



Debevoise
& Plimpton

ESG Investigations Tracker

Last updated on December 20, 2022.

ESG has become a prominent and divisive political issue in the United States. In addition to public criticisms of ESG initiatives, a number of states have launched investigations into whether certain ESG practices violate state and federal laws (see the Debevoise State-Level ESG Investment Developments Tracker [here](#)). Similarly, following the 2022 midterm elections, ESG is poised to become an increasingly important topic for the U.S. Congress. This tracker collects developments relating to the uptick in investigations of ESG practices and initiatives.

Contents

Click on each section to navigate directly there.

Page

December 6, 2022	1
House Republicans Launch Investigation into "Climate Cartel"	1
December 5, 2022	2
House Republicans Ask Federal Trade Commission to Explain a New Policy That They Worry Might Be Giving Weight to ESG Priorities As It Reviews Corporate Mergers	2
November 21, 2022	3
Democratic Attorneys General Respond to Republican Criticism of ESG Investing	3
November 15, 2022	4
Senate Committee on Banking, Housing, and Urban Affairs, 'Oversight of Financial Regulators: A Strong Banking and Credit Union Systems for Main Street'	4
November 3, 2022	5
Senators Including Grassley and Cotton Warn Law Firms About ESG Initiatives	5
September 22, 2022	5
Senate Committee on Banking, Housing, and Urban Affairs Holds Hearing for Annual Oversight of the Nation's Largest Banks	5
September 20, 2022	6
Senator Pat Toomey Requests ESG Ratings Firms Disclose Methodology	6
September 20, 2022	6
FTC Chair Lina Khan and DOJ Assistant Attorney Jonathan Kanter Testify Before the Senate, Confirming That There Is No ESG Exception to Antitrust Laws	6
September 15, 2022	7
SEC Chairman Gary Gensler Testifies Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs	7
September 6, 2022	7
BlackRock Responds to Attorneys General's Letters	7
August 4, 2022	8
Nineteen Attorneys General Criticize BlackRock for Relying on ESG Investment Criteria Rather Than Prioritizing Shareholder Profits.....	8
May 26, 2022	9
Former Vice President Mike Pence Calls for Government Intervention to Halt the "ESG craze"	9

DATE	TOPIC	SUMMARY	Source
December 6, 2022	House Republicans Launch Investigation into "Climate Cartel"	<p>On December 6, 2022, Republican members of Congress sent a letter to executives of the Steering Committee for Climate Action 100+ noting the role the organization plays in efforts to advance firms' ESG policies. Climate Action 100+ is an investor-led initiative that aims to ensure that the world's largest corporate greenhouse gas emitters act on climate change.</p> <p>The letter, addressed to Mindy Lubber (CEO of Ceres) and Simiso Nzima (Management Investment Director of CalPERS), requests information about ESG-related conduct or agreements that, the authors of the letter state, could be unlawful under U.S. antitrust laws. The letter requests numerous documents by December 20, 2022, including those related to:</p> <ul style="list-style-type: none"> • The various markets, sectors, or industries in which Climate Action 100+ or Ceres help investors, members, or other companies advance ESG-related goals; • Guidance from Climate Action 100+ or Ceres on how investors, members, or other companies can or should advance ESG-related goals; • Efforts by Climate Action 100+ or Ceres to obtain or solicit agreements, commitments, or other types of participation from any investors, members, or other companies, including but not limited to BlackRock, State Street, or Vanguard, to advance ESG-related goals; • Communications between or among investors, members, or other companies referring or relating to their joint or collective efforts to advance ESG-related goals, including any documents and communications reflecting or suggesting agreement over specific steps, policies, or best practices; • The founding of Climate Action 100+, including any documents and communications about the need for Climate Action 100+ to facilitate advancing ESG-related goals, and about the roles of Ceres and CalPERS; and • Communications with proxy advisory firms, including Institutional Shareholder Services 	Letter

December 5,
2022

House Republicans Ask
Federal Trade
Commission to Explain a
New Policy That They
Worry Might Be Giving
Weight to ESG Priorities
As It Reviews Corporate
Mergers

and Glass Lewis, or financial services companies, including PayPal, referring or relating to ESG-related goals.

The letter also includes a formal request to preserve all existing and future records and materials relating to facilitating and coordinating companies' efforts to achieve ESG-related goals.

