The Heritage Foundation

SPECIAL REPORT
No. 307 | DECEMBER 31, 2024

ESG, DEI, and What to Do About Them

David R. Burton

The Heritage Foundation

ESG, DEI, and What to Do About Them

David R. Burton

SPECIAL REPORT

No. 307 | DECEMBER 31, 2024

THOMAS A. ROE INSTITUTE FOR ECONOMIC POLICY STUDIES

About the Author

David R. Burton is Senior Fellow in Economic Policy in the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation.

This paper, in its entirety, can be found at **https://report.heritage.org/sr307**

The Heritage Foundation | 214 Massachusetts Avenue, NE | Washington, DC 20002 | (202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

ESG, DEI, and What to Do About Them

David R. Burton

ESG and DEI have become ubiquitous in government, corporations, and universities. ESG and DEI harm U.S. workers, consumers, and investors and are immoral. Federal and state policymakers need to protect the public from these pernicious progressive efforts. Reforms to a wide range of complex laws and regulations are required to adequately address the problem. Policymakers should particularly focus on ensuring that fiduciaries meet their fiduciary duties. Furthermore, if firms enjoy oligopolistic market power, their refusal to engage in commerce is highly disruptive to ordinary personal, commercial, or civic life, and there is little practical alternative for the targeted persons, firms, or organizations, then Congress should consider legislation to ensure these firms do not discriminate against customers.

ESG stands for environmental, social, and corporate governance factors, criteria, goals, or objectives. This *Special Report* describes ESG and its ideological cousin Diversity, Equity, and Inclusion (DEI) and why they are a problem.[1] Its primary focus, however, is how to appropriately address the ESG and DEI problems at both the federal and state level. There is no one policy solution that will address the problem because ESG and DEI are now ubiquitous throughout all levels of government (in administration, regulation, and procurement), in corporate America, and in universities.

Addressing ESG and DEI requires a multipronged approach. This *Special Report* makes 40 specific recommendations for reform or action by the 119th Congress and the new Administration at the federal level and 13 specific recommendations for reform or action at the state level. These recommendations are summarized at the end of the *Special Report*. Implementing these recommendations would be an important starting point, but there are undoubtedly many other steps that will need to be taken to finally end these destructive policies.

Introduction

In a free society, investors and business owners have the right to make their own decisions about how to invest or operate their business. They can invest their money or operate their business to maximize their return on investment or to minimize their risk, but they may also invest or make business decisions for charitable, social, ideological, or political objectives that result in lower financial returns.[2] There are two main limits to this principle. The first relates to fiduciaries, broadly defined, who invest or steward others' funds. The second imposes non-discrimination requirements on private firms with unusual economic power.

Fiduciaries have a legal obligation to act in the best interest of another person (usually called a principal or beneficiary). Examples of fiduciaries in an investment context would include most investment fund or endowment fund managers or advisers, pension fund managers, endowment fund trustees and directors, and officers of publicly traded companies or private firms with a large number of shareholders where there is a separation of ownership and control.[3]

The two most important duties that fiduciaries have are the duty of loyalty and the duty of care.[4]

1. The *duty of loyalty* means that the fiduciary must place the interest of the principal or beneficiary ahead of their own and act exclusively in the interest of the principal or beneficiary.

2. The *duty of care* means that the fiduciary must exercise the care, skill, prudence and diligence of a prudent person familiar with the matter that the fiduciary has undertaken.[5]

Fiduciaries do not have a right to pursue the fiduciaries' preferred charitable, social, ideological, or political objectives with other people's money without their consent. In other words, fiduciaries cannot, without the consent of investors or beneficiaries, decide to reduce the return on an investment or increase investment risk in furtherance of non-financial objectives chosen by the fiduciary. Blatant violation of fiduciary duties has now become commonplace in the name of ESG or ESG's ideological cousin DEI.

The second general limitation on the freedom of private businesses to conduct their business affairs with non-financial or non-economic considerations in mind involves common carriers,[6] public utilities,[7] monopolies,

and companies deemed public accommodations.[8] These limitations, long recognized in Anglo-American law, effectively impose broad non-discrimination requirements on these private companies with respect to customers. A phone company or electric utility, for example, cannot refuse to provide service to people because it dislikes their politics or the color of their skin. Although skepticism by policymakers about broadening these non-discrimination requirements is warranted, the scope and limits of these non-discrimination requirements should carefully evolve as markets and society develop.

A non-discrimination or non-exclusion requirement with respect to customers is appropriate in the case of firms that meet three tests.

1. The firm enjoys monopolistic or oligopolistic market power.

2. The firm's refusal to engage in commerce is highly disruptive to ordinary personal, commercial, or civic life.

3. There is little practical alternative for the excluded person, firm, or organization.

In modern society, this may well be the case with respect to certain large tech companies,[9] large health insurers or property and casualty insurers in some markets,[10] hospital systems in some markets,[11] and some large financial services companies (dominant registered investment advisers, dominant proxy advisory firms, and dominant credit card or payment processing companies).[12] Limitations on the ability of such firms to discriminate against private parties for political, social, or ideological purposes unrelated to an ordinary business purpose would be analogous to, but not identical to, the long-standing limits placed on common carriers, public utilities, monopolies, and companies deemed public accommodations.

What Is ESG?

ESG stands for environmental, social, and corporate governance (ESG) criteria, standards or factors. Although the term "ESG" has come into prominence over the past dozen years,[13] it is substantially similar to other progressive concepts used in a business or investing context, such as socially responsible investing, stakeholder capitalism, social justice, corporate social responsibility, sustainability, diversity, equity and inclusion (DEI),[14] fair trade, progressive "business ethics," and other terms.[15] ESG, as a term,

may have hit its peak.[16] Undoubtedly, some other term will come to represent the core idea of substituting progressive politics for the traditional purpose of business.

All of these terms have two characteristics. First, they are designed to remake the purpose of business. Second, they are never clearly defined and are like chameleons, changing to fit the latest left-wing cause *du jour* or the prejudices of a particular author or organization.[17] This fundamental amorphousness and lack of rigor has been empirically demonstrated by many studies that show very large differences[18] among the ESG ratings or ESG scores of particular firms by different ESG rating organizations.[19] What is different about ESG is the aggressiveness with which the federal government and woke investment advisers, proxy advisors, and corporate managers are pursuing ESG objectives at the expense of taxpayers, investors, retirees, beneficiaries, customers, and others.

Fiduciaries

Widespread violations of fiduciary duties are now commonplace. This is sometimes accomplished by simply ignoring fiduciary duties—usually without consequences. Often, however, it is done more surreptitiously by using ESG factors as a "tie-breaker" after purposefully creating ties or by asserting that ESG factors increase returns or reduce risks. The Biden Administration actively encouraged this behavior despite majority opposition in both the House and Senate.[20] This evasion is aggressively supported by the multi-billion-dollar "climate-industrial complex"[21] and the DEI industry[22] which employ vast numbers of people at corporations; universities;[23] tax-exempt organizations; and law, lobbying, accounting, and consulting firms[24] that profit from climate change requirements and from DEI or "human capital management" racial preference requirements.[25] These requirements will have a disproportionately adverse impact on small businesses and are a regulatory barrier to entry and competition. They will lead to further concentration in key industries since regulatory costs do not increase linearly with size.

Institutional DEI

DEI policies are often overtly racist and sexist in that they mandate that government or firms establish quotas or otherwise discriminate based on sex, skin color, ethnicity, or sexual orientation rather than making determinations based on individual achievement, talent, experience, or competence.

DEI defines diversity entirely in terms of these immutable characteristics[26] and assigns them to a hierarchy of privilege and deprivation, oppressor and oppressed. This scheme is hostile to the myriad of other kinds of diversity such as achievement, expertise, experience, approach to business or business philosophy, educational background, socio-economic background, ethical views, political views, integrity, geographic location, and so on.

Morally, DEI represents a marked step backwards. It is rejection of the principle that people should be judged on the content of their character and their individual achievement rather than their sex, race, national origin, ethnicity, or sexual orientation. It judges people as members of a racial or sexual group rather than as individuals. It is a rejection of the principle of equal protection under the law (or, often, regulations promulgated with questionable basis in law). It is a rejection of the principle that all are created equal. Discrimination or quotas on the basis of race, ethnicity, or sex should be a relic of the past—and most Americans agree.[27]

Asset Managers and Proxy Advisory Firms. Extreme concentration in the financial sector is one of the reasons that ESG has become particularly problematic now.[28] Just six firms—the investment management firms BlackRock,[29] The Vanguard Group,[30] Fidelity Investments,[31] and State Street,[32] and the proxy advisory firms Institutional Shareholder Services (ISS)[33] and Glass Lewis[34] (both foreign-owned)—effectively control most public corporations in the United States.[35]

Globally, the four largest asset managers controlled about 21 percent of total assets under management as of 2021.[36] The top 20 firms control approximately 45 percent of total assets under management globally.[37] Proxy advisory firms provide recommendations to pension, investment, and endowment fund managers regarding how to vote the shares owned by the funds. Their recommendations are usually followed. ISS[38] and Glass Lewis control an estimated 97 percent of the proxy advisory business.[39] Although estimates vary due to methodological differences or the type of votes analyzed, ISS and Glass Lewis together can move 10 percent to 38 percent of shares voted.[40]

As these six firms become increasingly "woke," seeking to use their voting power to impose ESG and DEI principles[41] on most public companies at the expense of investor returns, corporations are becoming an effective means of imprinting progressive values on everyday life throughout the United States. Until recently, the large investment managers were forthright that they are doing this.[42] Now, having received widespread criticism and legislative pushback at the state level, they are a bit more circumspect.[43] Nevertheless, they are still aggressively promoting ESG and DEI, although

this promotion is now being relabeled from ESG to "responsible business"[44] or "sustainability" in some corporations.[45] Rebranding the idea makes it no less pernicious.

Banking. A similar concentration is occurring in banking. As of 2022, the top five banks controlled 51 percent of U.S. deposits and the top 10 banks controlled 66 percent of U.S. deposits.[46] As these banks and their regulators become more aggressively progressive in their political orientation, problems with "debanking" for political reasons and the allocation of credit to achieve political aims will presumably become more common.[47] For now, however, the significant number of banking alternatives makes this a lesser problem than the effective control of most public companies by just six firms.[48]

Congress needs to prevent the evasion of fiduciary duties imposed on registered investment advisers[49] (fund managers) and their associated investment companies;[50] proxy advisory firms (retained by fund managers, retirement plan managers or trustees and broker-dealers); retirement plan sponsors and managers (regulated pursuant to the Employee Retirement Income Security Act of 1974 (ERISA)); and others. It also needs to prevent the evasion of fiduciary or other heightened duties[51] to investors by corporate directors and management[52] or broker-dealers[53] to the extent that federal law governs those duties. The next conservative administration needs to launch enforcement actions against registered investment advisers, proxy advisory firms, and ERISA fiduciaries that are violating their fiduciary duties. Congress also needs to prevent banking regulators and so-called self-regulatory organizations (SROs)[54] from allocating credit, financial services, and investment opportunities on the basis of ESG factors. Finally, it needs to keep ESG out of the federal procurement process.

State legislatures, attorneys general, treasurers, and other financial officers have an important role as well. State law governing state-sponsored pension plans, state contracting and procurement, the provision of financial services, and trusts and endowments can play an important role in protecting retirees, consumers, and taxpayers from the detrimental effects of ESG. State corporate, securities, banking, pension, and trust laws should be reformed to strengthen the protection of investors, depositors, and beneficiaries.[55] State attorneys general or treasurers can launch enforcement actions against investment advisers, retirement plan fiduciaries, and others with a fiduciary duty who violate this duty—and should investigate the proxy advisory firm duopoly.

Common Carriers, Public Utilities, Monopolies, and Other Large Firms

It is well-established that common carriers, public utilities, monopolies, and companies deemed public accommodations cannot generally decline to do business with customers because they do not like their race or ethnicity, their environmental views, their politics, and so on—or even for more benign reasons. The central question facing policymakers at the federal and state level is the degree to which these types of requirements should be broadened to encompass other firms that enjoy oligopolistic market power.

Candidates for such regulation would include:

- Certain large tech companies that own or control dominant operating systems, dominant search engines, dominant social media platforms, and cell phone manufacturing and software, among others;

- Large health insurers, property and casualty insurers, and hospital systems in certain markets; and

- Some large financial services companies (notably dominant registered investment advisers, dominant proxy advisory firms, and dominant credit card and payment processing companies).

Such limitations on the ability of firms to discriminate against private parties for political, social, or ideological purposes unrelated to an ordinary business purpose would be analogous to, but not identical to, the long-standing limits placed on common carriers, public utilities, monopolies, and companies deemed public accommodations. Such limitations, to the extent they are imposed, should simply require that firms must do business with customers on the same basis as other customers notwithstanding, for example, their lawful environmental practices (using fossil fuels, for example); the industry they are in (fossil fuel production, timber, agriculture, mining, firearms production, or distribution); their environmental views; their political views; or their race, religion, ethnicity, national origin, or sex. Specific proposals are discussed below.

