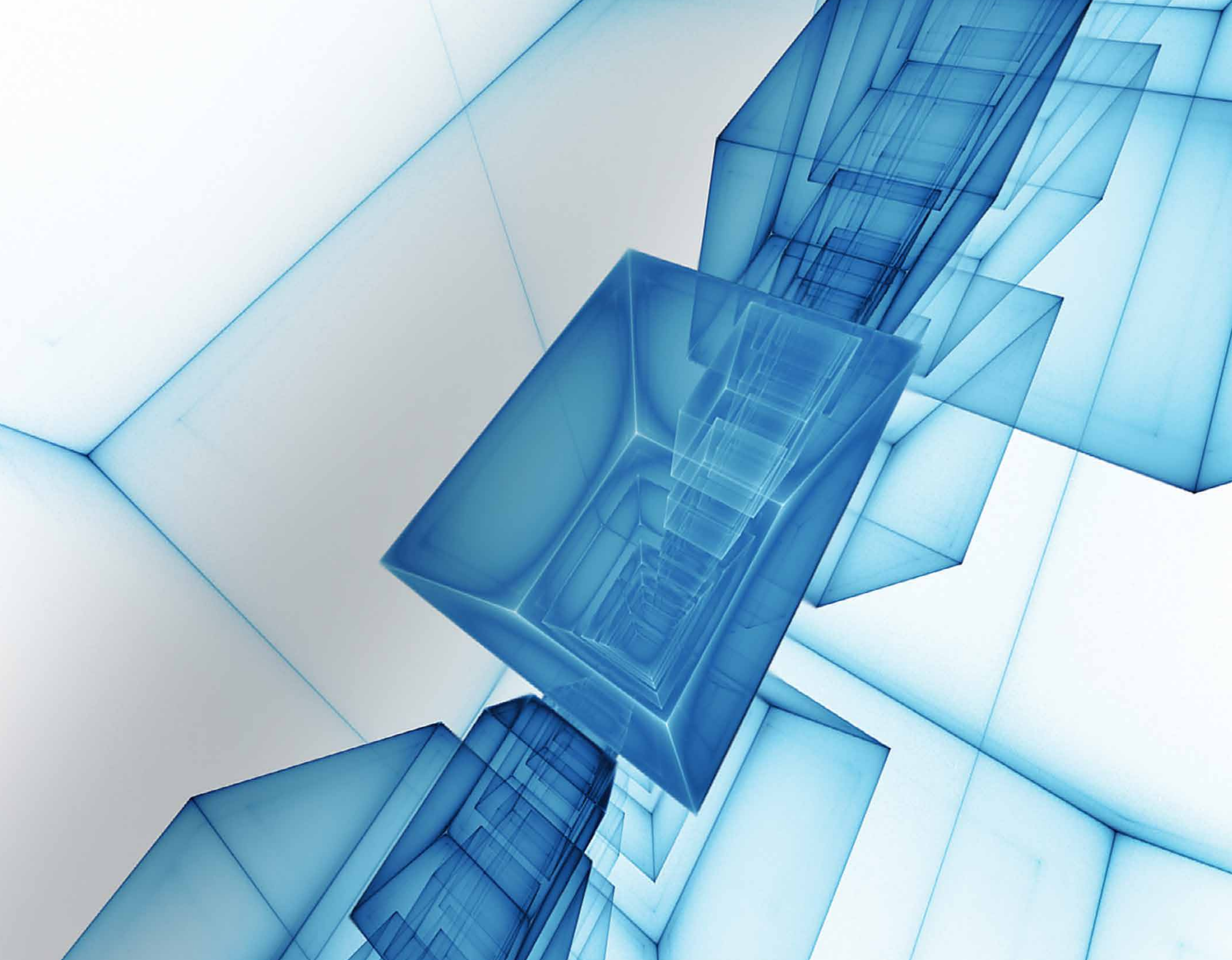
Vinson&Elkins

Fall 2024

V&E Quarterly Securities & ESG Updates



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Letter from the Editors

The first half of 2024 was eventful in the world of environmental, social and governance ("ESG"). Although ESG continued to lose the market tailwinds that have pushed it forward in recent years, regulatory pressures both domestically and internationally have continued to forge ahead.

The softening of market tailwinds was driven in part by carefully orchestrated pushback from conservative-leaning U.S. states and courts. Litigants also sought to ratchet back some of the perceived improper efforts by investors and companies in recent years to push agendas regarding issues like climate change; diversity, equity and inclusion ("DEI"); and other politicized issues. On the other side of the political spectrum, some left-leaning U.S. states and politicians have sought judicial remedies against certain sectors and select companies over arguably macro-societal issues like climate change — which some argue are not best addressed in courts. The recent announcement by the California Attorney General serves as a high-profile example of this trend. The California Attorney General announced that his office is seeking the disgorgement of profits against the oil majors predicated on theories of alleged intentional obfuscation of the sources and urgency of climate change.

The 2024 proxy season provided mixed results for supporters of ESG. While the volume of shareholder proposals remained elevated on topics related to DEI, climate and other environmental and social issues, support for these proposals declined year-over-year. On the other hand, governance proposals saw a resurgence in institutional investor support, perhaps indicating investor willingness to support topics that are widely considered to be less polarizing, and also perhaps because these proposals were better crafted and less prescriptive than the "E" and "S" proposals that continue to flood issuer proxy statements. We also saw a novel use of the courts, involving a suit to block climate-related proxy proposals from purported shareholders and which forwent the typical route of seeking no-action relief from the U.S. Securities and Exchange Commission ("SEC"). We also observed the rise in prominence of Artificial Intelligence ("AI") this year. AI proposals received notable shareholder support, including "breakthrough" proxy proposals — ballot proposals that, by and large, did not pass this year, but were new to the scene and garnered a critical mass of support — which may be a harbinger for what is to come in future proxy seasons.

Speaking of AI, this topic remains high on the issues list across the board. The SEC successfully brought an enforcement action against a company on the basis that the company, recognizing the strong demand for AI-related investments, overstated its sophistication and use of AI in its core business, thus defrauding investors in a groundbreaking case of "AI-washing." Public companies, many of whom are not "AI companies," are recognizing the massive potential disruptions that AI poses: this year 56% of Fortune 500 companies cited AI as a risk factor in their 10-K, a huge jump from just 9% in 2022.[1] Along with the promise of AI's ability to rewire the U.S. economy and society, including how we think and work, this year also has made clear that our nation's power grid may be unable to keep up with the sheer volume of energy that the AI revolution is going to require. Indeed, events of this past year illuminated the fact that our nation's power grid is not equipped to handle the surge in energy demand to run data centers and keep massive amounts of information flowing. And this is saying nothing of the many corporate commitments to decarbonize within the next few decades — commitments made long before AI was really part of those greenhouse gas emissions forecasts. With this significant increase in energy use, we anticipate that all energy, both traditional and renewable, will remain in significant demand for the foreseeable future as society navigates the tension between the demand

for lower carbon solutions with an insatiable demand for AI-driven technologies. This demand will tax our already fragile power grid, requiring new and different kinds of investments that may lead to significant risks and opportunities for companies.

We would be remiss if we failed to address the release this spring of the long-awaited SEC Climate Rule. As we discussed in detail in our white paper released shortly after the rule was published, the rule was immediately subject to vociferous opposition in the courts. Petitioners filed lawsuits on the very first day of the rule's release, and several more followed in the ensuing days. The Court of Appeals for the Eighth Circuit is now in the process of hearing the consolidated cases. In connection with the litigation, the SEC voluntarily stayed the rule. As a result, issuers have been standing by until it becomes clearer what, if anything, may survive the litigation and what the timelines for compliance may be once this works its way through the courts, likely including the U.S. Supreme Court. All of this comes in the midst of a U.S. presidential election with potentially major ramifications on administration priorities going forward.

Not to be outdone by the goings-on in the U.S., the European Union ("EU") and its Corporate Sustainability Reporting Directive ("CSRD") continued at pace, formally becoming law in EU member states. Although that regime only directly affects companies with certain EU nexuses, it is likely to affect many other companies extraterritorially, even if indirectly, given the need for EU reporters to include information about their supply chains as well as a very novel and (for U.S. companies especially) difficult-to-comprehend assessment of "double materiality" that differs significantly from the SEC's traditional notions of materiality. The EU continues to make ESG a focus with the recent proposal of the Corporate Sustainability Due Diligence Directive, which sets out corporate due diligence duties related to human rights and environmental impacts in a company's own operations and chains of activities. Domestically, states like California, with their own climate disclosure laws, may affect many U.S. issuers that might otherwise feel the heat abating with the SEC's Climate Rule on pause. Companies that may be subject to California's climate reporting laws may be feeling whiplash: on the one hand, the laws could be delayed or halted by a lawsuit filed by the U.S. Chamber of Commerce, but on the other hand, are unlikely to be delayed through legislative action — which many had hoped for. Proposals to push back the reporting timelines failed at the end of California's legislative session and Governor Newsom signed a new clean-up bill, SB 219, which effectively kept the original reporting deadlines intact.

In this edition of our quarterly ESG and Securities newsletter, we cover these issues as well as other major developments that are likely to affect public companies, such as the groundbreaking docket of cases that the U.S. Supreme Court decided this term, and in particular, three significant rulings that have the potential to reduce the power of administrative bodies, including the Environmental Protection Agency ("EPA") and the SEC. We cover what you need to know regarding major securities issues, policies and procedures in light of recent insider trading, cybersecurity and other SEC rulemaking and enforcement action. We also cover other major news, including the continued risks and interesting developments related to corporate "greenwashing."

Understanding and appropriately preparing for all of these developments requires awareness of these trends. While in some ways, it may feel like ESG is over, it seems that this is far from the truth — in many cases, ESG is changing from a voluntary, stakeholder demand-driven exercise to a regulatorily and court-driven mandate. As you delve into this complex, and sometimes erratic, set of developments, please remember that V&E is here to assist you.

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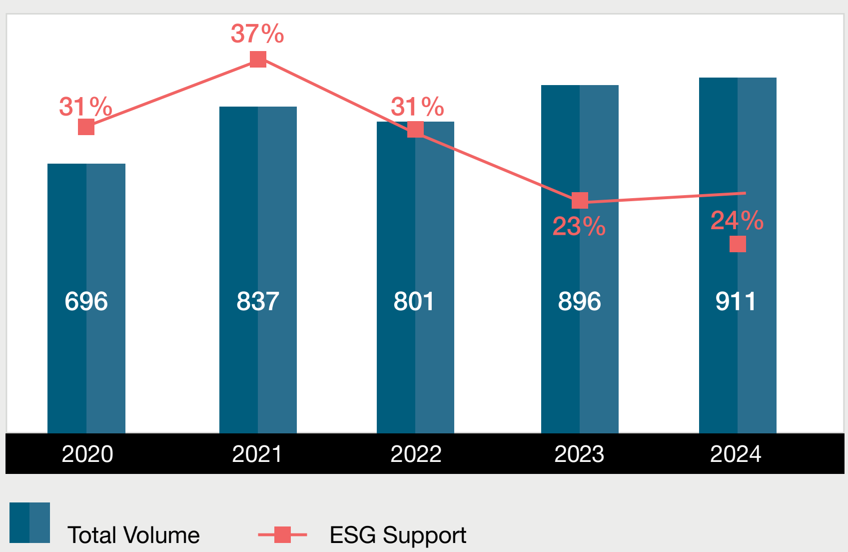
Proxy Season 2024 — What's New and What Went Down

ESG Support is Down, But ESG Proposals are as High as They've Ever Been

Proxy season 2024 has largely come to a close for end-of-calendar-year filers and, while some of the results may appear convoluted on their face, certain overall trends became clear once the layers are pulled back.

ESG proposals experienced a general increase in volume to 911 shareholder proposals in 2024, representing a continuation of the trendline we saw in 2023, in which shareholders submitted 897 proposals to corporate issuers. While 2024 again beat the previous year's record-breaking year for the volume of ESG proposals, average support levels remained steady with 2023, falling well below the high-water-mark level of ESG proposal support observed in 2021.

