

ALSTON & BIRD

# ESG Sustainability Spotlight

Q4 | 2024





# Navigating the ESG Landscape: Risks, Opportunities, and Strategic Insights

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

- **Regulatory Landscape:** In the United States, the rollback and deemphasis of ESG has created uncertainty at the federal level. Companies will need to be mindful of regulators' priorities and new rules going forward. Despite this potential for uncertainty, companies must stay informed about the additional state-level and international requirements and restrictions to ensure compliance.

- **Continued Focus:** Despite uncertainty at the federal level, we continue to see activity not only by private litigants in both state and federal courts but also by state attorneys general. Despite this continued scrutiny of companies' ESG practices, firms that prioritize ESG are better positioned to attract capital, retain talent, and build trust with stakeholders.
- **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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[Environmental, Social & Governance \(ESG\) Team](#)

# ESG SEC Enforcement Actions

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## OCTOBER

### SEC Finds Investment Adviser Failed to Adhere to Its Investment Criteria for ESG-Marketed Funds

**October 21, 2024** | *In the Matter of WisdomTree Asset Management Inc.*, [File No. 3-22268](#).

The SEC brought charges against New York investment adviser WisdomTree Asset Management Inc. for making misstatements about how its investment strategy incorporates ESG factors to avoid investing in "controversial products or activities." In prospectuses for three exchange-traded funds, WisdomTree represented to investors that the funds were ESG-focused and would not invest in companies involved in industries such as fossil fuels or tobacco. However, the three funds in fact invested in companies that were involved in such industries, including coal mining and the retail sale of tobacco products.

The SEC's order found that WisdomTree paid for a report from a third-party vendor to identify companies involved in fossil fuels and other industries and that the vendor's reports did not identify all companies involved in the targeted industries. WisdomTree became aware that its screening process was not identifying all companies involved in the targeted industries in September 2020, but it did not amend the prospectuses for the three funds until November 2022. In addition, the SEC found that WisdomTree failed to adopt and implement written policies and procedures designed to prevent violations of the Investment Advisers Act of 1940. The SEC also found that WisdomTree had violated the antifraud provisions of the Advisers Act and Investment Company Act of 1940. WisdomTree agreed to pay a civil penalty of \$4 million to resolve the charges.





DECEMBER

Arizona’s Attorney General Sues Farm Company for Substantial Groundwater Pumping

December 11, 2024 | *State of Arizona v. Fondomonte Arizona LLC* (Ariz. Sup. Ct.).

Arizona’s attorney general filed suit against Fondomonte Arizona LLC for alleged violations of Arizona’s public nuisance law. The [complaint](#) alleges that Fondomonte’s extraction of significant amounts of groundwater from the Ranegas Plain Basin primarily to grow alfalfa—a water-intensive crop—constitutes a public nuisance because it injures the Ranegas Basin community’s health, obstructs the community’s property use, and interferes with the community’s comfortable enjoyment of life and property. In the suit, Arizona’s attorney general complains that Fondomonte is extracting water at an unreasonable and excessive rate that, according to the Arizona Department of Water Resources, has already caused substantial subsidence in the Ranegas Basin. And if the water extraction is permitted to continue, the attorney general fears the Ranegas Basin community will need to abandon their homes and land for better access to quality water. For relief, the attorney general requests that the court enjoin Fondomonte from excessive groundwater pumping and establish an abatement fund, among other things.

NOVEMBER

Maine’s Attorney General Sues Oil Companies for Claims Concerning Fossil Fuel and Its Effect on Climate Change

November 26, 2024 | *State of Maine v. BP, et al.* (Me. Sup. Ct.).

Maine’s attorney general filed [suit](#) against several oil companies and a trade association for their claims about fossil fuel use and its effect on climate change. The complaint alleges that despite access to research showing that burning fossil fuels emits carbon dioxide and other greenhouse gasses, the companies misled the public about the impacts of using these fossil fuels, significantly contributing to climate-change-related harms in Maine. Maine’s attorney general complains that the companies’ actions constitute several violations of Maine common law, including negligence, nuisance, trespass, and violations of the Maine Unfair Trade Practices Act. For relief, Maine’s attorney general requests that the court assess monetary damages against the companies and require the companies to abate the dangerous conditions alleged to have been caused by their fossil fuels in Maine, among other things.