Why ESG Matters

Traditionally, the purpose of a business has been to earn a return for its owners by cost-effectively combining the capital and entrepreneurial spirit

of its owners with the labor and talent of its employees in a competitive environment to satisfy the wants and needs of its customers. Any well-run business must show due regard for its employees (otherwise their morale and productivity will decline, or they will leave to work elsewhere); its customers (otherwise revenues will collapse); its suppliers (otherwise the business will be unable to operate); and its community (otherwise its public reputation and its relationship with local officials will suffer).

Nevertheless, the primary reason that most companies are formed and that investors put their capital at risk (either to launch a company or by purchasing company securities on secondary markets like a stock exchange) is to earn a return. The relationship between entrepreneur–founders, investors, management, workers, suppliers, and customers have been—subject to certain broad constraints imposed by law—privately decided and voluntary.

Particularly in smaller enterprises in which ownership and control are not separated, or substantially overlap, the owners (as discussed above) have the right to operate their business to achieve objectives other than a return. But in cases in which ownership and control are separated, in the absence of an affirmative vote to the contrary, the business should be managed primarily to achieve a return for its owners by satisfying the wants and needs of its customers.[56]

ESG is an effort by government, investment advisers, proxy advisors, pension fiduciaries, and the management of large corporations[57] to redefine the purpose of business and investment as being to pursue environmental, "diversity," and other political or social justice objectives rather than earning a return by satisfying customers while treating employees or suppliers fairly. Investors may, of course, choose to invest their own money in funds or companies that have a social purpose beyond earning a return. That is why benefit corporations and benefit limited liability companies exist.[58] It is, however, illegitimate for government, corporate management, or advisers with a fiduciary duty to investors to reduce those investors' return in order to achieve the preferred political or social objectives of politicians, management, or advisers without the investors' permission. This is particularly true with respect to the beneficiaries of pension or other retirement plans.[59]

Governments at the federal, state, and local levels are increasingly allowing or requiring progressive actors in capital markets to make decisions for political, ideological, or social reasons rather than for business or economic reasons, and permitting systematic violations by those actors' of their fiduciary duties.[60]Politicians, regulators, and other advocates routinely argue that politicizing business decisions in the name of ESG is in the interest of shareholders, investors, retirees, workers, and customers. *This is false*

and rapidly becoming obvious despite the massive regulatory and financial support from the federal government. The data shows it.[61]

Moreover, if it were true, then there would be no need for ESG initiatives since the ordinary legal rules and the profit motive would do the job. In fact, as ESG becomes more commonplace and induces firms to make uneconomic decisions and misallocate scarce capital,[62] it will raise prices, reduce the quality of goods and services, cost jobs, reduce wages,[63] harm entrepreneurs seeking to raise capital, reduce investment returns,[64] and make American business less efficient, less dynamic, and less competitive internationally. The pursuit of progressive ESG objectives will further politicize business and the daily life of most Americans. ESG will force more and more Americans to comply with progressive dictates.

Solutions to the ESG and Related DEI Problem

This section addresses specific steps that federal and state legislators and officials can take to address ESG and the related DEI problem.

Prohibit Fiduciaries and Broker-Dealers from Acting Contrary to Investors' Financial Interest Unless They Secure Explicit Consent to Do So. As discussed above, investors have the legal and ethical right to invest their own funds for reasons other than a return. Fiduciaries, however, do not have the right to invest other people's money to achieve the fiduciary's social, political, or ideological objectives by lowering financial returns received by, or increasing financial risks borne by, those to whom they owe a fiduciary duty.

Congress should require that any ERISA fiduciary, registered investment adviser, or broker-dealer[65] be required to secure individualized written consent from an investor or plan beneficiary before they invest or vote securities for any reason other than maximizing risk-adjusted financial return. Congress should amend the law so that investing for such reasons (without obtaining investor or plan beneficiary consent) is an explicit violation of § 10(b) of the Securities Exchange Act; § 206(4) of the Investment Advisers Act;[66] § 17(j) of the Investment Company Act (which prohibits fraudulent, manipulative, or deceptive practices); ERISA fiduciary duties;[67] § 36 of the Investment Company Act governing the fiduciary duties of Registered Investment Companies.[68] A conservative administration should actually enforce existing fiduciary duty requirements rather than encouraging fiduciaries to evade their fiduciary duties.

State legislatures should require fiduciaries that are not regulated by the federal government to do the same and have similar robust penalties on the

firms and individuals who ignore this requirement. Examples would include those that are trustees for state pension plans or investment advisers for those plans,[69] trustees of state university endowments, or other government funds.[70] Consistent with the principle that private persons should be free to invest their own funds for purposes other than maximizing risk-adjusted returns, if an endowment or other fund accepts a gift, then expressed donor intent to do so should generally be respected (even at, for example, public universities) or the gift returned. No private institution should generally be required to invest in enterprises inconsistent with their purpose or values. State executive branch officials should consider a more aggressive enforcement posture ensuring that fiduciaries may not blithely ignore their fiduciary duties to further their own political, social, or ideological aims.

In addition, state corporate laws merit careful review and possible revision.

- First, the state corporate business judgment rule (usually judicially created), should be clarified, if required, to ensure that director duties to the corporation and shareholders exclude the pursuit of political, social, and ideological aims unrelated or detrimental to the financial performance of the firm.

- Second, the rules governing shareholder derivative lawsuits may need to be modified to ensure that when directors violate their fiduciary duties to the corporation and its shareholders that there are actual consequences.

- Third, the rules governing director or officer indemnification for purposeful or negligent violation of director or officer duties to the corporation may need to be narrowed so that director or officer liability for violating fiduciary duty is more likely.

There is an active competition for corporate charters. Managements tend to prefer jurisdictions that, via the business judgment rule, effectively enshrine board primacy rather than shareholder primacy. Jurisdictions that clearly require boards and management to act in shareholders' interest may be able to start effectively competing for corporate charters from outside their state. A full discussion of these corporate governance issues is beyond the scope of this *Special Report*.

Define Materiality for Purposes of Securities Law. The concept of materiality has been described as "the cornerstone" of the disclosure

system established by federal securities laws.[71] The Supreme Court has held that information or facts (or omitted information or facts) are material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision.[72] The Court has also indicated that information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available.[73]

There is no definition of material or materiality in the Securities Act or the Securities Exchange Act, although the term "material" is used in both many times. The Securities and Exchange Commission (SEC) has defined the term "material" in its regulations and changed its definition over years, often to conform to Supreme Court holdings. The current definition found in 17 Code of Federal Regulations § 240.12b–2 is:

> Material. The term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.

These definitions are fine as far as they go but they are quite general and provide little practical guidance to issuers. There is a spirited debate about whether "principles-based" or more "prescriptive" bright-line rules should govern disclosure by issuers of material information. The Securities and Exchange Commission's rules presently balance these two approaches.

There is also a major effort to effectively redefine what is material to include information that is really directed at achieving various social or political objectives. In other words, the information would be deemed material if a woke fund investment adviser or proxy advisory firm deems it "important" or would like to see the information—whether or not the information has any bearing on the financial results of the issuer.[74] The European Union (EU) has already gone down this path, calling it "double materiality."[75]

Instead, the focus of the materiality standard in the United States should remain on what actual investors need to know to meet their financial, economic, or pecuniary objectives—not the preferred political or social objectives of investment advisers, corporate managers, or regulators. The vast majority of underlying beneficial owners in investment funds and the vast majority of direct shareholders care about the returns earned in their

retirement and other accounts, not whether their advisers' or corporate management's political objectives are being met. While investors are free to invest in funds or corporations that explicitly sacrifice returns to achieve political objectives, few do so.[76]

Congress should statutorily define materiality in terms generally consonant with Supreme Court holdings on the issue, making it clear that the term "material" refers to financial returns and financial risks. It should also specifically exclude social and political objectives unrelated to investors' financial, economic, or pecuniary objectives.[77] Investors would remain free to invest in funds or corporations that explicitly state that they are seeking to achieve political or social objectives by sacrificing return. But the funds, investment advisers, and issuers would no longer be able to misrepresent what they are doing.

Prohibit Retirement Account Fiduciaries from Acting to the Detriment of Beneficiaries. With proper enforcement by the Department of Labor (DOL), the current ERISA statute would be adequate. It does, after all, provide that ERISA fiduciaries operate the plan *solely* in the interest of the participants and beneficiaries and for the *exclusive* purpose of providing benefits to participants and their beneficiaries or defraying the reasonable expenses of administering the plan.[78]

However, the DOL under both the Biden and Obama Administrations has permitted ERISA fiduciaries to purposefully create "ties" among investment alternatives and to resolve those ties using ESG criteria.[79] Ties are exceedingly rare in actual practice unless the fiduciary purposefully adopts a methodology that creates a large number of ties so that the fiduciary can then break the ties using criteria designed to further the fiduciary's social, political, or ideological purposes. For example, a fiduciary could divide all of the public operating company investment alternatives into five categories. Since there are about 5,000 possibilities,[80] there would be about 1,000 in the "best" category—1,000 "ties" which could then be broken using ESG factors.[81]

Congress should amend § 404 of ERISA explicitly prohibiting ERISA fiduciaries from considering any non-pecuniary, non-economic, or non-financial social, political, or ideological goals or objectives when choosing investments, voting proxies, or exercising other rights appurtenant to investments held by the plan unless the plan beneficiary has explicitly, in writing, consented to the use of these factors.

Congress should also require that any tie among investment alternatives be broken using a random methodology. Because actual ties among competing investment alternatives are exceedingly rare, this provision will rarely be used, but it is preferable to enabling woke fiduciaries to purposefully

create ties to evade the existing underlying requirements imposed by ERISA. Since it would only apply to actual ties where the projected return is the same, such a provision would have no material effect on returns.[82]

States should enact legislation to ensure that state retirement funds are invested solely to achieve a return for state employees who are pension-plan beneficiaries rather than to achieve the political or social objectives of those who manage the money.[83]

Change the Rules that Give Proxy Advisory Firms Outsize Importance. A number of regulatory steps by the DOL's Employee Benefits Security Administration and its predecessor agencies[84] and the SEC led to the dramatic rise in the power of proxy advisory firms.[85]

SEC rule 206(4)[86] provides that it is a fraudulent, deceptive, or manipulative act, practice, or course of business for an investment adviser to exercise voting authority with respect to client securities unless the investment adviser adopts and implements written policies and procedures that are reasonably designed to ensure that the investment adviser votes client securities in the best interest of clients.[87] The policies and procedures must describe how the investment adviser addresses material conflicts that may arise between the adviser and its clients.[88] In a 2004 no-action letter (withdrawn in 2018), the SEC opined that the use of proxy advisory firms could "cleanse" conflicts of interest between Registered Investment Advisers (RIAs) and investors.[89] The DOL has generally required fiduciaries to vote shares held by ERISA plans since 1988 and permitted outsourcing this function to proxy advisory firms.[90]

Congress should make various changes to rules that give proxy advisory firms such outsized importance in corporate governance. Congress should amend section 206 of the Investment Advisers Act[91] to make it clear that RIAs must act in the best interest of their client, and in the absence of individualized written consent from a client, that "best interest" means maximizing risk-adjusted financial return. Investing or voting proxies for any other reason, without obtaining written investor or plan beneficiary consent, should be explicitly, statutorily deemed a violation of § 206(4) of the Investment Advisers Act (or the new subsection explicitly requiring that RIAs act in the best interest of their client). Congress should also require the Securities and Exchange Commission to revise Rule 206[92] and Rule 14a–9.[93] Congress should also adopt statutory language making it clear that the use of third-party proxy advisory firms does not in any way relieve RIAs of their fiduciary duty or shield them from liability for conflicts of interest.

In addition, Congress should amend § 206 of the Investment Advisers Act such that voting proxies in furtherance of political, social, or ideological objectives that RIAs have publicly endorsed raises a rebuttable presumption

that a conflict of interest exists and that the RIA's fiduciary duty has been violated. Evidence that should be explicitly admissible in court or administrative proceedings and considered by the Securities and Exchange Commission when considering enforcement actions should include:

- Board members' or management's public statements;
- The firm's website; and
- Corporate or manager membership in, commitments to, or endorsements of:
  - An association,
  - A coalition,
  - Another similar organization,[94] or
  - Other publicly released information.

This presumption could be rebutted if the RIA then demonstrates with clear and convincing evidence that voting in favor of the RIA's declared political, social, or ideological objective was in its clients' best interest (defined as maximizing clients' risk-adjusted financial return). This will make duplicity by RIAs much more difficult. They would no longer be able to claim to be exercising their power to achieve political objectives in some forums while simultaneously claiming that they are doing nothing of the sort in others. In other words, they will not be able to virtue signal to politicians and activists by saying they are voting their proxies to further political objectives—while claiming to regulators, clients, and others that they are voting those proxies to maximize investor returns.

Congress should revise § 14 of the Securities Exchange Act[95] to increase proxy advisory firm transparency, to increase the ability of issuers to understand the basis of proxy advisory firm advice and to respond to their recommendations before shares are voted, to more aggressively police proxy advisory firm conflicts of interest, and to ensure that proxy advisory firms are acting in a manner consistent with the fiduciary duties of their clients rather to achieve the proxy advisory firm's political goals. Many of the provisions in the proxy-voting advice rule adopted by the SEC in 2020, and now largely rescinded, deserve congressional consideration.[96]

For necessary changes to ERISA, see the discussion below entitled Prohibit Retirement Account Fiduciaries from Acting to the Detriment of Beneficiaries.

