



# THE ENDGAME OF ESG:

**WHY IT MATTERS  
TO POLICYMAKERS  
AND ENFORCERS**

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# THE ENDGAME OF ESG: WHY IT MATTERS TO POLICYMAKERS AND ENFORCERS

## INTRODUCTION

What is the endgame of the environmental, social, and governance (ESG) movement? Is it a method of judging a corporation's investment value based on how well it adheres to certain environmental, social, and governance standards, such as reducing carbon emissions? Or is it a way for a select group of global organizations to dictate environmental and social policy not only in business but also in the public square?

In attempting to answer these fundamental questions, it has become clear that the ESG movement raises far more questions than answers. Who decides which ESG factors should be imposed on corporations? Are there objective compliance measurements? Should corporations prioritize the interests of society over those of shareholders? How does ESG affect workplace culture? And ultimately, do ESG ratings tell a potential investor the truth as to whether a corporation is a wise investment?

Van Morrison, in his song "Little Village," notes that there are two kinds of truth—the ones you believe in your head, and the ones you believe in your heart.<sup>1</sup> When it comes to investment decisions, investors have historically understood that successful investors use their head and follow business fundamentals, rather than trusting purely emotional factors. But basing investment decisions on broad societal goals—most of which are tenuously connected to business performance—is akin to investing based on emotion. Warren Buffet's investment mentor, Benjamin Graham, the guru of value investing, once warned: "Individuals who cannot master their emotions are ill-suited to profit from the investment process."<sup>2</sup>

Stanford University's Hoover Institution recently conducted a survey of individual investors to understand their perspective on ESG investing.<sup>3</sup> Over one-third of investors younger than age 50 said they would be willing to lose 11% to 15% of their retirement savings to support corporations that focus on ESG issues like gender diversity.<sup>4</sup> That sounds more like a heart analysis than an objective choice. Applying such a strategy is certainly an option for individual investors, but when it comes to

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<sup>1</sup> Van Morrison, Little Village, Lyrics, <https://www.lyrics.com/lyric/6603044/Van+Morrison/Little+Village>.

<sup>2</sup> Andy Shuler, *9 Top Benjamin Graham Quotes on Value Investing* (Nov. 21, 2019), <https://einvestingforbeginners.com/benjamin-graham-quotes-ashul/#:~:text=%E2%80%9CIndividuals%20who%20cannot%20master%20their,you%20even%20start%20to%20invest>.

<sup>3</sup> Hoover Institution, et al., 2022 Survey of Investors, Retirement Savings, and ESG, <https://www.gsb.stanford.edu/sites/default/files/publication/pdfs/survey-investors-retirement-savings-esg.pdf>.

<sup>4</sup> *Id.* at 18.

institutional investors managing other people’s money, the legal requirements are much more stringent. Someone managing another person’s money cannot have the motive of pursuing a non-financial goal.

This report will review what ESG is, the different kinds of ESG investing, the origins and historical development of the ESG movement, the global efforts to circumvent U.S. legal standards that hinder ESG investing, the recent push to mandate ESG by the current administration, the flaws of the ESG approach to investing, the societal harms caused by ESG, and the legal concerns that ESG presents for government officials who make and enforce public policy in Nebraska. In the end, the unavoidable conclusion is that the ESG movement has the potential to do substantial harm to both the financial system and society as a whole.

### *WHAT IS ESG?*

Environmental, social, and governance (ESG) investing has been on the rise in recent years.<sup>5</sup> ESG is a nebulous concept, but in general, it refers to asset managers’ and investors’ use of environmental, social, and corporate-governance factors in their decision-making.<sup>6</sup> In effect, ESG is a way to pressure corporations to act for the purpose of not only providing goods and services but also advancing certain social causes.

ESG is a component of “stakeholder capitalism,” which is the view that companies should serve not just their owners but also the interests of other stakeholders, including a company’s suppliers, customers, and employees—and even society and the environment writ large.<sup>7</sup> This view contrasts sharply with shareholder capitalism or shareholder primacy, which argues that the only focus of corporate executives should be maximizing shareholder return rather than pursuing their own personal objectives while using other people’s money.<sup>8</sup>

Modern stakeholder capitalism rests on two pillars: (1) that corporate officers and directors should advance the interests of all corporate stakeholders (not just shareholders); and (2) that corporate performance should be evaluated by “a new measure of shared value creation” that explicitly includes ESG goals in addition to

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<sup>5</sup> Saijel Kishan, *ESG by the Numbers: Sustainable Investing Set Records in 2021*, Bloomberg (Feb. 3, 2022), <https://www.bloomberg.com/news/articles/2022-02-03/esg-by-the-numbers-sustainable-investing-set-records-in-2021>.

<sup>6</sup> *What Is Environmental, Social, and Governance (ESG) Investing*, Investopedia (Sep. 27, 2022), <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp>.

<sup>7</sup> *Stakeholder Capitalism Metrics Initiative: Over 120 Companies Implement the ESG Reporting Metrics*, World Economic Forum, <https://www.weforum.org/impact/stakeholder-capitalism-esg-reporting-metrics/> (connecting stakeholder capitalism and ESG metrics).

<sup>8</sup> Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase its Profits*, NY Times (Sep. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

traditional financial metrics.<sup>9</sup> Under stakeholder capitalism, financial firms promote ESG-driven investment strategies, where they grade companies based on their ESG policies and make investment decisions based on the strength of a company's ESG score. One of the principal advocates of this modern iteration of stakeholder capitalism is Klaus Schwab, the founder and chairman of the World Economic Forum (WEF)—an international, non-governmental organization that touts ESG from its headquarters in Davos, Switzerland. Schwab says “[w]e should seize this moment to ensure that stakeholder capitalism remains the new dominant model” of capitalism.<sup>10</sup>

ESG proponents describe ESG issues as those that “are qualitative and not readily quantifiable in monetary terms,” and that “reflect externalities not well captured by market mechanisms.”<sup>11</sup> In other words, ESG issues are not easily measured or obviously connected to business or investment performance. Historically, investors have considered financially relevant factors and risks, all with an eye toward identifying whether investments will be financially profitable. But ESG goes beyond normal risk measures and assigns a score based on subjective environmental and social criteria.

One key focus of ESG is to advance the United Nations’ (UN) Sustainable Development Goals,<sup>12</sup> which include climate action, clean energy, gender equality, and responsible consumption and production, as illustrated by the graphic on the following page. ESG’s focus on these standards allows a global organization to impose its hand-picked, politically preferred metrics on American businesses.

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<sup>9</sup> Klaus Schwab, *Why We Need the ‘Davos Manifesto’ for a Better Kind of Capitalism*, World Economic Forum (Dec. 1, 2019), <https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/> (quotations omitted); R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press 2010) (1984).

<sup>10</sup> Schwab, *supra*.

<sup>11</sup> UNEP Finance Initiative & Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, 18 (Oct. 2005), [https://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf) (“2005 Freshfields Report”).

<sup>12</sup> Betsy Atkins, *Demystifying ESG: Its History & Current Status*, Forbes (Jun. 8, 2020), <https://www.forbes.com/sites/betsyatkins/2020/06/08/demystifying-esgits-history--current-status/?sh=418f996b2cdd>.

## The United Nations' Sustainable Development Goals



ESG supporters try to fit a lot within each of the letters—the “E,” the “S,” and the “G”—and we explore each one below. Much of the discussion below explores the ESG framework published by the International Business Council (IBC) of the WEF.<sup>13</sup>

***Environmental.*** The “E” asks how corporations interact with the environment. Specific criteria include corporate impact on climate change, greenhouse gas emission, air pollution, and water usage.<sup>14</sup> Overall, ESG scores typically downgrade companies considered to have a high carbon footprint (such as fossil fuel producers), while favoring companies that promote alternative forms of energy such as wind and solar. Perhaps most significant among environmental criteria used by asset managers is how companies plan to achieve “net-zero” carbon emissions by 2050 or otherwise contribute to achieving the objectives of the 2015 Paris Agreement.<sup>15</sup> This prompts ESG proponents to demand that companies disclose the greenhouse gas emissions they directly create and indirectly contribute through their customers, suppliers, and employees.<sup>16</sup>

Of particular concern to Nebraskans is ESG’s impact on agricultural businesses. ESG often comes down hard on agricultural companies because the work of

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<sup>13</sup> *Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation*, World Economic Forum (Sep. 2020), [https://www3.weforum.org/docs/WEF\\_IBC\\_Measuring\\_Stakeholder\\_Capitalism\\_Report\\_2020.pdf](https://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf) (“WEF Metrics”).

<sup>14</sup> *Id.* at 9.

<sup>15</sup> Lihuan Zhou & Hayden Higgins, *Investors: Sustainable Investing Demands More than Just Cutting Carbon*, World Resources Institute (June 8, 2022), <https://www.wri.org/insights/paris-agreement-aligned-investments>.

<sup>16</sup> Nick Grabar, et al., *SEC’s Climate Disclosure Rules: GHG Emissions Disclosure Requirements*, Harvard Law School Forum on Corporate Governance (May 6, 2022), <https://corpgov.law.harvard.edu/2022/05/06/secs-climate-disclosure-rules-ghg-emissions-disclosure-requirements/>.



farming and ranching—which is necessary to produce food essential to sustain life—generates waste byproducts, consumes water, uses land, and emits carbon dioxide and methane.<sup>17</sup> Some ESG proponents go so far as to advocate for limited use of fertilizers and non-electric farm vehicles.<sup>18</sup> These advocates ignore that existing federal and state laws already regulate environmental issues and that government agencies responsible for enforcing those laws monitor compliance by businesses.<sup>19</sup> ESG supporters want to add another layer of regulation based on malleable standards that have no recognized enforcement authority. Broadly imposing those standards on agricultural operators, in order to earn a high ESG’s investment rating or receive institutional financing, would be a disaster for this critical industry.

**Social.** The “S” encompasses all sorts of social goals favored by ESG proponents. At a high level, “[c]ommentators and investors have described S in many different ways: as social issues, labor standards, human rights, social dialogue, pay equity, workplace diversity, access to health care, racial justice, customer or product quality issues, data security, industrial relations, or supply-chain issues.”<sup>20</sup>

Foremost among current discussions of the “S” is “diversity, equity, and inclusion” (DEI) inside corporations and throughout society more generally.<sup>21</sup> Also relevant are criteria like how a company treats its workers and what positions it adopts on certain social issues like abortion and human sexuality (such as transgender issues).<sup>22</sup> Applying factors like these, many ESG ratings downgrade companies if they lack sufficient racial or gender diversity or if they hold the “wrong” kind of views on

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<sup>17</sup> Mark Segal, *Moody’s Expands ESG Credit Impact Scores to Cover Healthcare, Agriculture, Transport & Logistics Companies*, ESGtoday (July 26, 2022), <https://www.esgtoday.com/moodys-expands-esg-credit-impact-scores-to-cover-healthcare-agriculture-transport-logistics-companies/> (“[A]griculture companies were . . . rated as having moderately negative credit impact from ESG issues overall . . . . Heavy reliance on land and water contribute to high environmental risk exposure for nearly all companies, with social exposures for many companies stemming from supply chain, deforestation and potential livestock contamination issues.”).

<sup>18</sup> See Karthish Manthiram & Elizabeth Gribkoff, *Fertilizer and Climate Change* (Jul. 15, 2021), <https://climate.mit.edu/explainers/fertilizer-and-climate-change>.

<sup>19</sup> Most prominently, the federal Environmental Protection Agency (EPA) exists to “protect[] people and the environment from significant health risks” and to “develop[] and enforce[] environmental regulations.” Environmental Protection Agency, USA.gov, <https://www.usa.gov/federal-agencies/environmental-protection-agency#:~:text=The%20Environmental%20Protection%20Agency%20protects,develops%20and%20enforces%20environmental%20regulations>.

<sup>20</sup> Jason Saul, *Fixing the S in ESG*, Stanford Social Innovation Review (Feb. 22, 2022), [https://ssir.org/articles/entry/fixing\\_the\\_s\\_in\\_esg#](https://ssir.org/articles/entry/fixing_the_s_in_esg#).

<sup>21</sup> WEF Metrics, *supra*, at 9.

