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1. How is "ESG" in the United States defined in a corporate/commercial context, and what are its major elements?

In the United States, neither 'ESG' collectively nor the 'E,' 'S,' or 'G' individually has a singular legal definition. Nor is there a settled view in the U.S. business community as to ESG's precise contours.

Generally, ESG is viewed as shorthand for a broad range of societal challenges that businesses are increasingly being called on to help address, posing both risks and opportunities. These issues fall under 'environment' (inclusive of climate change, greenhouse gas emissions, biodiversity, resource use, and preservation); 'social' (inclusive of diversity, equity and inclusion, racial justice, human rights, labor conditions, and labor rights); and 'governance' (inclusive of traditional corporate governance, board diversity and competency, bribery and corruption, and good governance).

2. What, if any, are the major laws/regulations in the United States specifically related to ESG?

2022 saw a wave of ESG-related legal developments in the United States including by the Securities and Exchange Commission (SEC), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Department of Labor (DOL), and the Environmental Protection Agency (EPA). There also have been a number of significant state-level ESG developments.

On March 21, 2022, the SEC proposed rules for climate-related disclosure requirements to be added to Regulation S-K and Regulation S-X, which are applicable to all reporting issuers including both U.S. public companies and foreign private issuers. Under this proposed rule, disclosures would appear in periodic reports (e.g., 10-Ks, 20Fs, and 10-Qs) and registration statements (e.g., S-1s, S-3s, and S-4s), phasing in over time, based on a company's filer status.

The proposed Regulation S-K amendments would require a new, separately captioned 'Climate-Related Disclosure' section in applicable SEC filings. The key disclosures include: material climate-related risks and impacts; greenhouse gas emissions; risk management, oversight process and corporate governance; and targets, goals, and transition plans.

The proposed Regulation S-X amendments would require line-by-line disclosure in the notes of audited financial statements of the impacts and expenditures related to severe weather events and other natural conditions, transition activities, and identified climate-related risks. (See Question 6 for a more detailed discussion of the proposed Regulation S-K and Regulation S-X amendments.)

On May 25, 2022, the SEC proposed an amendment to the current funds Names Rule, adopted in 2001, expanding its 80 percent requirement to include ESG fund names. The SEC also issued a proposed rule related to ESG disclosures of funds and fund managers that would create additional disclosure requirements in fund prospectuses, annual reports, and adviser brochures for certain registered investment advisers, advisers exempt from registration, registered investment companies, and business development companies that offer investors products that consider ESG factors in their investment processes.

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On December 16, 2021 and March 30, 2022, respectively, the OCC and the FDIC issued for public comment proposed principles for climate-related financial risk management by banks with more than USD 100 billion in total consolidated assets. The proposals, which are substantially similar, set out a 'high-level framework' for managing climate-related financial risks and call for large banks to integrate climate-risk considerations in strategy and business planning.

On November 22, 2022, the U.S. Department of Labor made available final regulations addressing a fiduciary's duties under the Employee Retirement Income Security Act (ERISA) that revise and rescind portions of the Trump-era rules that had placed a chilling effect on the ability to consider ESG factors in the management and investment of US corporate retirement plan assets (e.g., pensions and 401(k) plans). The final regulations are intended to create a framework within which an ERISA fiduciary may take ESG into account in a manner that complies with ERISA, and largely track the Department's proposed regulations on the topic that were issued in October 2021. The ESG-related portion of the regulations take effect 60 days after their publication in the Federal Register on December 1, 2022.

The Uyghur Forced Labor Prevention Act (UFLPA) took effect on June 21, 2022. The UFLPA imposes restrictions related to China's Xinjiang Uyghur Autonomous Region (XUAR) including prohibiting certain imports from the XUAR and imposing sanctions on actors responsible for human rights violations in the XUAR. The UFLPA establishes a 'rebuttable presumption' that goods mined, produced, or manufactured wholly or in part in the XUAR, or produced by certain entities, are made with forced labor and therefore are prohibited for importation. In that regard, the UFLPA establishes a high burden of proof of 'clear and convincing evidence' submitted to U.S. Customs and Border Protection, that the goods were not produced using forced labor.

Relatedly, on June 17, 2022, the Forced Labor Enforcement Task Force of the Department of Homeland Security published its Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China (UFLPA Strategy). The UFLPA Strategy provides guidance to importers on the nature of due diligence and other supply chain management controls expected of importers seeking to comply with the UFLPA and the types of evidence required to rebut the presumption.