Prohibit Racism in the Board Room and in Financial Services Regulation. Many, perhaps most, of the proponents of diversity, inclusion, social justice, critical race theory, multiculturism, and identity politics reject (in their words) "the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law."[97] They are engaged in a systematic and sustained effort to effectively change the national ethos from *E Pluribus Unum* to *De Uno, Multis*.[98]

They seek to alter the "narrative" and to make sex, race, ethnicity, sexual orientation, and self-declared gender identity central to law, public policy, and self-understanding instead of individual achievement, merit, talent, and the content of one's character. They actively seek to discriminate on the basis of sex, race, ethnicity, or sexual orientation rather than achieve a society in which such discrimination is unlawful and rare. They seek a faux diversity measured by group identity, determined largely by immutable characteristics—rather than true diversity that accounts for the rich tapestry of human experience. They seek to subordinate individual merit to group identity. Financial regulators should not go down this path but have begun to do so.

The National Association of Securities Dealers Automated Quotations (Nasdaq) board diversity rule effectively imposes racial, ethnic, or sex-based quotas on board membership (otherwise the company must publicly explain why they did not meet the quotas) and relies on self-identification for board-diversity disclosures. Besides being immoral, the rule's subjective self-reporting mechanism raises liability concerns with respect to misrepresentation under the anti-fraud and reporting provisions of the federal securities laws.[99] A person who is a Caucasian male is objectively not a female Native American, whether he "self-identifies" as a female Native American or not. On December 11, 2024, the U. S. Court of Appeals for the Fifth Circuit (sitting en banc) ruled by a vote of 9-8 that the SEC's approval of the Nasdaq board diversity rule was inconsistent with the Securities Exchange Act of 1934 and vacated the SEC's order approving the rule.[100] The Federal Deposit Insurance Corporation (FDIC) has proposed going down a similar route for bank boards.[101] The FDIC, unlike Nasdaq,[102] is clearly a state actor, and its rules will have to pass constitutional tests regarding racial discrimination.

The Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in employment based on an individual's race, color, religion, sex, or national origin.[103] It also makes preferential treatment based on quotas or percentage targets unlawful.[104] The securities and banking laws should incorporate Civil Rights Act principles to prevent regulators, including SROs, from adopting rules or practices that discriminate on the basis of race, color, religion, sex, or national origin. Certainly, racism and sexism should not be legally mandated by securities regulators—including SROs. Congress should prohibit intentional discrimination on the basis of race, ethnicity, national origin, religion, or sex[105] by financial regulators and self-regulatory organizations.[106] Although board members are not generally regarded as corporate employees and therefore not currently subject to the anti-discrimination provisions of the Civil Rights Act, Congress should amend the law so that paid board members are.[107]

End Racism in or by the Federal Government. Overt racism under the rubric of DEI has now become ubiquitous in the federal government. Increasingly, the federal government is imposing racist requirements on those who deal with the federal government. This should end.

DEI-related Executive Orders 13985,[108] 13988,[109] 14020,[110] 14031,[111] 14035,[112]14091,[113] and National Security Memoranda NSM–03[114] and NSM–04[115] should be rescinded. Any programs or offices that carry out these executive orders or memoranda should be immediately closed, and the agency head should undertake an appropriate reduction in force and not transfer, reassign, or redesignate any employees or contractors whose positions or functions were eliminated. Congress should provide that no funds appropriated or otherwise made available by law shall be used to implement or comply with these executive orders or national security memoranda.

The Directors of the Office of Personnel Management (OPM), the Office of Management and Budget, and all agency heads should revise all regulations, policies, procedures, manuals, circulars, courses, training, and guidance such that they effectively rescind those that were promulgated, adopted, or implemented to comply with the executive orders and memoranda listed above. The OPM Director should close the Office of Diversity and Inclusion and the Chief Diversity Officers Executive Council and further undertake an appropriate reduction in force and not transfer, reassign, or redesignate any employees or contractors whose positions or functions are eliminated.

The federal government should enforce existing constitutional and statutory prohibitions on racism in the federal government. Moreover, Congress should specifically prohibit:

- Discriminating for or against any person on the basis of race, color, ethnicity, national origin, or sex;

- Conducting training, education, course work, or other pedagogy that that asserts that a particular race, color, ethnicity, biological sex, sexual orientation, gender identity, or national origin is inherently or systemically superior, inferior, oppressive, oppressed, privileged, or unprivileged; and

- Requiring as a condition of employment; as a condition for promotion or advancement; or as a condition for speaking, making a presentation, or submitting written materials the signing of or assent to a statement, code of conduct, work program or plan, or similar device that requires assent by the employee that a particular race, color, ethnicity, biological sex, sexual orientation, gender identity, or national origin is inherently or systemically superior, inferior, oppressive, oppressed, privileged, or unprivileged.[116]

Because the Biden Administration refused to comply with the law and engaged in discriminatory DEI programs, trainings, and preferences, Congress should prohibit spending on such programs or activities. Specifically, Congress should provide that no funds may be appropriated or otherwise made available by law for the purpose of maintaining in any federal agency

- An Office of Diversity, Equity, Inclusion and Accessibility; an Office of Diversity, Equity, and Inclusion; an Office of Diversity and Inclusion; or an Office of Diversity; or

- A Chief Diversity Officer or substantially similar officer.

Congress should also provide that no funds appropriated or otherwise made available by law shall be used for the purpose of developing, implementing, distributing, or publishing in any federal agency diversity, equity, inclusion, and accessibility plans, strategic plans, reports, surveys, or anything substantially similar or equity action plans, reports, surveys, or substantially similar plans, reports, or surveys. Statutory diversity offices, diversity requirements, and Chief Diversity Officers should be eliminated.[117]

Conduct an Antitrust Investigation of Proxy Advisory Firm Duopoly. As discussed above, ISS and Glass Lewis control an estimated 97 percent of the proxy advisory business.[118] Given the centrality of this

duopoly to the governance of U.S. public corporations, an antitrust investigation is warranted to gather facts about whether an antitrust violation has occurred. It is not clear whether this should be conducted by the Federal Trade Commission (FTC) or the Antitrust Division of the Department of Justice, given their overlapping jurisdictions.[119] The next Administration should make an explicit assignment to one agency. The FTC is governed by five commissioners, each serving a seven-year term. Given the governance structure of the FTC, it may be advisable to assign the investigation to the Antitrust Division.

State attorneys general should also undertake an investigation. They may bring federal antitrust suits on behalf of individuals residing within their states (*parens patriae* suits) or on behalf of the state as a purchaser. (Typically, that would be state pension plans or university endowments in the case of proxy advisory firms.) In addition, state attorneys general also may bring an action to enforce the state's antitrust laws.

Appropriately Use the Civil Rights Laws Against Left-Wing Racism. The next conservative administration should appoint leaders who will direct the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, the Office for Civil Rights in the Department of Education, the Office for Civil Rights at the Department of Health and Human Services, and the Office of Federal Contract Compliance Programs at the DOL to launch enforcement actions against DEI-motivated discrimination on the basis of race, ethnicity, national origin, or biological sex in employment, university admissions, and other areas.[120] Moreover, the next conservative administration should enforce the Equal Credit Opportunity Act against DEI racism.[121]

Banking. Congress should prohibit racism by financial regulators, including so-called self-regulatory organizations.[122] Congress also needs to prevent banking regulators and SROs from politicizing the allocation of credit, financial services, and investment opportunities on the basis of ESG factors. Virtually every financial regulator has started down this path.[123]

Congress should statutorily reverse the multitudinous climate change and DEI regulations in an ESG and DEI reversal bill. The bill should contain a separate section for each rule being rescinded, and in each section, Congress should take four steps.

1. It should adopt language similar to that used in the Congressional Review Act (the indicated rule will have "no force or effect").[124] It should, however, contain language that would also preclude adoption or enforcement of any "substantially similar rule."

2. It should adopt a provision that "no funds appropriated or otherwise made available by law shall be used to implement or comply with" the rule.

3. The statute should adopt a directive to the agency to amend the Code of Federal Regulations within 60 days to reflect the recission of the rule and explicitly waive Administrative Procedure Act notice-and-comment requirements with respect to those changes necessary to effect congressional recission of the rule.

4. It should adopt a directive to the agency to conform within 120 days all guidance, interpretative bulletins, no-action letters, and similar documents to reflect congressional rescission of the rule and make it explicitly clear that all such guidance is of no force and effect on the date of enactment of the bill.

Procurement. Because the federal government has routinely ignored constitutional prohibitions on discrimination in contracting,[125] Congress should prohibit discrimination on the basis of race, color, ethnicity, national origin, or sex in federal procurement, contracting, and grant-making and prohibit federal contracts or grants from mandating such discrimination or from mandating DEI training or offices. In addition, the Office of Federal Contract Compliance Programs at the DOL, among others, should launch enforcement actions against DEI racism in federal procurement.

Congress should make so-called climate change disclosure requirements in the procurement process unlawful.[126] While such requirements do enrich the climate industrial complex considerably, they do virtually nothing for the climate, they increase taxpayer costs, and they reduce competition in the procurement process.[127]

States may want to consider prohibiting, or seriously limiting, state contracts with companies that engage in economic boycotts based on ESG factors.[128] This will be of particular interest to legislators in states that have important industries that are being targeted by ESG proponents. The objective of such legislation is to create a commercial downside for companies that attempt to virtue signal to progressives by inflicting economic harm on companies that progressives do not like. Companies that make business decisions for business reasons would have nothing to fear from such legislation.

In this context, a company would be deemed to be engaging in an economic boycott when that company, without an ordinary business purpose, refuses to deal with, terminates business activities with, or otherwise takes

any commercial action that is intended to penalize, inflict economic harm on, limit commercial relations with, or change or limit the activities of another company because the company, without violating federal or state law, engages in activities with which progressives disagree.

That would potentially include the state government refusing to deal with, or limiting commerce with, companies that boycott other companies that:

- Engage in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel–based energy, timber, mining, agriculture, and firearms or ammunition;
- Do not meet, are not expected to meet, or do not commit to meet environmental standards or disclosure criteria, in particular to eliminate, reduce, offset, or disclose greenhouse gas emissions;
- Do not meet, are not expected to meet, or do not commit to meet corporate board or employment, composition, compensation, or disclosure criteria that incorporate characteristics protected under the state's state civil rights statute; or
- Do not facilitate, are not expected to facilitate, or do not commit to facilitate access to abortion, sex or gender change, or transgender surgery.

Require Corporate Neutrality in Limited Circumstances. As discussed above, policymakers should consider broadening non-discrimination or non-exclusion requirements in certain well-defined circumstances. Such limitations are a limit of the freedom of firms to act for non-financial reasons and therefore should be subject to serious skepticism by policymakers. Nevertheless, free societies have long considered such non-discrimination or non-exclusion requirements appropriate in some circumstances, and the limits to those requirements should carefully evolve as markets and society evolve.

If Congress finds that particular firms enjoy oligopolistic market power;[129] that their refusal to engage in commerce is highly disruptive to ordinary personal, commercial, or civic life; and that there is little practical alternative for the targeted persons, firms, or organizations, then Congress should consider legislation to address the problem. Such legislation could prohibit such firms from discriminating against potential customers based

on their race, ethnicity, national origin, sex, or their politics; the lawful businesses in which they engage;[130] or their commitment, or lack thereof, to climate change policies or greenhouse gas emission targets beyond those required by law.

Better, probably, is an approach that simply requires these firms to offer their services to all potential customers on ordinary terms with good-cause exceptions.[131] Although different common-carrier statutes and court cases use different language, the typical formulations prohibit "any unjust or unreasonable discrimination," "any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage," the "refusal of service without good cause," or the "unreasonable refusal to deal." Alternatively, some statutes or cases require "equal access," require that firms "serve all comers," or mandate that a firm "shall provide" the transportation or service upon "reasonable request" or unless there is "good cause" not to do so.[132] In all of these formulations, the contours of what is deemed to constitute good cause or unreasonable refusal would be a critical decision for policymakers.[133]

At the state level, in markets in which a very few large health insurers, property and casualty insurers, or hospital systems are dominant—and viable alternatives do not really exist—state legislators may want to review their laws and consider either modifying some existing common carrier or non-discrimination statute or enacting a new requirement to deal or to not discriminate on the basis of ESG factors.

State University Endowments. States should amend the Uniform Prudent Management of Institutional Funds Act[134] which has been enacted in every state except Pennsylvania, to ensure that funds managed and invested by state universities and government institutions for charitable or educational purposes are not diverted to lower-return investments to achieve the desired political or ideological objectives of fund managers.[135]

State 529 Plans. Internal Revenue Code § 529 establishes qualified tuition programs that enable parents and others to save for their children's education on a tax-deferred basis or to prepay tuition. Every state except Wyoming offers such plans. State legislators should ensure that these plan investment options maximize returns for parents saving for their children rather than to further ESG objectives.