<sup>22</sup> See *id.* at 9–10; Clara Hudson, *Abortion Looms as ESG Issue for Companies after Voiding of Roe*, Bloomberg Law (Jul. 8, 2022), <https://news.bloomberglaw.com/esg/abortion-looms-as-esg-issue-for-companies-after-voiding-of-roe>; *LGBTQ100 ESG Index*, Advancing Equality, <https://lgbtq100.com/> (listing “the top 100 . . . equality-driven U.S. companies from a universe of 500 publicly traded large-cap corporations”).

avored social topics. Most institutional investors agree that the “S” is “the most difficult to analyze and embed in investment strategies.”<sup>23</sup>

Like issues related to the “E,” many of the topics addressed under the “S” are already regulated by federal and state law. Indeed, federal laws administered by the Occupational Safety and Health Administration (OSHA) already set certain labor standards.<sup>24</sup> And myriad federal, state, and local laws outlaw discrimination in the workplace.<sup>25</sup> ESG advocates seek to use the “S” to advance causes not addressed by the laws, presumably because there is insufficient political will or there are legal barriers to government action such as the First Amendment.

**Governance.** The “G” refers to how the corporation is internally governed and how its leadership acts. Relevant factors include corporate fraud, anti-corruption efforts, board diversity, and potential illegal activity.<sup>26</sup>

Some of the governance considerations, such as sound accounting practices to prevent internal corruption, focus legitimately on business operations.<sup>27</sup> But the “G” is often comingled with the “S” and “E.” For example, one of the world’s largest investment managers, BlackRock, states that “board quality and effectiveness remains a top [corporate] engagement priority,” yet the highest number of BlackRock’s corporate engagements addressed climate change, and in the Americas, “insufficient board gender diversity was the top reason for [BlackRock] voting against a director.”<sup>28</sup> Similarly, Nasdaq’s recent Board Diversity Rule requires all listed companies to disclose “diversity statistics” regarding their boards of directors.<sup>29</sup> So it is the “E” and the “S” that appear to be ESG’s driving forces.

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<sup>23</sup> Saul, *supra*.

<sup>24</sup> Occupational Health and Safety Administration, United States Department of Labor, <https://www.osha.gov/aboutosha#:~:text=OSHA%27s%20Mission,%2C%20outreach%2C%20education%20and%20assistance>.

<sup>25</sup> See, e.g., 42 U.S.C. § 2000e-2(a)(1) (prohibiting workplace discrimination); Neb. Rev. Stat. § 48-1104(1) (same).

<sup>26</sup> WEF Metrics, *supra*, at 8.

<sup>27</sup> *Who Cares Wins: Connecting Financial Markets to a Changing World*, United Nations Global Compact, 6 (2004), [https://www.ifc.org/wps/wcm/connect/de954acc-504f-4140-91dc-d46cf063b1ec/WhoCaresWins\\_2004.pdf?MOD=AJPERES&CVID=iqeE.mD](https://www.ifc.org/wps/wcm/connect/de954acc-504f-4140-91dc-d46cf063b1ec/WhoCaresWins_2004.pdf?MOD=AJPERES&CVID=iqeE.mD) (“Who Cares Wins”).

<sup>28</sup> *Pursuing Long-Term Value for Our Clients: BlackRock Investment Stewardship A Look Into the 2020-2021 Proxy Voting Year*, BlackRock, 10 (June 30, 2021), <https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf>.

<sup>29</sup> Nasdaq, *Board Diversity Matrix Disclosure Requirements and Examples* (Aug. 3, 2022), [https://listingcenter.nasdaq.com/assets/Board%20Matrix%20Examples\\_Website.pdf](https://listingcenter.nasdaq.com/assets/Board%20Matrix%20Examples_Website.pdf).

## *DIFFERENT KINDS OF ESG INVESTING*

ESG investing is marketed in different forms. One kind, which some call “collateral benefits ESG,”<sup>30</sup> invests money in ESG-marketed funds that exclude investments in low ESG-rated companies or entire industries such as fossil fuels. The motive for investing in these funds is to achieve ESG-related social goals, and the investors are typically willing to forego some financial return in exchange for the collateral ESG benefit. According to *Bloomberg*, “money held in sustainable mutual funds and ESG-focused exchange traded funds rose to approximately \$3 trillion in 2021.”<sup>31</sup>

Another form of ESG investing is sometimes called “risk-return ESG,” which “entails the use of ESG factors as metrics for assessing expected risk and return with the aim of improved return with less risk.”<sup>32</sup> This accounts for a much larger pool of investments, as “assets under management” invested under risk-return ESG “are likely to reach \$41 trillion by the end of 2022.”<sup>33</sup> Truly using ESG metrics as risk-return factors would require investors to act contrary to some of ESG’s fundamental principles—by, for instance, purchasing ESG-disfavored assets (such as shares in fossil-fuel companies) when they are underpriced.<sup>34</sup> Since ESG firms are typically not willing to do this, there may not be much of a difference between collateral benefits and risk-return ESG in practice.

ESG proponents have recently begun to talk about “investing for sustainability impact” or “IFSI.”<sup>35</sup> This broad concept, using its proponents’ cumbersome language, refers to “any activities that involve an investor intentionally attempting to influence the behavior of investee enterprises and other third parties in assessable ways that can help to achieve overarching sustainability outcomes.”<sup>36</sup> Investing for sustainability impact, like ESG investing, divides into two forms. The first is “ultimate ends IFSI,” which seeks to achieve environmental benefits as “a distinct

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<sup>30</sup> Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by A Trustee*, 72 *Stan. L. Rev.* 381, 398 (2020).

<sup>31</sup> Kishan, *supra*.

<sup>32</sup> See Schanzenbach & Sitkoff, *supra*, at 398. An ESG risk-return investor might use ESG factors to pick stocks, hoping that those factors can identify market mispricing and buy or sell opportunities. *Id.* at 398, 439–41. Yet adding ESG factors to an “asset pricing model is a double-edged sword.” *Id.* at 444. Data-driven asset-pricing models would likely demonstrate “that firms with high ESG scores are overvalued and firms with low ESG scores are undervalued . . . because the market has overcorrected in reaction to those ESG scores.” *Id.* In other words, true risk-return ESG investing likely would encourage investors to buy fossil-fuel assets when clean-energy assets are overpriced.

<sup>33</sup> Kishan, *supra*.

<sup>34</sup> See Schanzenbach & Sitkoff, *supra*, at 443–44.

<sup>35</sup> UNEP Finance Initiative & Freshfields Bruckhaus Deringer, et al., *A Legal Framework for Impact: Sustainability Impact in Investor Decision-Making*, 11 (2021), <https://www.unpri.org/download?ac=13902> (“2021 Freshfields Report”).

<sup>36</sup> *Id.*



goal . . . alongside the investor’s financial return goals.”<sup>37</sup> The second—“instrumental IFSI”—pursues “sustainability objectives” to achieve the asset owner’s financial objectives by “protecting or enhancing the financial performance of the . . . portfolio.”<sup>38</sup>

Central to these modern investing practices is the corporate “engagement” or “stewardship” strategies of the large global investment firms.<sup>39</sup> These engagement practices are an outgrowth of the enormous power that investment firms have as managers of other people’s money, much of which is invested in simple index funds and not specifically designated as ESG investment. Some of ESG’s biggest supporters at the UN describe the process this way:

The responsibility for deciding where the majority of assets managed by the investment industry lies not with the ultimate asset-owner [such as an individual whose retirement funds are invested in the market] but rather with a small number of principals [institutional investors such as government pension boards] and their agents [asset managers or investment advisors such as BlackRock, Vanguard, or State Street].

By influencing the way investments are made, the legal factors that inform the decisions made by this relatively small group have a profound effect on the behavior of the entities in which these assets are invested and ultimately on the environments and societies with which these investment vehicles interact.<sup>40</sup>

In other words, an effective strategy for ESG proponents to advance their goals is to direct global investment firms to pressure large corporations to pursue ESG goals. Another strategy is for investment firms to use the proxy votes of their clients to force corporate boards to support ESG principles.<sup>41</sup> These kinds of corporate engagement—on issues ranging from environmental topics to social issues like abortion—by the top investment firms have become a staple of the modern ESG movement. Illustrating the point, many ESG adherents have recently used corporate engagement to try to

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<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.* at 12–13.

<sup>39</sup> According to BlackRock, one of the world’s largest investment firms, “[e]ngagement is core to our stewardship efforts as it provides us with the opportunity to improve our understanding of the business risks and opportunities that are material to the companies in which our clients invest, including those related to environmental, social, and governance (ESG) matters.” *BlackRock Investment Stewardship: Engagement Priorities*, BlackRock, 3 (Feb. 2022), <https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf>.

<sup>40</sup> 2005 Freshfields Report, *supra*, at 6.

<sup>41</sup> *Proxy Voting: Managers Focus on Environmental and Social Themes: Evaluating 25 Asset Managers’ Approaches to ESG Themes*, Morningstar Manager Research (July 12, 2022), [https://assets.contentstack.io/v3/assets/blt4eb669caa7dc65b2/bltd6ddd354091a45ed/62d97358a30ae37191c5fa27/Proxy\\_Voting\\_Managers\\_Focus\\_on\\_ES\\_Themes.pdf](https://assets.contentstack.io/v3/assets/blt4eb669caa7dc65b2/bltd6ddd354091a45ed/62d97358a30ae37191c5fa27/Proxy_Voting_Managers_Focus_on_ES_Themes.pdf).

force companies like Walmart, Lowe’s, and TJ Maxx to adopt corporate resolutions guaranteeing their employees access to abortion.<sup>42</sup>

These concerted efforts of asset managers to influence corporate boards are highly relevant to individuals saving for retirement who “simply want a good return on their investments.”<sup>43</sup> Employer-sponsored defined benefit and defined contribution retirement savings are concentrated in limited funds, and the individual employee often has little, if any, input into available investment options. Private and public employers, in turn, hire asset managers to design investment portfolios, and the largest asset managers are typically able to offer the lowest fees. These large asset managers then use the power they have from aggregating the retirement savings of countless individuals—most of whom did not sign up for an ESG strategy—to vote shareholder proxies and lobby corporate boards to advance ESG issues.<sup>44</sup> In this way, ESG proponents achieve their goals by using money owned by millions of unsuspecting individual investors who do not want to support some of ESG’s goals. Even large institutional investors like government pension boards that do not want to support ESG may find it difficult to avoid entanglement within the web of financiers, insurers, and investment managers promoting ESG.

### ***ORIGINS AND HISTORICAL DEVELOPMENT OF ESG***

***Early History of Stakeholder Capitalism and ESG.*** In 1919, the Michigan Supreme Court famously observed that “[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”<sup>45</sup> This shareholder-centric understanding of corporate purpose was challenged during the Depression era when Harvard Law professor E. Merrick Dodd suggested that corporate managers served as trustees not only to shareholders but also to other stakeholders, including employees, customers, and the general public.<sup>46</sup> As mentioned above, Dodd’s argument has been most prominently advanced by Klaus Schwab, who in 1971 established what has become the WEF and in 1973 published the first “Davos Manifesto,” which said that “the purpose” of businesses includes serving the interests of “societies” and “harmoniz[ing] the different interests of the [various] stakeholders.”<sup>47</sup>

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<sup>42</sup> Emile Hallez, *Shareholder Votes on Abortion Access Likely to Increase*, ESG Clarity (Jun. 27, 2022), <https://esgclarity.com/shareholder-votes-on-abortion-access-likely-to-increase/>.

<sup>43</sup> Joshua D. Rauh, *Why We Should Preserve Shareholder Capitalism*, Testimony Before the Joint Economic Committee, 6 (March 16, 2022), (“powerful firms that manage index funds impose ESG on corporate America as they vote on behalf of trillions of dollars of other people’s money”).

<sup>44</sup> *Id.*

<sup>45</sup> *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919).

<sup>46</sup> E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1153–56 (1932).

<sup>47</sup> *Davos Manifesto 1973: A Code of Ethics for Business Leaders*, World Economic Forum (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-1973-a-code-of-ethics-for-business-leaders/>.