In 2022, the federal government took action to address the disproportionate impact of pollution and climate change concerns on minority and low-income communities. On May 5, 2022, the U.S. Department of Justice (DOJ) created the Office of Environmental Justice and announced a new enforcement strategy to guide DOJ attorneys pursuing environmental justice cases. On September 24, 2022, the EPA similarly established the Office of Environmental Justice and External Civil Rights to advance environmental justice and civil rights. DOJ and the EPA are expected to scrutinize air and water pollution, soil and groundwater contamination, and other environmental issues that impact minority and low-income communities.

2022 also saw a range of U.S. state-level legislative and regulatory developments, with different approaches resulting in a challenging, bifurcated landscape to navigate at the state level.

Individual states have passed what are being viewed as 'Anti-ESG' laws and regulations, coming in two forms. First are 'Anti-Boycott' Bills targeting

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'financial institutions' that 'boycott' or 'discriminate against' companies in certain industries and that prohibit the state from doing business with such institutions or from investing the state's assets (including pension plan assets) through such institutions. Second are 'No ESG Investment Bills' prohibiting the use of state funds for the purpose of ESG or social investment. Under this type of Anti-ESG Bill, the state would be prohibited specifically from investing in strategies that consider ESG factors for any purpose other than maximizing investment returns.

17 states introduced 'Anti-ESG' laws in 2021 and 2022. For example, the Texas Government Code Title 10, Subtitle F, Chapter 2274 (S.B. 19, enacted in 2021) requires every financial institution doing business with state and local government entities to certify that it does not have a practice, policy, guidance, or directive that 'discriminates against a firearm entity or firearm trade association'. In addition, S.B. 19 directs state pension and school funds to divest shares they hold in financial groups that, in the government's view, boycott firearm companies. The Texas Government Code Title 8, Subtitle A, Chapter 809 (S.B. 13, enacted in 2021) calls upon the comptroller of public accounts to 'prepare, maintain, and provide to the permanent school fund and each statewide retirement system a list of all financial companies that boycott energy companies'. In addition, S.B. 13 directs state pension and school funds to divest shares they hold in financial groups that, in the government's view, boycott energy companies. Texas's comptroller announced on August 25, 2022 that 10 investment companies and 350 investment funds 'boycott' fossil fuel companies in the state. These companies now face possible divestment by state pension funds due to S.B. 13.

3. What other laws/regulations in the United States touch on ESG themes?

Given the breadth of ESG, numerous U.S. laws and regulations at both the federal and state levels address ESG. We highlight here only a few of the most relevant.

The Inflation Reduction Act, which was signed into law by President Biden in August 2022, is the most ambitious climate-related legislation in U.S. history. The Inflation Reduction Act includes numerous investments in climate projects such as investments in clean and renewable energy production, tax credits aimed at reducing carbon emissions, and tax credits for households to offset energy costs.

Section 1502 of the Dodd-Frank Act, as implemented by the SEC, requires all publicly listed companies to disclose their use of conflict materials, such as tantalum, gold, tin, or tungsten, sourced from the Democratic Republic of the Congo or an adjoining country if it is 'necessary to the functionality or production' of a product manufactured or contracted to the manufacture by the company, and the company files reports with the SEC under the Exchange Act. Under the rule, a company that uses any of the designated minerals must conduct a reasonable country-of-origin inquiry, performed in good faith and reasonably designed to determine the material's source.

Under the U.S. Foreign Corrupt Practices Act of 1977, the DOJ and the SEC investigate and prosecute corruption internationally. The FCPA prohibits bribery of foreign officials and it also imposes certain internal controls and books and records requirements on U.S. issuers.

The U.S. Congress also has enacted and amended various environmental statutes with the aim of reducing pollution and environmental impacts by imposing

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emission standards, reporting requirements, environmental management practices, and obligations to investigate and remediate contamination, including the Clean Air Act (1970 and amended in 1990), Clean Water Act (1972 and amended in 1987), the Safe Drinking Water Act (1974 and amended in 1986 and 1996), and the Comprehensive Environmental Response, Compensation, and Liability Act (1980 and amended in 1986 and 2002).