Power Grid. State legislators play a critical role in ensuring that consumers obtain the lowest-cost reliable energy and that ESG objectives do not harm consumers. State laws should provide that utilities must generate electricity at the lowest monetary cost consistent with achieving reasonable reliability goals and prohibit having so much intermittently generated

electricity (wind and solar) that they are unable to cost-effectively meet continuous operating requirements for summer and winter peak loads. The Affordable and Reliable Electricity Act provides model language.[136]

Analysis of Specific Federal Legislation

Guiding Uniform and Responsible Disclosure Requirements and Information Limits Act. The Guiding Uniform and Responsible Disclosure Requirements and Information Limits Act or GUARDRAIL Act, as reported out of committee,[137] would require that the SEC, when engaged in rulemaking, may only require issuers to disclose information that the issuer has determined to be material with respect to a voting or investment decision and defines material as whether there "is a substantial likelihood that a reasonable investor would view the failure to disclose that information as having significantly altered the total mix of information made available to the investor." While this is constructive and consonant with Supreme Court decisions on the meaning of "material," it does not go far enough.

As discussed above, the Left is trying to redefine "material" for purposes of U.S. law as anything a woke investment adviser may care about, and the European Union is pushing the so-called "double materiality" concept to achieve the same result. Thus, to defend the traditional U.S. conception of materiality from this assault, any statutory definition in U.S. law must define "material" in terms of evaluating the potential *financial* return and *financial* risks of an existing or prospective investment, and explicitly "define out" non-pecuniary, non-economic, or non-financial social, political, or ideological goals or objectives.[138]

The bill would require the SEC to study "the detrimental impact and potential detrimental impact" of two EU Directives. The first is entitled "Corporate Sustainability Due Diligence."[139] The second, "Corporate Sustainability Reporting," will require firms to report according to European Sustainability Reporting Standards and is part of the "European green deal."[140] The bill authors are correct to identify these two EU Directives as a serious problem.

Expecting, however, anything bordering on an objective report on the subject from the SEC is highly unrealistic since the commission has itself proposed something very similar to these two EU directives with its highly destructive climate change rule.[141] Any such report by the SEC will almost certainly jettison any objectivity, adhere to climate change activist orthodoxy, and find that, "yes, there are some costs, but the costs are worth the benefits." A study by some less partisan, more objective agency or body[142] may be of value, but a study by the SEC will have an utterly predictable outcome.

The GUARDRAIL Act would also establish a public company advisory committee. While it is probably useful to encourage reasoned discourse between commissioners, SEC staff, and those it regulates, large public companies generally have no shortage of lawyers and lobbyists. Thus, it is not clear that such a committee is necessary. Small public companies, however, often do not have a legion of lawyers and lobbyists and are disproportionately affected by the ever-increasing level of regulation. Were the bill to require that a substantial proportion of committee members be from smaller reporting companies[143] and emerging growth companies,[144] then such a committee could potentially play an important role.

Protecting Americans' Retirement Savings from Politics Act. The Protecting Americans' Retirement Savings from Politics Act[145] is a package of measures that would take important steps toward protecting investors by reining in ESG excesses by proxy advisory firms, registered investment advisers, broker-dealers, and institutional investment managers.

It would:

- Make it easier for issuers to exclude shareholder proposals that have repeatedly been defeated or that relate to environmental, social, or political matters;
- Require the registration of proxy advisory firms with the SEC;
- Create liability for failure to disclose material information relating to proxy-voting advice;
- Require institutional investment managers to make detailed reports regarding their proxy voting;
- Require institutional investment managers to certify that the voting decisions of the institutional investment manager are based solely on the best economic interest of the shareholders on behalf of whom the institutional investment manager holds shares;
- Prohibit "robovoting," defined as the practice of automatically voting in a manner consistent with the recommendations of a proxy advisory firm;
- Adopt a version of the INDEX Act;[146] and

- Provide that for purposes of the Investment Advisers Act standards of conduct, the "best interest" of a customer be determined using only pecuniary factors unless the customer provides informed written consent.

Title I would allow management to exclude a shareholder proposal that has been voted on and lost. It contains a sliding scale so that a proposal may be excluded if it has been voted on once during a five-year period and received less than 10 percent of the votes cast; twice during such five-year period and received less than 20 percent of the votes cast; or three or more times during such five-year periods and received less than 40 percent of the votes cast. These are more stringent thresholds than exist under current Securities and Exchange Commission rules.[147] This would reduce costs incurred in connection with politically motivated shareholder proposals that have been repeatedly defeated.

Title II would codify existing commission rules, allowing management to exclude a shareholder proposal that has been substantially implemented by the issuer[148] or where the "principal thrust or principal focus" duplicates another proposal previously submitted to the issuer by another proponent.[149] This is desirable in that it would prevent a future commission from reversing these rules and thereby increasing costs.

Title III would allow management to exclude a shareholder proposal if the subject matter of the shareholder proposal is "environmental, social, or political (or a similar subject matter)." This is a very important restriction, but because there is no definition of these terms, the implementing regulations and guidance will be of tremendous importance. Congress should provide greater detail. Specifically, it should define the terms "environmental," "social," and "political," and provide that the proposals can be excluded unless they are material to the financial results of the firm.

Title IV would effectively reverse SEC guidance, making it much more difficult for management to exclude shareholder proposals relating to a "significant social policy issue" as an intrusion on the "company's ordinary business operations."[150] This is desirable in that it will reduce costs and reduce shareholder proposals that are not material to the financial results of the firm.

Title V mandates an SEC study on various aspects of the proxy-voting system.

Title VI requires the registration of proxy advisory firms and requires that registered proxy advisory firms report information about their practices, financial condition, and conflicts of interest. It also requires that proxy

advisory firms certify that they will provide proxy-voting advice only in the "best economic interest" of shareholders and defines "best economic interest" as "decisions that seek to maximize investment returns over a time horizon consistent with the investment objectives and risk management profile of the fund in which the shareholders are invested." Given the outsized role, discussed above, that proxy advisory firms have in the governance of public corporations, this title would have a highly salutary effect.

Title VII would create liability for making false or misleading statements relating to proxy-voting advice. Such liability attaches to most actors in the financial markets. Proxy-voting advisory firms should be no different.

Title VIII would require, among other things, that institutional investment managers file an annual report with the Securities and Exchange Commission explaining how the institutional investment manager voted with respect to each shareholder proposal and how such votes were reconciled with the fiduciary duty of the institutional investment manager to vote in the best economic interests of shareholders. The costs imposed by this title could be significant. Those costs ultimately will have to be recovered from fund shareholders in the form of higher fees. While in the abstract, having this information is likely to promote adherence to discharging fiduciary duties, it may or may not be a cost-effective means of achieving that objective.

Title IX would prohibit the automatic voting with a proxy advisory firms' recommendations (i.e., robovoting). Requiring RIAs to actually evaluate how they vote, rather than blindly following proxy advisory firms' recommendations, promotes adherence to discharging their fiduciary duty.

Title X is a version of the INDEX Act. (See discussion below.)

Title XI would ensure that the determination, under the Investment Advisers Act standards of conduct, of whether broker-dealers and investment advisers are acting in the best interest of a customer is made using pecuniary factors, which may not be subordinated to or limited by non-pecuniary factors unless the customer provides informed, written consent that such non-pecuniary factors be considered. This is a highly constructive provision.

Businesses Over Activists Act. The Businesses Over Activists Act[151] would prohibit the SEC from compelling an issuer to include any shareholder proposals and prohibits the preemption of state regulation of shareholder proposals or proxy or consent solicitation materials.

Although the provision in this bill that prohibits preemption of state corporate law governing the proxy process is fine, the prohibition on requiring management to include shareholder proposals is a step too far. It would basically empower management to deny *any* shareholder proposal

a vote—and is a move toward board and management supremacy rather than shareholder supremacy.

Retirement Proxy Protection Act. The Retirement Proxy Protection Act[152] is constructive but, without amendment, fiduciaries would be able to evade its purpose, particularly with the complicity of a Department of Labor like the Biden DOL.

The bill provides that a fiduciary, when deciding whether to exercise a shareholder right and when exercising a shareholder right, must "act solely in accordance with the economic interest of the plan and its participants and beneficiaries." This, as discussed above, is not significantly different than the existing requirements under § 404 of ERISA that fiduciaries act "solely in the interest of the participants and beneficiaries"…"for the exclusive purpose of providing benefits to participants and their beneficiaries."[153] The bill also requires that fiduciaries "shall not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote non-pecuniary benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries."[154]

All of this is constructive, but it does not adequately address the problem of fiduciaries purposefully employing a methodology that creates "ties" among investment alternatives and then resolving those ties with ESG factors. As discussed above, this is precisely what the Biden DOL has greenlighted under current law—and the bill would not adequately address the problem since choosing between two "equally" attractive alternatives using ESG factors would not constitute "subordinating the interests of participants and beneficiaries."

The bill should be amended to explicitly prohibit ERISA fiduciaries from considering *any* non-pecuniary, non-economic, or non-financial social, political, or ideological goals or objectives when choosing investments, voting proxies, or exercising other rights appurtenant to investments held by the plan without the explicit written consent of plan beneficiaries. The bill should also require that any tie among investment alternatives be resolved using a random methodology.

The bill also provides a safe harbor allowing plans not to vote securities when doing so is not expected to have a material effect on the value of the plan investment or when the securities held are 5 percent (or less) of plan assets. This provision is positive, although the 5 percent threshold should probably be reduced to something more like 1 percent, since any significant change in the value of assets that constitutes 5 percent of plan assets can be expected to have a material impact on plan benefits.

Roll Back ESG To Increase Retirement Earnings Act. While well-intentioned, the Roll Back ESG To Increase Retirement Earnings (RETIRE) Act[155] as drafted is a mistake. It explicitly provides that

> if a fiduciary is unable to distinguish between or among investment alternatives or investment courses of action on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor if the fiduciary documents—
>
> (i) why pecuniary factors were not sufficient to select a plan investment or investment course of action.

Other than the documentation requirements,[156] this is not that different from the Biden DOL rule discussed above. It is an invitation to evasion by woke fiduciaries. As discussed above, fiduciaries that want to create ties that can then be resolved using ESG factors can easily do so. This bill effectively invites them to do so, as has the Biden DOL despite opposition from majorities in both the House and the Senate.

The bill should be amended to explicitly prohibit ERISA fiduciaries from considering *any* non-pecuniary, non-economic, or non-financial social, political, or ideological goals or objectives when choosing investments, voting proxies, or exercising other rights appurtenant to investments held by the plan without the explicit written consent of plan beneficiaries. The bill should also require that any tie among investment alternatives be resolved using a random methodology.

INvestor Democracy Is EXpected Act. The INvestor Democracy Is EXpected Act or INDEX Act[157] and Title X of the Protecting Americans' Retirement Savings from Politics Act are similar but have important differences. In general, Title X is simpler and would have a more pro-management effect. Both bills are designed to address the very real problem that perhaps one-fifth of the shares of Standard & Poor 500 issuers[158] are held by passive funds and that these funds are in turn overwhelmingly controlled by a few registered investment advisers who routinely vote the shares to achieve political, rather the business, objectives.[159]

Both pieces of legislation undoubtedly require refinement before they are actually enacted into law. They should not be rushed. There should be additional hearings. Public comments should be solicited by the two committees. Otherwise, there may be substantial unintended consequences and serious practical compliance difficulties. But serious reforms are

indicated with respect to both passively managed and actively managed funds to alleviate the effective control of most public companies by a very few investment advisers and proxy advisory firms.

Both bills apply only to "passively managed funds" and define that term to mean a fund that is "designed to track, or is derived from, an index of securities or a portion of such an index."[160] In the case of the INDEX Act, a fund that allocates 40 percent to 100 percent of its assets to an investment strategy tracking an index or indexes would qualify. In the case of Title X, it is 60 percent to 100 percent.

Both bills change the voting requirements with respect to non-routine matters but have markedly different definitions of what is routine. Title X defines routine very broadly, far beyond what would normally be regarded as routine. (Votes on mergers, for example, are deemed routine.) The INDEX Act deems many votes that would be regarded as routine as non-routine (uncontested board elections, for example).

The INDEX Act only governs voting requirements when an investment adviser's various funds have more than 1 percent of the voting authority of the outstanding securities of the registrant subject to the vote. Title X applies to all non-routine votes.

Title X requires that with respect to non-routine votes the shares be: (a) voted in accordance with the instructions of the beneficial owner of a voting security of the passively managed fund; (b) voted in accordance with the voting recommendations of the issuer; or (c) not voted. There is nothing in the bill about how the RIA is expected to get instructions, what to do if they do not receive timely instructions, mirror voting,[161] the consequences of failing to even try to get instructions, and so on. The INDEX Act generally requires the investment adviser to vote the shares it controls proportionately to the instructions it receives from beneficial owners (provided the 1 percent threshold mentioned above has been met).