ESG Proposals are Rising, but Support Declining[1]



[1] Sources: DealPointData as of June 3, 2024; Washington, Spierings, *2023 Proxy Season: More Proposals, Lower Support*

This dichotomy of high numbers of proposals with low levels of support can be attributed to several factors:

Reasons for High Number of ESG Proposals

- In 2021, the SEC issued Staff Legal Bulletin No. 14L ("SLB 14L") to provide new guidance for when the agency would grant no-action relief. SLB 14L takes a much more permissive perspective on shareholder proposal submission, meaning companies face a much higher hurdle to exclude proposals — particularly ones that touched on a "significant social policy." Historically, these proposals would have been excludable under various grounds such as micromanaging ordinary course business decisions and similar concepts that were traditionally considered to be within the purview of management or "too complex" for shareholders as a group to make an informed judgment. SLB 14L thus opened the floodgates for ESG proponents to submit more prescriptive proposals on day-to-day type management decisions that the SEC normally would have disallowed through the no-action relief process.

- The broadly permissive environment for shareholder proposals created by SLB 14L coupled with the fast-increasing focus on ESG concerns from many stakeholder groups, especially following the COVID-19 pandemic when racial justice and environmental issues saw a groundswell of support, combined to make issuers ripe targets to promote activists' pet environmental or social issue areas. The Rule 14a-8 shareholder proposal process often provides a low-cost method of garnering media attention or driving donor support to an environmental or social cause. In other words, the Rule 14a-8 shareholder proposal process became a relatively cheap megaphone for proponents to get their message out to the public, demonstrating one reason there has been a spike in these types of shareholder proposals.[2]

Reasons for Low Levels of Support for ESG Proposals

- As discussed above, SLB 14L helped to open the floodgates for shareholders to submit proposals deemed to have broad social importance. Activists submitted proposals that might normally be deemed as ordinary business or micromanagement to shine a spotlight on their pet issues, which subsequently failed to garner significant levels of support from shareholders.

- In response to the broad and largely unchecked push on corporate issuers in the last decade by many investors, employees, communities and others towards "stakeholder capitalism" and promoting the ESG movement, a loosely coordinated counterbalance has arisen for those that oppose the ESG ethos.
  - The Anti-ESG movement has gathered steam through actions in conservative state legislatures and conservative-leaning courts. This pushback has been acutely felt by the large institutional investors who have taken a reputational hit for purportedly promoting corporate policies and outcomes that are at odds with their fiduciary duties to their underlying asset owners.
  - These large institutional investors have seen outflows of capital from conservative state pension funds while having to defend against reputational harm in justifying what some say is their failure to promote their sole fiduciary responsibility — to preserve and increase value to the owners of the assets they manage.
  - Because of this anti-ESG movement, large institutional investors that control the proxy votes at nearly all public companies have become generally less aggressive in supporting or promoting polarizing environmental and social issues in the last couple of years. This softening of large institutional investor support for "pro-ESG" topics has led to a notable decrease in support for ESG proposals versus prior years.

- — The large institutional investors often cite their soft support for the flood of proposals based on such proposals being too "prescriptive," but these asset managers must also deal with the reality that they are themselves high-profile targets in the anti-ESG movement and are treading more carefully when it comes to supporting environmental and social proposals in the absence of a clearly identified weakness in a company's governance structure.

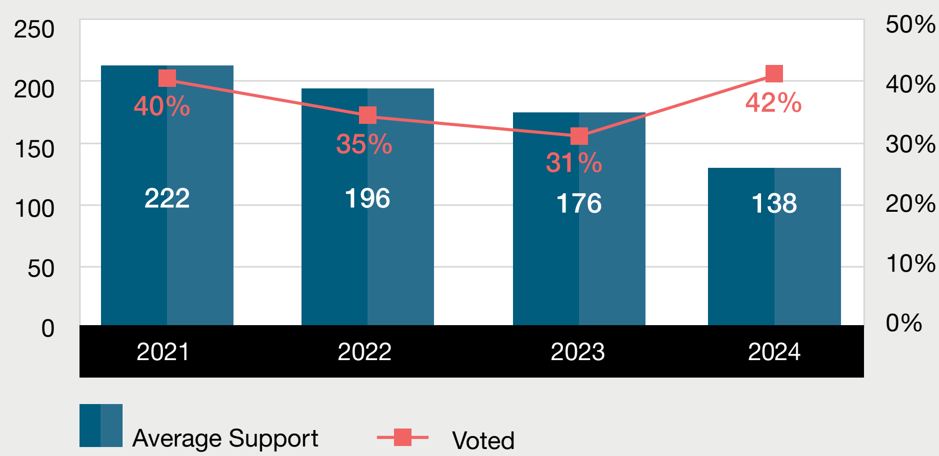
- Companies themselves have stepped up their disclosures and processes across the board. Many companies have heeded the demands of shareholders over the last couple of years, making strides in improved governance practices, enhanced disclosures and shareholder engagement. With these efforts, there are fewer obvious weak areas — or "low hanging fruit" — for ESG activists to pursue. Thus, institutional investors consider the remaining shareholder proposals pursued by activists to be lower in quality, to be highly prescriptive, to fail to articulate a case for long-term shareholder value, or some combination of the three. As a result, institutional investors have become more reluctant to support shareholder proposals, which is reflected in the declining support trendlines.

A Retreat To Governance Proposal Support

In light of these reasons for declining support for environmental and social shareholder proposals, there has been a retrenchment of sorts for investors in supporting governance proposals. Such proposals historically faced less politicization and fell more squarely within the mandate of institutional investors. The notable rise in governance shareholder proposal support this year may also be explained by the fact that such proposals are rarely soap-box issues for single-minded, nongovernmental organization activists seeking to raise awareness of a favored issue. As such, many governance shareholder proposals are viewed as higher quality by institutional investors, and more likely to garner their support.

While the *volume* of governance-focused shareholder proposals voted at S&P 1500 companies continued to decline this year, average *support* for those proposals jumped to 42% this year from 31% in 2023.

Governance Proposals, S&P 1500[1]



[1] Analysis by EY Center for Board Matters

Notably, the increased support in governance shareholder proposals this year was driven by an increase in support for the elimination of supermajority voting rules in charters and bylaws, which averaged 72% support, up from 54% in 2023.[3]

As of August 25, 48 governance shareholder proposals (including 31 shareholder proposals to eliminate supermajority voting requirements) obtained the requisite shareholder approval to pass, which well exceeded the number of successful environmental and social ("E&S") proposals, of which only two shareholder proposals and one shareholder proposal passed, respectively.

Declining Support for Environmental and Social Topics, with Plateaued Volume for Both

As previously described, there has been a general softening of support for E&S topics across the board this proxy season. This decreased support for E&S proposals also coincides with a flattening of the volume of these proposals — albeit at a historically high plateau.

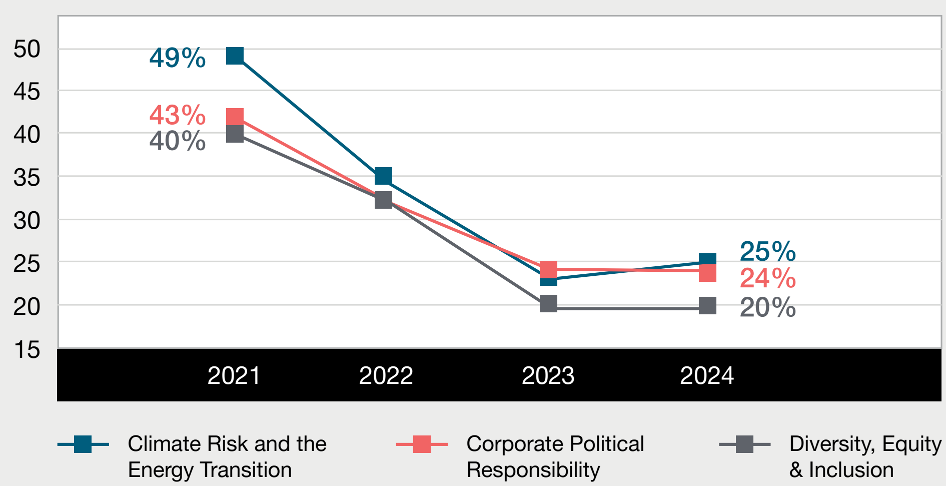
Although the volume of environmental-focused proposals overall declined by 2% as compared to 2023, variations have developed within individual subcategories of ESG topics:[4]

- The number of greenhouse gas emissions reduction proposals (including Scope 3 emissions) increased by 7%.
- The number of plastic/sustainable packaging proposals increased by 7%.
- The number of deforestation and lobbying proposals decreased by 6%.

Of the E&S proposals that were ultimately submitted to a vote,[5] less than 1% received majority support in the first half of 2024:

- Climate-related risk shareholder proposals received 25% support, down from 49% in 2021.
- Corporate political responsibility and giving decreased to 24% support from 43% in 2021.
- DEI-related shareholder proposals decreased to 20% support from a high of 40% in 2021.

Average Support Declined Across Key Environmental and Social Topics — Except for Climate-Related Proposals, S&P 1500[1]



[1] Analysis by EY Center for Board Matters

DEI Shareholder Proposals

This year, DEI shareholder proposals faced significant dips in support. Following the [2023 U.S. Supreme Court ruling on Affirmative action](), DEI-related shareholder proposals garnered not only significant levels of pushback from anti-ESG activists, but also a retrenchment in support from institutional investors that likely would have supported the proposals only a few years ago. Investors that might have backed their proposals in a different political climate now cite such shareholder proposals as highly prescriptive. To illustrate the point, in 2024, two key types of shareholder proposals — Civil Rights Audits and Racial Equity Audits — received significantly lower support as compared to 2022:

Average Support for DEI Proposals[1]

	2022	2024
Civil Rights Audits	48%	7%
Racial Equity Audits	41%	14%

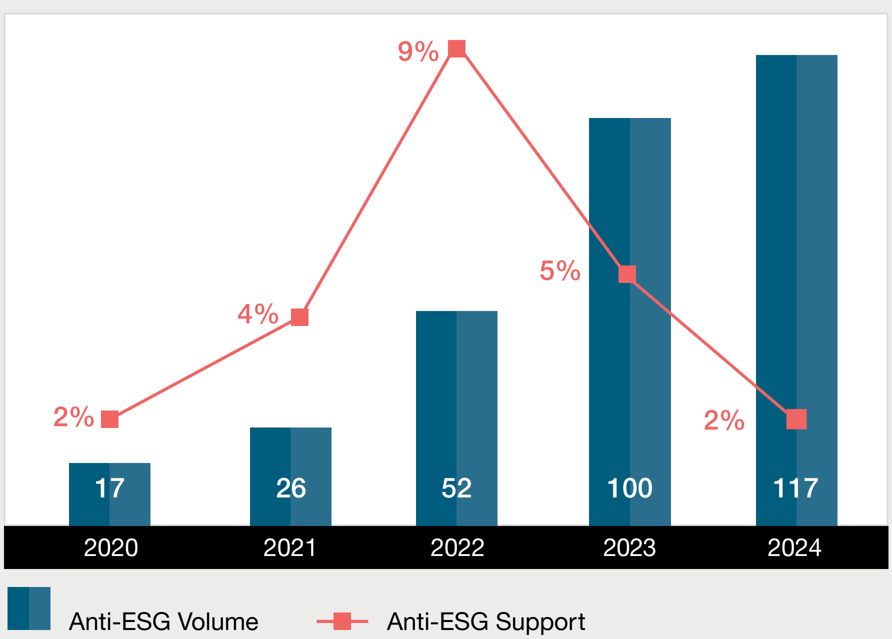
[1] Analysis by EY Center for Board Matters

Anti-ESG Shareholder Proposals

While anti-ESG sentiment has helped to weaken outright support for ESG from major institutional investors,[6] those same investors have not completely flipped on ESG. So far, major institutional investors have declined to support anti-ESG shareholder proposals, which often function as the inverse of similar ESG shareholder proposals.[7] Despite the increase in volume of headline-grabbing shareholder proposals that seek to have companies implement conservative-leaning policies, cease pursuing progressive-leaning efforts, or report on the financial burdens of trying to address certain topics such as climate change or DEI, these shareholder proposals failed to receive any notable support this year or in recent years.

So, while the anti-ESG movement is clearly notching significant wins in its ability to temper the pro-ESG movement, and in particular making institutional investors less vocal in their support of ESG, anti-ESG efforts by and large have not moved the needle through their own shareholder proposals. Instead, anti-ESG proponents leverage the same playbook and low-cost megaphone driving lower-quality proposals on the other side of the spectrum, contributing to low support totals across the board.