Twenty years later, the UN launched what has grown into the modern ESG movement. It started in 1992 when the UN adopted its Framework Convention on Climate Change (UNFCCC) and held its Conference on Environment and Development (the Rio Earth Summit).<sup>48</sup> At that time, a handful of large banks, including Deutsche Bank and HSBC, acting with the United Nations Environment Programme (UNEP), developed the UNEP Statement by Banks on the Environment and Sustainable Development.<sup>49</sup> A few years later, in 1995, the UNEP published the UNEP Statement of Environmental Commitment by the Insurance Industry.<sup>50</sup> By 2003, the UNEP banking and insurance groups merged to form the UNEP Finance Initiative (UNEP-FI).<sup>51</sup> In 2005, the UN turned to the investment industry when then-UN Secretary General Kofi Annan convened twenty of the world’s largest institutional investors to develop the Principles for Responsible Investment (PRI).<sup>52</sup> This completed the creation of UN-supported coalitions across the financial sector—investors, banks, and insurers. Today, PRI champions its six Principles for Responsible Investment, while UNEP-FI has developed the six Principles for Responsible Banking and the four Principles for Sustainable Insurance.<sup>53</sup>

Though the UN planted the seeds of the modern ESG movement in 1992, the organization kicked its efforts into hyperdrive in 1999. It was then that UN Secretary General Annan addressed the WEF in Davos, saying that “the goals of the United Nations and those of business can, indeed, be mutually supportive.”<sup>54</sup> Annan called on global companies to act in the “corporate sphere” to promote “a set of core values in the areas of human rights, labor standards, and environmental practices”—namely, those already “defined by international agreements, including . . . the Rio Declaration of the United Nations Conference on Environment and Development.”<sup>55</sup> A year later, the UN created its Global Compact as a “voluntary corporate citizenship initiative,” and its objectives were to “mainstream the Compact’s ten principles<sup>56</sup> in business activities around the world and catalyze actions in support of UN goals.”<sup>57</sup>

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<sup>48</sup> *What is the United Nations Framework Convention on Climate Change?*, United Nations, <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change>.

<sup>49</sup> *History*, UN Environment Programme Finance Initiative, <https://www.unepfi.org/about/about-us/history/>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *About the PRI*, Principles for Responsible Investment, <https://www.unpri.org/about-us/about-the-pri>.

<sup>53</sup> The Principles for Responsible Investment, Responsible Banking, and Sustainable Insurance are reproduced in Appendix A.

<sup>54</sup> *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos*, United Nations (Feb. 1, 1999), <https://press.un.org/en/1999/19990201.sgsm6881.html>.

<sup>55</sup> *Id.*

<sup>56</sup> The UN Global Compact’s ten principles are reproduced in Appendix A.

<sup>57</sup> *Who Cares Wins* at viii.

In 2004, the UN Global Compact issued a report entitled *Who Cares Wins*, which coined the term “ESG.”<sup>58</sup> It attempted to establish the link between environmental, social, and governance issues and investment decisions and argued that “inclusion of ESG factors in investment decisions will ultimately contribute to more stable and predictable markets.”<sup>59</sup> The Global Compact identified the key environmental issue as “climate change and related risks.”<sup>60</sup> The social goals focused on “workplace health and safety” and “human rights issues” at company premises, but did not mention diversity, equity, and inclusion principles—the chief social concern today.<sup>61</sup> And the primary governance issues were “board structure and accountability” and “accounting and disclosure practices.”<sup>62</sup>

Fast forward to a few years ago when the WEF encapsulated its ESG vision in its *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*.<sup>63</sup> Relying on stakeholder theory, the WEF declared that “a company serves not only its shareholders, but all its stakeholders—employees, customers, suppliers, local communities and society at large.”<sup>64</sup> Explicitly invoking ESG, the group added that corporate “[p]erformance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives.”<sup>65</sup> Following up on this Manifesto, Klaus Schwab recently assured the world that the business community is “focusing on fully integrating environmental, social, governance and data stewardship risks and opportunities into their governance and decision-making” by “implement[ing] the Measuring Stakeholder Capitalism metrics” that the WEF has developed.<sup>66</sup> And in January 2020, Schwab made it abundantly clear that the WEF is working hard to ensure that ESG-based stakeholder capitalism is not optional for businesses. He stated that it must be “wholeheartedly embrace[d] and companies must subscribe to the responsibilities that come with it, by actively taking steps to meet social and environmental goals”—lest they face existential threat from employees, clients, and voters.<sup>67</sup>

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<sup>58</sup> *Id.* at 1.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.* at 6.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, World Economic Forum (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Klaus Schwab, Foreword to Richard Samans & Jane Nelson, Sustainable Enterprise Value Creation, at vii (2022), <https://link.springer.com/content/pdf/10.1007/978-3-030-93560-3.pdf>.

<sup>67</sup> Klaus Schwab, *Capitalism Must Reform to Survive: From Shareholders to Stakeholders*, Foreign Affairs (Jan. 16, 2020) <https://www.foreignaffairs.com/articles/2020-01-16/capitalism-must-reform-survive>.

**Global Financial Alliances.** Over the last few years, UN-initiated coalitions of private actors across the financial sector—investors, banks, and insurers—have pledged their fidelity to environmental goals. These goals primarily derive from two sources: (1) the UN’s 2015 Paris Agreement;<sup>68</sup> and (2) the UN’s 2020 Race to Zero Campaign. The Paris Agreement aims to address a “global response to the threat of climate change” by “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”<sup>69</sup> And the Race to Zero Campaign seeks support from businesses and institutional investors “committed to achieving net zero carbon emissions by 2050 at the latest.”<sup>70</sup>

Recently, a vast array of global financial alliances committed to the Paris Agreement and the Race to Zero have emerged. The year 2019 saw the launch of the UN-convened Net-Zero Asset Owner Alliance in partnership with PRI.<sup>71</sup> In April 2021, the UN started the Net-Zero Banking Alliance.<sup>72</sup> And in July 2021, the Net-Zero Insurance Alliance was born.<sup>73</sup>

One of the most influential of these global financial alliances is the Glasgow Financial Alliance for Net Zero (GFANZ), “a global coalition of leading financial institutions in the UN’s Race to Zero that is committed to accelerating and mainstreaming the decarbonization of the world economy and reaching net-zero emissions by 2050.”<sup>74</sup> GFANZ members are “financial firms” that commit to “align[]” their “financing activities with net zero” and “achieve the goals of the 2015 Paris Agreement.”<sup>75</sup> In GFANZ’s own words, the reason “why we formed” is to get “the entire financial system” to “make[] ambitious commitments” to “alter the planet’s

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<sup>68</sup> Both President Barak Obama in September 2016 and President Joseph Biden in January 2021 purported to accept the Paris Agreement on behalf of the United States. Paris Agreement, United Nations Treaty Collection, n.5, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=en#5](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en#5). But that treaty has never been approved by the Senate, and thus it is not binding on the United States. See U.S. Const. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, *provided two thirds of the Senators present concur*”) (emphasis added).

<sup>69</sup> Paris Agreement, art. 2, § 1(a), [https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch\\_XXVII-7-d.pdf](https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf).

<sup>70</sup> *Race to Zero Campaign*, United Nations Climate Change, <https://unfccc.int/climate-action/race-to-zero-campaign>.

<sup>71</sup> *291 signatories with USD 66 trillion in AUM*, The Net Zero Asset Managers Initiative, <https://www.netzeroassetmanagers.org/>.

<sup>72</sup> *History*, UN Environmental Program Finance Initiative, <https://www.unepfi.org/about/about-us/history/>.

<sup>73</sup> *Id.*

<sup>74</sup> *The Glasgow Financial Alliance for Net Zero*, GFANZ, 11 (Nov. 2021), <https://assets.bbhub.io/company/sites/63/2021/11/GFANZ-Progress-Report.pdf>.

<sup>75</sup> *Id.*



climate trajectory.”<sup>76</sup> These ambitious commitments include “restrict[ing] funding for fossil-fuel companies and end[ing] financing for new coal projects.”<sup>77</sup>

Climate Action 100+ is a similar “investor-led initiative to ensure the world’s largest corporate greenhouse gas emitters take necessary action on climate change.”<sup>78</sup> According to Climate Action 100+ investors, “this implies the need to move towards net-zero emissions by 2050 or sooner.”<sup>79</sup> “The investor signatories of Climate Action 100+ believe that engaging and working with the companies in which they invest, to secure . . . robust company emissions reduction strategies, is . . . essential” to achieve their environmental goals.<sup>80</sup> Climate Action 100+ commitments are not contingent upon the economics or finances of any given investment, business strategy, or transaction. The group’s purpose is to “driv[e] business transition,” not maximize financial return.<sup>81</sup>

### ***EFFORTS TO CIRCUMVENT OR CHANGE U.S. LEGAL STANDARDS***

Over the years, ESG proponents have sought to remove legal obstacles to ESG investing in the U.S. One of the biggest obstacles arises from the fiduciary duties that U.S. law imposes on investment firms. In particular, financial management companies owe a duty of loyalty to the people whose money they manage. Most U.S. jurisdictions impose what is known as the “sole interest” duty of loyalty. “[A] trustee has a duty to administer the trust solely in the interest of the beneficiaries.”<sup>82</sup> This requires the trustee, which includes money managers at large investment companies, “not to be influenced . . . by motives other than the accomplishment of the purposes of the trust.”<sup>83</sup> “Acting with mixed motives triggers an irrebuttable presumption of wrongdoing.”<sup>84</sup> “[I]t is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee.”<sup>85</sup> A mixed motive alone is sufficient to establish a violation.<sup>86</sup>

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<sup>76</sup> *Id.* at 6.

<sup>77</sup> David Benoit & Amrith Ramkumar, *Big Banks and U.N. Green Finance Group Clash in Alliance: Miscommunication, infighting hamper coalition meant to direct trillions of dollars into energy transition*, Wall Street Journal (Oct. 26, 2022), [https://www.wsj.com/articles/big-banks-and-u-n-green-finance-group-clash-in-alliance-11666783246?mod=Searchresults\\_pos2&page=1](https://www.wsj.com/articles/big-banks-and-u-n-green-finance-group-clash-in-alliance-11666783246?mod=Searchresults_pos2&page=1).

<sup>78</sup> *About*, Climate Action 100+, <https://www.climateaction100.org/about/>.

<sup>79</sup> *The Three Asks*, Climate Action 100+, <https://www.climateaction100.org/approach/the-three-asks/> (emphasis removed).

<sup>80</sup> *Id.*

<sup>81</sup> *Global Investors Driving Business Transition*, Climate Action 100+, 1 (Jul. 2022), [https://www.climateaction100.org/wp-content/uploads/2022/07/Climate-Action-100-March-2022-Benchmark-Sector-Analysis\\_July22.pdf](https://www.climateaction100.org/wp-content/uploads/2022/07/Climate-Action-100-March-2022-Benchmark-Sector-Analysis_July22.pdf).

<sup>82</sup> Restatement (Third) of Trusts § 78(1) (2007).

<sup>83</sup> *Id.* § 78(1) cmt. f.

<sup>84</sup> Schanzenbach & Sitkoff, *supra*, at 401.

<sup>85</sup> Restatement (Third) of Trusts § 78(1)–(2) cmt. b.

<sup>86</sup> *Id.*

The federal Employee Retirement Income Security Act (ERISA) adopts this same sole interest rule. It provides that fiduciaries of a private retirement trust must “discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries” and “for the exclusive purpose of: [1] providing benefits to participants and their beneficiaries; and [2] defraying reasonable expenses of administering the plan.”<sup>87</sup> Interpreting that statute, the U.S. Supreme Court has explained that “the term ‘benefits’ . . . must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust’s beneficiaries. The term does not cover nonpecuniary benefits.”<sup>88</sup> This sole interest duty poses an obvious threat to ESG investing because that investment strategy makes ESG goals key to investment decisions rather than focusing solely on investors’ financial gains.