Dismantle DEI Act. The Dismantle DEI Act,[162] introduced by Senator J. D. Vance (R–OH) and Representative Michael Cloud (R–TX), would go a long way toward excising racist DEI policies from the federal government.[163] A slightly amended version of this bill was reported out of the House Oversight Committee on November 20, 2024.[164]

The bill defines a "prohibited diversity, equity, or inclusion practice" to mean:

> (1) discriminating for or against any person on the basis of race, color, ethnicity, religion, biological sex, or national origin; or

> (2) requiring as a condition of employment, promotion, advancement, speaking, making a presentation, or submitting written materials that an employee (a) undergo training, education, or coursework that asserts that a particular race, color, ethnicity, religion, biological sex, or national origin is inherently or systemically superior or inferior, oppressive or oppressed, or privileged or unprivileged or (b) sign or assent to a statement, code of conduct, work program, or plan that requires assent by the employee that a particular race, color, ethnicity, religion, biological sex, or national origin is inherently or systemically superior or inferior, oppressive or oppressed, or privileged or unprivileged.[165]

The federal government, including federal advisory committees, would be prohibited from engaging in prohibited DEI practices. A private cause of action would be created so that private litigants can sue to enforce these requirements. Various statutory DEI-oriented offices and chief diversity officers would be eliminated. The bill would rescind six of President Joe Biden's executive orders and two Biden Administration national security memorandums implementing racist DEI policies.

The Cloud–Vance bill would also require the Office of Personnel Management and the Office of Management and Budget to revise all regulations, policies, procedures, manuals, circulars, courses, training, and guidance to comply with the act. It would require the closure of all DEI or similar offices throughout the federal government and would abolish the Chief Diversity Officers Executive Council. It would prohibit a wide range of DEI actions and personnel practices by federal officials and prohibit the use of DEI factors in the federal performance appraisal process.

Federal contractors and grant recipients would be prohibited from using federal funds to engage in prohibited DEI practices. Most federal contracts would be required to contain a provision specifying that no part of the services performed under the contract can be performed in buildings or surroundings, under working conditions or in a working environment, provided by or under the control or supervision of a contractor or any subcontractor who is subject to, or required to comply with, a prohibited diversity, equity, or inclusion practice.

Education accreditation organizations would be prohibited from requiring or coercing any institution of higher education to engage in prohibited diversity, equity, and inclusion practices. Financial regulators, including so-called self-regulatory organizations, would be barred from engaging in prohibited DEI practices or requiring that regulated entities or members do so.

Analysis of Specific State Legislation

State Pension Fiduciary Duty Act. A version of the State Pension Fiduciary Duty[166] has been enacted in about 10 states.

The bill provides that fiduciaries for the state pension board must discharge their duties solely in the financial interest of the participants and beneficiaries for the exclusive purposes of providing financial benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system. This is analogous to ERISA requirements imposed on private plans.

The bill further provides that a fiduciary may take into account only financial factors when discharging its duties with respect to a plan and that all shares held by a public retirement system be voted solely in the financial interest of plan participants and their beneficiaries. It prohibits state plans from engaging investment managers or granting proxy-voting authority to any firm unless the firm has a practice of acting solely upon financial factors and commits in writing to do so. It contains substantial evidentiary and enforcement provisions.

Eliminate Economic Boycotts Act. The Eliminate Economic Boycotts Act[167] would generally require companies that contract with the state to certify that they do not boycott or discriminate against companies to achieve various political objectives. Specifically, states can require contractors to not discriminate against those engaged in conventional energy production, mining, agriculture, timber, or firearms industries.

The bill defines "economic boycott" to mean "without an ordinary business purpose, refusing to deal with, terminating business activities with, or otherwise taking any commercial action that is intended to penalize, inflict economic harm on, limit commercial relations with, or change or limit the activities of a company because the company, without violating controlling federal or state law" engages in various lines of business or fails to take various measures such as committing to DEI quotas or greenhouse gas emission targets.[168]

Affordable and Reliable Electricity Act. The Affordable and Reliable Electricity Act[169] would require electric utility regulatory agencies to develop rules and procedures promoting an affordable and reliable electric grid that meets estimated peak demand, including during extreme weather events.

The bill requires that

- Any new power-generation resource is chosen and approved based

solely on achieving the lowest total monetary cost;

- Existing power-generation resources not be retired prior to the end of their potential useful lives unless retirement results in a lower total monetary cost;

- The grid maintains a guaranteed power capacity of at least 115 percent of peak net load;

- Power-generation sources serving the grid meet continuous operating requirements for summer and winter peaks; and

- New intermittent power generation sources[170] not be approved unless the source has the support of firming power up to the expected maximum output level of the source for 48 hours during periods of peak load on the grid, and the cost of constructing or contracting for that firming power be included in calculating the total monetary cost of the intermittent generation source.

An Amendment to the Prudent Management of Institutional Funds Act. The Prudent Management of Institutional Funds Act has been adopted in every state except Pennsylvania.[171] State legislatures should amend the Prudent Management of Institutional Funds Act[172] to protect the charitable purpose of institutional funds managed and invested by state universities and other government institutions holding funds for charitable purposes. The bill requires that those managing these funds invest for a return and not for political purposes and, with certain exceptions, that they engage only service providers that invest or vote proxies to achieve a return.

Summary of Recommendations

This section briefly summarizes the recommendations made throughout the *Special Report*.

Congress should:

- **Statutorily define** materiality in terms generally consonant with Supreme Court holdings, making it clear that the term refers to financial returns and financial risk—and specifically excluding social and political objectives unrelated to investors' financial, economic, or pecuniary objectives.

- **Require** that any ERISA fiduciary, registered investment adviser, or broker-dealer be required to secure individualized written consent from an investor or plan beneficiary before they invest or vote securities for any reason other than maximizing risk-adjusted financial return. Investing or voting securities for such reasons, without obtaining investor or plan beneficiary consent, should be explicitly, statutorily deemed a violation of:
  - § 404 of ERISA,
  - § 10(b) of the Securities Exchange Act,
  - § 206(4) of the Investment Advisers Act, and
  - §§ 17(j) and 36 of the Investment Company Act.
- **Amend** § 404 of ERISA to explicitly prohibit ERISA fiduciaries from considering any non-pecuniary, non-economic, or non-financial social, political, or ideological goals or objectives when choosing investments, voting proxies, or exercising other rights appurtenant to investments held by the plan, and require that any tie among investment alternatives be resolved using a random methodology.
- **Amend** § 206 of the Investment Advisers Act to make it clear that: (1) registered investment advisers must act in the best interest of their client; and (2) in the absence of individualized written consent from a client, that "best interest" means maximizing risk-adjusted financial return—and that investing or voting proxies for any other reason, without obtaining written investor or plan beneficiary consent, is a violation of the adviser's fiduciary duty.
- **Amend** § 206 of the Investment Advisers Act such that voting proxies in furtherance of political, social, or ideological objectives that RIAs have publicly endorsed raises a rebuttable presumption that a conflict of interest exists and that the RIA's fiduciary duty has been violated.
- **Revise** § 14 of the Securities Exchange Act (a) to increase proxy advisory firm transparency; (b) to increase the ability of issuers to understand the basis of proxy advisory firm advice and to respond to their recommendations before shares are voted; (c) to more

aggressively police proxy advisory firm conflicts of interest; and (d) to ensure that proxy advisory firms are acting in a manner consistent with the fiduciary duties of their clients rather than to achieve the proxy advisory firm's political goals.

- **Require** the Securities and Exchange Commission to revise Rule 206 and Rule 14a-9 so that proxy advisory firms do not have outsized importance in corporate governance.

- **Adopt** statutory language, making it clear that the use of third-party proxy advisory firms does not in any way relieve RIAs of their fiduciary duty or shield them from liability for conflicts of interest.

- **Require** that proxy advisory firms certify that they will provide proxy-voting advice only in the "best economic interest" of shareholders (absent explicit written consent to the contrary).

- **Require** the registration of proxy advisory firms.

- **Create** liability for failure to disclose material information relating to proxy-voting advice.

- **Prohibit** "robovoting" by RIAs and other fiduciaries, defined as the practice of automatically voting in a manner consistent with the recommendations of a proxy advisory firm.

- **Make it easier** for issuers to exclude shareholder proposals that have repeatedly been defeated.

- **Make it easier** for issuers to exclude shareholder proposals that relate to environmental, social, or political matters.

- **Require** institutional investment managers to certify that the voting decisions of the institutional investment manager are based solely on the best economic interest of the shareholders on behalf of whom the institutional investment manager holds shares.

- **Require** institutional investment managers to make detailed public reports regarding their proxy voting.

- **Prohibit** discrimination on the basis of race, ethnicity, national origin, religion, or biological sex by financial regulators and self-regulatory organizations in their capacity as regulators or otherwise.

- **Amend** the Civil Rights Act so that paid board members are deemed employees for purposes of employment discrimination provisions in the act.

- **Statutorily reverse** DEI-related Executive Orders 13985, 13988, 14020, 14031, 14035, and 14091 and National Security Memoranda NSM–03 and NSM–04 by providing (a) that they are of no force and effect; (b) that no funds appropriated or otherwise made available by law shall be used to implement or comply with them; (c) that all agencies within 120 days must conform all guidance, interpretative bulletins, no-action letters, and similar documents to reflect the rescission of the orders and memoranda; and (d) all such guidance be made explicitly of no force and effect on the date of enactment of the bill.

- **Statutorily reverse** the multitudinous climate change and DEI regulations in an ESG and DEI reversal bill. The bill should (a) contain a separate section for each rule being rescinded; (b) provide that the indicated rule (or any substantially similar rule) has "no force or effect"; (c) provide that "no funds appropriated or otherwise made available by law shall be used to implement or comply with" the rule (or any substantially similar rule); (d) provide a directive to the agency to amend the Code of Federal Regulations within 60 days to reflect congressional rescission of the rule and explicitly waive Administrative Procedure Act notice and comment and other regulatory requirements with respect to those changes necessary to effect the congressional recission of the rule; (e) provide a directive to the agency to conform within 120 days all guidance, interpretative bulletins, no-action letters, and similar documents to reflect congressional rescission of the rule; and (f) make it explicitly clear that all such guidance is of no force and effect on the date of enactment of the bill.

- **Prohibit** banking regulators and SROs from allocating credit, financial services, and investment opportunities on the basis of ESG factors.

- **Prohibit** discrimination on the basis of race, color, ethnicity, national

origin, or sex in federal procurement, contracting, and grant-making, and prohibit federal contracts or grants from mandating such discrimination or from mandating DEI training or offices.

- **Prohibit** mandatory climate change disclosures in federal procurement, contracting, and grant-making, and prohibit federal contracts or grants from mandating such disclosures.

- **Prohibit** racism in government. Congress should specifically prohibit: (1) discriminating for or against any person on the basis of race, color, ethnicity, national origin, or biological sex; (2) conducting training, education, course work, or other pedagogy that that asserts that a particular race, color, ethnicity, biological sex, sexual orientation, self-professed gender identity, or national origin is inherently or systemically superior, inferior, oppressive, oppressed, privileged, or unprivileged; and (3) requiring as a condition of employment, as a condition for promotion or advancement, or as a condition for speaking, making a presentation, or submitting written materials, the signing of or assent to a statement, code of conduct, work program or plan, or similar device that requires assent by the employee that a particular race, color, ethnicity, biological sex, sexual orientation, self-professed gender identity, or national origin is inherently or systemically superior, inferior, oppressive, oppressed, privileged, or unprivileged.

- **Provide** that no funds may be appropriated or otherwise made available by law for the purpose of maintaining in any federal agency (a) an Office of Diversity, Equity, Inclusion and Accessibility; an Office of Diversity, Equity, and Inclusion; an Office of Diversity and Inclusion; an Office of Diversity; or substantially similar office; or (b) a Chief Diversity Officer or substantially similar officer.

- **Provide** that no funds appropriated or otherwise made available by law shall be used for the purpose of developing, implementing, distributing, or publishing in any federal agency (a) diversity, equity, inclusion, and accessibility plans, strategic plans, reports, or surveys, or anything substantially similar; or (b) equity action plans, reports, or surveys, or substantially similar plans, reports, or surveys.

- **Eliminate** all statutory diversity offices, diversity requirements, and chief diversity officers.

- **Evaluate** private firms exercising unusual economic power to further ESG or DEI. If Congress finds: (a) that particular firms enjoy oligopolistic market power; (b) that their refusal to engage in commerce is highly disruptive to ordinary personal, commercial, or civic life; and (c) that there is little practical alternative for the targeted persons, firms, or organizations, then Congress should consider legislation to address the problem. Such legislation could prohibit such firms from discriminating against potential customers based on their race, ethnicity, national origin, sex, or politics; the lawful business in which they engage; or their commitment, or lack thereof, to climate change policies or greenhouse gas emission targets beyond those required by law. Alternatively, Congress could simply require them to offer their services to all potential customers on ordinary terms with good-cause exceptions.

The federal executive branch should:

- **Rescind** Executive Orders 13985, 13988, 14020, 14031, 14035, and 14091 and National Security Memoranda NSM–03 and NSM–04. Any programs or offices that carry out these executive orders or memoranda should be immediately closed, and the agency head should undertake an appropriate reduction in force and not transfer, reassign, or redesignate any employees or contractors whose positions or functions were eliminated.