4. What, if any, litigation or enforcement activity has the United States seen related to ESG?

In March 2021, the SEC Enforcement Division created a Climate and ESG Task Force in response to increasing investor focus and reliance on climate- and ESG-related disclosure and investment. The Task Force's mandate includes:

- developing initiatives to identify proactively ESG-related misconduct;
- identifying any material gaps or misstatements in issuers' disclosure of climate risks under existing rules; and
- analyzing disclosure and compliance issues relating to investment advisers' and funds' ESG strategies.

On April 28, 2022, the Task Force brought an enforcement action, *Securities & Exchange Commission v. Vale S.A.*, 1:22-cv-02405 (E.D.N.Y.), alleging that, since 2016, Vale S.A. had manipulated multiple dam safety audits, obtained fraudulent stability certificates, and regularly misled local governments, investors, and communities about the safety of the Brumadinho dam through its disclosures. The SEC charged Vale S.A. with violating antifraud and reporting provisions of federal securities laws.

On May 23, 2022, the SEC resolved charges against BNY Mellon Investment Adviser, Inc. for misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds it managed. BNY Mellon Investment Adviser, Inc. agreed to pay a USD 1.5 million penalty to settle the charges.

On November 22, 2022, the SEC entered into a settlement agreement with Goldman Sachs Asset Management, alleging that it had not consistently followed its ESG policies and procedures in connection with products marketed as ESG investments. The products together held approximately USD 725 million in assets under supervision. Goldman paid a USD 4 million penalty and did not admit or deny the alleged shortcomings.

Recent ESG-related civil litigation includes *Earth Island Institute v. BlueTriton Brands* Civil Action 21-2659 (JEB) (D.D.C. Jan. 27, 2022), in which defendant BlueTriton, a water distribution company, was accused of greenwashing. BlueTriton made affirmative statements that it was an environmentally friendly and 'sustainable' company working to prevent plastic pollution that would 'continue to support the Company's commitment to being at the forefront of sustainable water management, advancing recycling and waste reduction' and continue 'a longstanding commitment to environmental leadership'. However, according to Earth Island Institute, BlueTriton had done little to address its plastic pollution and falsely communicated to customers that recycling mitigates the environmental harm from its plastic production and usage. Earth Island Institute alleges that BlueTriton violated the District of Columbia's Consumer Protection Procedures Act, which is a consumer protection law prohibiting a wide range of deceptive and unconscionable business practices.

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In addition, there is ESG-related civil litigation involving other aspects of ESG such as a case challenging a requirement that Nasdaq-listed companies have diverse boards, and if they don't, to explain why not (*Alliance For Fair Board Recruitment v. SEC,* 5th U.S. Circuit Court of Appeals, No. 21-60626).

5. What are the major non-law/regulatory drivers of ESG trends and developments in the United States?

Soft nonbinding laws

The United States has promoted the United Nations (UN) Sustainable Development Goals (SDGs), releasing a Sustainable Development Report every year. In addition, in 2021, under the Biden Administration, the United States rejoined the Paris Agreement. The United States also promotes the UN Guiding Principles on Business and Human Rights, which recognize a three-pronged approach to protecting human rights in the context of business activity.

The United States also upholds the OECD Guidelines for Multinational Enterprises (the Guidelines), a comprehensive set of recommendations for multinational enterprises to adopt in order to minimize and resolve impacts that arise from their operations in foreign jurisdictions and to encourage positive contributions to economic, social, and environmental progress, with a National Contact Point being a dispute resolution service to assist companies and stakeholders with responsible business conduct issues.

Many U.S. companies have committed voluntarily to ESG goals through international bodies. For example, a number of U.S. financial institutions are members of the Glasgow Financial Alliance for Net-Zero and the Net-Zero Banking Alliance or Net-Zero Asset Managers initiative, which means they may be subject also to the UN's Race to Zero campaign membership criteria. Through those criteria, corporations can be held to account for making progress on their climate commitments. Although not binding on the United States, the pressure to maintain memberships in international organizations may be another driver of domestic ESG trends and developments.

National Contact Points (NCPs)

The U.S. National Contact Point (USNCP) for Responsible Business Conduct is a dispute resolution and mediation resource that can support companies and stakeholders when responsible business conduct issues arise in a company's operations.

The USNCP, which is housed in the Bureau of Economic and Business Affairs of the U.S. Department of State, has three roles, to:

- promote awareness and encourage implementation of the Guidelines to business, labor, NGOs, and other members of civil society, the general public, and the international community;
- facilitate practical application of the Guidelines by bringing business and civil society together to identify potential and emerging RBC-related risks and discuss appropriate actions and responses under the Guidelines; and
- offer a 'Specific Instance' mediation process to be used when a party raises allegations against an MNE's operations.