Realizing the problems that the sole interest duty of loyalty presents, global ESG proponents have spent the last few decades trying to distort or change the law. In 2005, the UN commissioned a report to justify asset managers’ pursuing “*extra-financial* interests of savers in conjunction with their financial interests.”<sup>89</sup> “[T]he view that a fund must focus solely on maximising financial returns,” the report recognized, “has proven a significant impediment to the development of ESG investment practices.”<sup>90</sup> To avoid this, the report claimed that fiduciary duties are “flexible” and “open to re-interpretation over time,”<sup>91</sup> and that “[f]iduciary duties evolve over time according to changes in social norms and the values of society.”<sup>92</sup> Based on this view, the report announced that the “duty of loyalty” is not a “duty to maximise the return of individual investments.”<sup>93</sup> Instead, it merely requires that “[n]o investment should be made purely to give effect to the personal views of the decision-maker.”<sup>94</sup> It is also acceptable, the report concluded, for money managers to avoid investments “on the grounds that their ESG characteristics are likely to make them so repugnant to beneficiaries that they should not be invested in, *regardless of the financial return that they are expected to bring.*”<sup>95</sup> The report sought to paper over the fact that this understanding of fiduciary duty conflicts with prevailing U.S. law.

In 2015, the UN joined with PRI to address the fiduciary duty issue again. Their report, entitled *Fiduciary Duty in the 21st Century*, sought to “end the debate about whether fiduciary duty is a legitimate barrier to investors integrating [ESG]

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<sup>87</sup> 29 U.S.C. § 1104(a)(1)(A).

<sup>88</sup> *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) (cleaned up).

<sup>89</sup> 2005 Freshfields Report, *supra*, at 3 (emphasis added).

<sup>90</sup> *Id.* at 27.

<sup>91</sup> *Id.* at 7.

<sup>92</sup> *Id.* at 9.

<sup>93</sup> *Id.* at 8.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 12 (emphasis added).

issues into their investment processes.”<sup>96</sup> The report noted that “[d]espite the conclusions of the [2005] report, many investors continue to point to their fiduciary duties and to the need to deliver financial returns to their beneficiaries as reasons why they cannot do more” on ESG investing.<sup>97</sup> The 2015 report recognized the need to counter “[o]utdated perceptions about fiduciary duty and responsible investment” and “to modernize definitions and interpretations of fiduciary duty.”<sup>98</sup> It thus advanced a “concept of fiduciary duty [that] is organic” and “continue[s] to evolve as society changes.”<sup>99</sup> Under that malleable view, which paid little attention to U.S. law, the report went beyond concluding that the relevant fiduciary duties permit investment managers to consider ESG factors and affirmatively declared that “[f]ailing to consider . . . [ESG] issues[] in investment practice is a failure of fiduciary duty.”<sup>100</sup> This report, like its 2005 predecessor, did not show how this pronouncement was consistent with U.S. law.

Most recently, in 2021, those same UN organizations published another report entitled *A Legal Framework for Impact*. The report recognized that “laws and the way they have been understood have reflected” the view that investments are fundamentally “an exercise in generating financial return.”<sup>101</sup> Indeed, “applicable legal duties have generally been interpreted to require financial investment objectives to be prioritised.”<sup>102</sup> But according to the report, investment managers can no longer “approach the goal of earning a financial return in isolation from other valued goals” like ESG.<sup>103</sup> To ensure that investment firms can prioritize ESG, the report suggested that policymakers “chang[e] investors’ legal duties and discretions and how they are understood in ways that facilitate” ESG investing.<sup>104</sup> The report specifically suggested (1) legal “guidance making clear that in discharging existing duties . . . pursuing sustainability impact goals is an option,” (2) laws extending investment managers’ “discretions . . . to pursue sustainability goals that reflect . . . assumed beneficiary preferences . . . or objectives set by government,”<sup>105</sup> and (3) “a regulatory presumption that each investor . . . wish[es] their money to be managed in ways that achieve certain sustainability goals.”<sup>106</sup> Not stopping there, the report goes so far as to suggest the enactment of laws that actually “*requir[e]* investors to pursue” “especially pressing sustainability goals.”<sup>107</sup> No doubt realizing that existing law does not favor ESG, the report openly proffers these kinds of radical reforms.

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<sup>96</sup> UNEP Finance Initiative, et al., *Fiduciary Duty in the 21st Century*, 9 (2015), <https://www.unpri.org/download?ac=1378>.

<sup>97</sup> *Id.* at 11.

<sup>98</sup> *Id.* at 9.

<sup>99</sup> *Id.* at 13.

<sup>100</sup> *Id.* at 9.

<sup>101</sup> 2021 Freshfields Report, *supra*, at 7.

<sup>102</sup> *Id.* at 14.

<sup>103</sup> *Id.* at 7.

<sup>104</sup> *Id.* at 10.

<sup>105</sup> *Id.* at 17.

<sup>106</sup> *Id.* at 19.

<sup>107</sup> *Id.* at 17 (emphasis added).

## *RECENT FEDERAL PROPOSALS AND CHANGES*

On January 20, 2021, President Biden’s first day in office, he issued Executive Order 13990 entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”<sup>108</sup> In it, the President directed all federal agencies to “immediately commence work to confront the climate crisis . . . with action on a scale and at a speed commensurate with the need to avoid setting the world on a dangerous, potentially catastrophic, climate trajectory.”<sup>109</sup> The President’s “Government-wide approach to combat[ing] the climate crisis” runs through the National Climate Task Force led by Senior Advisor for Clean Energy Innovation and Implementation, John Podesta.<sup>110</sup> Not only has the President directed each federal agency to appoint its own “Agency Chief Sustainability Officer,”<sup>111</sup> but also he has established “a Presidential Sustainability Executives Program to place senior leaders from the private and non-profit sectors into term-limited appointments” to address climate issues.<sup>112</sup> Key to achieving these climate policy goals is “promoting the flow of capital” toward investments aligned with “the objectives of the Paris Agreement” and “away from high-carbon investments” in U.S. and foreign markets.<sup>113</sup> In sum, the President is, in his administration’s own words, pushing his climate agenda in “every corner of our Nation, every level of government, and every sector of our economy.”<sup>114</sup>

Many of the Biden Administration’s actions to regulate the environment—from regulatory actions to the Inflation Reduction Act—have come from the UN’s and PRI’s playbook. For example, PRI recommended that “the Department of Labor use existing authority to quickly establish that ERISA fiduciaries must consider material ESG factors.”<sup>115</sup> So on October 14, 2021, the Department proposed such a rule announcing that ERISA fiduciaries “can make investment decisions that reflect climate change and other environmental, social, or governance (‘ESG’) considerations, including climate-related financial risk, and choose economically targeted investments (‘ETIs’) *selected, in part, for benefits apart from the investment return.*”<sup>116</sup> More recently, in November 2022, the Department issued the final version of that rule announcing that

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<sup>108</sup> Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

<sup>109</sup> *Id.* at 7,041.

<sup>110</sup> Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619, 7,623 (Jan. 27, 2021).

<sup>111</sup> Executive Order 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70,935, 70,939 (Dec. 8, 2021).

<sup>112</sup> *Id.* at 70,939.

<sup>113</sup> 86 Fed. Reg. at 7,619–20.

<sup>114</sup> *Id.* at 7,622.

<sup>115</sup> *PRI 2021 U.S. Policy Priorities*, Principles for Responsible Investment, 1, <https://www.unpri.org/download?ac=14797> (“PRI 2021 U.S. Policy Priorities”).

<sup>116</sup> Prudence and Loyalty in Selecting Plan Investment and Exercising Shareholder Rights, 86 Fed. Reg. 57,272, 57,272 (Oct. 14, 2021) (emphasis added).

under ERISA “fiduciaries may consider climate change and other [ESG] factors when they make investment decisions and when they exercise shareholder rights[.]”<sup>117</sup>

PRI similarly called for the Securities and Exchange Commission (SEC) to “begin developing standardized ESG disclosure requirements” and “update fiduciary duties affirming ESG considerations as material.”<sup>118</sup> In response, on April 11, 2022, the SEC proposed a rule requiring all corporations registered with the SEC to disclose ESG information (including greenhouse gas emissions).<sup>119</sup> SEC Commissioner Hester Pierce cautioned that this proposed rule would “turn the [SEC’s] disclosure regime on its head” by “forc[ing] investors to view companies through the eyes of a vocal set of [non-investor] stakeholders.”<sup>120</sup> By shifting “the focus to metrics that matter to stakeholders,” these ESG disclosure mandates “dilute executives’ and managers’ accountability to shareholders for financial performance.”<sup>121</sup> Subsequently, on June 17, 2022, SEC published another proposed rule to increase ESG disclosures from investment managers by requiring them “to collect census-type information about funds’ and advisers’ uses of ESG factors.”<sup>122</sup>

PRI also advocated that the Treasury Department coordinate with the Office of the Comptroller of the Currency (OCC) “to create . . . metrics to weight climate-based risk to banks . . . and measure climate exposure across the financial system.”<sup>123</sup> The OCC responded on December 16, 2021, by issuing guidance that “identified the effects of climate change and the transition to a low carbon economy as presenting emerging risk to banks and the financial system.”<sup>124</sup> The OCC instructed banks to “consider climate-related financial risks as part of the . . . ongoing monitoring of portfolios,” likely causing credit-rate increases to businesses considered to pose climate risks.<sup>125</sup>

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<sup>117</sup> *Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, U.S. Department of Labor (Nov. 22, 2022), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>.

<sup>118</sup> *PRI 2021 U.S. Policy Priorities*, *supra*, at 1.

<sup>119</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

<sup>120</sup> Hester M. Pierce, *We Are Not the Securities and Environment Commission—At Least Not Yet*, U.S. Securities and Exchange Commission (Mar. 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

<sup>121</sup> Hester M. Pierce, *Chocolate-Covered Cicadas*, U.S. Securities and Exchange Commission (July 20, 2021), <https://www.sec.gov/news/speech/peirce-chocolate-covered-cicadas-072021>.

<sup>122</sup> Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654, 36,692 (June 17, 2022).

<sup>123</sup> *PRI 2021 U.S. Policy Priorities*, *supra*, at 2.

<sup>124</sup> *Principles for Climate-Related Financial Risk Management for Large Banks*, Office of the Comptroller of the Currency, 1, <https://www.occ.treas.gov/news-issuances/news-releases/2021/nr-occ-2021-138a.pdf>.

<sup>125</sup> *Id.* at 4.



On August 7, 2022, Vice President Kamala Harris cast the tie-breaking vote in the Senate to pass the Inflation Reduction Act of 2022, hailed by the Biden Administration as “the single largest and most ambitious investment in the ability of the United States to advance clean energy” and “confront the climate crisis . . . by reducing harmful greenhouse gas emissions.”<sup>126</sup> According to the head of U.S. Policy at PRI, “passage of the [Inflation Reduction Act] signifies that we have crossed a major hurdle and can now come together to support additional climate action that ensures a just, inclusive and orderly transition to net zero.”<sup>127</sup> The Act’s impact on emissions reduction is uncertain. The Bipartisan Policy Institute estimates that emissions will fall between 24 and 35 percent under current policy and that it might decline between 31 and 44 percent under the Act.<sup>128</sup>

### *THE FLAWS OF ESG*

ESG is long on promises—saving the environment, achieving justice, identifying investment risks, increasing investment returns—but short on delivery. Running throughout the ESG enterprise are systemic flaws: ESG lacks consistent metrics and ratings; its factors are often in conflict; its proponents do not practice what they preach; and it fails to deliver increased financial returns to investors.

***Lack of Consistent Metrics and Ratings.*** “ESG ratings vary markedly by ESG ratings provider.”<sup>129</sup> Rating companies differ “in which indicators are included in the ratings, in the weights given to each of those indicators, and in how they are measured.”<sup>130</sup> “The differences in how ratings providers calculate ESG scores can result in the same company being ranked quite highly by one provider and quite

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<sup>126</sup> Executive Order 14082, Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022, 87 Fed. Reg. 56,861 (Sep. 12, 2022). The House of Representatives subsequently passed the Inflation Reduction Act on August 12, 2022, without a single Republican vote, and the President signed the Act into law on August 16, 2022. H.R. 5376, 117th Cong. (2021–22).