Anti-ESG Proposals[1]

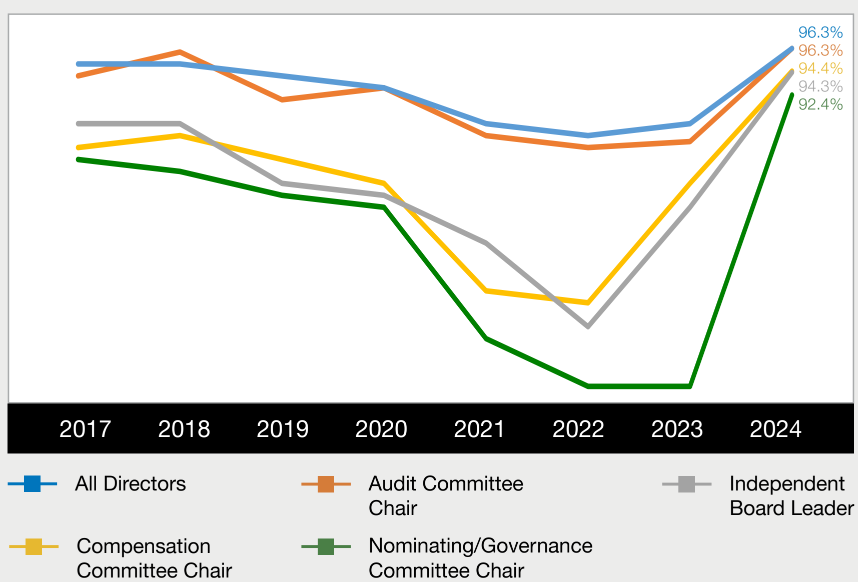


[1] Sources: DealPointData as of June 3, 2024; Washington, Spierings, *2023 Proxy Season: More Proposals, Lower Support*

Director Vote Trends

Director support was relatively high this proxy season as compared to prior years. The relatively high support can be attributed primarily to companies understanding and employing best practices when it comes to (i) director composition, (ii) awareness of proxy advisor and top investor voting guidelines on issues like board independence and director "over boarding,"[8] and (iii) a focus on the right mix of director skills. Despite this general increase in director support, certain types of directors, often chairs of committees tasked with responsibility for ESG oversight, will often receive slightly lower vote totals than their fellow board members for various reasons such as an investor disfavoring an aspect of the company's ESG performance. On the whole, however, while Board and committee leaders faced more opposition than their peers, they still secured strong support by historical standards.

Average Voting Support for Directors by Role, S&P 500 (% Support)[1]

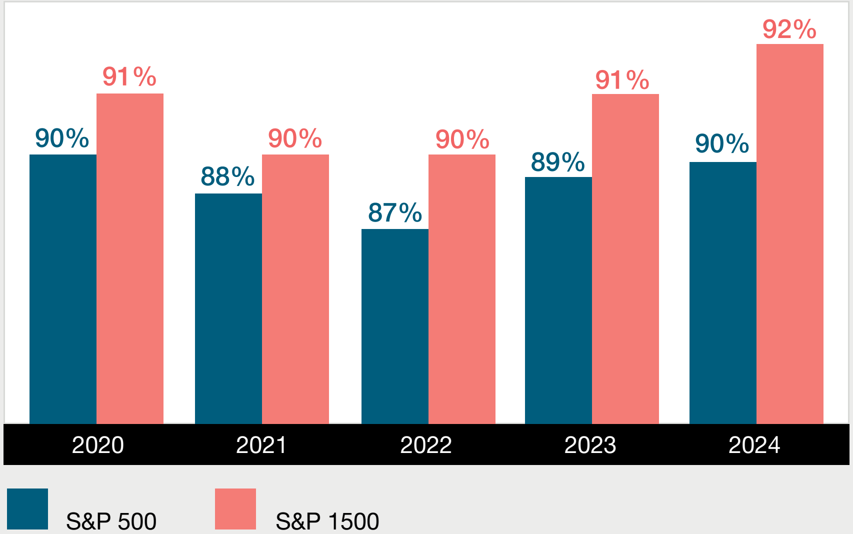


[1] Analysis by EY Center for Board Matters

Say on Pay

Only 4.5% of S&P 1500 companies this year received less than 70% support on their say-on-pay votes, down from 5.4% in 2023, with fewer than 1% receiving less than 50% support. The relatively strong say-on-pay performance this year versus prior years is likely attributable to increased adherence to ISS and Glass Lewis recommendations on pay practices, as well as a generally less frothy stock market compared to recent pandemic years, which most likely contributed to fewer outliers in pay-for-performance issues at companies on the whole.

Average Support for Say on Pay[1]



[1] Analysis by EY Center for Board Matters

Prior results do not guarantee a similar outcome.

Breakthrough Proposals

This proxy season, several novel shareholder proposals reached ballots and, while they generally failed to pass, are notable that they went from basically being non-existent to achieving significant support. Companies should watch these types of proposals closely, because they will almost certainly gather support in coming years. Three notable breakthrough proposals include:

- Green Financing Ratios – proposals targeted financial institutions seeking disclosure of the amount of financing they completed for traditional energy deals versus renewable energy transactions, in furtherance of the Paris Agreement's goal of scaling financing for a transition to renewables by 2030. Notable recipients of these proposals included major global banks, Bank of America and JP Morgan, with proposals reaching greater than 20% at these banks.
- Worker Health and Safety – several name-brand retailers and hospitality companies, including Walmart and Chipotle, received proposals seeking reports on workforce health and safety matters, with Chipotle's proposal receiving greater than 30% support.

Artificial Intelligence – AI-related proposals are perhaps the most notable new type of breakthrough proposal (see *Artificial Intelligence and the 2024 Proxy Season* on page 17). Proposals received strong support on topics ranging from details on how AI will affect workers and civil society in the future to how a firm is managing data privacy, systemic discrimination and intellectual property appropriation at major technology companies.

This year's proxy season indicates that, while ESG may be past its halcyon years of 2020 and 2021, within the E, S and G there remain areas of focus and concern for investors and other critical stakeholders. Companies would be wise to stay abreast of these trends and help their management and boards of directors understand the complex dynamics that are playing out now and into future years.

Please contact your V&E Team to discuss these developments and their implications.

Artificial Intelligence

SEC Charges Former Startup CEO with "AI Washing" Securities Fraud

On June 11, 2024, the SEC charged Illit Raz, the former CEO and founder of the since-shut-down artificial intelligence recruiting startup Joonko Diversity Inc. ("Joonko"), which purported to use AI technology to assist commercial customers with meeting hiring goals related to DEI,[9] with defrauding investors by making false and misleading statements about its AI capabilities.

In 2021 and 2022, Joonko, through Raz's solicitation, conducted two major rounds of equity fundraising, which resulted in $21 million of investment in the company.[10] During these fundraising efforts, Raz made several lofty claims about the company's operating position, including that Joonko: (1) had over 200 companies, including several Fortune 500 companies, in its customer base; (2) had 185,000 active monthly candidates on its platform in 2021; and (3) projected revenues to increase from $520,000 to over $2 million from 2020 to 2021, and further rise to $4.6 million and up to $8.5 million by the second half of 2023.[11]

Additionally, Raz made specific representations to investors about the basic technology underpinning Joonko's platform, such as (i) representing that Joonko used "AI-based technology" and provided an "automatic recruiting solution"; (ii) claiming that this technology was based on "seven different AI algorithms"; and (iii) explaining that the "proprietary algorithm first uses natural language processing and computer vision to scan public data on the candidates that are referred to us," that Joonko used "machine learning to improve the matching process as candidates select the roles they're interested in," and that the matching of candidates was "automated from end to end."[12]

According to the SEC, virtually none of Raz's claims about Joonko were true: The company had far fewer customers and users, as well as substantially less revenue, than were advertised to investors.[13] Worse still, the SEC alleged that even the algorithmic technology that formed the core of Joonko's operations did not in reality match the level of sophistication and automation that Raz had claimed.[14] As a result, the SEC charged Raz with violations of Section 17(a) of the Securities Act, as well as Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.[15]

With the dawn of new and rapidly changing technologies like blockchain and AI, many companies and executives may feel pressure to overstate the company's progress in developing and integrating such technology. While failure to advertise technological advances accurately can create risk unrelated to regulatory agencies, the charges against Raz demonstrate that, when made in connection with the sale of securities, the SEC is on the lookout for registrants who overpromise and underdeliver on their technological advancements. In its first panel on AI, held during the Securities Enforcement Forum West conference on May 28, 2024, SEC panelists highlighted two "first-of-their-kind settled enforcement actions," both announced earlier this year, against companies that falsely represented to investors that their AI capabilities were far more advanced than the technology actually was.[16]

With demand for AI booming, and the SEC on the prowl for cases in this area, companies must continue to walk the fine line between effective marketing of the promise of technological advancements and potentially fraudulent misstatements. Registrants are encouraged to work closely with counsel to inspect their marketing activities — particularly when the subject is AI — and ensure that public statements involving emergent technologies are accurate and compliant with federal and state laws.

AI and Energy: What Does Your Company Need to Know?

The story of AI is one of technological promise and societal challenge, and its effect on the U.S. electric power grid is fast becoming a pivotal chapter in energy regulation.

AI could revolutionize the electric industry, enhancing grid planning, permitting and siting, operations and reliability, and resilience, while helping accelerate progress toward climate goals. Yet powering this revolution will be a massive challenge. AI data centers consume eight times the power of non-AI-powered data centers.[17] And while modern data centers have become more efficient, the rate of power efficiency gains is decelerating.[18] Rising consumption will drive significant cost increases stemming from demand growth for power as a commodity and from demand for the electric grid to deliver power to data centers.

In 2022, data centers accounted for about 2.5% of U.S. electric demand.[19] By 2030, that figure could rise to 20%, with AI data centers accounting for three-quarters of the demand.[20] If forecasts hold, this growth will come alongside skyrocketing demand for new transmission facilities, as the electric grid faces growing demand and changing needs from robust U.S. manufacturing, electric vehicle charging, and the shifting generation mix, among other strains.[21]

National, Regional, and Local Concern

Power demand from data centers is projected to increase fourfold over the next 15 years.[22] This unprecedented load growth comes with new transmission and generation needs, which must be paid for, typically through customer rates.[23] Such price pressures will increasingly be felt nationwide. It was only a matter of time before these dynamics fell before state and federal regulators — and they have.

FERC into the Fray

In Northern Virginia, reliability issues are addressed (and paid for) through a regional process administered by the regional transmission organization, PJM Interconnection ("PJM"), under tariff provisions filed with the Federal Energy Regulatory Commission ("FERC"). Facing costs that are allocated regionally, neighboring ratepayers in Maryland cried foul, claiming that Virginia's tax incentives had driven the state's massive data center growth, and that Marylanders were unfairly sharing the transmission costs of the data centers while Virginians enjoyed nearly all the benefits.

In February, the Maryland Office of People's Counsel ("Maryland OPC") challenged the cost allocation via PJM's regional process to address reliability violations on the transmission grid. The Maryland OPC argued that the regional process for addressing reliability, which results in regional cost allocation, had been misapplied, contending that the costs for new transmission projects should instead be allocated based on the rules for policy-driven projects — so-called Multi-Driver Projects under the PJM tariff.[24]

But in April 2024, FERC overruled the Maryland OPC and others' protests, finding that the transmission project at issue was not a Multi-Driver Project and, thus, does not justify more localized cost allocation.[25]

This dispute is among the first centering on power-hungry AI data centers and regionalized cost sharing. But as states continue to pursue divergent economic and energy policies, it will not be the last.

