

*Section of Environment, Energy, and Resources
American Bar Association*

Environment, Energy, and Resources Law: The Year in Review 2023

Chapter F · Environmental, Social, Governance, and Sustainability

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**Chapter F: ENVIRONMENTAL, SOCIAL, GOVERNANCE, AND
SUSTAINABILITY
2023 Annual Report¹**

I. GOVERNMENTAL ACTION

A. *U.S. Administrative Law Developments*

1. U.S. Securities and Exchange Commission

Following the April 11, 2022 proposal of a climate change disclosure rule titled [The Enhancement and Standardization of Climate-Related Disclosures for Investors](#) (Climate Disclosure Rule),² the U.S. Securities and Exchange Commission (SEC) moved forward with a public comment period in 2022 and a final review process, which lasted throughout 2023. Under current securities regulations, registrants make financial and risk-related disclosures informing investors of material factors impacting those companies.³ The Climate Disclosure Rule represents the next step in the SEC’s response to investors’ calls for “more consistent, comparable, and reliable information about how a registrant has addressed climate-related risks when conducting its operations and developing its business strategy and financial plan.”⁴ If finalized as proposed, the Climate Disclosure Rule would require affected companies to provide “information about a registrant’s climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial condition,” as well as “greenhouse gas emissions, which have become a commonly used metric to assess a registrant’s exposure to such risks.”⁵ A final rule is expected in 2024.

Relatedly, on October 11, 2023, the SEC published a final rule titled [Investment Company Names](#) (2023 Names Rule).⁶ Intended to tackle [greenwashing](#) in the financial services industry, the 2023 Names Rule “addresses certain broad categories of investment company names that are likely to mislead investors about an investment company’s investments and risks”⁷ and highlights examples, such as funds “that consider ESG factors in their investment strategies....”⁸ The 2023 Names Rule, which expands the requirements of Rule 35d-1 under the Investment Company Act,⁹ requires funds having names that suggest a focus in a particular type of investment, industry, geographic area, or (new for

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²The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

³[Rules and Regulations for the Securities and Exchange Commission and Major Securities Laws](#), SEC. & EXCH. COMM’N (last visited Dec, 4, 2023).

⁴SEC. & EXCH. COMM’N, FACT SHEET: ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES 1 (2022).

⁵The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,334.

⁶Investment Company Names, 88 Fed. Reg. 70,436 (Oct. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).

⁷Investment Company Names, 88 Fed. Reg. at 70,436.

⁸*Id.* at 70,439.

⁹17 C.F.R. § 270.35d-1.

2023) characteristic (such as ESG) must invest at least 80 percent of the value of their assets in that particular type of investment.¹⁰

2. U.S. Department of Labor

The U.S. Department of Labor (DOL) spent the better part of 2023 facing challenges in the U.S. Congress and the courts to its December 1, 2022 final rule titled [Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights](#) (2022 ESG Rule).¹¹ The 2022 ESG Rule clarifies how retirement plan fiduciaries should approach selections of investments and investment courses of action under the Employee Retirement Income Security Act of 1974 (ERISA),¹² while providing some flexibility to allow a fiduciary to consider “the economic effects of climate change and other [ESG] factors. . . .” if the fiduciary determines such factors “relevant to a risk and return analysis.”¹³

The 2022 ESG Rule encountered significant political opposition in 2023. For example, on February 7, 2023, a resolution ([H.J. Res. 30](#)) was introduced in the U.S. House of Representatives, providing for Congressional disapproval of the 2022 ESG Rule.¹⁴ H.J. Res. 30 was passed by both houses of Congress and sent to President Joe Biden, who vetoed it on March 20, 2023, noting in a [Message to the House of Representatives](#) that “fiduciaries should be able to consider any factor that maximizes financial returns for retirees across the country.”¹⁵

On September 21, 2023, the 2022 ESG Rule was upheld by the Northern District of Texas following a [lawsuit](#) filed on January 26, 2023 by 25 state attorneys general and other interested parties.¹⁶ In a [Memorandum Opinion and Order](#) in *Utah v. Walsh*, Judge Matthew J. Kacsmark held that the ESG Rule does not violate ERISA and, as a matter of administrative law, is not arbitrary and capricious.¹⁷ A [Notice of Appeal](#) to the Fifth Circuit was filed on October 26, 2023.¹⁸

3. U.S. Financial Regulation

On October 30, 2023, an interagency guidance titled [Principles for Climate-Related Financial Risk Management for Large Financial Institutions](#) (Guidance) was published by the U.S. Department of the Treasury’s Office of the Comptroller of the Currency, the Federal Reserve System, and the Federal Deposit Insurance Corporation.¹⁹ The Guidance provides the largest financial institutions – those with over \$100 billion in consolidated assets – with “a high-level framework for the safe and sound management of exposures to

¹⁰Investment Company Names, 88 Fed. Reg. at 70,440.