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Shareholders

As recognized by the SEC in the 2010 Guidance and its 2022 proposals, there has been, and continues to be, significant shareholder demand for climate-related disclosures. In recent years, we have seen institutional investors form investor initiatives to encourage companies to provide better information regarding the impact of climate change on their businesses.

For example, in 2019, more than 630 investors who collectively manage more than USD 37 trillion signed the Global Investor Statement to Governments on Climate Change, which urged governments to require climate-related financial reporting. This initiative became the Investor Agenda's 2021 Global Investor Statement to Governments on the Climate Crisis, which was signed by 733 global institutional investors that collectively managed more than USD 42 trillion in assets. This investor initiative demanded that governments implement a range of measures, including mandating climate risk disclosure.

According to GlobeScan's 2021 public opinion research, U.S. retail investors are increasingly concerned with ESG investments. Half of American retail investors (51%) say ESG has influenced their investments, which is up 25 points compared to 2003.

6. Are the laws, regulations and obligations highlighted in Question 2 primarily related to corporate disclosure?

Reporting

The SEC set out the current climate disclosure framework for public companies in 2010 with its interpretive guidance (2010 Guidance). The 2010 Guidance did not create specific reporting requirements for climate change or other ESG-related matters. Instead, the 2010 Guidance recommended disclosure of:

- the impact of pending or existing climate change-related legislation, regulations, and international accords;
- the indirect consequences of regulation or business trends; and
- the physical impacts of climate change. These disclosures are recommended when the above are considered 'material' to the particular public company.

As outlined in question 2 above, the SEC's March 2022 climate-related disclosure rules proposed amendments to Regulation S-K and Regulation S-X, including disclosure of:

a) material climate-related risks and impacts;
b) greenhouse gas emissions;
c) risk management, oversight process, and corporate governance; and
d) targets, goals, and transition plans.

Under (a), the proposal would require companies to describe 'climate-related risks reasonably likely to have a material impact on the registrant, including on its business or consolidated financial statements, which may manifest over the short, medium, and long term'. These climate-related risks include both physical and transition risks. Companies would need to disclose how companies determined time horizons as well as how such determination ties to the expected useful life of assets and climate-related planning processes and goals. In addition, companies would need to consider not only the direct impacts of climate change on their financial statements and business but also the indirect impacts on their 'value chains'. The

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proposal would require companies to describe 'the actual and potential impacts of any [identified] climate-related risks . . . on the registrant's strategy, business model, and outlook', including: the nature of the impact; time horizon for each impact; how each impact is integrated into the company's business model, strategy, and outlook; impacts or reasonably likely impacts on financial statements; and resilience of business strategy in light of potential changes in climate-related risks.

For (b), the rule proposes mandatory disclosures for all registrants regardless of materiality regarding direct emissions from facilities owned or activities controlled by the registrant, known as Scope 1 emissions (e.g., combustion from company facilities) and indirect emissions from purchased energy (e.g., purchased electricity, heating and cooling), known as Scope 2 emissions. Disclosure of Scope 3 emissions, which are all other emissions from upstream and downstream activities (e.g., employee commuting and emissions generated by companies in which a financial institution invests) are mandatory if the emissions are 'material' or if the registrant has set greenhouse gas emission reduction targets that include Scope 3 emissions.

The proposal under (c) would require companies to describe 'the [board's] oversight of climate-related risks' and 'management's role in assessing and managing climate-related risks'. Moreover, companies would be required to describe the risk identification and assessment process, the risk management process, and the integration into overall risk management.

Finally, the proposal under (d) would require companies to describe the scope and calculation of any climate-related targets or goals, progress made, and any use of carbon offsets or renewable energy credits or certificates. Moreover, companies would be required to disclose any transition plan adopted as part of its climate risk management strategy. This disclosure would include a description of the plan, relevant metrics and targets, annual updates about the transition plan (e.g., actions taken to meet goals), and how the company plans to mitigate or adapt to identified physical and transition risks.

The proposed Regulations S-X amendments would require disclosure in the notes of audited financial statements on the impact of climate-related risks on business and consolidating financial statements, including:

- financial impact metrics of negative and positive impacts on an aggregated line-by-line basis (1% line-item threshold);
- expenditure metrics of aggregate amounts expensed or capitalized in response to climate-related impacts and risks, including transition activities, climate-related targets and goals, and other mitigation activities (1% line-item threshold); and
- impact of climate on financial estimates and assumptions.