Beyond Rate Effects

The sharp growth of AI data centers could also affect the future of fossil fuel-fired generation.[26] The AI revolution requires major energy inputs at a time when the closure of coal-, gas-, and oil-fired power plants is shrinking the baseload generation fleet, a trend that is expected to continue under (and in fact is a goal of) the EPA's Clean Power Plan 2.0.[27]

The need for fossil fuel-fired generation to power data center growth is also at odds with the internal policies of major tech companies,[28] which are championing their ability to deliver AI's power without tarnishing their green credentials. Companies are racing to secure power for data centers through power purchase agreements favoring renewable resources, but the available options become fewer by the day.[29]

Even if new, renewable generation can be planned, permitted, sited, and constructed in time to meet the needs of the AI data centers, the current electric grid might not be able to handle the power. The existing grid was generally built to move power to cities from remote coal- and natural gas-fired generation located near fuel sources. While some data centers are targeting locations close to existing generation sites,[30] there are simply not enough prime locations to accommodate the growth.[31]

As data centers continue to demand renewable energy, most of their power supply will likely have to be moved long distances across the transmission grid from new generation locations to new load centers. Doing so would require a massive build-out of the grid, which is not growing fast enough to handle the influx of new load from data centers.[32] The quest to build AI-powered data centers near reliable power sources has sparked a race to places where renewable energy can be collocated or the grid is resilient enough to accommodate the enormous power needs, as reflected in initiatives like Amazon's $10 billion data center project in Mississippi.[33]

Reshaping the Energy Landscape

AI holds enormous potential to reshape the energy landscape and challenge regulators. Potential harms from AI, such as misinformation, data privacy and cybersecurity threats, likely keep regulators up at night.[34] Other applications, such as using AI-powered cameras to provide around-the-clock fire monitoring and safety alerts, remain less controversial.[35]

Many applications exist for AI to enhance energy infrastructure: AI-accelerated power grid models for capacity and transmission studies, large language models to enable compliance with federal permitting, advanced AI to forecast renewable energy production for grid operators, smart grid applications of AI to enhance resilience, and even AI-powered methane detection from pipelines.[36]

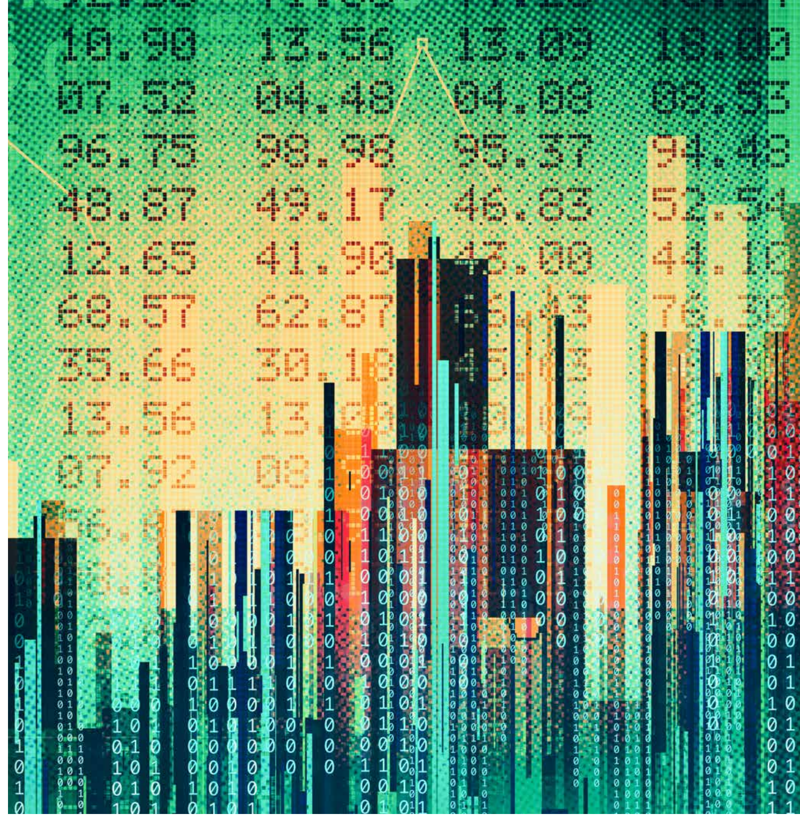
AI will also bolster the capacity of regulators to process information and monitor markets. FERC's fiscal year 2025 Budget Request to Congress, for example, includes funding to harness the generative potential of AI in its operations.[37]

Looking ahead, one thing is clear: As data centers are built and large language models are trained, AI's effect on the power grid — and energy regulation — will continue to grow. Indeed, major government initiatives are pushing the growth of AI to help modernize critical energy infrastructure, which serves as the backbone of the national economy. Regulators will increasingly confront issues around the safe, reliable, and cost-efficient deployment of AI throughout the energy economy. This is only the beginning.

As legal and business leaders of your companies, you should be well advised on the implications of AI on all aspects of your business, from how it may impact transactions and your acquisition strategy, how regulators are sharpening their focus on AI matters and the many other ways it may affect your business.

Please contact your V&E Team to discuss the developments of AI, AI regulations and risks and their implications on your company.

Artificial Intelligence and the 2024 Proxy Season



As described briefly in *Breakthrough Proposals* (page 12), the 2024 proxy season saw a breakthrough in AI-related shareholder proposals. Although AI presents opportunities for companies to enhance their efficiency and productivity, it also carries many potential risks to companies' operations and reputation. While none of the AI-related shareholder proposals passed in 2024, many showed significant levels of initial support.

For example, AFL-CIO submitted shareholder proposals at six companies (Amazon, Apple, Comcast, Disney, Netflix and Warner Bros.) requesting disclosures on transparency and board oversight of AI and, at Amazon, to form a new committee of independent directors to address human rights risks related to AI. ISS supported AFL-CIO's shareholder proposal at Apple on grounds that the disclosures would allow shareholders to evaluate the risks associated with the use of AI and actions taken by the company to mitigate those risks. Glass Lewis also supported the proposal, noting that the proposal was not overly burdensome and that its adoption would better allow shareholders insight into the company's use and ethical application of AI.

Ultimately, the Apple, Netflix and Warner Bros. proposals received 43%, 37% and 24% approval, respectively, while the Comcast and Disney proposals were withdrawn by the AFL-CIO following each company's agreement to enhance its respective AI-related disclosures. In contrast, the Amazon proposal received only 10% approval.

Similarly, Arjuna Capital filed shareholder proposals at three companies (Microsoft, Alphabet and Meta) requesting that each company assess the risks to its operations and the public welfare posed by facilitating misinformation and disinformation from AI. In this case, ISS and Glass Lewis opposed Arjuna Capital's proposal to Microsoft based on the rationale that Microsoft provided sufficient existing disclosure on its AI risks. Arjuna's proposal failed to pass, garnering just 21.2% support.

Additionally, a recent survey from ISS evaluated proxy statement disclosures from September 2022 to September 2023 and found that, for the most part, companies do not report on board oversight of AI risks.

- 15% of S&P 500 companies disclose board oversight of AI in their proxy statement.
- 13% of S&P 500 companies disclose having at least one director with AI-related experience.
- Information technologies companies led in disclosing some form of board or director expertise (38%), followed by companies in the health care (18%), communication services (15%), and consumer discretionary sectors (15%). Nine percent of energy sector companies provide such disclosure.

As AI continues to be a growing area of interest, shareholder proposals are likely to increase in both volume and support. Boards and management teams at major companies are overwhelmingly disclosing that AI is likely to pose potential risks to their business, with 56% of Fortune 500 companies citing AI as a "risk factor" in their most recent annual reports, up from just 9% in 2022 according to the *Financial Times*. Companies should consider how they use AI as part of the business operations and what, if anything, should be disclosed as part of the board's role in risk oversight.

Climate Corner

Climate Rule Litigation Tracker

The SEC released its final rule ("Final Rule") — The Enhancement and Standardization of Climate-Related Disclosures for Investors — on March 6, 2024, and one month later stayed the Final Rule pending litigation over the Final Rule in the Eighth Circuit. Below, we provide a tracker of this litigation, which V&E will continue to update in future iterations of the newsletter.

The Eighth Circuit has yet to schedule the case for oral argument, but the case will most likely be scheduled for later this year. Furthermore, after the Eighth Circuit reaches a decision on the Final Rule, it is likely that one of the parties will seek an appeal. If the U.S. Supreme Court grants review, another 12–18 months of review could be possible.

Although the Final Rule will not go into effect and compliance will not be required while the litigation is pending, the compliance dates under the Final Rule remain in place. There is no guarantee what a new compliance timeline, if any, would be should the Final Rule survive the legal challenges.

Final Rule Litigation Timeline

March 2024

March 6

The SEC adopted its final rule ("Final Rule") to standardize, and enhance, climate-related disclosures.

March 12

The Eighth Circuit issued an initial briefing schedule for *State of Iowa v. Securities and Exchange Commission*.

March 15

The Fifth Circuit issued a temporary administrative stay of the Final Rule. The Fifth Circuit's short order did not elaborate on reasons for granting the administrative stay.

March 21

Following a lottery process, the Judicial Panel on Multidistrict Litigation selected the Eighth Circuit as the winning venue to hear the challenge.

March 22

In response to the lottery, the Fifth Circuit lifted its temporary administrative stay and transferred the cases that had been filed in that court to the Eighth Circuit.

March 26

Two groups of challengers to the Final Rule filed requests that the Eighth Circuit issue a new temporary administrative stay or a full stay pending judicial review. The Eighth Circuit has not ruled on those requests.

April 2024

April 4

The SEC issued an order staying the Final Rule to avoid "regulatory uncertainty if registrants were to become subject to the Final Rule requirements during the pendency of the challenges to their validity."

June 2024

June 14

Petitioners filed opening briefs.

June 24

Intervenors and amici filed briefs in support of the petitioners.

August 2024

August 5

The SEC filed a consolidated response brief.

August 15

Intervenors and amici filed briefs in support of the SEC.

Interaction with Other Mandatory and Voluntary Reporting Frameworks Comparison

5 Key Takeaways of the Final Climate Rule:

1. Scope 3 Greenhouse Gas ("GHG") Emissions are out
2. Scope 1 and 2 GHG Emissions Disclosure is required ONLY for Large Accelerated Filers and Accelerated Filers and includes a Materiality Threshold
3. Regulation S-X Amendments are Largely Cut
4. Compliance Deadlines Have Been Pushed Back with Several Phase-Ins Adopted
5. The Final Rule Has Already Been Challenged and Stayed

For more details on these key takeaways, see our previous Insight.

	Global / ISSB IFRS S1 + S2
Region	Worldwide (adoption dependent on individual states)
Developed by	International Financial Reporting Standards Foundation (IFRS)
Initial Filing Year	2024
Breadth	Environment, Social, and Governance, all Sustainability
Relationship to TCFD	Closely aligned to TCFD in structure. IFRS S2 is the direct successor of TCFD. Builds on TCFD in terms of depth and guidance.
For Whom	For profit profit-oriented entities, including public sector business entities, dependent on local jurisdictional adoption
How Many Filers	TBD based on local jurisdictional adoption
Safe Harbor Provisions	Yes, delayed phase-in for SMEs
Materiality	Single materiality (financial)
Emissions Scopes Required	Scopes 1, 2, and 3
Scenario Analysis	Required to assess the resiliency of the business strategy
Executive Compensation	Requires disclosure of executive compensation linked to climate-related issues

Europe / EU CSRD/ESRS	U.S.A. / US SEC Rule	California / California (SB 253 and 261)
European Union	US	Worldwide (if doing business in CA)
European Financial Reporting Advisory Group (EFRAG)	United States Securities and Exchange Commission	State of California
2024	2025 for climate risks 2026 for emissions	2026 (SB 253) 2026, biennially thereafter (SB 261)
Environment, Social, and Governance, all Sustainability	Climate Change	Climate Change (All Scope 1, 2 and 3 (SB 253)) (TCFD-like Risk Report (SB 261))
Broadly aligned to the elements and recommendations of TCFD, but recommendations are structured differently. Builds on TCFD in terms of depth and guidance.	Broadly aligned to the pillars of TCFD, but recommendations are structured differently. Not all TCFD recommendations required.	SB 261 effectively mirrors TCFD or equivalent reporting requirement (*e.g.,* ISSB).
All entities subject to the EU CSRD-ultimately nearly all sizable EU entities and certain non-EU entities	Initially, only large accelerated listed entities	Entire worldwide enterprise (public or private) if over $1bn annual revenue and "doing business in CA" (SB 253) Entire worldwide enterprise (public or private) if over $500mm annual revenue and "doing business in CA" (SB 261)
Ultimately >50,000	Currently <10,000	~5,500 (SB 253) ~10,000 (SB 261)
Yes, delayed phase-in for SMEs	Yes, safe harbor for certain disclosures	Yes, safe harbor for Scope 3 GHG emissions that have reasonable basis and made in good faith (SB 253)
Double materiality (both financial and impact). Specific disclosures are required based on materiality.	Single materiality (financial)	No materiality threshold, can use emissions factor estimates (SB 253).
Scopes 1, 2, and 3	Scopes 1 and 2 if deemed material	Scopes 1, 2, and 3 (SB 253)
Required to assess the resiliency of the business strategy	Not required, unless conducted and deemed material by the filer	Seemingly required to conduct scenario analysis pursuant to TCFD or ISSB (SB 261)
Requires disclosure of executive compensation linked to climate-related issues	Does not require disclosure of executive compensation linked to climate-related issues	May recommend (TCFD) or require (ISSB) disclosure of executive compensation linked to climate-related issues (SB 261)

Business Groups Sue California to Block State's Climate Disclosure Laws

As further discussed in this Insight, on January 30, 2024, the U.S. Chamber of Commerce and five co-plaintiffs representing a coalition of business groups filed a lawsuit against the state of California seeking to block the state's landmark new climate disclosure laws. The plaintiffs filed suit in the U.S. District Court for the Central District of California, arguing that the Climate Corporate Data Accountability Act ("CCDAA") and the Climate-Related Financial Risk Act ("CRFRA") "unconstitutionally compel speech in violation of the First Amendment and seek to regulate an area that is outside California's jurisdiction."