¹¹Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550).

¹²Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1003 (2020).

¹³Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. at 73,827.

¹⁴H.R.J. Res. 30, 118th Cong. (1st Sess. 2023).

¹⁵[Press Release](#), White House, Message to the House of Representatives – President’s Veto of H.J. Res. 30 (Mar. 20, 2023).

¹⁶Complaint for Declaratory and Injunctive Relief, *Utah v. Walsh*, No. 2:23-cv-00016-Z (N.D. Tex. Jan. 26, 2023).

¹⁷Memorandum Opinion and Order, *Utah v. Walsh*, No. 2:23-cv-00016-Z (N.D. Tex. Sept. 21, 2023).

¹⁸Notice of Appeal, *Utah v. Su*, No. 2:23-cv-00016-Z (N.D. Tex. Oct 26, 2023).

¹⁹Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg. 74,183 (Oct. 30, 2023).

climate-related financial risks.”²⁰ Based on the premise that climate change and the transition to a lower carbon economy may threaten the U.S. financial system, the Guidance offers: (1) principles related to governance, policies and procedures, strategic planning, risk management, data and reporting, and scenario analysis; and (2) a framework addressing credit risks, liquidity risks, operational risks, and legal and compliance risks.²¹

B. U.S. Legislative Developments

Representative Ralph Norman (R-SC) sponsored [H.R. 4655](#), to amend the Securities Exchange Act of 1934 to prohibit the SEC from compelling the inclusion or discussion of shareholder proposals or proxy or consent solicitation materials, and for other purposes.²² The bill, which was introduced in the U.S. House of Representatives and referred to the House Committee on Financial Services on July 14, 2023, was reported out of committee on July 27, 2023, but has not moved forward. H.R. 4655 would prohibit the SEC from compelling an issuer to include any shareholder proposal or discussion related to a proposal within a proxy statement.²³

Representative Bryan Steil (R-WI) sponsored H.R. 4767, the [Protecting Americans’ Retirement Savings from Politics Act](#).²⁴ The bill, which was introduced in the U.S. House of Representatives and referred to the House Committee on Financial Services on July 20, 2023, was reported out of committee on July 27, 2023 but has not moved forward. Among other things, Title III of H.R. 4767 would allow issuers to exclude from shareholder meeting materials shareholder proposals submitted pursuant to 17 C.F.R. 240.14a-8 “if the subject matter of the shareholder proposal is environmental, social, or political (or a similar subject matter).”²⁵ Additionally, under Title IV of H.R. 4767, issuers may exclude shareholder proposals submitted pursuant to 17 C.F.R. 240.14a-8(i) “without regard to whether such shareholder proposal relates to a significant social policy issue.”²⁶

Representative Bill Huizenga (R-MI) sponsored H.R. 4790, the [Guiding Uniform and Responsible Disclosure Requirements and Information Limits Act of 2023](#).²⁷ The bill, which was introduced in the U.S. House of Representatives and referred to the House Committee on Financial Services on July 20, 2023, was reported out of committee on July 27, 2023, but has not moved forward. H.R. 4790 provides that the SEC, when engaged in rulemakings regarding disclosure obligations, shall only require an issuer to disclose information to the extent that the issuer determines the information is material within the context of voting or investment decisions made regarding the issuer’s securities.²⁸

C. California Legislative Developments

²⁰Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg. at 74,183.

²¹*Id.* at 74,187-89.

²²H.R. 4655, 118th Cong. (1st Sess. 2023).

²³*Id.* at 2.

²⁴H.R. 4767, 118th Cong. (1st Sess. 2023).

²⁵*Id.* at 5.

²⁶*Id.* at 6.

²⁷H.R. 4790, 118th Cong. (1st Sess. 2023).

²⁸*Id.* at 2-3.

In 2023, California signed into law three first-in-the-nation climate-related bills, potentially taking effect as soon as 2026.”²⁹ These laws are expected to impact thousands of businesses, including both private and publicly held companies.³⁰

1. California’s Climate Corporate Data Accountability Act, SB 253

Governor Gavin Newsom approved California Senate Bill 253 (“Climate Corporate Data Accountability Act”) on October 7, 2023.³¹ The Climate Corporate Data Accountability Act provides for three types of disclosures for all public and private entities that have more than \$1 billion in annual sales *and* “do business” in California. This applies even if the corporation, partnership, limited liability company, “or other business entity” is not California-based and is based on the entity’s revenue for the prior fiscal year.³²