A registrant must include in its Regulation S-X disclosures the impact of any climate-related risks identified in the Regulation S-K risk management disclosure. Specifically, the disclosure must include contextual information regarding how a certain metric was derived, including descriptions of significant inputs and assumptions, as well as any policy decisions adopted by the registrant in the calculation of the metrics. This information would come within the scope of an independent, registered public accounting firm's audit of the financials as well as a company's internal control over financial reporting. The financial statement disclosures would need to be provided for a company's most recently completed fiscal year and for each historical fiscal

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year included in the financial statements in the filing. There is no exemption for information that is not reasonably available with respect to historical periods.

Companies subject to the California Transparency in Supply Chains Act must disclose to what extent, if any, the retailer or manufacturer:

- verifies, evaluates, and addresses the risks of human trafficking and slavery in its product supply chain;
- audits suppliers to ensure compliance with company standards;
- requires direct suppliers to certify that the supply chains for all constituent parts comply with human trafficking prohibitions enshrined in domestic law where the part is produced;
- maintains internal accountability standards and procedures in case of violation; and
- trains employees and managers with direct responsibility for supply-chain management.

Under the Nasdaq Board Matrix, since August 8, 2022, most Nasdaq-listed companies must annually disclose statistics on their board's gender, sexual-orientation, and racial/ethnic diversity. This is the first rule of its kind to be introduced by a U.S. stock exchange.

7. Which sectors are most impacted by ESG in the United States? How significant is ESG investment in the United States?

Private equity

ESG considerations are increasingly central to investments in private equity in the United States. A U.S. SIF Foundation report, published in 2020, found that one out of every three dollars under professional management in the U.S. — a total of USD 17.1 trillion — was managed according to sustainable investing strategies. (See above, Questions 2 and 6 for further details regarding the SEC's proposed rules, such as the proposed amendment to the current Names Rule and the proposed climate-related disclosure requirements, and Question 4 for enforcement.)

Banks

Fitch Ratings considers ESG to be an increasing priority for North American banks and their stakeholders. This is both due to increased social and green bond issuances as well as systemic financial risks caused by climate change. While banks themselves are not particularly high emitting, they have a large proportion of 'financed emissions', which are included in Scope 3 GHG emissions. U.S. banks are under increasing pressure to disclose their financed emissions and commit to reducing them, in some cases, by developing strategies to reduce or stop financing to clients in certain high-emitting sectors.

Fashion

As mentioned above, the proposed FSSAA would require fashion retail sellers and manufacturers to disclose their environmental and social due diligence policies.

Travel Industry

Although not U.S.-specific, more than 300 travel companies, including U.S.-based companies, signed the Glasgow Declaration on Climate Action in Tourism during

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COP26, requiring them to submit a concrete and transparent plan to cut carbon emissions in half by 2030 and reach 'net zero' by 2050.

Automobile Industry

The Inflation Reduction Act, which President Biden signed into law on August 16, 2022, has significant provisions and allocates substantial funding for various initiatives supporting the further development of the electric vehicle (EV) market. These include tax credits for the purchase of new and used EVs, incentives to support the U.S. development of industries central to EV supply chains, and support for the buildout of EV charging stations, among others. In addition, the Biden Administration's American Jobs Plan includes a USD 174 billion investment in the EV market. Furthermore, in June 2022, the Biden Administration proposed new standards for a national EV charging network. Notably, the Bipartisan Infrastructure Law included an investment of USD 7.5 billion for EV charging infrastructure and more than USD 7 billion for the critical minerals supply chains necessary for batteries, components, materials and recycling. Moreover, on August 25, 2022 the California Air Resources Board approved the Advanced Clean Cars III rule, which established a year-by-year roadmap so that, by 2035, all new cars and light trucks sold in California will be zero-emission vehicles, including plug-in hybrid electric vehicles.

8. What are the trends in the United States regarding ESG governance?

In the United States, the move toward more governance-specific ESG factors appears to be primarily market driven, though regulatory agencies are increasingly imposing demands related to ESG reporting and disclosure. According to the Financial Times, the number of Chief Sustainability Officers in Fortune 500 companies grew in 2020 to 95, a 228% increase since 2011.