The CCDAA and CRFRA impose climate-related disclosure requirements, including requiring the annual disclosure of Scope 1, 2, and 3 GHG emissions, on public and private entities that "do business" in California and have annual revenues above certain thresholds, as further explained in this Insight. The plaintiffs' lawsuit marks the first legal challenge against the laws.

The plaintiffs allege that the laws compel businesses to speak noncommercially on controversial political matters and, thus, are presumptively unconstitutional under the First Amendment to the U.S. Constitution. The plaintiffs further claim that requiring disclosure of "out-of-state emissions" is an unconstitutional attempt to regulate GHG emissions outside of California's own borders in violation of the Supremacy Clause of the U.S. Constitution. Furthermore, the plaintiffs allege that the laws impose significant compliance burdens on companies, especially related to the reporting of Scope 3 GHG emissions. The plaintiffs therefore request that the court declare the two laws null, void, and with no force or effect and enjoin the California Air Resources Board ("CARB") from taking any action to implement or enforce the laws.

The relief sought by the plaintiffs, if granted, would halt implementation and enforcement of the new disclosure laws in full. The lawsuit, however, is in its infancy, and it remains to be seen how courts will address the allegations or the relief requested.

On August 31, 2024, the California Assembly and California Senate passed SB 219, which extends the deadline for CARB to adopt implementing regulations for the CCDAA by six months to July 1, 2025, among other amendments to the CCDAA and CRFRA. However, SB 219 does not push back initial disclosure, reporting and assurance requirements under the two California laws, in contrast to the two-year delay Governor Newsom had proposed in his recent budget bill. On September 27, 2024, Governor Newsom signed SB 219 into law.

Despite these pending legal challenges and the fact that delay of the reporting deadlines does not appear likely to occur via amendments to the law, companies would be wise to prepare for compliance with the California laws, which are not slated to be pushed back legislatively and would require reporting as soon as 2026 for fiscal 2025 Scopes 1 and 2 GHG data. In conjunction for preparation with the SEC's Final Rule and the CSRD, Companies should begin assembling key internal groups, such as environmental, risk management and legal teams. Companies will also need to evaluate the capabilities of their current attestation service providers and, if necessary, begin engaging with third-party assurance providers for their climate-related disclosures. Finally, as the ESG trends and the legal challenges continue to rapidly change, companies should take this opportunity to review Board and committee responsibilities related to oversight of ESG risks to ensure such responsibilities are delegated clearly and effectively.

We will continue monitoring this case and developments with respect to climate disclosure requirements generally.

Federal Bank Regulators Finalize Climate-Related Financial Risk Guidance

On October 24, 2023, the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of the Comptroller of the Currency ("OCC") jointly finalized their Principles for Climate-Related Financial Risk Management for Large Financial Institutions (the "Principles"). The Principles apply to the boards of directors and management of financial institutions with over $100 billion in total consolidated assets and provide guidance on how to account for climate-related financial risks.

Content of the Principles

The Principles detail how applicable financial institutions should incorporate considerations of the physical risks[38] and transition risks[39] associated with climate change into their existing risk management frameworks. This guidance consists of the following six general principles:

- **Governance:** Boards should ensure sufficient resources are dedicated to climate-related financial risk management and establish accountability for that risk management within their institutions. Management is responsible for implementing boards' strategic directions on climate-related financial risks, overseeing the creation and implementation of processes to account for such risks within institutions' existing risk management strategies, and informing boards of material climate-related financial risks.

- **Policies, Procedures, and Limits:** Management is responsible for building material climate-related financial risks into institutions' policies, procedures, and limits, which are subject to modification to reflect ongoing changes in climate risks and institutional operations.

- **Strategic Planning:** Material climate-related financial risk exposures should be incorporated into institutions' strategic planning, including their business strategies and capital monitoring. Boards should encourage management to account for climate-related risks alongside other risks (*e.g.*, operational) while also considering the effect that institutions' strategies may have on low-and-moderate income and underserved communities.

- **Risk Management:** The Principles provide that management should ensure that institutions' risk management frameworks possess adequate risk identification processes for climate-related financial risks.

- **Data, Risk Measurement, and Reporting:** Management should keep up-to-date on available data and technologies that may bear on, or should be incorporated into, institutions' climate-related financial risk management processes.

- **Scenario Analysis:** Climate-specific scenario analyses should be leveraged alongside existing risk management practices to assess the resiliency of institutions' strategies. Management should develop climate-related scenario analysis frameworks, the results of which should be reported to boards.

In addition, the Principles state that management should account for climate-related financial risks in the risk assessment processes for other types of risks, including financial risks (*e.g.*, credit and liquidity risks) and nonfinancial risks (*e.g.*, operational, legal, and compliance risks).

Takeaways and Next Steps

While the Principles elaborate on instances in which building out new capabilities would be prudent, they are intended to complement institutions' existing risk management frameworks and strategies. Accordingly, affected institutions may not need to create entirely new strategies and risk-management processes in order to satisfy the Principles. Rather, as the industry's approach towards climate-related risk develops, efforts to address the Principles' guidance will also inevitably evolve over time.

The Principles are neither intended to "prohibit nor discourage financial institutions from providing banking services to customers of any specific class or type." Business decisions, such as extending a loan or maintaining an account, continue to rest with affected financial institutions. However, the Principles establish numerous expectations, best practices, and areas of concern for affected institutions. It remains to be seen how compliance with the six general principles will be evaluated by bank regulators.

Another area to watch is the scope of the Principles. The Principles state that they are only applicable to financial institutions with over $100 billion in total consolidated assets. The final interagency guidance clarified that the Principles extend to foreign banking organizations with more than $100 billion in combined United States operations, as well as the branches or agencies of a foreign banking organization that individually have total assets of more than $100 billion. However, smaller financial institutions have already begun to express concern over the trickle-down effects the Principles may have on their business and operational decision-making. This concern is reinforced by the fact that the preamble to the Principles lists various risks associated with climate change for the entire financial industry. Moving forward, all financial institutions, regardless of size, should keep an eye on the potential knock-on effects of the Principles.

California Takes Next Step to Formally Impose Stricter Limits on RNG Projects Under the LCFS with Eventual Phaseout

In December 2023, the California Air Resources Board ("CARB") proposed amendments to California's Low Carbon Fuel Standards ("LCFS") Program. Among other amendments, CARB proposed a phaseout of LCFS crediting for renewable natural gas ("RNG") projects after 2040, new eligibility limits on RNG injected into the common carrier pipeline network, and an eventual phaseout of avoided methane crediting for RNG projects. These proposed amendments are likely to have long-term effects on the market for RNG given how the value of LCFS credits tend to drive the price of RNG by dramatically incentivizing RNG production. However, the immediate effects are tempered by the phase out approach.

For projects that break ground after December 31, 2029, CARB's proposal would phase out pathways for crediting biomethane/RNG used in vehicles after December 31, 2040. After 2040, any volumes of these fuels from these fuel pathways used in compressed natural gas vehicles would be reported with the same carbon intensity score as what CARB assigns to ultra-low sulfur diesel, meaning that RNG used as a combustion transportation fuel would generate a deficit under the LCFS. Two other noteworthy proposed amendments are: (1) new limitations on the current book and claim accounting approach and (2) the phaseout of "avoided methane" crediting.

Currently, the LCFS regulations allow book and claim accounting of RNG when the fuel is injected into the North American natural gas pipeline system. Consequently, the majority of these credits come from RNG injected into pipelines outside of California. Under the proposed amendments, CARB seeks to require operators to demonstrate that RNG is carried through common carrier pipelines physically flowing within California or toward an end use in California. The proposal specifies that such eligible pipelines must flow toward California at least 50% of the time on an annual basis. If finalized, the requirement to demonstrate deliverability for projects that break ground after January 1, 2030, for RNG would take effect on January 1, 2041, and could severely restrict the number of out-of-state projects that generate credits.

Methane producers who capture GHG emissions that would otherwise be released directly to the atmosphere can earn credits through the LCFS program's avoided methane crediting mechanism. For RNG projects commencing construction after December 31, 2029, CARB proposes that the LCFS program's avoided methane crediting will end in 2040 for RNG used as transportation fuel and in 2045 when used as a feedstock to produce renewable hydrogen. For RNG projects certified before January 1, 2030, CARB may renew the crediting period for up to three consecutive 10-year periods. Accordingly, certain RNG projects may continue generating LCFS credits after the 2040 phaseout deadline proposed by CARB.

RNG may be a victim of its own success, as CARB no longer views RNG as playing a significant role in decreasing the carbon intensity of transportation fuels within the state. Nevertheless, these changes, whatever their intent, have the potential to disrupt the already volatile national RNG market. Indeed, given how the value of the LCFS credits is directly tied to the quantity of credits on the market, the deluge of RNG production in recent years — and thus, increase in credits on the market — has led to a dramatic decrease in the value of the LCFS credits.

Through February 2024, CARB received over 400 public comments on these proposed amendments. The delay in adopting the proposed amendments allowed CARB to incorporate modifications to the original proposal, which were published on August 12, 2024, for an abbreviated comment period. In an attempt to ratchet up the stringency of the carbon intensity reduction requirements and raise LCFS credit prices, CARB proposed to raise the 2025 annual carbon intensity reduction benchmarks from 5% to 9%. Further, if CARB's August modifications are adopted as proposed, hydrogen produced using fossil gas as a feedstock will no longer be LCFS credit generation eligible, effective January 1, 2031. This proposed modification could have drastic consequences for "blue hydrogen" production and investment. In addition to the typical scrutiny from environmental and industry groups, the California Governor's Office of Planning and Research also submitted a comment letter pushing back on CARB's proposed changes to the treatment of forest biomass waste.

These proposed changes have been subject to much debate and, if adopted, would be some of the most significant updates the LCFS has seen since it was first adopted in 2011. Naturally, adoption of these major amendments continues to be a long process, one that has been subject to hundreds of public comments and additional modifications from CARB. CARB postponed the public hearing to consider these amendments, originally scheduled for March 21, 2024, until November 8, 2024, after the upcoming election. According to CARB, if the amendments are approved, they are expected to become effective in early 2025.

Please contact your V&E Team to discuss these developments and their implications.

FTC Non-Compete Rule

FTC Non-Compete Ban Set Aside

As discussed in this V&E Insight, on August 20, 2024, the U.S. District Court for the Northern District of Texas halted the Federal Trade Commission ("FTC") rule banning worker non-competes (V&E Insight into the rule) before it even had the chance to take effect. In its final ruling on the merits, the Court set aside the FTC rule with nationwide effect. Accordingly, absent a successful appeal by the FTC, it cannot enforce the rule against any employer.

In *Ryan, LLC v. Federal Trade Commission*, Judge Ada Brown determined that the FTC lacked statutory authority to issues substantive rules, such as the broad non-compete ban. The Court further concluded that the rule itself was arbitrary and capricious. For these reasons, under the Administrative Procedure Act, Judge Brown held the appropriate remedy was to set aside the rule in its entirety. Therefore, while the initial preliminary injunction applied only to the named parties in the case, the final judgment "affects all persons in all districts equally." The FTC has until October 20, 2024, to file an appeal with the Fifth Circuit. While the agency has noted it is considering appeal, general consensus is this would present an uphill battle.

At the time of the *Ryan* decision, there were two additional cases regarding the rule pending against the FTC — one in Pennsylvania and one in Florida. As to the Pennsylvania case, where the FTC had notched its only win by successfully defeating the plaintiff's preliminary injunction request, the plaintiff voluntarily dismissed its claims against the FTC following the *Ryan* decision. With respect to the Florida case, prior to Judge Brown's ruling, a preliminary injunction was issued prohibiting the FTC from enforcing its rule against the plaintiff in the case. The FTC has filed a notice of appeal with the Eleventh Circuit seeking to overturn such preliminary injunction. However, the Florida case deadlines had otherwise been stayed, and given the nationwide applicability of Judge Brown's ruling, further proceedings may be moot.