SB 253 requires all covered entities to disclose their Scope 1 and Scope 2 emissions to an emissions reporting organization, starting in 2026, as well as Scope 3 starting in 2027.³³ SB 253 requires the California Air Resources Board (CARB) to develop and adopt implementing regulations by January 1, 2025.³⁴ In signing SB 253, Governor Newsom expressed concerns over the feasibility of these deadlines, signaling potential delays.³⁵

2. California’s Climate-related Financial Risk Disclosures, SB 261.

California also passed a separate but related bill, SB 261 (“Greenhouse Gases: Climate-Related Financial Risk”), mandating disclosure of “climate-related financial risk” that includes both a physical risk to a reporting entity and a “transition” risk that the entity might incur.³⁶

SB 261 is similar to the SEC’s proposed Climate Disclosure Rule.³⁷ However, it is broader than the proposed SEC Rule in that it applies not just to publicly traded corporations but also to private entities. In a change from the \$1 billion threshold set in SB 253, SB 261 sets a *lower* financial threshold for entities that are deemed “covered entities”—those with total annual revenues over \$500 million and do business in

²⁹[California’s Not Waiting for the SEC’s Climate Disclosure Rules](#),

PRICEWATERHOUSECOOPERS (PWC) IN THE LOOP, 1 (2023).

³⁰*Id.*

³¹Climate Corporate Data Accountability Act, S. 253, 2023-2024 Leg., Reg. Sess. (Cal. 2023).

³²Climate Corporate Data Accountability Act, S. 253, 2023-2024 Leg., Reg. Sess. (Cal. 2023) (adding Health & Safety Code provision and defining “reporting entity”).

³³*Id.* (new statutory term Section 38532(b)(3)-(5) defining “Scope 1 emissions,” “Scope 2 emissions,” and “Scope 3 emissions”).

³⁴*Id.* (new statutory provision Sect. 38532(c)(1)).

³⁵[Letter](#) from Governor Gavin Newsom to Members of Cal. State S. (Oct. 7, 2023).

³⁶Greenhouse Gases: Climate Related Financial Risk, Cal. S.B. 261 (2023 Cal. Stat. Chap. 383) (to be codified as CAL. HEALTH & SAFETY CODE § 38533).

³⁷The Enhancement and Standardization of Climate-related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed April 11, 2022). For a detailed discussion of the SEC proposed rule, see T. Fox, B. Israel, and S. Gray, *Climate-Related Disclosure Obligations at the Federal and International Level*, in ENVIRONMENTAL, SOCIAL, GOVERNANCE: THE PROFESSIONAL’S GUIDE TO THE LAW AND PRACTICE OF ESG CHAPTER 6 (B. Israel, E. Fleishhacker, and T. Johnson eds) (2023).

California.³⁸ As with SB 253, Governor Newsom also expressed concerns about the feasibility of the deadlines required by SB 261.³⁹

3. California’s Voluntary Carbon Market Disclosure Business Regulation Act, AB 1305

On October 7, 2023, Governor Newsom also signed [Assembly Bill \(AB\) 1305](#), now known as the Voluntary Carbon Market Disclosures Business Regulation Act (VCMDBA). Unlike SB 253 and SB 261, AB 1305 requires disclosure without implementing regulations. Rather, effective January 1, 2024, covered business entities marketing or selling voluntary carbon offsets must disclose details regarding project accountability, completion, and emissions reductions. AB 1305 applies to businesses operating in California or “making claims” in California. It also requires “an entity that purchases or uses voluntary carbon offsets that makes claims regarding the achievement of net zero emissions or other, similar claims, as specified” to disclose and document how claims have been determined or accomplished, how progress is measured, and whether there is independent third-party verification.⁴⁰

D. U.S. Judicial Developments

A multitude of climate change lawsuits continued to move through the U.S. courts in 2023, including those filed by states and local government entities. Most cases are still in the procedural stage; however, some rulings have been made on choice of venue.

Over the past few years, several states filed climate change litigation against oil and gas companies.⁴¹ The companies are trying to remove the climate cases to federal venues. Courts generally are deciding the cases should remain in state court; and the Supreme Court is denying petitions for writ of certiorari.⁴²

Additional decisions have been rendered by federal circuit courts, in suits brought by county and local governments, concerning remands to state court.⁴³

³⁸S. 261, Sec. 2 (Cal. 2023) (providing for new Cal. Health & Safety Code section 38533, subpart 38533(a)(4) (defining term “Covered entity”).

³⁹[Letter](#) from Governor Gavin Newsom to Members of Cal. State S. (Oct. 7, 2023) (on file with the Off. of the Governor).