There is also federal support for a growing emphasis on governance factors. On November 22, 2022, the DOL introduced new rules that would expressly enable ERISA fiduciaries to consider ESG factors in their investment decisions. These considerations include governance factors such as board composition, executive compensation and transparency, and accountability in corporate decision-making as well as a corporation's avoidance of criminal liability and compliance with labor, employment, environmental, tax, and other applicable laws and regulations.

9. To what extent are ESG ratings or ESG benchmarks relied upon in the United States?

ESG rating agencies

The Big Three credit rating agencies, namely Standard & Poors, Moody's, and Fitch Ratings, were all founded in the United States. All three provide ESG-rating services. In 2022, there were increasing calls for government regulation of the ESG ratings industry, though not government action to do so.

ESG benchmarks

MSCI is a U.S.-founded finance company that created some of the most widely used ESG benchmarks and indexes.

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In addition, U.S.-based Citi's 2021 ESG Report was prepared using the GRI Standards and included reporting in accordance with SASB. Moreover, Citi's reporting is guided by the Principles for Responsible Banking, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights.

10. What is the role of the private markets versus public markets in driving ESG developments in the United States?

ESG agenda

There is a wide range of actors driving ESG developments in the United States. Investor and shareholder pressure has clearly influenced the SEC's climate-change disclosure guidelines and proposals.

In its 2022 Enhancement and Standardization of Climate-Related Disclosures for Investors Proposal, the SEC noted that its 2010 Guidance on climate-related reporting for public companies was in response to increasing pressure from the public and shareholders for public companies to disclose how climate change is likely to impact their business. Many companies have provided information in response to investor demand. The SEC's March 2022 climate-related disclosure proposal said that it was 'appropriate' for the SEC to consider this investor demand when designing disclosure regimes under federal securities laws.

In recent years, companies also increasingly have weighed in on sensitive social and political issues. For example, companies across the United States expressed their support for the Black Lives Matter movement through pledges to increase diversity, donations to civil rights groups, and changes in policies and practices. Dozens of U.S. companies signed letters calling for police reforms, and, on June 2, 2020, Bank of America pledged it would spend USD 1 billion over four years to address racial and economic inequality.

With respect to ESG-related shareholder proposals, there has been an overall uptick in the United States, with a more nuanced picture in terms of the support received. Influential institutions like BlackRock have been supportive of ESG proposals, while at the same time voicing reservations, particularly for proposals that were more prescriptive in nature. These factors, in addition to talk of an impending recession, seemed to reduce the overall support of shareholders in 2022. In the oil and gas industry, shareholders of fossil fuel companies, Chevron, BP, and ConocoPhillips to name a few, increasingly voted against climate-related resolutions. This decrease in shareholder support comes in the wake of disruptive events around the globe and the profits fossil fuel companies have experienced following the energy crisis and resultant high oil prices.

11. What are the major challenges in terms of compliance for companies under ESG obligations?

Although the proliferation of voluntary disclosure and reporting frameworks has increased reporting and disclosures by companies, this has also led to challenges for investors. As letters from the Vanguard Group, Inc. and the U.S. Impact Investing Alliance in 2021 highlight, this prompted inconsistent, incomparable, and unreliable information. Due to the abundance of third-party voluntary frameworks, companies

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have the ability to choose under which framework they disclose and the degree of disclosure. This has led to partial disclosures that are often inconsistent year on year; the form and content of the disclosures can vary significantly. According to a 2018 study by the World Business Council for Sustainable Development, it was difficult for investors to use sustainability disclosures because of a lack of consistency and comparability. Moreover, as these third-party frameworks are voluntary, companies lack the incentives or external pressure to provide complete and adequate disclosures.

However, according to 2021 letters from the American Enterprise Institute, Heritage Foundation, and Texas Public Policy Foundation (amongst others), there is a belief that the assumptions that underpin the climate-related impact assessment were too uncertain to enable companies to determine the real risks to their businesses caused by climate change. These commenters argue that these voluntary frameworks are unnecessary as many companies already disclose climate-related risks, and these rules are more costly than the so-called 'private ordering' of climate-related disclosures.

In addition, 2021 letters from the Institute of Free Speech, West Virginia Attorney General, and Texas Public Policy Foundation argued that mandatory climate disclosure rules could violate First Amendment rights. Also contributing to the trend may be the increased willingness of fossil fuel companies to proactively put in place energy transition plans and emissions goals to preempt climate-centric shareholder resolutions.

