

ALSTON & BIRD

ESG Sustainability Spotlight

Q3 | 2024



In today's business world, environmental, social, and governance (ESG) issues have taken center stage, and companies, both public and private, are increasingly recognizing the significance of ESG responsibility. Today's executives, managers, and stakeholders find themselves navigating a complex landscape filled with risks and opportunities.

The ESG Imperative

ESG encompasses a broad spectrum of factors that impact a company's long-term sustainability and performance. Let's break down what each component entails:

- **Environmental (E):** This dimension focuses on a company's impact on the environment. It includes considerations such as carbon emissions, resource usage, waste management, and climate change resilience.
- **Social (S):** The social aspect encompasses how a company interacts with its employees, customers, communities, and other stakeholders, as well as the non-environmental impacts of its supply chain. Topics like diversity and inclusion, labor practices, human rights, and community engagement fall under this category.
- **Governance (G):** Governance refers to the systems and processes that govern a company's decision-making. It involves board composition, executive compensation, transparency, and adherence to ethical standards.

The ESG Landscape Today

- **Heightened Focus:** Investors, regulators, and consumers are increasingly scrutinizing companies' ESG practices. Firms that prioritize ESG are better positioned to attract capital, retain talent, and build trust with stakeholders.
- **Regulatory Landscape:** In the United States, federal regulators' loss of judicial deference may subject their evolving ESG-related regulations to increasing legal

challenges. In addition, the Securities and Exchange Commission (SEC) appears to have placed less priority on its previously announced ESG initiatives. Despite the potential for uncertainty at the federal level, the SEC continues to enforce its ESG-related rules, and companies must stay informed about the additional state-level and international requirements and restrictions to ensure compliance.

- **Political Dynamic:** As ESG has grown in prominence, it has also grown more controversial. It is not enough to know the rules where a company is located; companies need to know the rules everywhere they do business.

Alston & Bird's ESG Advisory Team

At Alston & Bird, our ESG Advisory Team provides strategic guidance to companies navigating the ESG landscape. Our services include:

- **Understanding ESG Dynamics:** We help companies grasp the nuances of ESG and tailor their approaches accordingly.
- **Regulatory Insights:** Our team stays abreast of ESG-related regulations worldwide, ensuring clients remain compliant.
- **Shareholder Engagement:** Crafting effective responses to shareholder proposals requires expertise. We guide companies in this critical area.
- **Risk Mitigation:** Minimizing litigation and enforcement risk is crucial. Our strategies and materials help companies proactively address potential legal challenges.

ESG Tracker and Sustainability Spotlight

Our [ESG Tracker](#) and this publication offer valuable insights into federal and state enforcement actions, litigation trends, and shareholder proposals. They serve as a resource for companies seeking to stay informed and make up-to-date decisions on all matters related to ESG.

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SEC Dims Spotlight on ESG Initiatives

The SEC appears to be placing less priority on ESG-related initiatives, as seen by the exclusion of ESG from its 2024 Division of Examinations priorities. The SEC has also disbanded its ESG task force, with an SEC spokesperson commenting that the "strategy has been effective, and the expertise developed by the task force now resides across the Division." Nonetheless, the SEC continues to enforce its ESG-related rules.

SEPTEMBER

SEC Settles Pod Recycling Claims

September 10, 2024 | [In the Matter of Keurig Dr Pepper Inc.](#), No. 3-22100.

The SEC accepted an offer of settlement from Keurig over Keurig's statements about the recyclability of its K-Cup pods. Keurig had conducted research that indicated environmental concerns factored into some consumers' decisions to purchase a Keurig brewing system. The pods represented a significant percentage of net sales of Keurig's coffee segment, and the coffee segment represented a significant percentage of net sales across all of Keurig's business segments. In its Forms 10-K for fiscal years 2019 and 2020, Keurig stated it had conducted extensive testing to ensure its pods could be successfully recycled. The SEC found that Keurig had omitted from these Forms 10-K that two of the largest recycling companies in the United States, collectively operating more than one-third of the recycling facilities nationwide, told Keurig they would not accept pods at their recycling facilities because there was not sufficient commercial benefit for recycling the pods. As a result, the SEC determined that Keurig's statements about the recyclability of its pods were incomplete and inaccurate and charged Keurig with violating Section 13(a) of the Exchange Act and Rule 13a-1. Keurig agreed to pay a \$1.5 million civil penalty to settle the SEC's charges.



AUGUST

Montana Attorney General Issues Civil Investigative Demand Against Investment Firm for Ratings of Israeli Companies

August 28, 2024 | *In re Investigation of MSCI Inc.*

Montana’s attorney general issued a [civil investigative demand](#) against MSCI Inc., an investment firm, for reducing the ESG ratings of Israeli companies for their actions to support Israel in the Israel-Palestine conflict while not reducing the ratings of other non-Israeli institutions that are operating in regions rife with human rights violations. The attorney general requested that MSCI produce documents involving more than 17 different subject areas for Montana’s chief legal officer to investigate whether MSCI violated Montana’s Unfair Trade Practices and Consumer Protection Act. The attorney general reported that he is prepared to prosecute MSCI to the fullest extent of the law if any violations were substantiated.

Virginia Attorney General Issues Opinion Prohibiting Virginia Retirement System from Making ESG-Based Investment Decisions

August 16, 2024 | Virginia Attorney General opinion #23-062

Virginia’s attorney general issued an [opinion](#) that asserts Virginia law prohibits the board of trustees of the Virginia Retirement System (VRS) from making investment decisions based on ESG policies over financial considerations. The attorney general commented that Virginia law requires the board to discharge its duties solely in the interest of VRS beneficiaries, which, the argument goes, creates a fiduciary duty of loyalty to VRS beneficiaries. The opinion ultimately concluded that instead of ESG-based policies, the VRS board must make investment decisions that secure the best financial results for VRS beneficiaries.