<sup>127</sup> Gregory Hershman, Head of U.S. Policy at PRI, Comments on the Passage of the U.S. Inflation Reduction Act through the Senate (Aug. 8, 2022), <https://www.unpri.org/news-and-press/pri-commentary/9321.article>.

<sup>128</sup> *Inflation Reduction Act (IRA) Summary: Energy and Climate Provisions*, Bipartisan Policy Center (Aug. 4, 2022), <https://bipartisanpolicy.org/blog/inflation-reduction-act-summary-energy-climate-provisions/>.

<sup>129</sup> Feifei Li & Ari Polychronopoulos, *What a Difference an ESG Ratings Provider Makes!*, Research Affiliates (Jan. 2020), <https://www.researchaffiliates.com/publications/articles/what-a-difference-an-esg-ratings-provider-makes>; see also Florian Berg, et al., *Aggregate Confusion: The Divergence of ESG Ratings*, 2 (Apr. 15, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3438533](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533) (“Berg, *Aggregate Confusion*”) (“ESG ratings from different providers disagree substantially”).

<sup>130</sup> Florian Berg, *Why Do ESG Ratings Vary So Widely—and How Can Investors Make Sense of Them?*, Wall Street Journal (Nov. 2, 2022), <https://www.wsj.com/articles/esg-ratings-investing-data-raters-11667229384> (“Berg, *Why Do ESG Ratings Vary So Widely*”); see also Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good*, 3 (Mar. 20, 2020) (“[R]ating organizations differ not only in how to measure the various ESG criteria, but also with respect to what criteria are deemed worthy of measurement.”).

poorly by another.”<sup>131</sup> Considering that the broad concepts of “environmental,” “social,” and “governance” are so amorphous—and depend on “subjective judgments”<sup>132</sup> and “all sorts of human biases”<sup>133</sup>—it is no wonder ESG ratings are vastly inconsistent. The lack of clear metrics “makes it difficult to evaluate the ESG performance of companies, funds, and portfolios.”<sup>134</sup>

A few examples illustrate the point. Amazon often earns “high ESG ratings because [it is a] predictably low producer[] of greenhouse gas emissions,” but it achieves those favorable marks only because raters either ignore or downplay the company’s “deplorable labor practices” and “predatory pricing.”<sup>135</sup> Similarly, Facebook is typically rated high in ESG circles even though its product has “been tied to an increase in mental health issues in young people” and its monopolistic business model “threaten[s] the existence of a well-functioning free-market system.”<sup>136</sup> The failure to account for the full picture surrounding these companies shows that the ESG rating system is deeply flawed.

Some might argue that the proposed SEC rule mandating certain ESG disclosures will solve the inconsistency in ESG ratings. This is not true. While mandating certain disclosures might help bridge an information gap, it will not achieve ratings consistency. As discussed above, inconsistent ratings result from a difference in the factors considered, the weight given to each factor, and the way that each factor is measured.<sup>137</sup> These inconsistencies will persist even if disclosures are compelled. The problem lies not in the lack of information but in the ambiguity and subjectivity that pervades the entire ESG enterprise.

***Conflict between ESG Factors.*** Conflicts inevitably arise between the “E,” the “S,” and the “G.”<sup>138</sup> For example, the typical ESG environmental position supports investment in solar energy, but the solar industry relies heavily on critical components made through slave labor in China, and the funding of slave labor is diametrically opposed to the social goals of ESG.<sup>139</sup> Consider also the tension between the environmental push for electric cars and the fact that cobalt needed to

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<sup>131</sup> Li & Polychronopoulos, *supra*.

<sup>132</sup> *Id.*

<sup>133</sup> Berg, *Why Do ESG Ratings Vary So Widely*, *supra*.

<sup>134</sup> Berg, *Aggregate Confusion*, *supra*, at 2.

<sup>135</sup> Hans Taparia, *The World May Be Better Off Without ESG Investing*, Stanford Social Innovation Review (Jul. 14, 2021), [https://ssir.org/articles/entry/the\\_world\\_may\\_be\\_better\\_off\\_without\\_esg\\_investing](https://ssir.org/articles/entry/the_world_may_be_better_off_without_esg_investing).

<sup>136</sup> *Id.*

<sup>137</sup> See Berg, *Why Do ESG Ratings Vary So Widely*, *supra*.

<sup>138</sup> Andrea Webster, et al., *The Elephant in the Room: The ESG Contradiction*, CFA Institute (Jan. 28, 2022), <https://blogs.cfainstitute.org/investor/2022/01/28/the-elephant-in-the-room-the-esg-contradiction/>.

<sup>139</sup> William Alan Reinsch, *A Dark Spot for the Solar Energy Industry: Forced Labor in Xinjiang*, Center for Strategi and International Studies (Apr. 19, 2021), <https://www.csis.org/analysis/dark-spot-solar-energy-industry-forced-labor-xinjiang>.

manufacture those cars is mined from the poorest countries through forced child labor.<sup>140</sup> More generally, many ESG environmental goals are exorbitantly expensive, and incurring those costs necessitate lower wages and fewer jobs; in this way, “[t]he ‘E’ comes at the expense of the ‘S.’”<sup>141</sup> The internal conflicts and contradictions are enough to make ESG proponents’ heads spin.

When these internal conflicts arise, someone must make a judgment call. Is it worse to bypass solar investment or to fund slave labor? The ardent environmentalist might justify slavery, while the humanitarian might pass on solar. No objective metric resolves these disputes. In the end, each investor and each corporation must answer these important moral questions for themselves. ESG cannot.

***Inconsistent and Hypocritical Conduct.*** A cloud of suspicion hangs over the entire ESG enterprise because its largest proponents fail to consistently practice their professed principles. For instance, BlackRock has committed to the Ten Principles of the UN Global Compact,<sup>142</sup> which require businesses to “make sure that they are not complicit in human rights abuses.”<sup>143</sup> But in December 2021, BlackRock was granted special operating status by the Chinese Communist Party (CCP), and that has allowed it to market funds invested in Chinese companies, many of which have been flagged for human-rights violations.<sup>144</sup> But if all ESG principles matter, it makes no sense for BlackRock to connect itself to the CCP and its past and present human-rights violations.

Another major ESG proponent, Goldman Sachs, provides an additional example of corporate hypocrisy. In January 2020, its CEO David Solomon announced to the WEF that Goldman will no longer “take a company public unless there’s at least one diverse board candidate, with a focus on women.”<sup>145</sup> Yet showing its lack of vigilance on anti-corruption efforts—a supposed staple of ESG governance—later that year Goldman agreed to pay over \$6 billion to various governments to settle claims that the company gave money to “government officials for help in getting or

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<sup>140</sup> Vivienne Walt, *Blood, Sweat, and Batteries*, *Fortune* (Aug. 23, 2018), <https://fortune.com/longform/blood-sweat-and-batteries/>.

<sup>141</sup> Webster, *supra*.

<sup>142</sup> *2021 Sustainability Disclosure*, BlackRock, 4, <https://www.blackrock.com/corporate/literature/continuous-disclosure-and-important-information/blackrock-2021-sasb-disclosure.pdf>.

<sup>143</sup> *The Ten Principles of the UN Global Compact*, United Nations Global Compact, <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

<sup>144</sup> See Letter from Coalition for a Prosperous America to Laurence Fink, Chairman and Chief Executive Officer of BlackRock, Dec. 15, 2021, <https://prosperousamerica.org/wp-content/uploads/2021/12/211215-ltr-BlackRock.pdf> (listing various BlackRock-marketed funds “holding the securities of eight [Chinese] companies that have been placed on the U.S. Department of Commerce’s Entity List for egregious human rights abuses”).

<sup>145</sup> Hugh Son, *Goldman Won’t Take Companies Public without ‘at Least One Diverse Board Candidate,’ CEO Says*, *CNBC* (Jan. 23, 2020), <https://www.cnbc.com/2020/01/23/goldman-wont-take-companies-public-that-dont-have-at-least-one-diverse-board-candidate-ceo-says.html>.

keeping business.”<sup>146</sup> It thus seems that the largest ESG players pursue ESG’s purported goals only when it is convenient to them. This suggests that ESG functions more as a tool to assert control over others rather than a set of principles to be faithfully followed.

***Principal-Agent Problems.*** ESG activism is rife with misaligned incentives between principals and their agents. Start with investors and their asset managers.<sup>147</sup> Asset managers generate revenue by charging management fees, and ESG products enable asset managers to charge higher fees, as illustrated by the fact that Blackrock charges five times more for its ESG version of the S&P 500 than its standard S&P 500 fund.<sup>148</sup> Anything that popularizes ESG encourages investors to purchase asset managers’ more profitable products.

Concocting a financial rationale for ESG also allows asset managers to invest funds for both ideological investors and financially focused investors. Blackrock states that \$3.3 trillion of its assets come from clients who have “net zero commitments as their own investment objective.”<sup>149</sup> One of these clients is the New York City Comptroller. As discussed below, that client demands that Blackrock implement ESG engagement practices across all its assets. The only way an asset manager can comply with this demand without losing its financially focused clients is by constructing a financial rationale for ESG. Otherwise, Blackrock will lose either its net-zero clients or its financially focused clients to a competitor who services one or the other.

Similarly, corporate officers and directors subject to ESG activism face misaligned incentives. They endure constant demands from large asset managers, united through initiatives like Climate Action 100+, to act in ways that may not benefit the company or increase profits for investors. If they fail to act, such directors might be voted out. So this provides a powerful incentive for corporate officers and directors to cloak ESG practices in a financial rationale, even if the evidence is thin, which it is, as discussed in the following section.

To be sure, agency relationships are often vulnerable to conflicts. But the subjectivity inherent in ESG determinations—particularly when combined with the

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<sup>146</sup> Rozanna Latiff, *Understanding Goldman Sachs’ Role in Malaysia’s 1MDB Mega Scandal*, Reuters (Oct. 22, 2020), <https://www.reuters.com/article/us-goldman-sachs-1mdb-settlement-explain/understanding-goldman-sachs-role-in-malaysias-1mdb-mega-scandal-idUSKBN2772HC>.

<sup>147</sup> See Henrike Schneider, *Scenarios for Investment Managers’ Exploitation of ESG*, Geopolitical Intelligence Services (Apr. 20, 2020), <https://www.gisreportsonline.com/r/esg/>; Marianne Westerholm, *The Interplay between ESG Risk and Financial Performance* (2022), [https://helda.helsinki.fi/dhanken/bitstream/handle/10227/486177/Westerholm\\_Marianne.pdf?sequence=1](https://helda.helsinki.fi/dhanken/bitstream/handle/10227/486177/Westerholm_Marianne.pdf?sequence=1).

<sup>148</sup> *How BlackRock Made ESG the Hottest Ticket on Wall Street*, Investment News (Dec. 31, 2021), <https://www.investmentnews.com/how-blackrock-made-esg-the-hottest-ticket-on-wall-street-215383>.

<sup>149</sup> *BlackRock Supports Consistent Climate-Related Disclosures; Urges Global Coordination*, BlackRock (Jun. 2022), <https://www.blackrock.com/corporate/literature/whitepaper/spotlight-blk-supports-consistent-climate-related-disclosures-urges-global-coordination-june-2022.pdf>.

corporate group think surrounding the whole enterprise—seems to raise conflicts at every turn.

***No Consistent Profit for Investors.*** A mantra of ESG proponents is that ESG-integrated investing can produce “better risk-adjusted returns for investors over the long-term.”<sup>150</sup> Yet scholars who rigorously analyzed that question in 2020 reached a different conclusion. Focusing on the outcomes for investors, these scholars found “the results to be inconclusive on . . . whether higher ESG ratings are associated with greater risk-adjusted returns.”<sup>151</sup> Put differently, “the evidence that markets reward companies for being ‘good’” in the ESG sense “is weak to non-existent.”<sup>152</sup> In fact, they observed that once the market factors in ESG, “the expected returns” of “high ESG stocks” “will be less.”<sup>153</sup> It appears that ESG proponents’ efforts might actually be counterproductive because “if a subset of investors and companies play by ESG rules, investors in bad [ESG] companies will earn higher returns than investors in good [ESG] companies and bad companies will gain market share at the expense of good companies.”<sup>154</sup>

Real-world examples show that one of the most extreme ESG investing strategies—a negative screen,<sup>155</sup> which means divesting from industries that do not fit the ESG mold—is bad for investors. Most prominent is the California Public Employees’ Retirement System’s (CalPERS) 2001 decision to divest from the tobacco industry.<sup>156</sup> A 2018 report concluded that CalPERS lost over \$3.5 billion in investment gains over a 17-year period by refusing to invest in that industry.<sup>157</sup> Similarly massive losses will likely follow investment managers who divest from profitable but ESG-disfavored industries such as oil, gas, and coal. To illustrate, coal prices have soared recently,<sup>158</sup> which means investment managers who divested from coal companies have likely experienced losses or at least underperformed managers who did not divest for political reasons. While individual investors can make these value decisions for themselves, institutional investors must put their clients’ financial interests ahead of these sorts of ESG considerations.