- **Revise** all regulations, policies, procedures, manuals, circulars, courses, training, and guidance such that they effectively rescind those that were promulgated, adopted, or implemented to comply with the executive orders and memoranda listed above.

- **Close** any Office of Diversity and Inclusion or similar office.

- **Terminate** the employment of any chief diversity officer or similar position.

- **Close** the Chief Diversity Officers Executive Council and further undertake an appropriate reduction in force and not transfer, reassign, or redesignate any employees or contractors whose positions or functions are eliminated.

- **Enforce** existing fiduciary duty requirements, rather than encouraging

fiduciaries to evade their fiduciary duties, by launching enforcement actions against registered investment advisers, proxy advisory firms, and ERISA fiduciaries that violate their fiduciary duties.

- **Reverse** the Biden DOL rule entitled, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights."

- **Reverse** the Nasdaq board diversity rule.

- **Direct** the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, and the Office for Civil Rights in the Department of Education to launch enforcement actions against discrimination on the basis of race, ethnicity, national origin, and biological sex in employment, university admissions, and other venues undertaken in the name of DEI.

- **Launch** an antitrust investigation of the proxy advisory firm duopoly by either the Federal Trade Commission or the Antitrust Division of the Department of Justice. Given the governance structure of the FTC, it may be advisable to assign the investigation to the Antitrust Division.

- **Revise** all regulations, policies, procedures, manuals, circulars, courses, training, and guidance that were adopted to further the Biden Administration's climate change agenda.

- **Launch** enforcement actions against investment advisers, retirement plan fiduciaries, and others with a fiduciary duty who violate that duty.

State legislatures should:

- **Enact** legislation to ensure that state retirement funds are invested solely to achieve a return for state employees who are pension plan beneficiaries, rather than to achieve the political or social objectives of those who manage the money.

- **Consider** prohibiting, or seriously limiting, state contracts with companies that engage in economic boycotts based on ESG factors.

- **Evaluate** state corporate business judgment rule (usually judicially created), and clarify, if required, that director duties to the

corporation and shareholders excludes the pursuit of political, social, and ideological aims unrelated or detrimental to the financial performance of the firm.

- **Consider** modifying the rules governing shareholder derivative lawsuits so that when directors violate their fiduciary duties to the corporation and its shareholders there are actual consequences.

- **Evaluate** whether the rules governing director or officer indemnification for purposeful or negligent violation of director or officer duties to the corporation may need to be revised.

- **Evaluate** whether state corporate, securities, banking, pension, and trust laws should be reformed to strengthen the protection of investors, depositors, and beneficiaries.

- **Review** the laws in markets in which a very few large health insurers, property and casualty insurers, or hospital systems are dominant and viable alternatives do not really exist. Consider either modifying some existing common-carrier or non-discrimination statute or enacting a new requirement to deal with discrimination on the basis of ESG factors.

- **Amend** the Uniform Prudent Management of Institutional Funds Act to ensure that funds managed and invested by state universities and government institutions for charitable or educational purposes are not diverted to lower return investments to achieve the desired political or ideological objectives of fund managers.

- **Ensure** that § 529 plan investment options maximize returns for parents saving for their children's education.

- **Ensure** that consumers obtain the lowest cost, most reliable energy and that ESG objectives do not harm consumers. State laws should provide that utilities must generate electricity at the lowest monetary cost consistent with achieving reasonable reliability goals and prohibit having so much intermittently generated electricity (wind and solar) that they are unable to cost effectively meet continuous operating requirements for summer and winter peak loads.

State executive branch officials should:

- **Launch** enforcement actions against investment advisers, retirement plan fiduciaries, and others with a fiduciary duty who violate their fiduciary duty.

- **Undertake** an investigation of proxy advisory firm duopoly. States may bring federal antitrust suits on behalf of individuals residing within their states (*parens patriae* suits) or on behalf of the state as a purchaser. In the case of proxy advisory firms, the purchaser would typically be state pension plans or university endowments. In addition, state attorneys general also may bring an action to enforce the state's antitrust laws.

- **Ensure** that 529 plan investment options maximize returns for parents saving for their children's education.

Conclusion

ESG and DEI are serious problems harming workers, consumers, and investors throughout the county in numerous ways. ESG and DEI have become ubiquitous in government, corporations, and universities. Federal and state legislators need to protect the public from these pernicious progressive efforts. Unfortunately, there is no simple way to address the problem. Reforms to a wide range of complex laws and regulations are required to adequately address the problem.

Endnotes

1. The "S" in ESG is usually an operational synonym for DEI.
2. Accepting lower returns to achieve charitable, social, ideological, or political objectives is conceptually analogous to a donation. Approximately 35 states, including Delaware, allow for the creation of Benefit Corporations and Benefit Limited Liability Companies (LLCs) that explicitly provide for a dual-purpose business associations (both profit and some other non-financial purpose). There are no benefit corporations among the largest 500 firms (by revenue) in the United States. There are approximately 15 publicly traded benefit corporations, including Veeva Systems (NYSE: VEEV); United Therapeutics (NASDAQ: UTHR); and Coursera (NYSE: COUR). Investors in Benefit Corporations understand that their investment is not exclusively for a return. See "Publicly Traded B Corps," B Lab, December 21, 2022, https://kb.bimpactassessment.net/support/solutions/articles/43000632643-publicly-traded-b-corps (accessed December 19, 2024), and Ronald J. Colombo, "Taking Stock of the Benefit Corporation," *Texas A&M Law Review*, Vol. 7, No. 1 (2019), pp. 73–124, https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1184&context=lawreview (accessed December 19, 2024).
3. Registered Investment Advisers, trustees (including ERISA plan trustees), and others are fiduciaries. For purposes of the ESG discussion in this *Special Report*, however, the term "fiduciary" should be construed broadly to include those with heightened obligations to investors such as broker-dealers (who have an obligation to act in the "best interest" of investors). See 17 Code of Federal Regulations § 240.15l–1 (Regulation Best Interest). See also Securities and Exchange Commission Staff Bulletin, "Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations," modified April 20, 2023, https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers (accessed December 19, 2024). Under state law, corporate directors and officers are generally regarded as having a "fiduciary duty" to either the corporation or to shareholders. This, however, is often worded as a "duty of care" or "duty of loyalty" and can often be mitigated by various indemnification provisions that allow corporations to indemnify directors (but sometimes not officers) for certain non-intentional acts such as negligence. Court cases in any given jurisdiction articulate the scope of director and officer duties to the corporation and its shareholders. Particular attention should be paid to the so-called "business judgment" rule which, in practice, heavily influences the contours of the duty owed by directors to the corporation and its shareholders. See, for example, *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 (Mich. 1919), and *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). The *Caremark* decision is being used to gradually transform Delaware's corporate director standards to a stakeholder standard. See Leo E. Strine, Jr., Kirby M. Smith, and Reilly S. Steel, "Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy," *Iowa Law Review*, Vol. 106, No. 4 (2021) https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/Strine_Smith_Steel.pdf (accessed December 19, 2024), and William P. Barr and Jonathan Berry, "Delaware Is Trying Hard to Drive Away Corporations," *Wall Street Journal*, November 24, 2023, https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a (accessed December 19, 2024). For a statement of the traditional rule, see Model Business Corporation Act (2016 Revision) (December 9, 2016), §§ 8.30–8.31. Section 8.30(a) reads: "Each member of the board of directors, when discharging the duties of a director, shall act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation." See also David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge, U.K.: Cambridge University Press, 2018). Fiduciaries that invest in benefit corporations or index funds that include benefit corporations without beneficiaries' consent have come under criticism because benefit corporations are not seeking to maximize risk-adjusted returns. See Matt Cole and Jeff Sherman, "The Charities Hiding in Your 401(k)," *Wall Street Journal*, October 11, 2023, https://www.wsj.com/articles/the-charities-hiding-in-your-401-k-finance-environmental-social-governance-investing-public-benefit-corporations-e2fc96b6 (accessed December 19, 2024).
4. Depending on context and jurisdiction, fiduciaries may also have a duty of obedience, good faith, confidentiality, prudence, and disclosure.
5. The exact contours of these duties vary slightly depending on the context and the jurisdiction.
6. The term "common carrier" is used primarily in the context of transportation of passengers and goods and communications.
7. These are primarily regulated at the state and local level and the scope of the regulations vary. The Federal Energy Regulatory Commission and the Federal Communications Commission are the primary federal utility regulators.
8. See, for example, Charles K. Burdick, "The Origin of the Peculiar Duties of Public Service Companies," Parts I and II, *Columbia Law Review*, Vol. 11, No. 7 (November 1911), pp. 616–638, and *Columbia Law Review*, Vol. 11, No. 8 (December 1911), pp. 743–764; J. A. McClain, Jr., "The Convenience of the Public Interest Concept," *Minnesota Law Review* (1931), https://core.ac.uk/download/pdf/217206704.pdf (accessed December 19, 2024); *Allnutt v. Inglis* (1810) 104 Eng. Rep. 206, 12 East 527 (KB) (United Kingdom); *Munn v. Illinois*, 94 US 113 (1876) ("It has...been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and, in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."); *Louisville Transfer Co. v. Am. Dist. Tel. Co.*, 1 Ky. L.J. 144 (Ch. Ct. Louisville 1881); *State ex rel. Webster v. Nebraska Telephone Co., 22 N.W. 237* (Neb. 1885); *Chesapeake Tel. v. Balt. Tel.,* 66 Md. 399 (1887); *Biden v. Knight First Amendment Institute*, 593 U. S. 1220 (2021) (Concurring Opinion of Justice Thomas, especially Part A), https://www.supremecourt.gov/opinions/20pdf/20-197_5ie6.pdf (accessed December 19, 2024); Ganesh Sitaraman and Morgan Ricks, "Tech Platforms and the Common Law of Carriers," *Duke Law Journal*, Vol. 73 (2024), pp. 1037ff, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4663711 (accessed December 19, 2024); Brendan Carr and Nathan Simington, "The First Amendment Does Not Prohibit the Government from Addressing Big Tech Censorship," Notice and Comment, *Yale Journal on Regulation*, January 11, 2024, https://www.yalejreg.com/nc/the-first-amendment-does-not-prohibit-the-government-from-addressing-big-tech-censorship-by-brendan-carr-and-nathan-simington/ (accessed December 19, 2024); Richard A. Epstein. "Should Platforms Be Treated as Common Carriers? It Depends," American Enterprise Institute, July 2022, https://platforms.aei.org/wp-

content/uploads/2022/07/Should-Platforms-Be-Treated-as-Common-Carriers.pdf (accessed December 19, 2024); Adam Candeub, "Common Carrier Law in the 21st Century," *Tennessee Law Review* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4644936 (accessed December 19, 2024); Daniel Deacon, "Common Carrier Essentialism and the Emerging Common Law of Internet Regulation," *Administrative Law Review*, Vol. 67, No. 1 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627736 (accessed December 19, 2024); Ganesh Sitaraman, "Deplatforming," *Yale Law Journal*, Vol. 133, No. 419 (November 2, 2023), https://ssrn.com/abstract=4375304 (accessed December 19, 2024); Philip Hamburger and Clare Morell, "The First Amendment Doesn't Protect Big Tech's Censorship: The Companies Enjoy the Privileges of Common Carriers without the Responsibilities," *Wall Street Journal*, July 31, 2021, https://www.wsj.com/articles/big-tech-twitter-facebook-google-youtube-sec-230-common-carrier-11627656722 (accessed December 19, 2024); Lawrence J. Spiwak, "Regulatory Implications of Turning Internet Platforms into Common Carriers," Phoenix Center *Policy Paper* No. 60 (September 2023), https://www.phoenix-center.org/pcpp/PCPP60Final.pdf (accessed December 19, 2024); Alfred Avins, "What Is a Place of 'Public' Accommodation?" *Marquette Law Review*, Vol. 52, No. 1 (Summer 1968), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=2418&context=mulr&httpsredir=1&referer= (accessed December 19, 2024); Britt P. Tevis, "'Jews Not Admitted': Anti-Semitism, Civil Rights, and Public Accommodation Laws," *Journal of American History*, Vol. 107, No. 4 (March 2021), pp. 847–870, https://academic.oup.com/jah/article-abstract/107/4/847/6157131?login=false (accessed December 19, 2024); and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

9. The Heritage Foundation, "Big Tech," https://www.heritage.org/big-tech. Of special concern are those that control dominant operating systems, dominant search engines, dominant social media platforms, cell phone manufacturing and software, among others.

