

ARIZONA STATE UNIVERSITY

**CORPORATE & BUSINESS LAW JOURNAL FORUM**

---

---

VOLUME 3

SEPTEMBER 2022

NUMBER 23

---

---

**COMMENTARY**

*The War Against “Woke Capitalism”: Anti-ESG Legislation in State Government*

BY JULIA SARDIÑAS\*

It seems that the culture warriors have chosen the sustainable investment movement as their latest battleground. In recent years, corporate interest in environmental, social, and governance (“ESG”) criteria has exploded. In 2021, ninety-two percent of the S&P 500 and seventy-one percent of the Russell 1000 published sustainability disclosures.<sup>1</sup> The number of Environmental & Social (“E&S”) shareholder proposals receiving majority support almost tripled between 2019 and 2021.<sup>2</sup> These proposals advocated for setting greenhouse gas emission reduction targets, increasing board diversity, and disclosing political contributions.<sup>3</sup> While supporters argue that reallocating capital into sustainability will improve long-term returns for investors,<sup>4</sup> opponents argue that ESG activists are forcing companies to support unpopular, unprofitable progressive causes.<sup>5</sup>

---

\* J.D. Candidate, Class of 2023, Sandra Day O’Connor College of Law at Arizona State University.

<sup>1</sup> 92% of the S&P 500® and 70% of the Russell 1000® Published Sustainability Reports in 2020, *G&A Research Shows*, GOVERNANCE & ACCOUNTABILITY INST., INC. (Nov. 30, 2021), <https://www.ga-institute.com/research/ga-research-collection/sustainability-reporting-trends/2021-sustainability-reporting-in-focus.html#:~:text=The%202021%20research%20report%20features%20CDP%2C%20CSA%2FDJSI>.

<sup>2</sup> Marc S. Gerber & Raquel Fox, *Investors Press for Progress on ESG Matters, and SEC Prepares to Join the Fray*, SKADDEN (Jan. 19, 2022), <https://www.skadden.com/insights/publications/2022/01/2022-insights/corporate/investors-press-for-progress>.

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

<sup>4</sup> *Pursuing Long-Term Value for Our Clients: A Look Into the 2020-2021 Proxy Voting Year*, BLACKROCK INV. STEWARDSHIP (June 30, 2021), <https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf>.

<sup>5</sup> *The ESG Pushback*, HERITAGE FOUND. (May 15, 2022), <https://www.heritage.org/environment/heritage-explains/the-esg-pushback>.

Last week, thirteen state treasurers published a letter opposing recent legislation aiming to curb ESG investment.<sup>6</sup> So far, seventeen states have proposed or passed “anti-ESG bills.”<sup>7</sup> These bills fall into two camps: some ban state entities from contracting with companies that discriminate against fossil fuel businesses or gun manufacturers, while others ban state entities from investing in funds that consider ESG criteria.<sup>8</sup> Legal commentators supporting anti-ESG bills argue that sustainability-focused investors are violating the sole interest rule, which requires that a trustee only consider the interests of the beneficiary, by promoting social goals.<sup>9</sup> Other commenters have observed that ESG investing does not violate fiduciary duties if the trustee’s exclusive motives are to improve risk-adjusted returns.<sup>10</sup>

Thus far, anti-ESG bills have exchanged symbolic political victories for increased costs. For instance, Texas passed the first “Energy Discrimination Elimination” law last summer.<sup>11</sup> The statute requires that the Texas Comptroller maintain a list of financial companies that boycott energy companies.<sup>12</sup> “Boycott” is defined broadly, encompassing any action intended to “penalize, inflict economic harm on, or limit commercial relations” with fossil fuel companies.<sup>13</sup> State entities are then prohibited from investing in any company on this list.<sup>14</sup> However, the statute exempts state entities if the entity determines that the requirement interferes with its fiduciary duties.<sup>15</sup> If ESG disclosures yield material information, these broad exceptions would allow trustees to continue investing in blacklisted companies. Texas has also passed a similar bill aimed at companies that boycott firearm manufactures.<sup>16</sup> Since both statutes went into effect, five of the largest underwriters

---

<sup>6</sup> Press Release, Brad Lander, Comptroller, New York City, Comptroller Lander Joins State Treasurers’ Letter Opposing Anti-ESG Legislation (Sept. 14, 2022), <https://comptroller.nyc.gov/newsroom/statement-from-comptroller-lander-on-recent-anti-esg-legislation/>.

