Published on *The National Law Review* https://natlawreview.com

Top 10 ESG Developments for 2023

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2023 saw terms like “ESG,” “greenwashing,” and “circular economy” come into common use. We also saw a tsunami of other environmental, social, and governance (ESG)-related developments at the international, federal, and state levels.

Below is our Top 10 List of ESG-related cases and regulatory developments from 2023.

No Final SEC Climate-Related Disclosure Rule in 2023

On December 6, 2023, the Biden Administration released its regulatory agenda for fall 2024, which shows US Securities and Exchange Commission (SEC) intends to finalize the much anticipated **climate-related disclosure requirements for public companies** in April 2024. After the SEC released the proposed rule in 2022, the proposal was met with a flood of public comments and followed by a year of increased anti-ESG sentiment, which has perhaps contributed to the SEC's delay in issuing the final rule. While the SEC has not yet finalized the rule, the Commission continues to work through other ESG-related disclosure rules:

- **Cybersecurity Risk Management Disclosure Rules**: The Commission finalized **cybersecurity risk management disclosure rules** in July 2023 requiring companies to make timely disclosure of cybersecurity incidents and to offer more robust information about risk oversight and management.
- **ESG Fund Rules**: In September 2023, the SEC adopted changes to the "**Names Rule**" to ensure that ESG investing strategies are appropriately disclosed. The SEC also expects to finalize the "**Enhanced Disclosures Rule**" that would require funds and advisors to provide more specific disclosures in fund prospectuses, annual reports, and advisor brochures based on the ESG strategies they pursue in April 2024.
- **Other ESG-Related Proposals on the SEC's Agenda**: Proposals for new rules relating to human capital management and corporate board diversity also remain on the SEC's **short-term agenda** and are expected to be released in

April and October of 2024, respectively.

FTC-Proposed Updates to the Green Guides

In December 2022, the Federal Trade Commission (FTC) sought public comment on **proposed updates to the Green Guides** for the use of environmental claims. The FTC sought public comment on specific issues including guidance on carbon offsets and climate change, and the terms “recyclable” and “recycled content.” We **summarized** comments received in May. Potential revisions to the Green Guides are still under consideration as 2023 comes to a close.

Anti-ESG Movement Litigation

The Anti-ESG movement undeniably picked up pace in 2023. More than one-third of states passed anti-ESG laws in 2023. A majority of ESG-related shareholder proposals failed to pass in 2023, and new lawsuits have been filed challenging governmental entities and companies’ ESG-related activities and decisions. In addition, some companies have quietly distanced themselves from the term “ESG” itself on their websites and in their publicly disclosed reports.

In the litigation space, the main case filed last year is *State of Utah v. Martin J. Walsh*, filed in federal court in Amarillo, Texas. These parties, including 26 states and others challenged the US Department of Labor’s (DOL) “Investment Duties Rule,” clarifying the duties of fiduciaries to Employment Retirement Income Security Act of 1974 (ERISA) employee benefits plans concerning the appropriate selection of investments, namely those that included ESG considerations. After the case was filed, defendants moved to transfer the case to the US District Court for the District of Columbia or a district court where a plaintiff resided. In March, the

Amarillo federal court **decided** that the case should proceed in Amarillo. (See our discussion **here**.) In September, the court rejected the plaintiffs' claims, **finding that DOL acted appropriately when it promulgated the rule**. Similar claims are pending in various courts, including ***Wong v. New York City Employees' Retirement System***, currently pending in New York state court.

EU ESG Regulatory Activity

The European Union (EU) made progress under the Corporate Sustainability Reporting Directive in 2023, by adopting the European Sustainability Reporting Standards (ESRS). On July 31, 2023, the European Commission adopted ESRS, which requires detailed sustainability reporting starting January 1, 2024.

California Climate-Related Disclosures Rules

On October 7, 2023, the California Governor Gavin Newsom signed three bills into law requiring climate-related disclosures from businesses doing business in California. (See our discussion **here**.) The **Climate Corporate Data Accountability Act** requires US-based businesses with total annual revenues over one billion dollars and doing business in California to report their Scope 1, Scope 2, and Scope 3 greenhouse gas emissions. The **Climate-Related Financial Risk Act** requires US-based businesses with total annual revenues over five hundred million dollars and doing business in California to prepare climate-related risk disclosures aligned with the Task Force on Climate-Related Financial Disclosures (TCFD) reporting framework or another equivalent framework. The Voluntary Carbon Market Disclosures Act requires companies that operate in California and make net-zero, carbon-neutral, or significant emissions reductions claims to document their accuracy and means of achieving these goals on their websites, with additional disclosure requirements for companies that purchase, use, market, or sell voluntary carbon offsets.

“Greenwashing” Cases

Coming into the year, we **posited** that we were likely to see sustainability-focused claims used to fill perceived gaps in environmental regulations. While we believe that events have proved true this hypothesis, there were so many ESG-related developments this year that they warranted a post separate from **our environmental year in review**. Two American greenwashing cases are significant enough to note:

- In May, a group of Delta Air Lines’ customers filed **a class action suit** alleging that the airline’s marketing claims of carbon neutrality are false and misleading. (See our discussion **here**.) The class suit claims that they were charged higher prices because there is a “significant market premium for green services.” The named plaintiff asserted that she “purchased Delta flights at a market premium due to her belief that by flying Delta she engaged in more ecologically conscious air travel and participated in a global transition away from carbon emissions.” She also alleged she would have not purchased Delta’s services, if she understood at the time of purchase that Delta’s carbon neutral representations were false.
- In December, the Hawaii Supreme Court permitted tort litigation relying on greenwashing theories to proceed against major petroleum companies. (See our discussion **here**.) The **decision** in *City and County of Honolulu v. Sunoco LP* allows tort litigation against various oil and gas producers to proceed. Much of the court’s analysis hinges on the “deceptive promotion” of risks posed by using carbon-based

fuels. Earlier this year, we **outlined how “greenwashing” theories could be used to fill in a perceived vacuum caused by broad frustration with the lack of comprehensive regulation of carbon- and climate-related issues**. The Hawaii decision is squarely in line with this trend.

SCOTUS Ruling Affecting DEI and Environmental Justice (EJ) Issues

Students for Fair Admissions (SFFA) v. Harvard involved Harvard University’s college admissions process, alleging that the process violates Title VI of the Civil Rights Act of 1964 by discriminating against Asian American applicants in favor of white applicants. On June 29, 2023, the US Supreme Court’s **holding in *SFFA*** *found* that the use of race in college admissions processes violates the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. (Our discussion of potential application of *SFFA* in the EJ space is **here**.)

While there is no indication that well-formulated corporate Diversity, Equity, and Inclusion (DEI) programs are unlawful after *SFFA*. But without a doubt, the combination of growing anti-ESG political sentiment combined with the *SFFA* decision, may lead to further scrutiny of corporate DEI programs.

National Law Review, Volumess XIII, Number 342