D.C.’s Attorney General Reaches Settlement with Gas Company over Failure to Meet Solar Development Requirements

November 15, 2024 |

The District of Columbia’s attorney general announced a [settlement](#) with AltaGas Ltd. to resolve a breach of its merger agreement with Washington Gas, which required AltaGas to develop 10 megawatts of solar energy to offset Washington Gas’s greenhouse gas emissions. Under the settlement, AltaGas must pay an initial \$2.1 million penalty to Washington, D.C. and additional monetary penalties that accrue daily until the solar capacity requirements are fulfilled, among other requirements. The first \$2.1 million of the additional penalties will be paid into the District Department of Energy & Environment’s Renewable Energy Development Fund to help develop additional solar resources throughout Washington, D.C., with any excess penalties to be paid into the city’s general fund.

Bipartisan Coalition of Attorneys General Issues Call on FCC to Improve Efforts to Stop Illegal Robocalls

November 13, 2024 | *In the Matter of Improving the Effectiveness of the Robocall Mitigation Database* (FTC).

A bipartisan coalition of 46 attorneys general are calling on the Federal Communications Commission (FCC) to improve its Robocall Mitigation Database and help prevent bad actors from plaguing American citizens with robocalls and texts. Voice service providers must register with the FCC’s database to operate in the United States. The coalition argues, however, that the database does not sufficiently prevent bad actors from obtaining legitimate registrations by filing inaccurate, false, or misleading information. The coalition proposes significant changes to the FCC’s database and its operation—including vetting information from voice service providers and penalizing providers that submit false information—to improve the database’s accuracy and efficiency while minimizing bad actors’ ability to take advantage of the database and the American people.

OCTOBER

State Attorneys General Urge the Federal Government to Protect American Drivers from Foreign Interference

October 24, 2024 | Comments on the Notice of Proposed Rulemaking entitled “Securing the Information and Communications Technology and Services Supply Chain: Connected Vehicles,” 89 Fed. Reg. 79,088 (Sept. 26, 2024) (Docket No. 240919-0245)

Several state attorneys general issued a [comment letter](#) urging the Department of Commerce’s Bureau of Industry and Security to finalize and issue its proposed rule to secure information and communications technology and services in connected vehicles. The rule seeks to define a connected vehicle as a mechanically powered vehicle (not including rail line cars) manufactured primarily for use on public streets “that integrates onboard networked hardware with automotive software systems to communicate via dedicated short-range communication, cellular telecommunications connectivity, satellite communication, or other wireless spectrum connectivity with any other network or device.” The attorneys general contend that malicious actors—including foreign adversaries—may exploit the technology in connected vehicles to access sensitive data stored on vehicle systems; gather geolocation and behavioral data in sensitive environments (such as military bases); and spy, monitor, and surveil passengers through sensors and cameras outside the vehicle, among other things. The attorneys general encourage the bureau to finalize its proposed rule as soon as possible to ensure passengers in connected vehicles are adequately protected from harm.





DECEMBER

**December 9, 2024** | *Juliana, et al. v. United States of America, et al.* (S. Ct.).

Twenty-one youth plaintiffs filed a [petition for writ of certiorari](#) in the U.S. Supreme Court seeking review of the Ninth Circuit’s May 1, 2024 order instructing the district court to dismiss the suit without leave to amend. The petition presents two questions: (1) When plaintiffs have established that their ongoing injuries are traceable to the defendants’ policies and practices, does Article III require a particularized factual determination of whether a federal agency or official will redress the plaintiffs’ injuries following a favorable declaratory judgment that resolves the constitutional controversy? (2) Are there exceptions to the three demanding conditions for mandamus articulated in *Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367, 380–81 (2004). The petition asks the court to hold the petition pending the Court’s opinion in a separate matter, and then grant, vacate, and remand the case to the Ninth Circuit for further proceedings.

**December 2, 2024** | *Center for Biological Diversity v. City of Pittsburg, et al.*, No. N24-2162 (Cal. Sup. Ct., County of Contra Costa).

The plaintiff filed a [petition for writ of mandate and complaint for declaratory and injunctive relief](#) in California state court alleging that the City of Pittsburg certified an environmental impact report (EIR) that failed to disclose or adequately analyze negative environmental impacts on biological resources, wildfires, community safety, GHG emissions, water quality, water supply, traffic, and noise for the Pittsburg Technology Park Specific Plan. The plaintiff requests, among other things, writs of mandate directing the respondents to vacate and set aside certification of the EIR, writs of mandate directing the respondents to comply with the California Environmental Quality Act (CEQA), a temporary stay, a temporary restraining order, preliminary and permanent injunctions, and a declaration that certifying the EIR and approving the project violated CEQA and CEQA guidelines.