As noted above, individual states are passing what are being viewed as 'pro-ESG' and 'anti-ESG' laws and regulations, resulting in an increasingly bifurcated landscape. The lack of a unified national strategy is causing significant complexity for businesses operating across the United States. This has been a key challenge for financial institutions where some investors are pushing for more ESG considerations in lending and the underwriting process, while some states, mainly Texas and West Virginia, are punishing firms that have such policies in place by not allowing state entities to do business with those firms. For example, the Illinois Sustainable Investing Act (2020) mandates that 'all public or government agencies involved in managing funds … develop, publish, and implement sustainable investment policies,' whereas Senate Bill 19 in Texas requires every financial institution doing business with state and local government entities to certify that it does not 'have a practice, policy, guidance or directive that discriminates against a firearm entity or firearm trade association.'

Another challenge is the expense of complying with climate-related reporting requirements, especially in light of the SEC's proposal for detailed climate-related disclosure (see Questions 2 and 6 for more detail). A 2022 survey by the SEC found that, on average, corporate issuers are spending USD 533,000 annually on climate-related disclosures, and institutional investors are spending USD 1,372,000 annually to collect, analyze, and report climate-related data to inform their investment decisions.

12. What information sources are most relevant for ESG considerations in the United States?

There is no single information source that consolidates all the major ESG developments taking place in the United States. For federal regulatory developments, monitoring the SEC website at *www.sec.gov* is helpful; congressional developments can be found at *www.congress.gov*. Each state government has a parallel site.

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Debevoise & Plimpton LLP has an ESG Resource Center, which can be found at *www.debevoise.com/topics/environment-social-and-governance*, and publishes an ESG Weekly Update outlining ESG developments of interest to the business community with a focus on legal and regulatory developments, accessible through the ESG Resource Center.

13. Has the United States developed a Taxonomy related to ESG?

No.

14. What does the future hold for ESG in the United States?

In the short term, there is an expected focus on disclosure and reporting and an increased effort in enforcement. The SEC is also expected to issue final rules imposing mandatory ESG disclosures for public companies, covering corporate board diversity, climate change, and cybersecurity risk governance, among other areas.

The focus on enforcement from the SEC and DOJ is also likely to increase. In 2021, the SEC hired its first senior policy advisor for climate and ESG, created a climate and ESG task force as part of its enforcement division, and directed the Division of Corporate Finance to enhance the focus on climate-related disclosures.

We are likely to see a consolidation in ESG frameworks in the medium term. The regulatory changes on the horizon are the outcome of the SEC's March 2021 proposal, which models the climate-related disclosure requirements of the Task Force for Climate-related Financial Disclosures with the aim of producing a consistent, comparable, and reliable disclosure framework.

The Biden Administration has projected a long-term commitment to ESG. In a White House press release on April 22, 2021, President Biden announced a new target for the United States to achieve a 50%-52% reduction in U.S. greenhouse gas and pollution from 2005 levels by 2030. Moreover, the Biden Administration published its 2021 long-term strategy setting out how the United States can reach its goal of net-zero emissions no later than 2050. However, the 2022 Supreme Court decision in *West Virginia v. EPA*, 597 U.S. __ (2022) — which held that the EPA lacked authority, under the Clean Air Act, to cap greenhouse gas emissions in the manner conceived in the Clean Power Plan — will limit the options available to the Biden Administration for reaching these goals.

As mentioned above, the Inflation Reduction Act is the most ambitious climate-related legislation in U.S. history. The Inflation Reduction Act includes numerous investments in climate projects such as investments in clean and renewable energy production, tax credits aimed at reducing carbon emissions, and tax credits for households to offset energy costs. According to a White House press-release on August 23, 2022, due to the Inflation Reduction Act's investments, the United States is on track to decrease greenhouse gas emissions by about 40% below 2005 levels in 2030, therefore positioning the United States to meet President Biden's climate goals of cutting greenhouse gases by 50%-52% in 2030 and reaching net-zero by no later than 2050.

U.S. bank regulators are expected to continue their focus on climate-related risk management for financial institutions. We anticipate final guidance from the OCC, the FDIC, and possibly the Federal Reserve Board (FRB), on a standalone

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or interagency basis, in the coming months, and the FRB has indicated greater focus on climate-related scenario analysis in 2023. Some state regulators are also expected to publish guidance, such as the New York Department of Financial Services, which regulates state-supervised financial institutions.

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