10. Insurance (except, increasingly, for health insurance) has traditionally been primarily a matter for state regulation. Nationally, while there is some concentration, there does not appear to be the type of extreme concentration in health or property and casualty insurance that there is in investment management or banking. Because insurance markets are regulated at the state level, this may not be the case in any given state market. See "AMA Identifies Market Leaders in Health Insurance," December 12, 2023, https://www.ama-assn.org/press-center/press-releases/ama-identifies-market-leaders-health-insurance (accessed December 19, 2024) ("At the national level, the 10 largest health insurers by market share were: 1. UnitedHealth Group (14%), 2. Elevance Health (12%), 3. CVS (Aetna) (11%), 4. Cigna (10%), 5. Kaiser Permanente (7%), 6. Health Care Service Corp. (6%), 7. Blue Cross Blue Shield of Michigan (2%), 8. Blue Cross Blue Shield of Florida (2%), 9. Blue Shield of California (2%), and 10. Highmark (2%)."), and National Association of Insurance Commissioners, "Property And Casualty Insurance Industry; 2023 Top 25 Groups and Companies by Countrywide Premium," https://content.naic.org/sites/default/files/research-actuarial-property-casualty-market-share.pdf (accessed December 19, 2024) (The top 10 firms control 48 percent of the market, while the top 20 firms control 62 percent.). Thus, any non-discrimination, neutrality, or anti-boycott legislation relating to insurance should probably be undertaken at the state level.

11. The degree of concentration in hospital markets varies considerably. Methodology and other issues have a major impact on study results. The Health Care Cost Institute found that 72 percent of metropolitan areas have "highly concentrated" hospital markets. See Tara O'Neill Hayes and Kate Dixon, "Hospital Markets and the Effects of Consolidation," American Action Forum, October 8, 2019, https://www.americanactionforum.org/research/hospital-markets-and-the-effects-of-consolidation/ (accessed December 19, 2024); Brent D. Fulton et al., "The Rise of Cross-Market Hospital Systems and Their Market Power in the U.S.," *Health Affairs*, Vol. 41, No. 11 (November 2022), https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00337 (accessed December 19, 2024) ("The share of community hospitals in the US that were part of hospital systems increased from 10 percent in 1970 to 67 percent in 2019.... The number of systems in urban commuting zones that could potentially exert enhanced cross-market power increased from thirty-seven systems in 2009 to fifty-seven systems in 2019, an increase of 54 percent."); Garret Johnson and Austin Frakt, "Hospital Markets in the United States, 2007–2017," *Healthcare*, Vol. 8, No. 3 (September 2020), https://pubmed.ncbi.nlm.nih.gov/32919591/ (accessed December 19, 2024) ("Hospital markets were already highly concentrated in 2007 and became even more concentrated between 2007 and 2017, across all service types that we measured. The least concentrated service was emergency department care, while intensive care and obstetrics were the most concentrated. As of 2017, 19.0% of markets—representing 11.2 million Americans—are served by only one hospital system.").

12. See detailed discussion below under the heading "Solutions to the ESG and Related DEI Problem."

13. A Google Book Ngram Viewer case sensitive search without smoothing shows that use of the term "ESG" began increasing in 2004, radically increased starting in 2012, and increased by a factor of three by 2019 (compared to 2012). See https://books.google.com/ngrams/graph?content=ESG&year_start=1800&year_end=2019&corpus=en-2019&smoothing=0&case_insensitive=true (accessed December 19, 2024). A United Nations report is often credited with launching use of the term "ESG." See "Who Cares Wins: The Global Compact Connecting Financial Markets to a Changing World," United Nations, 2004, http://documents1.worldbank.org/curated/en/280911488968799581/pdf/113237-WP-WhoCaresWins-2004.pdf (accessed December 23, 2024).

14. This term would typically include initiatives based on critical race theory, "white privilege," and intersectionality.

15. Each of these terms has evolved in meaning over time and they have a substantially—even dramatically—different meaning depending on the author or speaker. There is a voluminous literature discussing—but seldom defining—these concepts. In the case of "social justice," the term has changed meaning with the political and social situation for two centuries. In contemporary political parlance, "social justice" is associated with ideologies that are, at the very least, deeply suspicious of market outcomes and that countenance a high degree of government intervention in the economy. Often, it is a proxy term for Social Democratic or socialist views on economics and overtly racist theories such as critical race theory on social issues. Typical is the definition of social justice in American Library Association, "Equity, Diversity and Inclusion at the American Library Association," https://www.ala.org/aboutala/sites/ala.org.aboutala/files/content/Equity%2C%20Diversity%20and%20Inclusion%20Orientation.pdf (accessed December 19, 2024) ("Social Justice is the 'full and equitable participation of people from all social identity groups in a society that is mutually shaped to meet their needs. A world in which the distribution of resources is equitable and sustainable, and all members are physically and psychologically safe, secure, recognized, and treated with respect.") See also Mike Gonzalez, *The Plot to Change America: How Identity Politics Is Dividing the Land of the*

Free (New York: Encounter Books, 2020), and Peter W. Wood, *Diversity Rules* (New York: Encounter Books, 2019). The economic dimension of social justice rests on the premise that a pre-determined distribution of goods should be enforced by the state. This is a substantially different conception of justice than most, which rely on evaluating individual actions, merit, and desert. In a corporate context, social justice and the term "stakeholders" are usually buzzwords or "fuzzwords" that count as virtue-signaling by management. Samuel Gregg, "How Corporations' Good Social and Environmental Intentions Undermine the Common Good," *Reason*, November 2022, https://reason.com/2022/10/15/the-rise-of-the-stake-holders/ (accessed December 19, 2024). For a selection of recent discussions of these concepts from both critical and supportive perspectives, see Brian Barry, *Why Social Justice Matters* (Cambridge: Polity Press, 2005); Michael Novak, Paul Adams, and Elizabeth Shaw, *Social Justice Isn't What You Think It Is* (New York: Encounter Books, 2015); David Miller, *Principles of Social Justice*, revised ed. (Cambridge: Harvard University Press, 2001); Thomas Patrick Burke, *The Concept of Justice: Is Social Justice Just?* (New York: Bloomsbury Academic, 2011); Friedrich A. von Hayek, "The Atavism of Social Justice," in Friedrich A. von Hayek*, New Studies in Philosophy, Politics, Economics and the History of Ideas*, chapter 5 (Abingdon-on-Thames: Routledge, 1978); and Gavin Kelly, Dominic Kelly, and Andrew Gamble, eds., *Stakeholder Capitalism* (New York: St. Martin's Press, 1997). For historical context, see Leonard Trelawny, *The Elements of Social Justice* (London: George Allen & Unwin, 1922), and John Bates Clark, *Social Justice Without Socialism* (Boston: Houghton Mifflin, 1914).

16. Mark Maurer, "America's ESG Hiring Boom Is Starting to Cool," *Wall Street Journal*, February 13, 2024, https://www.wsj.com/articles/americas-esg-hiring-boom-is-starting-to-cool-2dd1e0de (accessed December 19, 2024); "An ESG Asset Manager Exodus," *Wall Street Journal*, February 15, 2024, https://www.wsj.com/articles/climate-action-100-exodus-j-p-morgan-state-street-blackrock-esg-investing-b78d2a06 (accessed December 19, 2024); and Ashley Rindsberg, "Have We Reached Peak ESG?" *UnHerd*, December 27, 2023, https://unherd.com/2023/12/have-we-reached-peak-esg/ (accessed December 19, 2024).

17. See, for example, "Preliminary Report on ESG Climate Related Financial Services Concerns," ESG Working Group, House Committee on Financial Services, June 23, 2023, https://financialservices.house.gov/uploadedfiles/hfsc_esg_working_group_memo_final.pdf (accessed December 19, 2024); Hester M. Peirce, "Chocolate-Covered Cicadas," U.S. Securities and Exchange Commission, July 20, 2021, https://www.sec.gov/news/speech/peirce-chocolate-covered-cicadas-072021?utm_medium=email&utm_source=govdelivery (accessed December 19, 2024); Mark T. Uyeda, "Remarks at the 2022 Cato Summit on Financial Regulation," U.S. Securities and Exchange Commission, November 17, 2022, https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722 (accessed December 19, 2024); Vivek Ramaswamy, *Woke, Inc.: Inside Corporate America's Social Justice Scam* (New York: Center Street, 2021); Stephen R. Soukup, *The Dictatorship of Woke Capital: How Political Correctness Captured Big Business* (New York: Encounter Books, 2021); Paul H. Tice, *The Race to Zero: How ESG Investing Will Crater the Global Financial System* (New York: Encounter Books, 2023); David R. Burton, Comment on "The Enhancement and Standardization of Climate-Related Disclosures for Investors," U.S. Securities and Exchange Commission, June 17, 2022, https://www.sec.gov/comments/s7-10-22/s71022-20131980-302443.pdf (accessed December 19, 2024).

18. In more formal terms, there is a low correlation among the ratings of particular firms by different rating agencies.

19. See, for example, Elroy Dimson, Paul Marsh, and Mike Staunton, "Divergent ESG Ratings," *Journal of Portfolio Management*, Vol. 47, No. 1 (November 2020), https://api.repository.cam.ac.uk/server/api/core/bitstreams/c498bbb7-9f03-4c52-b86a-1f4229dc60ed/content (accessed December 19, 2024); Rajna Gibson Brandon, Philipp Krueger, and Peter S. Schmidt, "ESG Rating Disagreement and Stock Returns," Swiss Finance Institute *Research Paper Series* No. 19–67, May 2021; Gregor Dorfleitner, Gerhard Halbritter, and Mai Nguyen, "Measuring the Level and Risk of Corporate Responsibility: An Empirical Comparison of Different ESG Rating Approaches," *Journal of Asset Management*, Vol. 16, https://www.academia.edu/44361083/Measuring_the_level_and_risk_of_corporate_responsibility_An_empirical_comparison_of_different_ESG_rating_approaches (accessed December 19, 2024); Kevin Prall, "ESG Ratings: Navigating Through the Haze," CFA Institute, August 10, 2021, https://blogs.cfainstitute.org/investor/2021/08/10/esg-ratings-navigating-through-the-haze/ (accessed December 19, 2024); Florian Berg, Julian F. Kölbel, and Roberto Rigobon, "Aggregate Confusion: The Divergence of ESG Ratings," forthcoming *Review of Finance*, April 15, 2022, http://dx.doi.org/10.2139/ssrn.3438533 (accessed December 19, 2024).

20. See, for example, 29 Code of Federal Regulations § 2550.404a–1(c)(2), adopted at *Federal Register*, Vol. 87, No. 230 (December 1, 2022), pp. 73822–73886, https://www.federalregister.gov/documents/2022/12/01/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights (accessed December 19, 2024) ("If a fiduciary prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment, or investment course of action, based on collateral benefits other than investment returns."). Both the House and the Senate passed H.J. Res. 30 pursuant to the Congressional Review Act disapproving this rule. President Biden vetoed it, and the House was unable to override the veto. See "All Information (Except Text) for H.J. Res. 30," February 7, 2023, https://www.congress.gov/bill/118th-congress/house-joint-resolution/30/all-info (accessed December 19, 2024);

21. The climate industrial complex is big business. One rule alone, by the Securities and Exchange Commission, would increase "external costs" by at least $6.4 billion. "External" is this context means hiring law firms, accounting firms, and climate consultants. See PRA Table 4 at *Federal Register*, Vol. 87, No. 69 (April 11, 2022), pp. 21334–21473, https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf (accessed December 19, 2024). Using updated hourly cost estimates would increase the estimate to $8.4 billion, quadrupling the cost of being a public company. See Mark T. Uyeda, "Remarks at the 2022 Cato Summit on Financial Regulation," U.S. Securities and Exchange Commission, November 17, 2022, https://www.sec.gov/news/speech/uyeda-remarks-cato-summit-financial-regulation-111722 (accessed December 19, 2024). Virtually every other financial regulator, including the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency at the Treasury Department, the Commodities Futures Trading Commission, and the National Credit Union Administration plan to impose climate change rules as well, thus dramatically increasing the income to those in the climate business. Furthermore, the Biden Administration proposed introducing climate change disclosure into the federal procurement process. See *Federal Register*, Vol. 87, No. 218 (November 14, 2022), pp. 68312–68334, https://www.

govinfo.gov/content/pkg/FR-2022-11-14/pdf/2022-24569.pdf (accessed December 19, 2024). Thus, soon, this business will amount to many tens of billions of dollars annually and will constitute a potent lobby to keep the rules in place. Many of the regulators that drafted the rule creating this "industry" will then leave government to join the regulatory compliance industry they helped create. For concerns about this "revolving door," see the March 18, 2022, letter to Securities and Exchange Commission Chairman Gary Gensler from U.S. Senator Bill Hagerty, https://www.hagerty.senate.gov/wp-content/uploads/2022/03/SEC-revolving-door-letter-2022-03-18.pdf (accessed December 19, 2024). See "Comments for The Enhancement and Standardization of Climate-Related Disclosures for Investors," https://www.sec.gov/comments/s7-10-22/s71022.htm (accessed December 19, 2024) (contains voluminous examples of how the climate industrial complex works to enhance its business). See The Heritage Foundation, "Comments on Federal Regulations," https://www.heritage.org/comments-federal-regulations (accessed December 19, 2024) (contains comments on the various proposed rules by financial regulators including citations to the various proposing releases). See also Columbia Center on Sustainable Investment, "Finance for Zero: Redefining Financial-Sector Action to Achieve Global Climate Goals," June 2023, https://ccsi.columbia.edu/sites/default/files/content/docs/Finance_for_Zero_CCSI_June_2023.pdf (accessed December 19, 2024). Given that these rules are further along in the European Union and more complex, the amounts are likely to be even larger in the aggregate in Europe.