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<sup>150</sup> *ESG Integration*, BlackRock, <https://www.blackrock.com/institutions/en-us/solutions/sustainable-investing/esg-integration>.

<sup>151</sup> Cornell & Damodaran, *supra*, at 2.

<sup>152</sup> *Id.* at 19.

<sup>153</sup> *Id.* at 13.

<sup>154</sup> *Id.* at 21.

<sup>155</sup> See Suzanne McGee, *ESG Investors Face a Choice: Do You Use a Positive or Negative Screen*, Wall Street Journal (Nov. 1, 2022), <https://www.wsj.com/articles/esg-investing-companies-screening-11667226822> (acknowledging that many ESG investors “still rely on negative screens”).

<sup>156</sup> *CalPERS Decision to Divest from Tobacco Is Costly*, Chief Investment Officer (Dec. 12, 2018), <https://www.ai-cio.com/news/calpers-decision-divest-tobacco-costly/>.

<sup>157</sup> *Id.*

<sup>158</sup> Su-Lin Tan, *‘Dirty Ol’ Coal’ is Making a Comeback and Consumption is Expected to Return to 2013’s Record Levels*, CNBC (Aug. 1, 2022), <https://www.cnbc.com/2022/08/02/coal-consumption-is-expected-to-return-to-2013s-record-levels-ia.html>.



## *THE SOCIETAL DANGERS OF ESG*

While the asserted goals of the ESG movement might appear admirable on the surface, the ESG regime supplants free markets and individual choice by centralizing power in a small group of global financial elites.

**Centralizing power.** U.S. law and social order is built on the decentralization of power.<sup>159</sup> Governmental authority is vertically split between federal and state, and it is horizontally divided among executive, legislative, and judicial branches.<sup>160</sup> Power in the marketplace, thanks to antitrust laws, is similarly designed to be dispersed among corporate actors.<sup>161</sup> Decentralizing authority in these ways is essential to preserving freedom because it prevents the few from imposing their rules, goals, and values on everyone else.<sup>162</sup> ESG sacrifices this hallmark of our social order by concentrating power in a small group of elites running global financial firms.<sup>163</sup> In an ESG world, those organizations dictate the goals falling under the broad rubric of ESG. And they impose those goals by leveraging their market power to demand that all corporations act accordingly.

ESG also inhibits our public debate. Debates about social issues belong in the public square, but ESG shifts them to the offices of global financial firms. What those firms say about social issues—important topics ranging from energy production to abortion—establish a litmus test for others to follow. As ESG continues its ascendancy, formative social issues once addressed by local governments and civic institutions will be settled by global elites and imposed on the world through the immense financial power they wield. And when those global financial firms assert their market power to settle important social issues, they effectively prevent the

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<sup>159</sup> See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020) (explaining that the Framers of the U.S. Constitution identified a simple “solution to governmental power and its perils . . . : divide it”).

<sup>160</sup> See *id.* (“At the highest level, [the Framers] split the atom of sovereignty itself into one Federal Government and the States. They then divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.”) (cleaned up).

<sup>161</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”).

<sup>162</sup> See *Seila Law*, 140 S. Ct. at 2202 (“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”).

<sup>163</sup> Marlo Oaks, *Why I Oppose ESG: Use Politics, Free Markets to Decide Policy, Not Coercion*, Fox Business (Aug. 22, 2022), <https://www.foxbusiness.com/energy/oppose-esg-politics-free-markets-not-coercion> (“Our country was founded on the concept of plurality to prevent a consolidation of power. Our constitutional form of government separates power into equal branches with checks and balances. The markets represent one of our most pluralistic institutions, comprised of many parties with diverse views about the future. Markets only operate when differing views are allowed. ESG moves the market to one view that is generally subjective and political.”).

average citizen from having a voice. It is concerning to give such a small group “the right to evaluate such policies on behalf of” everyone else.<sup>164</sup>

***Subverting Democracy.*** Americans have historically settled the most pressing issues of the day through the democratic process. Democratically elected officeholders, rather than financial moguls in Davos, should lead the debate about the social values of Americans. Investment firms are not well suited to resolve the most important questions that ESG seeks to address, such as whether reducing carbon emissions in the U.S. is justified geopolitically if it means greater reliance on products from China or lower standards of living imposed by higher energy prices. Those issues should be decided by the people directly or through their elected legislators. Global financial leaders should not take on governmental functions because they are “untrained” to do so and it is not “their enterprise.”<sup>165</sup> Allowing them to do it ultimately “subverts the basis of a liberal democracy.”<sup>166</sup>

To be sure, Congress recently addressed some environmental issues through the Inflation Reduction Act, and no matter the wisdom of that law’s policy choices, it is legitimate for the people’s representatives to address those issues through the democratic process.<sup>167</sup> That is the way Americans should resolve the important policy questions that divide us.

But the Biden Administration’s regulatory actions are a different story altogether. Those efforts—including the SEC’s proposals to mandate ESG disclosures and the Department of Labor’s attempt to redefine the fiduciary duty imposed by ERISA—are improper agency actions that greatly exceed the authority Congress gave them.<sup>168</sup> Similarly, it is illegitimate for ESG proponents to continue their course of using global investment firms to impose their values through ESG decrees. If an environmental or social issue is worth settling, the people should speak through their elected representatives.

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<sup>164</sup> Cornell & Damodaran, *supra*, at 21.

<sup>165</sup> Stephen M. Bainbridge, *Don’t Compound the Caremark Mistake by Extending It to Esg Oversight*, 77 Bus. Law. 651, 676 (2022).

<sup>166</sup> *Id.*

<sup>167</sup> It is telling that Congress chose to pursue its preferred environmental goals through subsidies rather than restrictions and mandates. Unlike ESG financial alliances like GFANZ, which prohibit companies from engaging in certain activities like funding coal mining, Congress’s approach was all carrot and no stick. Perhaps this was because Congress realized that pursuing environmental goals such as having all power generated by “renewables” would so immiserate the country that they would not be politically viable.

<sup>168</sup> See Letter from Patrick Morrissey, West Virginia Attorney General, and 15 Other State Attorneys General to Gary Gensler, Chairman, SEC (June 14, 2021), <https://perma.cc/ME49-9P6H>; Comment Letter from Patrick Morrissey, West Virginia Attorney General, Mark Brnovich, Arizona Attorney General and 22 Other State Attorneys General to Vanessa Countryman, Secretary, SEC (June 15, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131409-301574.pdf>.

***Eroding Faith in Markets.*** The ESG movement also has the pernicious effect of undercutting people’s faith in the free market. ESG subjects normally independent market decisions to a form of central planning that results from market concentration. Under normal circumstances, if ExxonMobil chose to transform itself from an oil and gas company to a renewable energy company, market forces would compel Chevron or some other major oil company to expand production to capture the market share abandoned by Exxon. But since Exxon and Chevron (and nearly every other major oil and gas company that is publicly traded) have the same need to access capital markets that are dominated by ESG proponents, both are under the same pressure to move away from oil and gas production despite increasing demand from the public for cheap, reliable energy. As energy prices inexorably rise (which is the point of divesting from fossil-fuel companies),<sup>169</sup> the general public will increasingly see this as a failure of the free-market system, rather than the concerted effort of a small group of actors imposing the costs of their environmental program on society at large.

***Undermining Freedom and Detracting from Business.*** The ESG movement also threatens freedom in the marketplace and beyond. Under ESG, investment firms pressure corporations to take positions on certain social or environmental topics, and that, in turn, commits those corporations to positions on controversial issues. The result is that those businesses often become hostile places for employees with different views. This is distressing because employees’ political and religious views should not dictate their standing in corporate America. Yet ESG’s insistence on injecting divisive public-policy issues into the corporate world makes those views relevant.

This problem has arisen within The Walt Disney Corporation. Earlier this year, a group of Disney employees announced that the company has become “an increasingly uncomfortable place to work for those of us whose political and religious views are not explicitly progressive.”<sup>170</sup> According to those employees, Disney “has fostered an environment of fear that any employee who does not toe the line will be exposed and dismissed.”<sup>171</sup>

Practically speaking, this means that jobs at some corporations will be walled off to people with certain views. And it means that employees will not be free to speak their views on some topics for fear of professional retaliation. This restricting of jobs and silencing of speech undermines freedom.

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<sup>169</sup> See Russ Greene, *De-ESG or Keep Paying the ESG Tax*, National Review (Sep. 22, 2022), <https://www.nationalreview.com/2022/09/de-esg-or-keep-paying-the-esg-tax/>.

<sup>170</sup> Tyler O’Neil, *Disney’s Left-Wing Activism Creates ‘Environment of Fear’ that is “Damaging Morale,” Some Workers Say*, Fox Business (Mar. 25, 2022), <https://www.foxbusiness.com/politics/disney-left-wing-activism-environment-fear-workers>.

<sup>171</sup> *Id.*

The effect stretches beyond employees to business owners and corporate leaders. In an ESG world, it is largely unacceptable for companies to remain apolitical and focus on making great products or providing excellent services for their customers. Businesses are pressured to take positions on divisive issues and risk alienating part of their customer base. But corporate leaders should not be pressured into all this politicking. They should be left to focus on generating the products and services that provide benefits to their customers and create wealth for their shareholders.

### ***ESG CONCERNS FACING GOVERNMENT OFFICIALS IN NEBRASKA***

It is important for government officials who establish the law and enforce public policy in Nebraska—including legislators and state agency directors—to learn about this topic because it raises many legal concerns. Three are addressed in this report. First, ESG investing presents legal issues for fiduciaries responsible for investing other people’s money. Second, concerted ESG-based collusion and coercion against disfavored businesses raises serious legal questions under federal and state antitrust laws. Third, ESG threatens to change the workplace in ways that might cause employers to violate federal and state employment laws. We address these concerns below.

***Investment Managers’ Fiduciary Duties.*** The sole interest duty of loyalty discussed above is reflected throughout Nebraska law. Most broadly, it is part of the general duty of loyalty placed on all trustees in Nebraska. They must “administer the trust *solely* in the interests of the beneficiaries.”<sup>172</sup>

Likewise, the Nebraska Investment Council—which oversees the investment activity of more than \$23 billion in state funds, including “the assets of the retirement systems administered by the Public Employees Retirement Board”<sup>173</sup>—shares that same stringent duty of loyalty. The Investment Council’s voting members must “discharge their duties with respect to the assets of the retirement systems . . . *solely* in the interests of the members and beneficiaries of the retirement systems . . . for the *exclusive* purposes of [1] providing benefits to members” and “members’ beneficiaries” and “[2] defraying reasonable expenses incurred within the limitations and according to the powers, duties, and purposes prescribed by law.”<sup>174</sup> The Investment Council has observed that the benefits it seeks are financial in nature, identifying its “mission” as “deliver[ing] investment management services to provide direct financial benefit exclusively to the owners of the[] funds” entrusted to the Council.<sup>175</sup> The sole

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<sup>172</sup> Neb. Rev. Stat. § 30-3867(a) (emphasis added).

<sup>173</sup> Neb. Rev. Stat. § 72-1239.01(1)(a).

<sup>174</sup> Neb. Rev. Stat. § 72-1239.01(1)(b) (emphasis added); *accord* Neb. Rev. Stat. § 72-1277(2) (requiring these individuals “to discharge their duties with respect to such assets solely in the best interest of the members and beneficiaries of such plans”).

