated $315 million in fees for financial firms in 2021.

And Texas has company. In 2021, Wyoming Gov. Mark Gordon signed into law House Bill 236/ House Enrolled Act 87. According to a press release, the bill prohibits financial institutions and payment processors in Wyoming from discriminating against firearms businesses that support or are "engaged in the lawful commerce of firearms, firearm accessories or ammunition products."

"I will relentlessly defend our Second Amendment and the Wyoming businesses involved in the firearms industry," said Gordon.

Similar "firearm industry nondiscriminatory legislation (FIND)" bills are pending in at least 10 states, according to the New York Times.

Abortion. In a newly incandescent social issue since the Supreme Court in June overruled *Roe v. Wade* and held that the Constitution does not confer the right to abortion (*Dobbs v. Jackson Women's Health Organization*), battle lines are being drawn over companies' pledges to assist employees in states that outlaw abortion.

A number of major companies have announced they will provide travel fund assistance to employees seeking abortions out of state. According to CBS News, the list includes retailers (Amazon, Target), banks (Bank of America, Citigroup, JPMorgan Chase, Goldman Sachs), and media companies (Buzzfeed, CNN, the New York Times), among others.

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But such employee benefits may run afoul of some states' abortion statutes prohibiting assistance in obtaining abortions.

According to Law.com, the Texas Freedom Caucus in early July threatened Sidley Austin partners with civil and criminal penalties and disbarment when the firm signaled it would provide travel assistance.

> Texas state officials have raised the possibility of enforcement for companies that provide employee assistance in obtaining abortions.

And in an interview posted by Patriot Takes, Texas Attorney General Ken Paxton said he's "looking at" enforcement actions against companies providing travel assistance for employees seeking abortions, with potential penalties of "over $100,000" for each occurrence.

If companies and firms face potential civil or criminal enforcement action for providing assistance to employees in obtaining abortions, the resulting threat of shareholder lawsuits could have a chilling effect on companies looking to provide such assistance.

What's next

Companies and investment managers will need to carefully monitor the rising tide of anti-ESG legislation, litigation, and threatened enforcement.

Laws or regulations that companies are currently complying with may be struck down, like the California board diversity laws.

Some rights previously taken for granted are now threatened, like the choice of doing or not doing business with certain industries and companies without legal repercussion. In Texas, the possibility of criminal prosecution for perceived inaccurate statements about discrimination against firearm businesses merits close scrutiny.

Even companies that are not actively pursuing ESG goals may run afoul of new prohibitions. For example, mainstream company diversity trainings could potentially violate Florida's "Stop WOKE Act."

As political battles continue to spill into financial arenas, law firms and corporate counsel will have a crucial role in advising companies and firms in navigating an increasingly polarized, perilous landscape.

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