The letter was signed by Rep. Jim Jordan (R-OH), the incoming chair of the House Judiciary Committee, as well as Reps. Dan Bishop (R-NC), Matt Gaetz (R-FL), Scott Fitzgerald (R-WI), Cliff Bentz (R-OR), and Tom McClintock (R-CA).

On December 5, 2022, Republican members of Congress sent a letter to Federal Trade Commission ("FTC") Chair Lina Khan, requesting an explanation of whether the FTC is using ESG as a factor in merger reviews.

[Letter](#)

The letter sets out two main concerns:

- First, that the FTC replaced its policy interpreting its statutory mandate to root out unfair methods of competition with one that "relies on a much broader, more amorphous, reading of [its mandate] that can easily be manipulated by the political whims" of the FTC ("the Policy Statement"); and
- Second, that merging companies have reported inquiries from the FTC requesting information outside the traditional scope of whether consumers have been harmed, including how a deal would affect ESG issues.

The letter contends that the FTC's Policy Statement and its reported promotion of ESG criteria in merger reviews could make it less likely that the FTC would "address collusive activities supporting ESG." The members of Congress express concerns that Chair Khan's comments during the September 20, 2022 Senate Judiciary Committee hearing (see below), namely that "[ESG] 'cooperation or agreements, in as much as they can affect competition, are always relevant,' left open the possibility that collusion on ESG initiatives may not be an enforcement priority."

The letter also asserts that the Biden Administration's executive order on competition raises concerns that using ESG criteria "as a political tool has spread to other regulators such as the

November 21,
2022

Democratic Attorneys
General Respond to
Republican Criticism of
ESG Investing

Federal Deposit Insurance Corporation (FDIC) or the Securities & Exchange Commission (SEC).”

The letter was signed by Reps. Scott Fitzgerald (WI-05), Andy Biggs (AZ-05), Tom Tiffany (WI-07), Warren Davidson (OH-08), Byron Donalds (FL-19), Michelle Fischbach (MN-07), Greg Steube (FL-17), Matt Gaetz (FL-01), Randy Weber (TX-14), Chip Roy (TX-21), Doug Lamborn (CO-05), and Matt Rosendale (MT-AL).

The letter requests a response from Chair Khan by December 19, 2022.

On November 21, 2022, D.C. Attorney General Karl Racine and 17 other Democrat state attorneys general wrote to Senators and members of Congress about their warnings against ESG investing. In particular, the letter addresses the August 4, 2022 letter sent by 19 Republican attorneys general to BlackRock, which stated that it was relying on ESG investment criteria rather than shareholder profits in managing state pension funds, potentially in violation of state and federal law.

[Letter](#)

The attorneys general’s letter emphasizes that ESG factors “are like any other material factors—such as supply chain concerns or changing interest rates—that inform investment decision-making” and that consideration of ESG factors is therefore a part of prudent investment decision-making. The letter also suggests that state pension funds are considering ESG factors because this yields positive financial results, even in states where this would now be prohibited. The attorneys general also highlight the importance of preventing greenwashing, and highlight the SEC’s efforts in this area.

The letter also responds to the suggestion that public pension plans taking ESG factors into account in financial decisions would be contrary to their fiduciary duties; the attorneys general are clear in their view that the consideration of ESG factors is consistent with legal responsibilities to evaluate potential risk and reward in assessing the merits of an investment.

Lastly, the letter rejects the claim that asset managers that consider ESG factors may be violating antitrust and competition laws on the basis that an expression of general recommendations or a statement in favor of or against certain policies does not, without more, constitute a violation of the

November 15,
2022

Senate Committee on Banking, Housing, and Urban Affairs, 'Oversight of Financial Regulators: A Strong Banking and Credit Union Systems for Main Street'

Sherman Act. The consideration of ESG factors does not "categorically block investment in any given industry or sector," but merely allows for an "evaluation of the expected impact of environmental, social, and governance events on returns."

On November 15, 2022, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing with representatives from the Federal Reserve (the "Fed"), the National Credit Union Administration (the "NCUA"), the FDIC, and the Office of the Comptroller of the Currency (the "OCC"). At this hearing, Senator Patrick Toomey (R-PA), the Ranking Member of the Committee, voiced his concerns over the politicization of financial regulation.