<sup>175</sup> *About Us*, Nebraska Investment Council, <https://nic.nebraska.gov/about-us>.

interest language that applies to the Investment Council, which the legislature enacted in 1996,<sup>176</sup> mirrors the nearly identical text adopted in 1974 in the federal ERISA, as discussed above.

ESG investing is generally in tension with the sole interest duty of loyalty, as multiple States' Attorneys General have already concluded.<sup>177</sup> Investment managers who make ESG considerations central to their decision-making process are often acting with a mixed motive because they are seeking the achievement of both ESG goals and financial gains. The sole interest duty of loyalty demands more of financial professionals managing other people's money.

The duty of loyalty concerns become clearer when one of two additional factors is present. First, investment companies that have announced corporate engagement priorities with no link to company performance—such as the goal of achieving gender diversity on corporate boards—are highly suspect.<sup>178</sup> Indeed, it is difficult to see how investment managers who incur costs pursuing causes unconnected to investment performance are acting solely in their clients' financial interests.

Second, investment firms that have joined the global financial alliances discussed above—which have pledged themselves to certain environmental goals—have openly proclaimed their allegiance to causes other than their clients' financial welfare. Having so publicly professed their commitment to these issues, competing assurances to place clients' financial interests above all else ring hollow. To put it

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<sup>176</sup> See 1996 Neb. Laws L.B. 847 § 21.

<sup>177</sup> *E.g.*, Indiana Att'y Gen. Op. 2022-3 (Sep. 1, 2022) (concluding that “Indiana law prohibit[s] the Indiana Public Retirement System . . . from choosing investments or investment strategies based on ESG considerations”); Kentucky Att'y Gen. Op. 22-05 (May 26, 2022) (concluding that “[s]takeholder capitalism’ and ‘environmental, social, and governance’ investment practices, which introduce mixed motivations to investment decisions, are inconsistent with Kentucky law governing fiduciary duties owed by investment management firms to Kentucky’s public pension plans”); see also Letter from Jeff Landry, Louisiana Attorney General, to John M. Schroder, Louisiana Treasurer (Aug. 30, 2022) (concluding that “where investment firms . . . utilize ESG without full disclosure, they are likely in violation of a Louisiana registered investment advisor’s fiduciary duties owed to investor-clients”).

<sup>178</sup> See BlackRock Investment Stewardship, Pursuing Long-Term Value for our Clients, 24, <https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf> (“In the Americas region, insufficient board gender diversity was the top reason for [BlackRock] voting against a director.”); Kim Elssesser, *Goldman Sachs Won’t Take Companies Public If They Have All-Male Corporate Boards*, Forbes (Jan. 23, 2020), <https://www.forbes.com/sites/kimelssesser/2020/01/23/goldman-sachs-wont-take-companies-public-if-they-have-all-male-corporate-boards/?sh=5af012b19475> (explaining that “it’s nearly impossible to assess the returns attributable to a diverse corporate board[] because there are just too many confounding variables,” and noting that a professor reviewed “the academic research on the impact of adding women to corporate boards” and concluded that “when you removed all of the confounding variables, diversity had no effect on profitability”); *Crest v. Padilla*, No. 19STCV27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022) (declaring California’s corporate-board gender-equity statute violative of the State’s Equal Protection Clause, and noting that “high quality academic studies that use sophisticated econometric methodologies and the most current statistical analyses . . . do not support the existence of a causal relationship between women on boards and improved corporate performance and corporate governance”).



concretely, the duty of loyalty requires a willingness to make money off either “dirty” or “clean” energy whenever the risk-return calculus suggests that one or the other is a good investment. But a firm that has joined one of these alliances has indicated it cares more about environmental change than investment performance. That seems inconsistent with the duty of loyalty.

The duty of loyalty is also implicated in a more subtle way. Conflicts may arise between clients of asset managers who want to pursue ESG strategies and those who want to pursue the traditional purpose of maximizing an investment’s risk-adjusted return. If the investment manager privileges the preferences of the client who wants to pursue an ESG strategy, he is not being loyal to the other class of investors.

To illustrate, consider BlackRock’s role as the largest asset manager for New York City’s (NYC) pension funds, overseeing approximately \$43 billion of those assets.<sup>179</sup> The NYC pension funds are committed to achieving net-zero emissions by 2040.<sup>180</sup> NYC Comptroller Brad Lander recently warned BlackRock that any “backtracking on its climate commitments” would result in a “reassess[ment]” of NYC’s relationship with the company.<sup>181</sup> Lander even demanded that BlackRock provide a detailed explanation of how it will “achiev[e] net zero across its entire portfolio” and “keep[] fossil fuel reserves in the ground.”<sup>182</sup> BlackRock has not publicly responded to Lander’s demands. But it is reasonable to think that BlackRock might appease NYC by conforming to its environmental dictates. The fiduciary duty of loyalty, however, requires asset managers to invest for the sole purpose of financially benefiting their clients. Decisions seeking to placate these kinds of political demands appear to be in direct conflict with that duty.

While we can imagine scenarios in which choosing to invest with an asset-management firm that is an active ESG proponent might not violate a fiduciary duty, avoiding such a firm is the safer strategy. Investing with ESG-focused firms demands vigilance and constant monitoring to ensure that they are solely focused on pursuing financial gains for the people of Nebraska. This is particularly true for asset managers whose ESG strategies infect the company engagement and voting actions undertaken on behalf of Nebraska’s investments. If that ongoing monitoring raises red flags, the Nebraska Investment Council might need to explore other options.

Investment managers who pursue an ESG program may also violate the duty of prudence. Nebraska law requires voting members of the Investment Council to “act with the care, skill, prudence, and diligence under the circumstances then prevailing

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<sup>179</sup> Letter from Brad Lander, New York City Comptroller, to Larry Fink, CEO, BlackRock, 2 (Sept. 21, 2022), <https://comptroller.nyc.gov/wp-content/uploads/2022/09/Letter-to-BlackRock-CEO-Larry-Fink.pdf>.

<sup>180</sup> *Id.* at 3.

<sup>181</sup> *Id.* at 1.

<sup>182</sup> *Id.* at 4–5.



that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”<sup>183</sup> Current ESG investment practices could be considered imprudent. ESG-focused asset managers argue that they rely on ESG because “climate risk is investment risk.”<sup>184</sup> Explaining themselves, they contend that the so-called “energy transition”—the presumption of a shift from cheap, reliable fossil fuels to expensive, intermittent renewable energy sources—will make fossil fuels obsolete and that any investment in fossil-fuel production or infrastructure could be lost.

This argument has so many flaws that it is doubtful whether a competent fiduciary could believe it. Consider just three of the problems. First, there are good reasons to believe that it is physically impossible to achieve this “energy transition” anytime in the next three decades. The International Energy Agency (IEA) roadmap to net zero by 2050 assumes that “almost half the reductions [will] come from technologies that are currently at the demonstration or prototype phase.”<sup>185</sup> It seems quite a stretch to assume that all these technologies will come to fruition and grow to scale at the rate necessary to bring about the supposed transition. Nor is it at all clear that the natural resources, such as lithium, cobalt, and copper, needed for any large-scale energy transition could be extracted at a reasonable cost. For example, the IEA roadmap for net zero presumes that “demand for lithium for use in batteries grows 30-fold to 2030 and is more than 100-times higher in 2050 than in 2020,” but it does not analyze whether that much lithium can feasibly be acquired.<sup>186</sup>

Second, even if it were physically possible to achieve net zero in the next few decades, the purported transition could occur only with sufficient government mandates that are unlikely to happen.<sup>187</sup> Tellingly, the UN recently observed that it is “not credible” to believe governments will take action consistent with their previous climate pledges.<sup>188</sup> In other words, even the UN does not think governments will adopt the policies necessary to implement the “energy transition.” Despite this, countless asset managers are making trillion-dollar decisions based on that very assumption.

Third, any “energy transition,” assuming one eventually occurs, will not arrive on a timeline that affects many current investments. As BlackRock has admitted,

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<sup>183</sup> Neb. Rev. Stat. § 72-1239.01(3).

<sup>184</sup> Larry Fink, *A Fundamental Reshaping of Finance*. BlackRock (2020), <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> (“Fink Letter”).

<sup>185</sup> International Energy Agency, *Net Zero by 2050 A Roadmap for the Global Energy Sector*, 15, [https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroBy2050-ARoadmapfortheGlobalEnergySector\\_CORR.pdf](https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroBy2050-ARoadmapfortheGlobalEnergySector_CORR.pdf).

<sup>186</sup> *Id.* at 71.

<sup>187</sup> See Fink Letter, *supra* (“government must lead the way in this transition”).

<sup>188</sup> United Nations Environment Programme, *Emissions Gap Report 2022: The Closing Window — Climate crisis calls for rapid transformation of societies*, xv (2022), <https://www.unep.org/emissions-gap-report-2022>.

“[u]nder any scenario, the energy transition will still take decades.”<sup>189</sup> Because of the time value of money, returns today and in the immediate future have a much greater value than anticipated returns in the distant future. And the further into the future anticipated income or costs are, the less impact they will have on investment decisions today.<sup>190</sup> At a minimum, a prudent fiduciary would attempt to maximize returns from existing appreciation on assets like coal rather than winding them down for a climate impact. Notably, Blackrock has taken the opposite approach, co-authoring a GFANZ report titled “The Managed Phaseout of High-emitting Assets: How to Facilitate the Early Retirement of High-Emitting Assets as Part of a Just Transition to a Net-Zero World.”<sup>191</sup>

In short, it is folly for an asset manager to act with confidence about what the future will look like in 2050 when they likely did not anticipate major geopolitical and economic events such as the collapse of the Soviet Union, the rise of the internet and the smartphone, the dot-com crash, the Great Financial Crisis, the COVID-19 pandemic, or the Russian invasion of Ukraine. Yet they act with certainty about a purported wholesale change in how people will live, work, travel, and eat. This is not a reasonable basis upon which a prudent fiduciary would act.

***Antitrust Concerns.*** Federal and Nebraska antitrust laws make illegal “[e]very contract, combination..., or conspiracy, in restraint of trade or commerce.”<sup>192</sup> These laws forbid certain agreements and coordinated action that seeks to restrain trade and harm consumers. This includes coordinated agreements among competing input suppliers to refuse to deal, except on certain terms, with buyers of their products and services. These cases are often referred to as “group boycotts.”

The U.S. Supreme Court has long held that coordinated action by competitors that results in reduced output or increased prices is illegal under antitrust laws. The level of scrutiny and analytical framework that courts apply to these cases depends upon the nature of the coordination. In cases involving naked price fixing or market division, courts have found these types of agreements “so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal *per se*.”<sup>193</sup> These agreements are presumed to reduce output or increase prices without further analysis. In the alternative, there are coordinated actions by competitors “whose competitive effect can only be evaluated by analyzing the facts

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<sup>189</sup> Fink Letter, *supra*.

<sup>190</sup> This does not consider that the more distant an anticipated event or income, the more speculative it is, and the greater the discount needs to be.

<sup>191</sup> Available at [https://assets.bbhub.io/company/sites/63/2022/06/GFANZ\\_-\\_Managed-Phaseout-of-High-emitting-Assets\\_June2022.pdf](https://assets.bbhub.io/company/sites/63/2022/06/GFANZ_-_Managed-Phaseout-of-High-emitting-Assets_June2022.pdf).

<sup>192</sup> 15 U.S.C. § 1; Neb. Rev. Stat. § 59-801.

