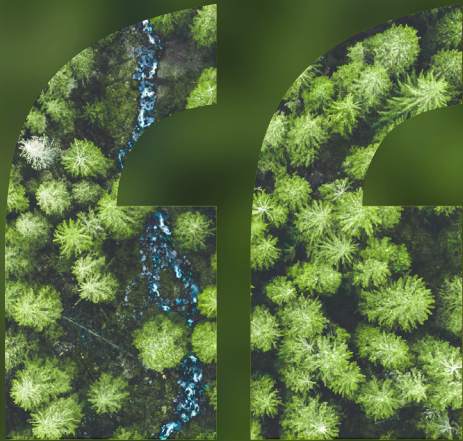
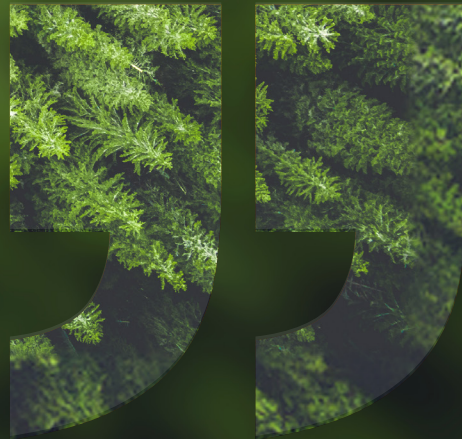


C L I F F O R D
C H A N C E



**WHAT THE NEW TRUMP
ADMINISTRATION
COULD MEAN FOR ESG**



— THOUGHT LEADERSHIP

DECEMBER 2024



WHAT THE NEW TRUMP ADMINISTRATION COULD MEAN FOR ESG

While the debate over ESG has been bubbling in the United States for some time, the reelection of former president Donald Trump and the Republican sweep of Congress have given deregulatory forces control over the US federal legislative and administrative levers of power.

This impending change – and the influence of prominent anti-ESG figures in the new administration – have led to forecasts of a broad rollback of federal ESG-related regulation in the coming year. This briefing provides a high-level survey of potential areas for change, in environmental and climate regulation, the energy transition, antitrust, the workplace, and in the regulation of investors and asset managers. The field is complex and the direction of travel is unpredictable; this survey provides a snapshot of areas that likely will receive focus early in the new administration.

Environmental and Climate Regulation

The Biden administration's ambitious climate-related regulatory agenda, developed in coordination with the U.S. Environmental Protection Agency (EPA), faces considerable rollback by the incoming Trump administration. This regulatory agenda included initiatives such as the Inflation Reduction Act (IRA), rejoining the Paris Agreement on climate change, developing a goal of net-zero greenhouse gas emissions by 2050, and publishing a host of rules aimed at curbing air pollution and climate change. It is likely to be one of the Trump administration's highest priorities in the first 100 days after taking office.

When first elected in 2016, President-elect Trump announced an intention to withdraw from the Paris Agreement at the first opportunity and did so in November 2019. The new administration may attempt to go further this term and, in addition to the widely expected withdrawal from the Paris Climate Accord, could remove the US from the United Nations Framework Convention on Climate Change, the foundation for the Paris Agreement, effectively denying the US a seat at global climate bargaining tables. The latter move may be slightly less certain and could be met with constitutional challenges.

On the domestic front, as soon as Inauguration Day, the Trump administration will likely freeze any pending Biden-era rules that have not taken effect by then, including any EPA rulemakings. This freeze could extend to include quasi-regulatory actions, including assessments, determinations, standards, and guidance such as the June 2024 "MOVES" greenhouse gas emissions modeling guidance, April 2024 Renewable Fuel Standard petition process guidance, and numerous 2024 fiscal grants for projects and programs that support reductions in emissions. We also expect that the Securities and Exchange Commission (SEC) will withdraw support for its Climate Disclosure Rule, which is currently stayed pending litigation.

More broadly, the Trump administration is likely to target Biden administration policies that encouraged the manufacture and use of electric vehicles, including the numerous EPA vehicle emissions standards already subject to litigation, recognition of California's authority over vehicle emissions under the Clean Air Act, and government procurement rules. Other targets will likely include the Waste Emissions Charge imposed by the IRA on methane leakage from oil and gas production and federal approvals for wind and solar projects on federal land or water, including offshore wind. With

respect to the Waste Emissions Charge rule in particular, even if the rule is not completely precluded, it could present an opportunity for the Trump administration to swap the rule for one that implements a more industry-friendly methane fee.