California Attorney General Files Amicus Brief to Support SEC’s Climate Disclosure Rule

August 15, 2024 | *State of Iowa v. SEC*, No. 24-1522 (8th Cir.).

California’s attorney general filed an [amicus brief](#) in the Eighth Circuit to support the SEC’s climate disclosure rule, which requires companies regulated by the SEC to provide certain climate-related information in their registration statement and annual reports – including, in certain instances, disclosures on severe weather events and other natural conditions. Under the final disclosure rule, SEC-regulated entities must provide information about any climate-related risks that have or are reasonably likely to materially impact their business strategy, results of operations, or financial condition. The attorney general supports the disclosure rule because California suffers the economic effects of climate-related natural disasters and the rule will help California-based investors make more informed investment decisions. According to the amicus brief, the disclosure rule can also help guard against “greenwashing,” which occurs when an entity makes a misleading or deceptive claim of environmental responsibility.



Amendments to Illinois Human Rights Act Backed by Illinois Attorney General Signed into Law

August 12, 2024 | HB5371

Illinois’s attorney general and the Illinois Department of Human Rights, along with state legislative stakeholders, collaborated to amend the Illinois Human Rights Act to further enhance protections against discrimination in housing and employment. In addition to clarifying important terms, the amendments further enhanced the attorney general’s authority to investigate “broad, systemic problems or incidents of discrimination” and remedy those violations via lawsuits. The amendments are also positioned to help victims of discrimination confidentially report discriminatory and hateful incidents and collect judgments more efficiently.

JULY

Arizona Attorney General Sues Automobile Manufacturers over “Super Clean” Truck Claims

July 18, 2024 | *State of Arizona v. FCA US* (Sup. Ct. Ariz.).

Arizona’s attorney general filed suit against two automobile manufacturers – Cummins Inc. and FCA US LLC (formerly Fiat Chrysler Automobiles) – for alleged violations of the Arizona Consumer Fraud Act. The attorney general claims that the two manufacturers falsely marketed, advertised, and sold model year 2013–2019 Ram 2500 and 3500 trucks equipped with 6.7-liter diesel engines that included illegal auxiliary emission control devices (known as defeat devices), which detect when vehicles or engines are undergoing testing for EPA certification and reduce the vehicle’s or engine’s emissions output during testing to ensure emissions compliance but ultimately result in increased nitrogen oxide emissions during normal use. According to the complaint, the two manufacturers knowingly and falsely advertised that their vehicles were “super clean” and eco-friendly and employed clean diesel technology and then sold these vehicles for premiums under the guise that the vehicles were compliant with all EPA emissions criteria. The attorney general ultimately requests that the two manufacturers be enjoined from advertising and selling the affected vehicles in Arizona and that they compensate affected Arizona customers.



SEPTEMBER

September 24, 2024 | *Conservation Law Foundation Inc. v. Moore*, No. 24- -03770 (Vt. Sup. Ct.).

The plaintiffs filed a citizen suit under Vermont’s Global Warming Solutions Act (GWSA). The suit alleges that the state’s secretary of natural resources has not complied with her duties under the GWSA, including conducting public hearings and using technically sound data to support rulemaking decisions. The suit asks the court to determine whether new or amended rules are necessary to achieve the statute’s requirement that the state reduce its greenhouse gas emissions by at least 26% below 2005 levels by 2025.

September 9, 2024 | *Kouyate v. NUK USA LLC*, No. 1:24-cv-04020 (N.D. Ga.).

The plaintiffs filed a proposed class action complaint against NUK USA LLC, asserting that the company has falsely advertised a line of pacifiers as made from “100% sustainable silicone.” In fact, the complaint alleges, the pacifiers have a negative impact on the natural resources used to create them and on the environment. Specifically, the plaintiffs point to (1) the product’s manufacturing process, which requires intensive mining operations; (2) its distribution, which requires transportation in greenhouse-gas-emitting trucks and planes; and (3) its disposal processes, noting that silicone is not recyclable, reusable, or biodegradable.

JULY

July 19, 2024 | *Plastic Pollution Coalition v. Danone Waters of America LLC*, No. 2024-CAB-004562 (D.C. Sup. Ct.).

A nonprofit advocacy organization filed a complaint against the maker of evian bottled water, alleging false and deceptive marketing in violation of District of Columbia consumer protection law. The complaint alleges that Danone Waters promotes evian as “natural” and “healthy” while a laboratory evaluation found microplastics and bisphenol A in the bottled

water products. The complaint also alleges that Danone misleads consumers by advertising its products as “100% recyclable” and “made from 100% recycled plastic” despite the company’s ongoing contributions to plastic pollution through its reliance on single-use plastic packaging.

July 12, 2024 | *Gyani v. Lululemon USA Inc.*, No. 1:24-cv-22651 (S.D. Fla.).

A consumer filed a putative class action complaint alleging that athleisure fashion company Lululemon created its Be Planet “greenwashing” marketing campaign to mislead customers to believe the company’s business practices and products were sustainable. The complaint alleges that Lululemon’s marketing campaign messages (such as promises to “become a more sustainable and equitable business [and] minimize its environmental impact”) are unfair, false, deceptive, and misleading because the company is responsible for significant greenhouse gas emissions, landfill waste, and the release of microplastics into the environment. The complaint brings claims for violations of the Florida Deceptive and Unfair Trade Practices Act, misleading advertising under Florida law, and unjust enrichment.



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