[Link](#)

Senator Toomey pointed out three examples that demonstrate this politicization:

1. the Fed announced a "pilot climate scenario analysis exercise" with the six largest U.S. banks to ensure banks understand their transition risk as it pertains to global warming;
2. the Federal Reserve, FDIC, and OCC joined the Network for the Greening of the Financial System, which seeks to "mobilize mainstream finance to support the transition toward a sustainable economy"; and
3. the NCUA has also made recommendations that credit unions consider altering membership requirements and products offered because of climate change.

Senator Mike Rounds (R-SD) also focused a question to the representative from the NCUA about a statement in the NCUA's draft 2022-2026 strategic plan related to the NCUA's suggestion that credit unions serving agricultural communities consider altering its membership.

Outside of these statements and questions, the other comments in the hearing related to ESG were related to banks' and credit unions' ability to manage climate-related and geopolitical risks. Specifically, Mr. Barr, Vice Chairman of Supervision at the Fed, said that he is concerned about the long-term risks from climate change and geopolitical instability. Additionally, he said that the Federal Reserve was interested in joining the FDIC and the OCC in providing guidance to the largest banks,

November 3,
2022

Senators Including
Grassley and Cotton
Warn Law Firms About
ESG Initiatives

those with over \$100 billion in assets, related to climate-related risks.

On November 3, 2022, Republican Senators Marsha Blackburn (TN), Tom Cotton (AR), Chuck Grassley (IA), Mike Lee (UT), and Marco Rubio (FL) authored identical letters to 51 leading law firms. The letters contained explicit warnings about each firm's ESG practice and its impact on clients and the U.S. economy.

[Letter
Press Release](#)

In particular, the Senators argued that ESG initiatives could violate federal antitrust law. In this regard, they cited FTC Commissioner Lina Khan as stating that ESG group initiatives are "relevant to" the FTC insofar as they threaten competition. They also relied upon a statement by Assistant Attorney General of the Antitrust Division Jonathan Kanter, who expressed agreement with the general idea that anticompetitive behavior is subject to antitrust laws.

The senators also expressed concerns about the ESG movement's impact on the energy sector, particularly coal, oil, and gas companies, and geopolitical competition. Ultimately, the Senators warned that Congress will begin investigating ESG initiatives for possible violation of antitrust laws and advised firms to preserve relevant evidence in anticipation of such investigations.

September 22,
2022

Senate Committee on
Banking, Housing, and
Urban Affairs Holds
Hearing for Annual
Oversight of the
Nation's Largest Banks

On September 22, 2022, the Committee on Banking, Housing, and Urban Affairs conducted a hearing on Annual Oversight of the Nation's Largest Banks. The hearing was led by Chairman Sherrod Brown (D-OH) and Ranking Member Patrick Toomey (R-PA). Representatives from the following banks were in attendance as witnesses: Wells Fargo & Company, Bank of America, JPMorgan Chase & Co., Citigroup, Truist Financial Corporation, U.S. Bancorp, and the PNC Financial Services Group.

[Hearing - Annual
Oversight of the Nation's
Largest Banks](#)

In his opening statement, Senator Toomey accused large banks of acquiescing to demands for them to face issues not related to banking itself "by embracing a liberal ESG agenda that harms America." In particular, Senator Toomey pointed to banks' greenhouse gas emission reduction pledges, commitments to paying the costs of employees' travel to obtain abortions, decisions not to finance firearm manufacturers, and statements on voting rights and immigration policies. He urged banks to instead maintain independence from social and political issues in order to continue fulfilling their societal role as "drivers and promoters of free

September 20,
2022

Senator Pat Toomey
Requests ESG Ratings
Firms Disclose
Methodology

enterprise.”

All witnesses wrote positively about their banks’ impacts on climate, diversity, and social mobility initiatives. William H. Rogers, Jr. (Truist), Andy Cecere (Bancorp), and William S. Demchak (PNC) all spoke about their banks’ ESG programs or impacts specifically. None of the witnesses directly responded to Senator Toomey’s criticisms regarding ESG in their written statements.