The U.S. Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, which overturned the *Chevron* doctrine that required federal courts to defer to a federal agency's reasonable interpretation of ambiguous statutes, and arguably requires agencies to ground their regulations more clearly in statutory authority, may provide additional impetus to the Trump administration's efforts to halt certain EPA actions, including those regulations aimed at addressing climate initiatives.

Ultimately, the range of the Trump administration's deregulatory efforts remains to be seen. At the same time, it is likely that certain states will try to work to fill the gap to maintain US climate-focused commitments over the long term, and states may well be the key to progressing climate policy in the next four years. These states will likely continue to impose disclosure rules, set stronger environmental standards than the federal government, and use tools such as the state procurement power to advance low-emissions production requirements related to key American commodities. Democrat-led states, together with environmental groups, are expected to vigorously litigate against the Trump administration's actions on climate change, similar to what occurred during the former president's first term.

The Inflation Reduction Act and Energy Transition

Trump campaigned on repealing the IRA, which provides substantial financial incentives for energy transition projects. However, a full repeal of both the IRA's subsidies and tax credits seems unlikely, as many of the tax credits under the IRA benefit conventional oil and gas production companies. To date, Trump has only explicitly stated a plan to pull back unspent funds from the US\$142.3 billion allocated for climate-related grants, loans, and other spending programs.

However, the IRA contains provisions specifically allocating certain funds. Therefore, attempts by the executive branch to rescind, reallocate, or pull back funds could be subject to court challenge as violations of the Constitution's Appropriations Clause, which requires appropriated funds to be spent.

While a full legislative repeal of the IRA may be unlikely, there are other ways to frustrate its implementation. Under the Congressional Review Act (CRA), Congress may review and revoke recently finalized rules. The Clean Vehicle Tax Credits, Advanced Manufacturing Production Credit, and Waste Emissions Charge rules were only recently finalized and, accordingly, are susceptible to such review. The Clean Hydrogen Production Credit rules, which are still being finalized, are also likely to be changed by the incoming administration. However, the hydrogen credit has strong bipartisan support and the backing of the oil & gas industry. Therefore, rather than blocking the Clean Hydrogen Production Credit rules, the administration could make the standards to qualify for credits less stringent.

Finally, the Trump administration is expected to repeal energy sector climate regulations, such as the recently finalized power plant regulations mandating emissions reductions for coal and gas-fired power, and some of the other Biden-era methane rules, including the pipeline methane leak detection and repair rules.

Antitrust

During the Biden Administration, Republican-controlled states, referred to as "Red States," were the main proponents of antitrust enforcement with relation to ESG. Enforcement authorities in several of those states announced a series of investigations into whether climate change commitments made by financial institutions and asset managers under various industry agreements, in particular the UN-sponsored Glasgow Financial Alliance for Net Zero ("GFANZ") and related Net Zero Banking Alliance (NZBA) and Net Zero Asset Managers initiative (NZAM). Following some of these investigations, in November 2024

a dozen states sued three prominent asset managers for allegedly using and conspiring to use shareholding positions in coal companies to suppress industry output of coal, and other states sued four heavy duty truck manufacturers for allegedly conspiring to reduce the supply of internal combustion vehicles.

To-date, the federal antitrust authorities have not embraced this trend, although the FTC Chair did testify before Congress that there is no ESG exemption to antitrust law, and Republican Senators and Representatives have issued letters to industry alleging that industry climate commitments may violate antitrust law. During the previous Trump Administration, however, antitrust authorities did scrutinize agreements between major auto manufacturers and the State of California relating to fuel-efficiency and emissions standards. With the coming changes in the Administration and in Congress, we are again likely to see federal antitrust attention turn to ESG.

The Workplace

It is widely anticipated that the incoming Trump administration will seek to roll back Diversity, Equity & Inclusion (DE&I) mandates and initiatives. We can anticipate that then-President Trump's September 2020 Executive Order on Combating Race and Sex Stereotyping, which imposed limits on certain workplace DE&I training, will return in some form. The previous order, which did not survive a court challenge and was overturned by the Biden administration, removed certain mandatory training programs for the federal workforce and companies supporting federal contracts.