<sup>7</sup> Elizabeth S. Goldberg et al., *The State of Anti-ESG Legislation*, MORGAN LEWIS: ML BENEBITS (Aug. 25, 2022), <https://www.morganlewis.com/blogs/mlbenebits/2022/08/the-state-of-anti-esg-state-legislation?p=1>.

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

<sup>9</sup> Jed Rubenfeld & William P. Barr, *ESG Can’t Square With Fiduciary Duty*, WALL STREET J.: OPINION (Sept. 6, 2022), <https://www.wsj.com/articles/esg-cant-square-with-fiduciary-duty-blackrock-vanguard-state-stree-the-big-three-violations-china-conflict-of-interest-investors-11662496552>.

<sup>10</sup> Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STANFORD L. REV. 381, 385-86 (Feb. 2020), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/02/Schanzenbach-Sitkoff-72-Stan.-L.-Rev.-381.pdf>.

<sup>11</sup> See generally Prohibition on Investment in Financial Companies that Boycott Certain Energy Companies, TEX. GOV’T. CODE. ANN. §809 (West 2022).

<sup>12</sup> TEX. GOV’T. CODE. ANN. §809.051(a) (West 2022).

<sup>13</sup> TEX. GOV’T. CODE. ANN. §809.001(1) (West 2022).

<sup>14</sup> TEX. GOV’T. CODE. ANN. §809.053(d)(1) (West 2022).

<sup>15</sup> TEX. GOV’T. CODE. ANN. §809.005(d)(1) (West 2022).

<sup>16</sup> See generally Prohibition on Contracts with Companies that Discriminate Against Firearm and Ammunition Industries, TEX. GOV’T. CODE. ANN. §2274 (West 2022).

in the world have exited the municipal market in Texas.<sup>17</sup> As a result, a recent study found that Texas municipalities will pay an additional \$300-500 million in interest in bonds.<sup>18</sup>

Although the financial consequences of ESG bills may be up for debate, it is indisputable that these bills have created ample fodder for political conflict. In August, the Texas Comptroller blacklisted nine financial institutions, including BlackRock, the world's largest asset manager.<sup>19</sup> In response, many of the institutions shied away from the ESG label, pointing instead to longstanding ties to the energy sector.<sup>20</sup> For example, BlackRock has hotly denied boycotting the energy sector, noting that the institution is the largest investor in Texas' oil and gas industry.<sup>21</sup> The Texas Comptroller's statements suggest that states intend to name and shame large financial institutions with the hopes of spooking smaller investors from joining the ESG movement. Responses from companies like BlackRock may signal that funds are weary of political retaliation and are not ready to fully plunge into sustainable investing.

Given the rise of anti-ESG backlash and a bear market in the S&P 500, shareholder support for ESG activism has cooled this year.<sup>22</sup> As ESG investing becomes more politically controversial, anti-ESG rhetoric and legislation will likely gain steam in anticipation of the midterm elections. Regardless of which side wins the culture war, anti-ESG legislation will increase regulatory complexity and uncertainty for financial companies seeking to invest in state entities.

---

<sup>17</sup> Daniel Garrett & Ivan T. Ivanov, *Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies* 1 (July 11, 2022) (unpublished), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4123366](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366).

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

<sup>19</sup> Brooke Masters & Patrick Temple-West, *Companies Attack Texas Over 'Politicised' ESG Blacklist*, FIN. TIMES (Aug. 29, 2022), <https://www.ft.com/content/8031aaad-efc6-4829-ac02-bd9c151974f4>.

<sup>20</sup> *Id.*

<sup>21</sup> Brooke Masters & Patrick Temple-West, *BlackRock Labels Texas 'Anti-Competitive' Over ESG Blacklisting*, FIN. TIMES (Aug. 25, 2022), <https://www.ft.com/content/9bbb250f-2995-4035-914c-b42b1f3397ee>.

<sup>22</sup> Greg Andrews, *Is the ESG Locomotive Suddenly Losing Steam?*, ALM (June 9, 2022), <https://www.law.com/2022/06/09/inside-track-is-the-esg-locomotive-suddenly-losing-steam/>.