On October 31, 2022, Senator Patrick Toomey wrote to a group of 12 ESG ratings firms requesting information on methodologies used to calculate ESG ratings, and requiring them to preserve documents, communications, and other information related to the request. The 12 firms are MSCI, ISS, Bloomberg, Sustainalytics, Moody’s, CDP, S&P Global, FTSE Russell, RepRisk, FactSet, Refinitiv, and Arabesque S-Ray.

[Letter
Press Release - U.S.
Senate Committee on
Banking, Housing, and
Urban Affairs](#)

The letters were a follow-up to an initial request sent on September 20, 2022 asking the firms to share non-proprietary methodologies used to assign ESG ratings to companies. Specifically, the September 20 letters asked the firms to answer a number of questions, including:

- whether companies have an opportunity to submit clarifying comments to their ratings for the benefit of investors;
- how the firms determine the credibility of the data sources used;
- how the firms approach ratings with respect to issues such as abortion and gun control; and
- how the firms deal with potential conflicts of interest, in cases where the firms also issue proxy vote recommendations or offer advisory services.

The October 31 letters stated that there is an “increased bipartisan interest in conducting oversight of the ESG industry” and that “the use of ESG factors in capital allocation has become an issue of increasing bipartisan interest to Congress and regulators.” Furthermore, Senator Toomey highlighted concerns about the “veracity” of third-party data, the opacity of ratings methodologies, and the management of conflicts of interest.

September 20,
2022

FTC Chair Lina Khan and
DOJ Assistant Attorney
Jonathan Kanter Testify

On September 20, 2022, the Senate Subcommittee on Antitrust, Competition Policy and Consumer

[Link](#)

Before the Senate,
Confirming That There
Is No ESG Exception to
Antitrust Laws

Rights held a hearing on the "Oversight of the Enforcement of the Antitrust Laws." During a Q&A session, Senator Tom Cotton asked Federal Trade Commission Chair Lina Khan and Assistant Attorney General Jonathan Kanter of the Department of Justice's General Antitrust Division about ESG antitrust concerns, and specifically about Climate Action 100+ and BlackRock.

Both Khan and Kanter confirmed that there is no ESG exception to antitrust laws. Khan further confirmed that ESG cooperation or agreements, "in as much as they can affect competition, are always relevant" to the Federal Trade Commission. Kanter confirmed that when firms have substantial power and use that power to achieve anticompetitive ends, that should be actionable under antitrust laws.

September 15,
2022

SEC Chairman Gary
Gensler Testifies Before
the U.S. Senate
Committee on Banking,
Housing, and Urban
Affairs

On September 15, 2022, SEC Chairman Gary Gensler testified before the U.S. Senate Committee on Banking, Housing, and Urban Affairs. Gensler highlighted the SEC's efforts in driving greater efficiency, integrity, and resiliency in the funds and investment management space, for instance by proposing a rule enhancing the disclosure requirements for advisers and investment companies marketing themselves with ESG-related labels. This would help ensure that investors can see the information that supports claims by funds and advisers.

[Link](#)

September 6,
2022

BlackRock Responds to
Attorneys General's
Letters

On September 6, 2022, Dalia Blass, BlackRock's head of external affairs, responded to a letter from certain state attorneys general (see below), stating that the letter "makes several inaccurate statements about BlackRock's motive for participating in various ESG-related initiatives" and that this participation is "entirely consistent" with BlackRock's fiduciary duties. Furthermore, BlackRock stated that its engagement process with the companies in which it invests on behalf of its clients is focused on enhancing transparency.

[Link](#)

BlackRock also argued that climate risks pose investment risks and that this view is "by no means unique" but also not "universal"; it therefore offers its clients a "broad choice of investment products that are designed to help them meet their varied goals, priorities, and risk tolerances." BlackRock also described itself as an industry leader in offering clients a choice in proxy votes.

Furthermore, BlackRock stated that its participation in climate-related initiatives neither reflects coordinated activity implicating antitrust laws nor

August 4, 2022

Nineteen Attorneys
General Criticize
BlackRock for Relying on
ESG Investment Criteria
Rather Than Prioritizing
Shareholder Profits

“mixed motives” inconsistent with its duty to act solely in its clients’ interests. For instance, when joining Climate Action 100+, BlackRock says it submitted a memorandum explicitly stating that its participation is “not an informal or formal agreement to (i) buy, sell, hold, or vote our shares together with any other CA100+ signatory, or (ii) act in concert with any other signatory to acquire or consolidate control over any company or its board.”