We can expect the "red state" "blue state" divide on DE&I to remain with strong support for DE&I initiatives in some states contrasting with the pullback in others, continuing to create challenges for companies that operate in multiple states. But we could see challenges to DE&I initiatives, including on grounds of reverse discrimination, finding more success in the

courts. We are already seeing some employers pull back on public initiatives so as to avoid litigation risks.

We also can expect that the SEC's proposed Human Capital Management Disclosure rule – requiring the disclosure of certain workforce metrics – will remain unfinalized and not come into effect, and it is highly unlikely that the Federal Trade Commission's efforts to ban non-compete agreements, which have been thwarted by the courts, will proceed.

Finally, given campaign promises that immigration will be a key priority, we can expect a significant impact on employers, whether it be through limitations on certain visa categories or an increase in immigration-related enforcement in workplaces.

Investors and Asset Managers

While the recent election results all but ensure an indefinite postponement of the SEC's ESG regulatory agenda as related to asset managers, asset managers must nonetheless continue to ensure that they have robust policies and procedures relating to the utilization/integration of ESG considerations in their investment process.

As the SEC pauses its ESG regulatory agenda at the federal level, at the state level, we continue to see a bifurcated approach to ESG regulation and expect that to continue in the near future. As a result, a fragmented ESG regulatory approach in the United States will force asset managers to stay on top of regulatory initiatives at both federal and state levels to ensure that their compliance framework reflects the same.

The fragmented approach to ESG regulation in the United States will likely make it harder for global asset managers to adopt a one-size-fits-all model. As a result, greater resources should be allocated to ensure robust compliance policies and procedures are in place to mitigate regulatory, compliance and headline risk. Centralization of ESG

oversight is recommended to minimize the aforementioned risks.

While the SEC hits pause on its ESG regulatory agenda, we expect it to continue its focus on identifying ESG compliance failures and looking to bring enforcement actions where appropriate. Finally, it will be interesting to see whether the recently adopted amendments to Rule 35d-1 under the Investment Company Act of 1940, as amended, or, as it is better known, the “Names Rule”, may be rescinded or modified, including as such Rule is applicable to registered investment companies that incorporate ESG factors in their investment processes.

Department of Labor/ERISA

In November 2022, the Department of Labor (DOL) released interpretive guidance on how “ERISA’s fiduciary duties of prudence and loyalty apply to plan investments that promote environmental, social, or governance goals.” The DOL called its guidance the “Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.” We call it the “DOL ESG investing rule.”

The DOL ESG investing rule has been subject to litigation since its promulgation. In the latest judicial action, in July 2024 the Fifth Circuit Court of Appeals vacated a district court decision on the DOL ESG investing rule and remanded the case to the district court to determine whether the DOL ESG investing rule “can be squared

with either ERISA or the [Administrative Procedure Act].” The case is still before the United States District Court for the Northern District of Texas.

If the case remains pending when the Trump administration is installed, the administration may no longer defend the DOL ESG investing rule. It is a reasonable bet that the DOL will eventually modify or remove the current DOL ESG investing rule. While what comes next is speculative, the DOL may reinstate its 2020 rule, promulgated during the previous Trump administration, that limited fiduciary considerations of non-pecuniary factors when evaluating plan investments.

Conclusion

One thing is clear – the first half of 2025 will be an extraordinarily active time for ESG-related measures in the United States. At the same time, significant disclosure and due diligence requirements in other jurisdictions – in particular the EU – are expected to continue to move forward, creating possible dilemmas for multinational enterprises that must navigate these potentially divergent regimes. This future will require an increasingly nuanced approach, informed by knowledge of the specific requirements in the variety of jurisdictions in which you operate. We are available to assist as companies seek to navigate this increasingly complex world.



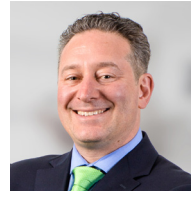
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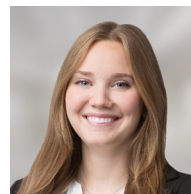
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NOTES

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