With the FTC rule set aside, employers can return their focus to compliance with applicable state laws that govern restrictive covenants. Currently, four states fully prohibit non-competes, while many other states have laws limiting non-competes in some way, such as through income thresholds, specific industry bans, or duration limits. In addition to state laws, employers must also consider current positions taken by the National Labor Relations Board with respect to restrictive covenants.

Despite its loss in *Ryan*, the FTC succeeded in sparking a nationwide dialogue regarding non-competes. As a result, many employees have a heightened sense of awareness of state non-compete laws — laws that continue to rapidly evolve in number and complexity.

Please contact your V&E Team for additional guidance regarding the use and enforceability of non-competes and other restrictive covenant agreements.

Recent Shifts in Administrative Agency Authority

At the end of its latest term, the U.S. Supreme Court handed down three watershed decisions that have the power to drastically change the way administrative agencies regulate, how they enforce their regulations, and, ultimately, the power administrative agencies wield over those they regulate.

Loper Bright: Limiting Agency Interpretive Power

For more than 40 years, under what became known as the "*Chevron* doctrine," where a federal law was silent or ambiguous on a particular interpretative question, courts had to defer to an agency's interpretation of that law, as long as the interpretation was rational or reasonable. The *Chevron* doctrine had the effect of a thumb on the scale in favor of the agency if there was a question on interpretation. The premise was that agencies' experience with the statutory scheme, expertise in technical and scientific issues, and political accountability make them better situated than judges to fill gaps in statutory schemes.

In *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court, overruling *Chevron*, shifted the interpretive power away from regulators and into the hands of federal courts. Now, courts must apply their independent judgment to determine what statutes mean and "may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Loper Bright casts significant doubt on agencies' authority to regulate in a wide range of areas where agencies have historically regulated in reliance on *Chevron* deference, as well as on agencies' abilities to invoke expansive interpretations of vague or ambiguous statutes. Emboldened litigants will see *Loper Bright* as a tool to limit aggressive assertions of agency authority and potentially defeat regulations they oppose.

Jarkesy: The SEC — and Other Agencies — Lose Home-Field Advantage

Dozens of agencies, including the SEC, OSHA, and the EPA, contain their own in-house adjudication forums. In fact, there are over 1,500 administrative law judges ("ALJ") who hear roughly 700,000 cases every year.

In *SEC v. Jarkesy*, in which the Court considered the SEC's authority to use its in-house ALJ to seek civil penalties for securities fraud violations, the Court determined that this method of adjudication, given the circumstances of the case, violated the Seventh Amendment right to a trial by jury. The SEC now must try securities fraud cases in federal court, where that right is available.

Although *Jarkesy* involved fraud claims asserted by one agency, it has the potential to reach the dozens of other agencies that have traditionally used their in-house courts to assert similar kinds of claims.

Corner Post: Paving the Way for Challenges to Longstanding Regulations

The Administrative Procedure Act, which governs challenges to various agency decisions, allows plaintiffs to challenge a regulatory action within six years after a right of action accrues. In *Corner Post, Inc. v. Board of Governors of the Federal Reserve*, the U.S. Supreme Court determined that the six-year limit does not begin on the date of the final agency action, but rather can only begin to run when a plaintiff is injured, because only upon injury does the plaintiff's right of action "accrue" under the statute.

Corner Post creates a clear avenue for challenges to longstanding regulations, which the dissent says will, along with *Loper Bright*, create a "tsunami of lawsuits against agencies."

V&E Team Succeeds in Dismissing Greenwashing Claims and a New Greenwashing Attack Develops

On July 3, 2024, a team of V&E securities litigators secured the complete dismissal of claims against former directors of Enviva Inc. in the U.S. District Court for the District of Maryland. The case was one of the first in what promises to be a wave of securities class actions alleging that purported "greenwashing" statements amount to securities fraud. The opinion's acceptance of our team's arguments promises to be an important precedent in future cases pursuing this novel theory.

Enviva, a sustainability-focused biomass energy company, markets its wood pellets as a sustainable alternative to fossil fuels for the generation of electricity and heat. In October 2022, a short-seller published a report regarding Enviva, contending that the company's public sustainability-related statements in investor marketing materials amounted to "flagrant greenwashing" and denouncing its claims of being a "pure play ESG Company" as "nonsense on all accounts," leading to a 13.13% decline in its stock price. Stockholders sued under the federal securities laws, alleging that Enviva's statements about its sustainable practices, such as those pertaining to the sourcing of wood pellets from low-value wood and the resulting reduction of GHG emissions from burning wood pellets in lieu of fossil fuels, constituted securities fraud.

On behalf of Enviva, our team filed a motion to dismiss these claims and the complaint in its entirety. The court dismissed the claims against the former directors, finding, among other reasons, that the statements that the plaintiffs claim were fraudulent, in context with other statements, were not materially misleading to a reasonable investor. Addressing the hotly contested line between actionably misleading statements and mere puffery, the court found that the statements expressing the company's commitment to sustainability were "too vague, aspirational, and non-verifiable" to be materially misleading.

This case demonstrates yet another potential avenue for plaintiffs to challenge alleged greenwashing claims. Like with other greenwashing challenges, litigation targeting investor marketing statements and disclosures will likely continue to gain momentum. Companies and their leaders should continue to scrutinize their sustainability-related claims in all capacities, especially as we continue to see the increased prevalence of greenwashing litigation. Also, companies should stay well advised of the potential risks associated with all types of corporate claims, from marketing to sustainability reporting and those associated with securities offerings.

Should your company be subject to any real or threatened litigation our comprehensive and industry leading litigation, securities and ESG teams are here to help. Please contact your V&E team if your company can use any support.

California Sues Oil Company for Plastics Recycling Claims

As discussed in our recent Insight, on September 23, 2024, the State of California filed a greenwashing lawsuit accusing an oil major of allegedly misleading consumers and the public about the adequacy and availability of plastic recycling and inappropriately hiding from the public the reality of plastics pollution. The state claims the company engaged in statements "designed to conceal and mislead consumers, including the State, its businesses, and its residents about the serious adverse consequences that would result from continued use of plastic products," including virgin and recycled plastics materials and products containing those materials.

The case follows on the heels of California's [previous greenwashing lawsuit] against five of the largest oil majors for alleged greenwashing claims denying or downplaying the connection between oil and natural gas and climate change, which is seeking disgorgement of profits for committing violations of consumer protection laws. Energy companies, and particularly oil and gas producers and others in the downstream plastics value chain, have been at increasing risk of being the next target of plastics-related greenwashing allegations. The risk of greenwashing claims being asserted against oil companies looked to be a likely next step in the aggression on sustainability matters by plaintiffs and regulators against energy companies.

Getting Ahead of the Upstream Risks

Consumer packaged goods companies know that sustainability sells. And in their efforts to market their products as sustainable, they have long contended with allegations of greenwashing — the practice of claiming their products are friendlier to the environment than they actually are. With these companies facing heavier pressure to shrink their plastics footprint, greenwashing scrutiny of their activities is only sharpening. Recent developments — from private lawsuits to government investigations to shareholder proposals — signal that relief is nowhere in sight. Yet while consumer packaged goods companies have historically borne the brunt of public outcry about plastic waste, they are no longer the only companies grappling with plastics-related greenwashing concerns. Indeed, whether from regulators, investors, or consumers, greenwashing scrutiny increasingly targets the entire plastics value chain. While energy companies have been in the crosshairs for some time over the impact of carbon emissions, it is foreseeable that concerns about plastic waste will eventually work their way back to the source: oil.

The Next Big Target

There is a strong case that integrated energy companies and upstream oil and gas producers — whose polarizing public image makes them easy marks for concerned shareholders, activists, politicians, and the plaintiffs' bar — may become the next target of plastics-related greenwashing allegations. Major oil companies have faced plastics-related shareholder proposals. While these proposals do not allege greenwashing, they show that stakeholders care increasingly about plastics-related issues, and are willing to take action against companies about them. Even when without merit, greenwashing allegations carry serious risks, including eroding customer trust, dissuading investment, jeopardizing partnerships, reducing share prices, disrupting operations, and harming corporate reputations — all while costing extraordinary amounts of time, energy, and money to defend. To get ahead of those risks, many upstream companies will need to review and refine how they portray their plastics-related goals, risks, and initiatives.

Vetting the Value Chain

A key challenge will be to collect and verify information from third parties. With reducing plastic waste becoming a higher priority for stakeholders and regulators alike, integrated energy companies and upstream oil and gas producers will feel a similar urgency to highlight their efforts toward that end, or to project how softening demand for virgin plastics could affect their business. Complicating matters further, upstream and integrated oil companies often must rely on information from others down the plastics value chain — like processors, converters, retailers, and waste management companies — to support their plastics-related claims. But in communicating with their stakeholders, upstream companies must make ample time to substantiate this information, and build out robust processes for doing so. This is especially critical for evaluating statements predicated on a product's recyclability, as inadequate infrastructure prevents most plastic from being recycled. Many companies throughout the plastics value chain (including upstream oil and gas companies) are making statements about the percentage of their end-use plastics that are recyclable, even when litigation is starting to surface alleging that recyclability claims cannot be supported when most plastic never actually gets recycled. Vetting the value chain is seldom straightforward. And prioritizing speed over substantiation can lead to statements that are incomplete or vague at best — and false or misleading at worst.

Show and Tell

While several oil and gas companies have made plastics-related claims, complex ESG politics have left others wondering whether the benefits of doing so outweigh the double-edged risk: taking heat from activists for purportedly overhyping their commitment to sustainability, while inflaming anti-ESG advocates who contend that focusing on sustainability undermines business fundamentals. This dynamic could lead some upstream companies to consider a form of “greenhushing” — keeping quiet about their plastics-related sustainability endeavors, even when trending favorably, lest they antagonize stakeholders or invite legal challenges. Greenhushing might seem practical as a stopgap measure, especially for companies still developing their data-reporting and validation capabilities. But this practice may be short-sighted, because it can signal that a company is unprepared to address stakeholder concerns or regulator demands. For this reason, upstream companies would be wise to communicate beyond their headline claims. This means publishing thorough, specific evidence underpinning those claims, and explaining how their plastics-related initiatives — or efforts to future-proof this revenue stream — will continue to add value to the business. Upstream companies that show their work, rather than just talk about it, position themselves to elevate their credibility with investors and consumers, and deter greenwashing allegations in the process.

Another Layer of Complexity

In March, the EU reached a provisional agreement on a new law to ban some single-use plastics and make all packaging fully recyclable by 2030. And in December, the United Nations plans to adopt a treaty that legally binds countries to ending plastic pollution. Stateside, four legislatures (California, Colorado, Maine, and Oregon) have recently passed extended producer responsibility laws for packaging, which aim to shift costs for the end-of-life management of packaging from local governments to producers. Nine more states have introduced similar legislation in 2024. In weakening demand for plastic packaging and making it more expensive to produce, these developments may compel companies to rethink how they manage their plastics-related business lines, and to consider whether they should plan for a future with lower virgin plastic demand. Meanwhile, the Federal Trade Commission’s (“FTC”) forthcoming update of its Green Guides, which private plaintiffs use to bring greenwashing litigation, is widely expected to set higher standards for claiming that products are recyclable. If the FTC takes that approach, upstream companies will need to conduct a rigorous review of their own recycling-related claims.

Striking a Balance

Light, cheap, and durable, plastics make modern life possible, playing a critical role in technology, medicine, food storage, and more. But plastics’ extremely long lifespan — and the microplastics that result as they degrade — are a visceral issue worldwide (much less abstract and hard-to-see than climate change), which has made plastic waste a pressing concern across the world. In that light, we should expect that the pressure to reduce the world’s dependence on plastics will only become more acute — and fall increasingly to the companies that are part of their value chain. As upstream companies respond to that pressure, they will confront competing challenges: sharing their plastics-related goals and efforts toward those goals, while protecting themselves from greenwashing allegations. Striking a balance between the two requires sound, forward-thinking counsel, and is key to getting ahead of the risks.

SEC Regulatory Watch and State Law Updates

SEC's Spring 2024 Regulatory Agenda Released

On July 8, 2024, the Office of Information and Regulatory Affairs released the SEC's Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions, which sets out the short- and long-term regulatory actions that the SEC plans to take. Remember that these dates are aspirational and do not represent strict deadlines.