<sup>193</sup> *Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (cleaned up).

peculiar to the business, the history of the restraint, and the reasons why it was imposed.”<sup>194</sup> Such cases are often referred to as “rule of reason” cases.<sup>195</sup>

Although courts have applied both the *per se* and rule of reason frameworks to group boycotts, most are reviewed under the “rule of reason.”<sup>196</sup> Under the rule of reason, a court considers the ways in which the group boycott “limit[s] consumer choice by impeding the ordinary give and take of the market place,” giving opportunity to defendants to present “some countervailing procompetitive virtue,” such as “increased efficiencies in the operation of a market or the provision of goods or services.”<sup>197</sup> Yet any “countervailing . . . virtue[s]”<sup>198</sup> must do more than further some purported social or political objective; they must enhance competition.<sup>199</sup>

As discussed above, numerous financial alliances—composed of competing banks and money managers—have pledged themselves to achieving various environmental goals. One such alliance—Climate Action 100+—is comprised of hundreds of big banks and money managers that together manage over \$68 trillion.<sup>200</sup> This is no small sum, as it accounts for “over 50 percent of all global assets under management.”<sup>201</sup> Yet right now, Climate Action 100+ is collectively using its “influence to compel companies to shut down coal and natural-gas plants.”<sup>202</sup>

These competing banks and investment funds coordinate their efforts. Member-investors are organized by Climate Action 100+ into groups “spearheaded by a lead investor or investors, who work cooperatively with a number of [other] collaborating investors.”<sup>203</sup> These teams of banks and investment funds then plan, according to “principles and processes” established by Climate Action 100+, how they

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 689.

<sup>196</sup> See *Fed. Trade Comm’n v. Indiana Fed’n of Dentists*, 476 U.S. 447, 458–59 (1986) (using the rule of reason to find illegal an agreement among dentists not to submit x-rays to dental insurers). *But see Fed. Mar. Comm’n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968) (“Under the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*.”); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (“Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.”).

<sup>197</sup> *Id.* at 459.

<sup>198</sup> *Id.*

<sup>199</sup> See *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2159 (2021) (“The Court has regularly refused . . . requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.”).

<sup>200</sup> *About*, Climate Action 100+, <https://www.climateaction100.org/about/>.

<sup>201</sup> *Id.*

<sup>202</sup> Mark Brnovich, *ESG May Be an Antitrust Violation*, Wall Street Journal (Mar. 6, 2022), <https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807>.

<sup>203</sup> *Engagement Process*, Climate Action 100+, <https://www.climateaction100.org/approach/engagement-process/>.

will “engage” downstream “focus companies” from which they will secure commitments to comply with ESG mandates.<sup>204</sup>

Climate Action 100+’s approach is both highly coordinated and openly coercive. Illustrating the coordination, the group publicly discloses that as part of its efforts to ensure “strong and concerted action,” lead investors must report their “engagement plans and priorities” to a central organization.<sup>205</sup> And demonstrating the coercion, Climate Action 100+ admits that the “central message of each engagement” with a target company is that “inaction” by the target “may result in investors taking further action” to force compliance.<sup>206</sup> In fact, the organization openly touts its “successes” in escalating pressure on target companies to comply with ESG mandates.<sup>207</sup>

Many members of these financial alliances are belatedly recognizing the serious antitrust risk their agreements have created. In late 2022, GFANZ and its associated member groups altered the terms of their agreements over concern about legal risk, including that involving antitrust.<sup>208</sup> This risk was so great that many large banks threatened to quit unless the binding nature of the agreements was changed.<sup>209</sup> Even so, this repudiation of a previous anticompetitive agreement could be considered pretextual if the parties to the agreement continue to act as though the agreement were still in place.<sup>210</sup>

The ultimate results of these alliances’ coordinated efforts are increased costs, reduced output, and higher prices for products made by target companies. Unsurprisingly, these collective efforts “hurt[] the pocketbook of all Americans” because “if you produce less” of a product, “the cost will go up.”<sup>211</sup> That is why some States’ Attorneys General, including the Nebraska Attorney General’s Office, have “launched an investigation into this potentially unlawful market manipulation.”<sup>212</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Successes*, Climate Action 100+, <https://www.climateaction100.org/progress/successes/>.

<sup>208</sup> Kenza Bryan, *COP27: Mark Carney clings to his dream of a greener finance industry*, Financial Times (Nov. 9, 2022), <https://www.ft.com/content/8d0c1064-881e-42b4-9075-18e646f3e1ad>.

<sup>209</sup> Stephen Morris, et al., *US banks threaten to leave Mark Carney’s green alliance of legal risks*, Financial Times (Sept. 21, 2022), <https://www.ft.com/content/0affe0aa-c62a-49d1-9b44-b9d27f0b5600>.

<sup>210</sup> See *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 53 (E.D. Pa. 2007) (“For evidence of pretext to support an inference of conspiracy, . . . it must be supported by additional evidence of opportunity to conspire, direct evidence of an agreement, or other circumstantial evidence of restraint of trade.”) (quoting *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 134 (D.D.C. 2006)).

<sup>211</sup> Brnovich, *supra*; see also Amrith Ramkumar and Joe Wallace, *Oil Price Hits Pandemic High as Investors Bet on Green Energy*, Wall Street Journal (Jun. 14, 2021), <https://www.wsj.com/articles/investors-bet-green-energy-focus-will-push-up-oil-prices-11623656321> (explaining that reduced investments in fossil fuels will decrease production and prompt further price increases).

<sup>212</sup> Brnovich, *supra*.

**Employment Concerns.** ESG is also a recipe for legal problems in Nebraska’s workplaces. Key ESG standards include racial and gender diversity in the workforce.<sup>213</sup> But if the push for those goals goes too far, such that employers start to make employment decisions based in part on race or sex, they will walk themselves directly into race or sex discrimination claims under federal and state law.<sup>214</sup> Or if the corporate climate becomes hostile to people of certain races or religions—like the situation at Disney discussed above<sup>215</sup>—that will give rise to potential liability for creating a hostile work environment. Prudent corporate counsel should approach ESG with a healthy dose of caution. The U.S. Supreme Court’s forthcoming decisions in *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199, and *Student for Fair Admissions v. University of North Carolina*, No. 21-707—while involving college admission decisions rather than employment decisions—will likely shed additional light on these employment issues.

Additional legal concerns arise for local governmental employers that raise capital through investments, such as cities and counties that issue bonds. If those governments succumb to ESG pressure to adopt certain positions on social issues, they will alienate employees who hold different views and send the message that those views are not acceptable in the workplace. But governmental employers must comply with the U.S. Constitution, so they cannot punish employees for speaking their views on matters of public concern.<sup>216</sup>

To illustrate this concern, suppose ESG rating companies rely on the “S” to pressure a city to mandate the use of gender-identity-based pronouns at work.<sup>217</sup> If the city takes an adverse action against an employee for his or her speech on that topic—an undeniable matter of public concern—<sup>218</sup>it will likely violate that employee’s constitutional liberties.<sup>219</sup> Without ESG, the city would have likely stayed

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<sup>213</sup> See WEF Metrics, *supra*, at 9 (looking at the “[p]ercentage of employees” by “gender and other indicators of diversity”).

<sup>214</sup> See 42 U.S.C. § 2000e-2(a)(1) (declaring it to be “an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); Neb. Rev. Stat. § 48-1104(1) (declaring it to “be an unlawful employment practice for an employer . . . [t]o fail or refuse to hire, to discharge, or to harass any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, disability, marital status, or national origin”).

<sup>215</sup> O’Neil, *supra*.

<sup>216</sup> See *Connick v. Myers*, 461 U.S. 138, 145 (1983) (explaining that the Constitution “safeguard[s] speech on matters of public concern” spoken by employees of governmental entities).

<sup>217</sup> See *LGBTQ100 ESG Index*, Advancing Equality, <https://lgbtq100.com/> (identifying a pillar of the LGBTQ100 ESG Index as enacting “[n]on-discrimination policies across business entities”).

<sup>218</sup> See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (describing “gender identity” as a “sensitive political topic[]” that is “undoubtedly [a] matter[] of profound value and concern to the public”) (cleaned up).

<sup>219</sup> See *Meriwether v. Hartop*, 992 F.3d 492, 511–12 (6th Cir. 2021) (university that punished a professor for declining to use gender-identity-based pronouns violated his free-speech rights).

silent on the matter, but once pushed into the fray, the city found itself facing difficult employment issues.

### *CONCLUSION*

Understanding the endgame of ESG is not difficult. Its advocates at the WEF and UN have been quite open about it. To quote the UN's tagline to its Sustainable Development Goals, they seek to "transform our world" by establishing global energy policies and advancing their preferred social values. If they have their way, an unelected few will settle these matters for the entire globe.

ESG proponents seek to achieve this transformative environmental and social change by leveraging the institutional might of the investment, banking, and insurance industries through a method that could best be described as a corporate "shake down." They are trading on power that the world's largest asset managers have acquired as fiduciaries of other people's money to force the world's largest corporations to fundamentally reshape life as we know it. The power and flexibility of the ESG tool is astounding. Its advocates select the topics to address, identify the "right" positions on those topics, and demand that others fall in line, all while pretending that these demands are only driven by concern about maximizing return for investors. That ESG considerations stray so far from evaluating a business's operations, products, and services is not surprising given their goal of environmental and social transformation.

As a State Attorney General's Office, we work tirelessly to protect the constitutional system our founders gave us. Often, that involves calling out the executive branch for exceeding its authority or suing the federal government for intruding on the States' domain. But we now face a different, more elusive threat—the whole ESG enterprise. Make no mistake, this new challenge, while different than those that have come before, is a threat to American sovereignty, our democratic form of government, and individual liberty.

It is important for public policymakers and those who enforce the law to understand this challenge. The power that ESG proponents have amassed is alarming. And there seems to be but one primary obstacle to ESG realizing its ultimate endgame—the rule of law that has sustained American liberties for centuries.









## Appendix

### *The Principles for Responsible Investment*<sup>220</sup>

- Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.
- Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices.
- Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest.
- Principle 4: We will promote acceptance and implementation of the Principles within the investment industry.
- Principle 5: We will work together to enhance our effectiveness in implementing the Principles.
- Principle 6: We will each report on our activities and progress towards implementing the Principles.

### *The Principles for Responsible Banking*<sup>221</sup>

 <p><b>PRINCIPLE 1: ALIGNMENT</b></p> <p>We will align our business strategy to be consistent with and contribute to individuals' needs and society's goals, as expressed in the Sustainable Development Goals, the Paris Climate Agreement and relevant national and regional frameworks.</p>	 <p><b>PRINCIPLE 2: IMPACT &amp; TARGET SETTING</b></p> <p>We will continuously increase our positive impacts while reducing the negative impacts on, and managing the risks to, people and environment resulting from our activities, products and services. To this end, we will set and publish targets where we can have the most significant impacts.</p>	 <p><b>PRINCIPLE 3: CLIENTS &amp; CUSTOMERS</b></p> <p>We will work responsibly with our clients and our customers to encourage sustainable practices and enable economic activities that create shared prosperity for current and future generations.</p>
 <p><b>PRINCIPLE 4: STAKEHOLDERS</b></p> <p>We will proactively and responsibly consult, engage and partner with relevant stakeholders to achieve society's goals.</p>	 <p><b>PRINCIPLE 5: GOVERNANCE &amp; CULTURE</b></p> <p>We will implement our commitment to these Principles through effective governance and a culture of responsible banking.</p>	 <p><b>PRINCIPLE 6: TRANSPARENCY &amp; ACCOUNTABILITY</b></p> <p>We will periodically review our individual and collective implementation of these Principles and be transparent about and accountable for our positive and negative impacts and our contribution to society's goals.</p>

<sup>220</sup> *What are the Principles for Responsible Investment?*, Principles for Responsible Investment, <https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment>.

<sup>221</sup> *About the Principles*, UN Environment Programme, <https://www.unepfi.org/banking/more-about-the-principles/>.

### *The Principles for Sustainable Insurance*<sup>222</sup>

- Principle 1: We will embed in our decision-making environmental, social and governance issues relevant to our insurance business.
- Principle 2: We will work together with our clients and business partners to raise awareness of environmental, social and governance issues, manage risk and develop solutions.
- Principle 3: We will work together with governments, regulators and other key stakeholders to promote widespread action across society on environmental, social and governance issues.
- Principle 4: We will demonstrate accountability and transparency in regularly disclosing publicly our progress in implementing the Principles.

### *The UN Global Compact's Ten Principles*<sup>223</sup>

#### **Human rights**

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

#### **Labour**

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

#### **Environment**

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

#### **Anti-Corruption**

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

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<sup>222</sup> *The Principles*, UN Environment Programme, <https://www.unepfi.org/insurance/insurance/the-principles/>.

<sup>223</sup> *The Ten Principles of the UN Global Compact*, *supra*.