⁴⁰Act of October 7, 2023, ch. 365, 2023

⁴¹*See* Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019); Delaware v. BP America Inc., No. N20C-09-097-AML-CCLD (Del. Super. Ct. Sept. 10, 2020); Minn. v. Amer. Pet. Inst., (Ramsey Cnty. Dist. Ct., June 24, 2020) (No. 62-CV-3837); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D.R.I. 2019); New Jersey v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct. Oct. 18, 2022); Platkin v. Exxon Mobil Corp, No. 22-cv-06733 (RK) (JBD), 2023 WL 4086353 (D.N.J. June 20, 2023).

⁴²*See* Mayor of Balt., et al. v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022), *cert. denied* 143 S. Ct. 1795 (2023); Delaware v. BP America Inc., No. 20-1329-LPS, 2022 WL 605822 (D. Del. Feb. 8, 2022); Minn. v. Amer. Pet. Inst., (Ramsey Cnty. Dist. Ct. June 24, 2020) (No. 62-CV-3837), *cert. denied* (U.S. Jan. 8, 2024) (No. 23-168); Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44 (1st Cir. 2022), *cert. denied* 145 S. Ct. 1796 (2023).

⁴³*See, e.g.*, Boulder Cnty. v. Suncor Energy, 25 F.4th 1238 (10th Cir. 2022), *cert. denied* 143 S. Ct. 1795 (2023); Honolulu v. Sunoco, 39 F.4th 1101 (9th Cir. 2022), *cert. denied* 143 S. Ct. 1795 (2023), *on remand* 153 Haw. 326 (Haw. Oct. 31, 2023) (denying motions to dismiss); San Mateo Cnty. v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022), *cert. denied* 143 S. Ct. 1797 (April 24, 2023); City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d

II. INTERNATIONAL SUSTAINABILITY REPORTING REQUIREMENTS

A. *International Financial Reporting Standards Sustainability Reporting Standards S1 and S2*

In response to demands for a comprehensive global baseline of sustainability disclosures, the International Financial Reporting Standards Foundation (IFRS Foundation) formed the International Sustainability Standards Board (ISSB) in 2021. On June 26, 2023, to help companies avoid duplicative reporting, the ISSB issued its first two sustainability reporting standards, [IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information](#) and [IFRS S2 Climate-related Disclosures](#).⁴⁴ Both standards require an entity to disclose information that “is useful to users of general purpose financial reports in making decisions relating to providing resources to the entity.”⁴⁵ This includes sustainability and climate-related “risks and opportunities that could reasonably be expected to affect the entity’s cash flows, its access to finance or cost of capital over the short, medium or long term.”⁴⁶ The mandatory application of these standards depends on each jurisdiction’s endorsement or regulatory processes.

B. *The E.U. Corporate Sustainability Reporting Directive (CSRD)*

The European Union’s Corporate Sustainability Reporting Directive (CSRD) took effect on January 5, 2023.⁴⁷ For companies falling within the scope of the CSRD, including many non-E.U. companies, the directive requires disclosure of qualitative and quantitative information related to their environmental, social, and governance impacts based on a double materiality assessment that will eventually inform the development of a strategic business plan. The CSRD aims to standardize climate reporting globally, increase transparency, and minimize greenwashing.

The first step of the CSRD reporting process is to conduct a double materiality assessment, which requires (1) a financial materiality assessment of the impact sustainability matters have on operations⁴⁸ and (2) an impact materiality assessment evaluating each step in the company’s value chain for the impact on the planet and society.⁴⁹ Value chain mapping will be especially challenging for businesses with a global reach or complex product lines. Finally, the CSRD introduces third-party assurance and audit requirements for certain aspects of disclosed information.⁵⁰ The scope of the CSRD is wide-reaching and has the potential to affect global companies with activities in the E.U., requiring companies worldwide to evaluate if or when they will be subject to the CSRD as it is applied in four stages between 2024 and 2028.

Cir. 2022), *cert. denied* 143 S. Ct. 2483 (May 15, 2023); *Plaquemines Parish v. Chevron USA, Inc.*, No. 22-30055 (5th Cir. Oct. 17, 2022), *cert. denied* 143 S. Ct. 991 (Feb. 27, 2023); *Oakland v. BP PLC*, 2023 WL 8179286 (9th Cir. Nov. 27, 2023); *Dist. of Col. v. Exxon Mobil Corp.*, No. 22-7163, 89 F.4th 144 (D.C. Cir. Dec. 19, 2023).

⁴⁴[ISSB issues inaugural global sustainability disclosure standards](#), IFRS FOUND. (June 26, 2023).

⁴⁵[IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information](#), IFRS FOUND. (Dec. 11, 2023).

⁴⁶[IFRS S2 Climate-related Disclosures](#), IFRS FOUND. (Dec. 11, 2023).

⁴⁷Directive 2022/2464, of the European Parliament and of the Council of 14 December 2022, As Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) 15.

⁴⁸*Id.* at Recital 29.

⁴⁹*Id.*

⁵⁰*Id.*