Highlights Regarding Final Rulemaking Include:

- Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices — October 2024
- Rule 14a-8 Amendments — April 2025

Highlights Regarding Proposed Rulemaking Include:

- Human Capital Management Disclosure — October 2024
- Corporate Board Diversity — April 2025
- Disclosure of Payments by Resource Extraction Issuers — April 2025

SEC Charges Seven Public Companies with Violations of Whistleblower Protection Rule

On September 9, 2024, the SEC announced that seven public companies will pay a combined $3 million in civil penalties to settle whistleblower protection violations. The companies were each charged in connection with employment, separation, or other agreements that the SEC claimed violated Rule 21F-17 under the Securities Exchange Act of 1934, which prohibits any action that may impede individuals from communicating with the SEC about possible securities law violations. While whistleblower protection has been an SEC enforcement priority since the inception of its whistleblower protection program following passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act, this press release announcing a set of otherwise-unrelated actions is reminiscent of the broad sweeps the SEC has conducted as part of its efforts to target off-channel communications. The wide range of penalties is also noteworthy; fines ranged from $19,500 to $1,386,000 and closely correlated with the number of agreements entered. Additionally, the SEC did not find that any potential whistleblowers were actually impeded from reporting because of the language in the agreements, noting in each of the seven orders that it was "unaware of any instances in which [the entity] took action to enforce these provisions or in which the affected employees declined to speak with the Commission staff about potential violations of securities laws." With these actions and the other whistleblower protection provision cases from the past year, including one against a privately held company, market participants should review all of their standard contracts for compliance.

SEC Continues to Pursue Greenwashing Claims Despite Disbanding Climate and ESG Task Force

Despite the SEC reportedly disbanding its Climate and ESG Task Force, the agency announced charges on September 10, 2024, against Keurig Dr Pepper for reporting violations under Section 13(a) of the Securities Exchange Act of 1934 and Rule 13a-1 related to making inaccurate statements regarding the recyclability of K-Cups. Keurig disclosed in its 2019 and 2020 annual reports that its pods had been tested with recycling facilities and could be "effectively recycled," but failed to disclose that two of the largest recycling companies had expressed concern about the feasibility of curbside recycling for K-Cup pods and conveyed that they did not intend to accept the pods for recycling. The SEC found the omission rendered Keurig's claims incomplete and inaccurate and Keurig agreed to a cease-and-desist order and $1.5 million civil penalty.

Delaware State Bar Association Proposes Amendments to the DGCL Addressing Recent Chancery Decision on Stockholders' Agreements

In *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, the Delaware Court of Chancery declared invalid provisions in a stockholder agreement giving a stockholder pre-approval rights over common corporate actions such as removal or appointment of company officers, incurrence of indebtedness, and entry into a merger or sale under Delaware General Corporate Law ("DGCL") Section 141(a). Section 141(a) provides that "the business and affairs of every corporation … shall be managed by or under the direction of the board of directors," and the court held that the invalidated provisions impermissibly delegated away this authority via a stockholder agreement.

In response to *Moelis*, the Delaware legislature passed amendments to DGCL Section 122, which became effective on August 1, 2024. The newly added DGCL Section 122(18) seeks to provide clarity in light of the *Moelis* decision and permits corporations to enter into contracts with current or prospective stockholders in exchange for minimum consideration as determined by the corporation's board of directors. Under the new amendments, the corporation may agree to (i) restrict or prohibit itself from taking actions specified in the contract, (ii) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract, and (iii) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract.

The new amendments will not result in any changes to the fiduciary duties of directors in entering such contracts. The new amendments apply to all contracts made by a corporation, all agreements, instruments or documents approved by the board of directors and all agreements of merger and consolidation entered into by a corporation, whether or not such agreements are made, approved or entered into on or before the effective date of the amendments.

Texas Business Courts are Now Open for Business

The newly adopted Texas Business Courts began hearing cases on September 1, 2024. These courts aim to bolster the Texas judicial system by adding an efficient court specializing in large commercial business disputes.

The Texas Business Courts will have jurisdiction over certain specific categories of commercial cases where the amount in controversy exceeds $5 million in some instances, and $10 million in others, and the case involves specific business-related issues, such as corporate governance and internal corporate affairs issues, securities litigation, breaches of fiduciary duties, actions arising out of the Texas Business Organizations Code, or commercial transactions in which the parties agreed the business court would have jurisdiction. The business courts will also have jurisdiction over cases with publicly traded companies, regardless of the amount in controversy, which involve specific business-related issues.

As part of House Bill 19, the Texas Legislature also created the Court of Appeals for the Fifteenth Court of Appeals District (the "15th Court of Appeals"), a new intermediate court of appeals charged with direct appellate review of decisions from the business courts. The 15th Court of Appeals is based in Austin, Texas, and became effective on September 1, 2024. Decisions of the 15th Court of Appeals are subject to discretionary appellate review by the Supreme Court of Texas.

For more information on the Texas Business Courts, see our recent Insight or please contact a member of your V&E team.

SEC Succeeds on Shadow Insider Trading Theory

SEC Secures Victory in *Panuwat* Case

The Securities and Exchange Commission ("SEC") caught the attention of the corporate and investment world in August 2021 when it filed an insider trading action against biopharmaceutical company employee Matthew Panuwat based on a new "shadow trading" theory. The case was new in that Mr. Panuwat was alleged to have made improper profits not from the company that employed him or to whom he owed a duty of confidentiality, but in the securities of third-party firms based on non-public information that he possessed as a result of his work with his employer. In the case, the SEC alleged that Mr. Panuwat learned in the course of his employment that Mr. Panuwat's employer — the biopharmaceutical company Medivation, Inc. — was to be acquired by Pfizer, Inc., as well as the anticipated purchase price for the transaction. Before the acquisition was publicly announced, Mr. Panuwat purchased out-of-the-money, short-term stock options in another biopharmaceutical company (Incyte Corporation ("Incyte")) on the theory that the similarly situated entity's value would increase upon announcement of his company's acquisition. The SEC claimed that Mr. Panuwat, by trading in Incyte securities ahead of the Medivation announcement, obtained illicit profits of $107,066.

The SEC's "shadow trading" theory survived a motion to dismiss. In allowing the case to continue, the court noted that Mr. Panuwat's actions were in direct violation of Medivation's employee policies, which define insider trading as using information learned in the course of employment to buy or sell stock in *any* publicly traded company. The court held that the SEC had put forward sufficient evidence that Mr. Panuwat's trades in Incyte were in breach of duties owed to Medivation based on: (1) Medivation's insider trading policy, (2) a confidentiality agreement Mr. Panuwat had signed with Medivation, and (3) traditional principles of agency law arising because Medivation entrusted Mr. Panuwat with confidential information.

At trial, the SEC presented evidence that Mr. Panuwat began purchasing Incyte call options seven minutes after receiving an email from Medivation's CEO stating that the Medivation acquisition was imminent, identifying the acquirer, and stating the price. The SEC also demonstrated that the purchases constituted the largest trade Mr. Panuwat had ever made. At trial, Mr. Panuwat claimed that he chose to invest in Incyte, not because of the CEO's email, but based on a then-recent analyst report recommending the purchase of Incyte call options. In a prior deposition, Mr. Panuwat had stated that he did not remember why he decided to trade Incyte securities. The SEC and Mr. Panuwat also presented competing testimony on whether Medivation's acquisition was likely to materially affect Incyte's stock price. The jury found that the SEC had established by a preponderance of the evidence that Mr. Panuwat was liable for insider trading.

Following the judgment, the SEC remains firm in its messaging that its insider trading charge in the case was not novel, but was rather an ordinary application of the longstanding "misappropriation theory" of insider trading, and the SEC continues to investigate and press "shadow trading" cases. The SEC recently announced settled charges against Andreas "Andy" Bechtolsheim, the founder and Chief Architect of Silicon Valley-based technology company Arista Networks, for misappropriating material nonpublic information regarding the impending acquisition of Acacia Communications, Inc. ("Acacia") after learning of the acquisition through Arista Network's relationship with another multinational technology company. The other company was allegedly considering acquiring Acacia and consulted with Mr. Bechtolsheim concerning the potential acquisition. The SEC noted that Arista Network's insider trading policy specifically prohibited the misuse of any nonpublic information of other companies and provided that nonpublic information acquired

in the course of employment with the company could be used only for legitimate business purposes. To settle the SEC's charges, Mr. Bechtolsheim agreed to pay a civil penalty of nearly $1 million.

Panuwat and Bechtolsheim show that both the SEC and at least some courts are taking a broader view of insider trading violations and enforcement, as well as the sources of duties that may underlie alleged violations. While these cases tend to be highly fact-specific, traders and their advisors should consider the extent to which material nonpublic information learned in the course of one's employment might be material, not just to the employer, but to other public companies (regardless of whether the other company does business with the employer or competes with the employer).

Moreover, companies should review their insider trading policies, confidentiality agreements, and training processes and materials in light of the SEC's increasing focus on the "shadow trading" theory and the importance of the wording of employer policies in both *Panuwat* and the Bechtolsheim Complaint. Depending on a company's industry and particular circumstances, changes to the scope of prohibited conduct may be appropriate, particularly with respect to restrictions on transactions in securities of *other* companies. When considering policy changes, companies should keep in mind the SEC's focus on issuer compliance programs and indications that issuers foster compliance within their organizations. Because this is a developing area of the law, companies may wish to increase the frequency with which they review and train on their insider trading policies to account for new developments and to keep employees and business advisors apprised of these matters.

Please contact your V&E Team to discuss these developments and their implications.

Prior results do not guarantee a similar outcome.

Form SD

Compliance Deadline for Resource Extraction Issuers

After two failed attempts, in December 2020, the Securities and Exchange Commission ("SEC") adopted a final rule requiring all "resource extraction issuers" to disclose any payments made to the U.S. federal government or any foreign government in connection with the commercial development of oil, natural gas or minerals (the "Payments Rule"). September 2024 marked the first deadline for "resource extraction issuers" with a December 31 fiscal year end to furnish Form SD.

Compliance Deadlines

The Payments Rule, which became effective on March 16, 2021, provided a 2-year transition period such that fiscal year 2023 is the first applicable reporting year. Form SD is due 270 days following the close of the issuer's fiscal year. For example, an issuer whose fiscal year ended on December 31, 2023, has until September 26, 2024, to furnish the required disclosure on Form SD. Companies subject to the Payments Rule must make such disclosures annually by filing a Form SD on EDGAR, and the disclosures are required to be XBRL tagged.

What Does the Payments Rule Require?

The Payments Rule applies to any company that (i) files an annual report with the SEC (including foreign private issuers filing on Form 20-F and Canadian issuers filing on Form 40-F) and (ii) "engages in the commercial development of oil, natural gas, or minerals," which includes exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity. Due to the breadth of this definition, the Payments Rule covers most upstream public reporting companies in the United States. In addition, certain midstream companies that are engaged in natural gas treating and processing may also be covered by the Payments Rule. Entities that meet certain criteria may be exempt from the disclosure requirements.

Resource extraction issuers are required to disclose company-specific, project-level information such as the type and total amount of each payment made for each applicable project and the type and total amount of payments made to the Federal, or any foreign, government.

Please contact your V&E Team to discuss these new requirements, whether they apply to your company, and the upcoming disclosure deadlines.

Navigating the SEC's New Cybersecurity Disclosure Rules

The Securities and Exchange Commission ("SEC") has recently adopted new cybersecurity disclosure rules for public companies, which require more detailed and accurate information about cybersecurity risks, processes, and incidents. However, complying with these rules poses a challenge for companies, as they must balance the need to inform investors and regulators with the risk of exposing sensitive information that could facilitate cyberattacks. Moreover, the SEC has been actively pursuing enforcement actions against companies that it deems to have misled investors or failed to disclose material cybersecurity information, such as SolarWinds Corp. ("SolarWinds") and its Chief Information Security Officer ("CISO").

One of the most significant cases in this area is the SEC's lawsuit against SolarWinds and its CISO, as we discuss further in this V&E Insight, which alleged that they defrauded investors by making false and misleading statements about their cybersecurity practices and risks and by failing to disclose a major cyberattack for nearly two years. The SEC claimed that SolarWinds violated various provisions of the Securities Exchange Act of 1934, including Section 13(b)(2)(B), which requires companies to maintain adequate internal accounting controls, and Section 13(a) and related rules, which require companies to maintain effective disclosure controls and procedures. The SEC also sought to hold the CISO personally liable for his role in the alleged fraud.