Lastly, BlackRock stated in its response that it does not boycott energy companies or any other industry, and that it is “troubled by recent efforts to use ‘anti-boycott’ statutes to limit retirees’ options in meeting [their retirement] goals.” BlackRock also stated that its votes against management on climate-related issues are not to penalize companies, but rather to achieve the best long-term value for those companies and their shareholders.

On August 4, 2022, 19 Attorneys AGs wrote to Larry Fink, the CEO of BlackRock, stating that BlackRock relies on ESG investment criteria rather than shareholder profits in managing state pension funds, potentially in violation of state and federal law.

[AGs’ Letter](#)

The letter set out six concerns regarding BlackRock’s ESG activities, namely:

1. Neutrality: A letter from BlackRock’s chief client officer stated that BlackRock is agnostic on the question of energy and merely offers investing clients a range of investment options in the energy sector. The AGs argued that this apparent neutrality “differs considerably” from BlackRock’s public commitments, including its membership to the Net Zero Managers Alliance.
2. Dialogue: The AGs argued that though BlackRock states that it has joined climate change advocacy organizations, including GFANZ and Climate Action 100+, in order to participate in “dialogue” with governments, companies and financial institutions on ESG matters, this dialogue is not regarding how to maximize financial returns, as required by state law. For example, the AGs argued that the expressed purpose of GFANZ is to “alter the planet’s climate trajectory,” not to

“dialogue.”

3. Duty of loyalty: Many state laws require a fiduciary to discharge duties solely in the interest of the participants and beneficiaries. The AGs argued that BlackRock’s actions around promoting net zero, the Paris Agreement, and/or taking action on climate change indicate “rampant violations of this duty” and constitutes acting with mixed motives.
4. Duty of care: Many states require a fiduciary to make reasonable efforts to verify facts relevant to the investment. The AGs argued that BlackRock’s commitment to have all assets under management achieve net zero by 2050 could be a pretext to force companies to adopt climate policies, despite the fact that the United States has not implemented net zero mandates. The AGs argued that BlackRock’s focus on net zero and on making climate issues “the number one portfolio engagement factor” is further evidence that it does not have a sole focus on financial returns.
5. Antitrust: The AGs argued that BlackRock’s “coordinated conduct” with other financial institutions to impose net zero raises antitrust concerns and could be a breach of Section 1 of the Sherman Act.
6. Energy boycotts: Many of the AGs’ states have adopted legislation prohibiting energy company boycotts. As the definition of an energy boycott includes actions to penalize companies for failing to meet emissions standards beyond what is required by relevant law, the AGs argued that voting against companies for failing to meet disclosure standards not required by law could be a breach of the prohibition on energy boycotts.

May 26, 2022

Former Vice President Mike Pence Calls for Government Intervention to Halt the “ESG craze”

Writing in the *Wall Street Journal* in May 2022, former vice president Mike Pence argued that certain progressive politicians and regulators are subverting the democratic process through ESG regulatory strategies. In particular, Pence focused on ESG-scoring schemes, which he believes “empower an unelected cabal of bureaucrats, regulators and activist investors to rate companies based on their adherence to left-wing

[WSJ – Republicans Can Stop ESG Political Bias](#)

values.” Pence pointed to the S&P 500 ESG Index’s delisting of Tesla as an example of ESG being weaponized to achieve political goals—here, Pence asserted, punishing Tesla CEO Elon Musk for his criticism of the Biden-Harris administration.

Not only are ESG initiatives democratically illegitimate, Pence continued, but they are also bad for U.S. businesses. Pence pointed to the fact that Exxon Mobil and Chevron have received lower ESG ratings than Russian state-owned competitors, hurting the abilities of U.S. companies to compete in the global market. ESG efforts, according to Pence, have also resulted in corporate boards being usurped by environmental interests and banks refusing to finance U.S. oil and gas producers.

Going forward, Pence urged two strategies to combat the impact of ESG principles on U.S. businesses. First, Pence advised local, state, and federal lawmakers to curb the influence of ESG principles, particularly when it comes to state pension funds managed by investment professionals who are “pushing a radical ESG agenda,” through effective legislation. Second, Pence called upon Republican political leaders to ensure that “end[ing] the use of ESG principles nationwide” is integral to the Republican platform.