NOVEMBER

**November 6, 2024** | *Organic Consumers Association v. Mission Produce Inc.*, No. 2024-CAB-006996 (D.C. Sup. Ct.).

A nonprofit organization [sued](#) an avocado producer pursuant to the D.C. Consumer Protection Procedures Act, claiming that the company wrongly markets its avocados as being sustainably sourced when in fact, the complaint alleges, its sourcing practices contribute to illegal deforestation, water scarcity, climate change, biodiversity and habitat loss, and other negative environmental consequences in Mexico. The organization brings the case on behalf of the general public of D.C. and D.C. avocado consumers. The organization does not seek monetary damages, but does seek declaratory and injunctive relief requiring the defendant to stop advertising its products as “sustainable.”

OCTOBER

**October 4, 2024** | *Organic Consumers Association v. Calavo Growers Inc.*, No. 2024-CAB-006328 (D.C. Sup. Ct.).

A nonprofit organization [sued](#) an avocado producer and distributor on behalf of D.C. consumers alleging false and deceptive advertising in the sale of avocado products under the D.C. Consumer Protection Procedures Act. The complaint alleges that on its website, Calavo wrongfully markets its avocado products as being “sustainable” and “better for the planet” and represents the company’s commitment to “long-term ecological balance, environmental soundness, and social equity.”The plaintiff alleges that Calavo’s sourcing practices contribute to climate change, deforestation, water shortages, biodiversity and habitat loss, and other negative environmental consequences in the avocado-growing regions of Michoacán and Jalisco, Mexico. The action seeks declaratory and injunctive relief, as well as attorneys’ fees, but no money damages.

**October 22, 2024** | *Eisner v. Meta Platforms Inc., et al.*, No. 3:24-cv-02175 (N.D. Cal.).

The Northern District of California [granted](#) Meta and Mark Zuckerberg’s motion to dismiss the plaintiff’s amended complaint brought under Section 14(a) of the Securities Exchange Act. The plaintiff alleged that Meta made misleading statements in its 2024 proxy statement about its efforts to protect children from sexual predators, and as a result he suffered economic loss by virtue of bringing this action. The court found that much of the information the plaintiff argued

Meta should have disclosed was available to the public and rejected his argument that he need not allege economic loss because he sought only injunctive relief. The court maintained the conclusion it reached in its earlier denial of the plaintiff’s motion for preliminary injunction that many of Meta’s proxy statements were inactionable “broad policy affirmations or aspirational statements.”

**October 25, 2024** | *Beyond Pesticides v. The Scotts Miracle-Gro Company*, No. 2024-CAB-006782 (D.C. Sup. Ct.).

A nonprofit public interest organization [filed suit](#) against a lawn and garden fertilizer products manufacturer alleging false and deceptive marketing and sales of its EcoScraps fertilizer. The plaintiff alleges that the representations on the product packaging that the fertilizer is “eco friendly” and “sustainable” are deceptive because the plaintiff’s testing of the products revealed they contain PFAS from contaminated sewage sludge. The plaintiff brings claims under the D.C. Consumer Protection Procedures Act and seeks declaratory and injunctive relief.

**October 30, 2024** | *The People of the State of California v. PepsiCo Inc., et al.*, No. 24STCV28450 (Cal. Sup. Ct., Los Angeles).

Los Angeles County [sued](#) beverage manufacturers PepsiCo and Coca-Cola, alleging that they misrepresented the environmental impact of single-use plastic beverage containers and misled consumers into falsely believing that recycling could offset associated environmental harms. The complaint alleges that the defendants represented themselves as “sustainable” companies and marketed the single-use bottles as “recyclable” and “made to be remade” despite knowing that plastics cannot be readily disposed of without associated environmental impacts. The complaint brings state claims for public nuisance, unfair competition, and untrue or misleading advertising and seeks injunctive and declaratory relief, restitution, civil penalties, and costs. On December 2, 2024, the defendants removed the case to the Central District of California under federal question and federal officer jurisdiction (No. 2:24-cv-10340).





NOVEMBER  
Shareholder Has an IDEA About Discrimination

*Kanaly v. McDonald, et al.*, No. [1:24-cv-08839](#)  
(S.D.N.Y. Nov. 20, 2024).

Shane Kanaly, a purported Lululemon shareholder, sued certain of Lululemon’s current and former directors and officers on behalf of the company for breach of fiduciary duty and violations of the federal securities laws. The plaintiff alleges that the defendants did not disclose that Lululemon’s IDEA (Inclusion, Diversity, Equity, and Action) program was not structured to meaningfully combat discrimination within the company and that employees continued to experience discriminatory treatment as a result. This was allegedly revealed when an online magazine published an article in November 2023 containing accounts from former Lululemon employees stating that Lululemon’s corporate culture is “unwelcoming of Black people.” The suit alleges similar facts to a securities class action filed against Lululemon earlier in 2024 related to inventory issues with Lululemon’s Breezethrough line.



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