However, on July 18, 2024, a federal judge in the Southern District of New York dismissed most of the SEC's claims, finding that SolarWinds' disclosures were not materially misleading or inadequate and that Section 13(b)(2)(B) did not apply to cybersecurity controls. The court evaluated various statements made by SolarWinds on its website, press releases, blog posts, and periodic reports and found that most of them were either non-actionable corporate puffery or sufficiently disclosed the risks of cybersecurity failures. For example, the court held that SolarWinds' risk disclosures in its Forms S-1 and 10-K were clear and detailed and that a reasonable investor would not be misled by them. The court also found that SolarWinds' disclosures filed in the days following the discovery of the SUNBURST attack, which affected thousands of its customers, were timely and informative for investors. The only claims that survived the motion to dismiss were those related to two specific statements on SolarWinds' website security statement, which the court found to be materially misleading.

The SolarWinds case illustrates the complex and changing nature of cybersecurity disclosure requirements and enforcement actions, and the potential liability that companies and their officers face in this area. Companies should consult with experienced legal counsel to ensure that cybersecurity disclosures — in all forms and in all media — are accurate, adequate, and compliant with the SEC's rules and guidance.In particular, companies should avoid making three key mistakes: oversharing, overpromising, and not acknowledging current risks and prior incidents.

First, companies should avoid revealing too much detailed information about their cybersecurity processes, as doing so may create a roadmap for malicious actors to breach the systems of the company or those of their customers. Second, companies should not overpromise in their disclosures and thereby expose the company and its C-suite to potential SEC enforcement action. Third, companies often include generic and hypothetical risk scenarios in their cybersecurity risk factors. However, disclosing generic and hypothetical risk factors when cybersecurity risks have in fact materialized can lead to enforcement action and litigation risk, as previously noted.

Vinson & Elkins will continue to monitor emerging cybersecurity and disclosure trends and to assist companies in navigating this fast-moving space. Please contact your V&E Team to discuss these developments and their implications.

Endnotes

1 Arize, "The Rise of Generative AI in SEC Filings" (July 2024), https://arize.com/wp-content/uploads/2024/07/The-Rise-of-Generative-AI-In-SEC-Filings-Arize-AI-Report-2024.pdf.

2 Notwithstanding the flood of shareholder proposals that likely were permitted following 2021's SLB 14L, 2024 also saw a reversion to the SEC's willingness to provide no-action relief, likely partially in response to criticism from institutional investors that too many prescriptive and low value proposals were ending up on ballots in 2022 and 2023. According to the Shareholder Rights Group, as of May 2023, the SEC staff "nearly doubled the number of exclusions" of shareholder proposals as compared to 2023, noting the SEC staff granted company requests for no-action regarding shareholder proposals about 68% of the time (excluding requests withdrawn), compared with 56% at the same point last year. *See*, Lewis Sanford, "SEC No Action Statistics to May 1, 2024," Shareholder Rights Group https://www.shareholderrightsgroup.com/2024/05/sec-no-action-statistics-for-2024.html (last visited Sept. 12, 2024). This increase in support of no-action requests, yet the still record number of proposals on ballots, seems to implicate the sheer unprecedented volume of submissions this year due to the other factors described.

3 Jamie Smith, "2024 proxy season review: Five takeaways," EY Americas Center for Board Matters (July 16, 2024), https://www.ey.com/en_us/board-matters/proxy-season-review.

4 Amanda Buthe et al., "An Early Look at the 2024 Proxy Season," Georgeson (2024).

5 Note that many threatened proposals are settled through engagement with a proponent before they ever become publicly known in a proxy statement.

6 Larry Fink, BlackRock's influential CEO and widely known ESG evangelist, publicly declared in 2023 that he will no longer use the term ESG because it has become too politicized — and instead expressed that BlackRock's expectation is for companies to articulate how they are managing risks to the company that may be material to its long term performance, versus being overtly prescriptive on specific corporate behaviors and structures that it expects of corporate issuers. Mr. Fink's influential letter to CEOs and directors in 2024 conspicuously lacked any references to the term "ESG" this year.

7 Anti-ESG proposals largely expect companies stop doing something that proponents argue is not financially accretive to the company, like address climate change, promote racial justice or other topics that are arguably tangential or not connected to a company's sole purpose, which they assert is to drive financial return to shareholders.

8 Many major investors have expressed concerns over directors having too many outside commitments to be effective board members and have published specific guidance on what their expectation are – either quantitatively or qualitatively — on what they expect from directors' total board commitments.

9 Complaint, *Sec. Exch. Comm'n v. Raz*, No. 1:24-CV-04466, 4–5 (filed June 11, 2024), available at https://www.sec.gov/files/litigation/complaints/2024/comp-pr2024-70.pdf.

10 *Id.* at 6–7.

11 *Id.*

12 *Id.* at 13–14.

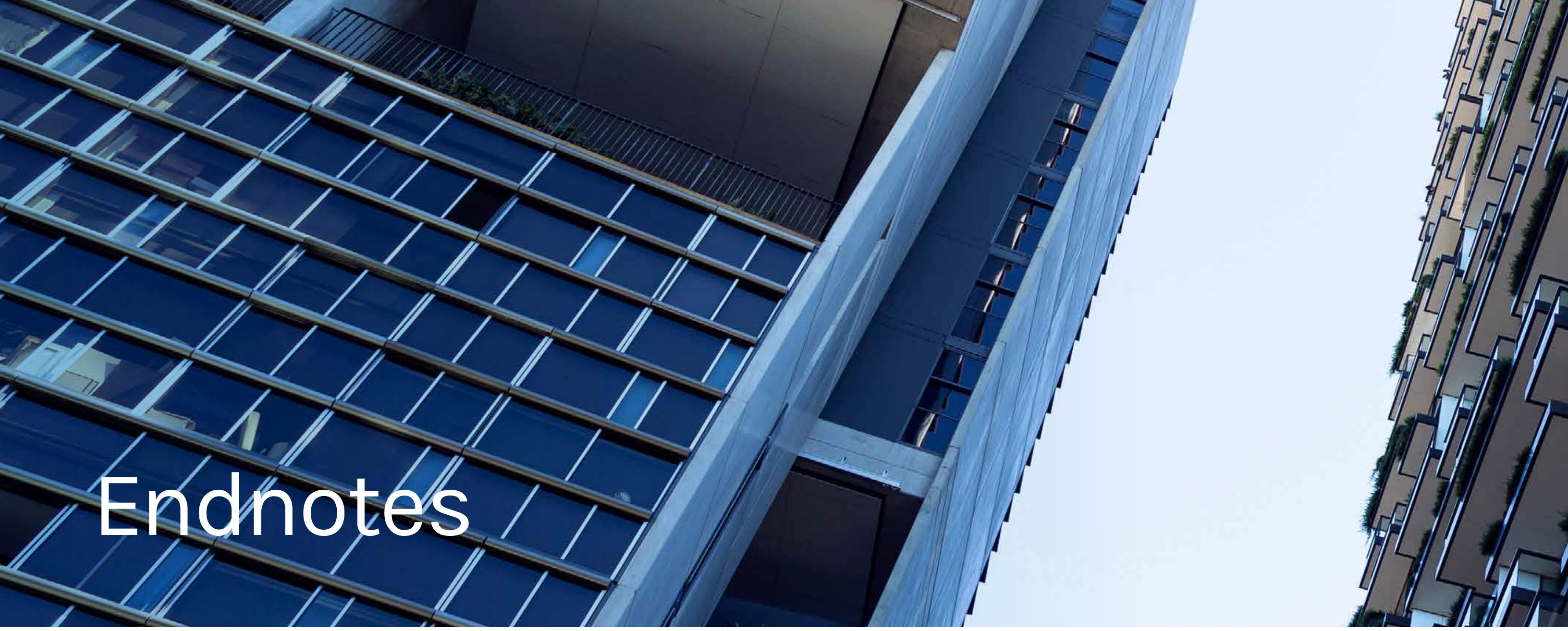
13 *Id.*

14 *Id.* at 14.

15 U.S. Securities and Exchange Commission, "SEC Charges Founder of AI Hiring Startup Joonko with Fraud," Press Release, June 11, 2024, https://www.sec.gov/news/press-release/2024-70.

16 Rebecca Fike & Illana Gomez, "Cooperation and Compliance: Navigating Artificial Intelligence at the Securities Enforcement Forum," *V&E: Insight*, June 12, 2024, https://www.velaw.com/insights/cooperation-and-compliance-navigating-artificial-intelligence-at-the-securities-enforcement-forum/. *See also* U.S. Securities and Exchange Commission, "SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence," Press Release, March 18, 2024, https://www.sec.gov/news/press-release/2024-36.

17 *See* Dominion Energy, *Business review investor meeting*, at 49 (Mar. 1, 2024) (describing rack power density), available at https://s2.q4cdn.com/510812146/files/doc_downloads/2024/2024-03-01-business-review-investor-slides-vTC.pdf ("Dominion Investor Presentation").



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18 Goldman Sachs, "Generation growth; AI, data centers and the coming US power demand surge" (Apr. 28, 2024), available at https://www.goldmansachs.com/insights/goldman-sachs-research/generational-growth-ai-data-centers-and-the-coming-us-power-demand-surge.

19 Matt DiLallo, *AI Could Power Huge Demand for This Fuel by 2030*, The Motley Fool, Apr. 20, 2024, available at https://www.fool.com/investing/2024/04/20/ai-could-power-huge-demand-for-this-fuel-by-2030/.

20 *Id.*

21 *See* Patrick Sisson, "AI Frenzy Complicates Efforts to Keep Power-Hungry Data Sites Green," *New York Times* (Feb. 29, 2024), available at https://www.nytimes.com/2024/02/29/business/artificial-intelligence-data-centers-green-power.html.

22 Dominion Investor Presentation at 45–46.

23 Jennifer Hiller, and Scott Patterson, "How Big Data Centers Are Slowing the Shift to Clean Energy," *Wall Street Journal* (Apr. 29, 2024), available at https://www.wsj.com/business/energy-oil/how-big-data-centers-are-slowing-the-shift-to-clean-energy-44ef4145?mod=Searchresults_pos1&page=1.

24 *PJM Interconnection, LLC*, Motion for Leave to File Answer and Answer of the Maryland Office of People's Counsel, FERC Docket No. ER24-843 (filed Mar. 20, 2024).

25 *PJM Interconnection*, L.L.C., "Order on Cost Allocation Report and Tariff Revisions Order," 187 FERC ¶ 61,012 at 3–7 (Apr. 8, 2024) (citing PJM Open Access Transmission Tariff).

26 *See* Hiller and Patterson, *supra* n.23.

27 *See* Environmental Protection Agency, New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 89 Fed. Reg. 39,798 (May 9, 2024).

28 Hiller and Patterson, *supra* n.23; Sisson, *supra* n.21.

29 *Id.*

30 *See* Sisson, *supra* n.21.

31 *See* Evan Halper, "Amid Explosive Demand, America Is Running Out of Power," *Washington Post* (Mar. 7, 2024), available at https://www.washingtonpost.com/business/2024/03/07/ai-data-centers-power/.

32 *See* Sisson, *supra* n.21; Robert Walton, *Granholm Tells Congress 'Adjustments Have Been Made' to Distribution Transformer Proposal*, Utility Dive (Mar. 21, 2024), available at https://www.utilitydive.com/news/Granholm-DOE-transformer-rule-adjustments-budget-hearing/710940/.

33 Mississippi Development Authority, *Amazon Web Services Plans to Invest $10 Billion, Creating 1,000 Jobs to Establish Data Center Complexes in Mississippi* (Jan. 25, 2024) available at https://mississippi.org/news/amazon-web-services-to-invest-record-shattering-10-billion/.

34 U.S. Department of Energy, "AI for Energy, Opportunities for a Modern Grid and Clean Energy Economy" at 24–25, 39–41 (April 2024), available at https://www.energy.gov/sites/default/files/2024-04/AI%20EO%20Report%20Section%205.2g%28i%29_043024.pdf ("DOE Report"), identifying risks from the integration of AI on the power grid.

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36 DOE Report at 5–8.

37 Federal Energy Regulatory Commission, FY 2025 Congressional Justification at 10, 83 (Mar. 11, 2024), available at https://www.ferc.gov/sites/default/files/2024-03/FERC%20FY25%20Congressional%20Justification_3-11-2024_post.pdf.

38 The Principles define physical risks as being the types of physical harm caused by climate change-related phenomena (*e.g.*, hurricanes, increased global temperatures) to people and property.

39 The Principles define transition risks as being stressors that can affect different institutions or industries and are associated with the transition to a low carbon economy (*e.g.*, changes in consumer practices or government policy).

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