22. The examples of DEI in government and corporate America are very nearly endless. For a sympathetic report from one of the purveyors of DEI training, see "The State of Data-Driven DEI: 2023 Trends & 2024 Opportunities," Paradigm, November 19, 2023, https://info.paradigmiq.com/hubfs/Paradigm%202023%20State%20of%20DEI%20Report.pdf?_hsmi=283235651&_hsenc=p2ANqtz-_AZCBy6c6qUW9GJ984uhoNgnD2_3_1-yFp_UrW9xt5I2sB2sQ0MRNLD_snwvADYqquwqVzXPBhs-KrCD5tNLO9nA3NgA (accessed December 19, 2024). For Biden Administration orders implementing DEI in the federal government, see Joe Biden, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," Executive Order 13985, January 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/ (accessed December 19, 2024); Joe Biden, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," Executive Order 13988, January 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/ (accessed December 19, 2024); Joe Biden, "Establishment of the White House Gender Policy Council," Executive Order 14020, March 8, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-establishment-of-the-white-house-gender-policy-council/ (accessed December 19, 2024); Joe Biden, "Executive Order on Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders," Executive Order 14031, May 28, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/28/executive-order-on-advancing-equity-justice-and-opportunity-for-asian-americans-native-hawaiians-and-pacific-islanders/ (accessed December 19, 2024); Joe Biden, "Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce," Executive Order 14035, June 25, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/ (accessed December 19, 2024); Joe Biden, "Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government," Executive Order 14091, February 16, 2023, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/ (accessed December 19, 2024); Joe Biden, "Revitalizing America's Foreign Policy and National Security Workforce, Institutions, and Partnerships," NSM–03, February 4, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/memorandum-revitalizing-americas-foreign-policy-and-national-security-workforce-institutions-and-partnerships/ (accessed December 19, 2024); and Joe Biden, "Advancing the "Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World," NSM–04, February 4, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/memorandum-advancing-the-human-rights-of-lesbian-gay-bisexual-transgender-queer-and-intersex-persons-around-the-world/ (accessed December 19, 2024). DEI is ubiquitous in large corporations as well. See, for example, Caroline Colvin, "Once Neglected, DEI Initiatives Now Present at All Fortune 100 Companies," HR Dive, July 20, 2022, https://www.hrdive.com/news/2022-fortune-companies-dei/627651/ (accessed December 19, 2024). For an article lamenting that the "DEI-Industrial Complex" needs to do more in corporate America, see Lily Zheng. "The Failure of the DEI-Industrial Complex," *Harvard Business Review*, December 1, 2022, https://hbr.org/2022/12/the-failure-of-the-dei-industrial-complex (accessed December 19, 2024).

23. Steven W. Bradley et al., "The Impact of Chief Diversity Officers on Diverse Faculty Hiring," *Southern Economic Journal*, Vol. 89, No. 1 (July 2022), pp. 3–36, https://onlinelibrary.wiley.com/doi/epdf/10.1002/soej.12584 (accessed December 19, 2024) ("By the 2019 academic year, 68.7% of the major U.S. universities in our study had a CDO [Chief Diversity Officer] or equivalent executive in place.")

24. See, for example, Allysia Finley, "Bidenomics and the Boom in DEI and ESG Jobs," *Wall Street Journal*, July 16, 2023, https://www.wsj.com/articles/bidenomics-and-the-boom-in-dei-and-esg-jobs-college-grads-disclosure-8c284ca0 (accessed December 19, 2024). According to *The New York Times*, the University of Michigan spent approximately a quarter of a billion dollars on DEI over a decade. See Robby Soave, "University of Michigan Spent $250 Million on DEI, Made Students Unhappier," *Reason*, October 16, 2024, https://reason.com/2024/10/16/dei-new-york-times-michigan-university-students/ (accessed December 19, 2024).

25. Regarding human capital management requirements, see, for example, "Recommendation of the SEC Investor Advisory Committee, Investor-as-Owner Subcommittee Regarding Human Capital Management Disclosure," Investor Advisory Committee, September 21, 2023, https://www.sec.gov/files/spotlight/iac/20230921-recommendation-regarding-hcm.pdf (accessed December 19, 2024). Such a rule is on the SEC's regulatory agenda filed with the Office of Information and Regulatory Analysis. See "View Rule," Office of Information and Regulatory Affairs, Office of Management and Budget, RIN 3235–AM88, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM88 (accessed December 19, 2024).

26. Typical is this definition of privilege provided by Dr. Sherita Hill Golden, Chief Diversity Officer for Johns Hopkins Medicine ("Privilege is a set of unearned benefits given to people who are in a specific social group.... In the United States, privilege is granted to people who have membership in

one or more of these social identity groups: White people, Able-bodied people, Heterosexuals, Cisgender people, Males, Christians, Middle or owning class people, Middle-aged people, English-speaking people.") See Patrick Reilly, "Johns Hopkins' Diversity Chief Labels Whites, Males and Christians as 'Privileged,'" *New York Post*, January 11, 2024, https://nypost.com/2024/01/11/news/johns-hopkins-hospitals-dei-chief-labels-whites-males-and-christians-privileged-in-letter-to-staff/ (accessed December 19, 2024), and Megan Sayles, "University Officials Take Issue with Chief Diversity Officer's Definition of 'Privilege' in 'Diversity Digest' Newsletter," *AFRO*, January 18, 2024, https://afro.com/johns-hopkins-medicine-employees-and-students-speak-out-on-rebuke-of-dr-sherita-golden/ (accessed December 19, 2024).

27. For example, "WSJ/NORC Poll March 2023," p .11, https://s.wsj.net/public/resources/documents/WSJ_NORC_Poll_March2023.docx (accessed December 19, 2024) (Fifty-six percent opposed colleges and universities considering a student's race and ethnicity when making decisions about student admissions, while only 15 percent supported race and ethnicity being considered.).
28. See, for example, "The New Emperors: Responding to the Growing Influence of the Big Three Asset Managers," Minority Staff of the U.S. Senate Banking Committee, December 2022, https://www.banking.senate.gov/imo/media/doc/the_new_emperors_responding_to_the_growing_influence_of_the_big_three_asset_managers.pdf (accessed December 19, 2024), and Matt Wirz, "Move Aside, Big Banks: Giant Funds Now Rule Wall Street," *Wall Street Journal*, April 22, 2024, https://www.wsj.com/finance/investing/investment-funds-new-financial-supermarkets-9b8187d7 (accessed December 19, 2024).
29. "About Blackrock in the U.S.," Blackrock, https://www.blackrock.com/us/individual/about-us/about-blackrock (accessed December 19, 2024).
30. "Vanguard," Vanguard, https://corporate.vanguard.com/ (accessed December 19, 2024).
31. "We Are Fidelity," Fidelity, https://www.fidelity.com/about-fidelity/our-company (accessed December 19, 2024).
32. "Our Company," State Street, https://www.statestreet.com/us/en/asset-manager/about/our-story (accessed December 19, 2024).
33. "About ISS," ISS, https://www.issgovernance.com/about/about-iss/ (accessed December 19, 2024). ISS is a subsidiary of Deutsche Börse AG.
34. "Company Overview," Glass Lewis, https://www.glasslewis.com/company-overview/ (accessed December 19, 2024). Glass Lewis has been owned by Peloton Capital Management, an Ontario, Canada, private equity firm since March 2021.
35. Although they sometimes do, these six firms do not need to have authority to collectively vote an actual majority of shares to effectively control the outcome of votes—and corporate managements know this. If they control 40 percent of voting shares, their position will prevail unless more than 83.3 percent of other shareholders vote against their position. If they control 30 percent, their position will prevail unless more than 71.4 percent of other shareholders vote against their position.
36. $26.9 trillion out of $131 trillion or 20.53 percent. "The World's Largest 500 Asset Managers," Thinking Ahead Institute and Pensions & Investments, October 2022, https://www.thinkingaheadinstitute.org/content/uploads/2022/10/PI-500-2022_final_1013.pdf (accessed December 19, 2024).
37. Ibid.
38. For information on ISS, see "About ISS," ISS, https://www.issgovernance.com/about/about-iss/ (accessed December 23, 2024).
39. James K. Glassman and J. W. Verret, "How To Fix Our Broken Proxy Advisory System," Mercatus Center, George Mason University, April 16, 2013, https://www.mercatus.org/system/files/Glassman_ProxyAdvisorySystem_04152013.pdf (accessed December 19, 2024) (61 percent for ISS and 36 percent for Glass Lewis). Egan-Jones Proxy Services, Segal Marco Advisors, and ProxyVote Plus are much smaller competitors. See also James K. Glassman and Hester Peirce, "How Proxy Advisory Services Became So Powerful," Mercatus Center, George Mason University *Policy Brief*, June 18, 2014, https://www.mercatus.org/system/files/Peirce-Proxy-Advisory-Services-MOP.pdf (accessed December 19, 2024), and Editorial, "Cracking the Proxy Advisory Duopoly," *Wall Street Journal*, July 12, 2023, https://www.wsj.com/articles/proxy-advisory-firms-glass-lewis-institutional-shareholder-services-esg-investing-761e044f (accessed December 19, 2024).
40. See, for example, James R. Copland, David F. Larcker, and Brian Tayan, "Proxy Advisory Firms: Empirical Evidence and the Case for Reform," Manhattan Institute, May 21, 2018, https://manhattan.institute/article/proxy-advisory-firms-empirical-evidence-and-the-case-for-reform (accessed December 19, 2024); Paul Rose, "Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting," Manhattan Institute, April 2021, https://manhattan.institute/article/proxy-advisors-and-market-power-a-review-of-institutional-investor-robovoting (accessed December 19, 2024); Stephen Choi, Jill Fisch, and Marcel Kahan, "The Power of Proxy Advisors: Myth or Reality?," *Emory Law Journal*, Vol. 59, No. 4 (March 2010), pp. 869–918, https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1370&context=elj (accessed December 19, 2024) (ISS alone, 6 percent to 10 percent implying that ISS and Glass Lewis together would be around 10 percent to 16 percent); Yonca Ertimur, Fabrizio Ferri, and David Oesch, "Shareholder Votes and Proxy Advisors: Evidence from Say on Pay," *Journal of Accounting Research*, Vol. 51, No. 5 (December 2013), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2305420_code348861.pdf?abstractid=2019239&mirid=1&type=2 (accessed December 19, 2024) ("When both recommend Against, voting dissent is higher by 38.3%."); Nadya Malenko and Yao Shen, "The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design," *Review of Financial Studies*, Vol. 29, No. 12 (December 2016), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2902401_code634969.pdf?abstractid=2526799&mirid=1&type=2 (accessed December 19, 2024); John G. Matsusaka and Chong Shu, "Robo-Voting: Does Delegated Proxy Voting Pose a Challenge for Shareholder Democracy?" Social Science Research Network, October, 2 2023, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4564648_code50088.pdf?abstractid=4564648&mirid=1&type=2 (accessed December 19, 2024) ("We examine over 65 million votes cast during the period 2008–2021 by 14,582 mutual funds to describe and quantify the prevalence of robo-voting. Overall, 33 percent of mutual funds robo-voted in 2021; 22 percent with ISS, 4 percent with Glass Lewis, and 6 percent with management."); Jie Cai, Jacqueline L. Garner, and Ralph A. Walkling, "Electing Directors," *Journal of Finance*, Vol. 64, No. 5 (October 2009), pp. 2389–2421, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1297543_code328592.

pdf?abstractid=1101924&mirid=1&type=2 (accessed December 19, 2024) (ISS alone, 19 percent, implying a combined 30 percent); Jennifer E. Bethel & Stuart L. Gillan, "The Impact of the Institutional and Regulatory Environment on Shareholder Voting," *Financial Management*, Vol. 31, No. 4 (Winter, 2002), pp. 29–54, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=359642 (accessed December 19, 2024) (ISS alone, 13.6 percent to 20.6 percent, implying a combined percentage of 22 percent to 33 percent); Cindy R. Alexander et al., "The Role of Advisory Services in Proxy Voting," National Bureau of Economic Research *Working Paper* No. 15143 (July 2009), https://www.nber.org/system/files/working_papers/w15143/w15143.pdf (accessed December 19, 2024); Chong Shu, "The Proxy Advisory Industry: Influencing and Being Influenced," *Journal of Financial Economics*, forthcoming (February 9, 2024, revision), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3614314 (accessed December 19, 2024); and *A Call for Change in the Proxy Advisory Industry Status Quo: The Case for Greater Accountability and Oversight*, Center On Executive Compensation, January 2011, https://www.wsj.com/public/resources/documents/ProxyAdvisoryWhitePaper02072011.pdf (accessed December 19, 2024).

41. See, for example, Nasdaq's board diversity rule. David R. Burton, "Nasdaq's Proposed Board-Diversity Rule Is Immoral and Has No Basis in Economics," Heritage Foundation *Backgrounder* No. 3591, March 9, 2021, https://www.heritage.org/sites/default/files/2021-03/BG3591_0.pdf, and "Together as One," BlackRock, 2024, https://www.blackrock.com/corporate/literature/fact-sheet/together-as-one.pdf (accessed December 23, 2024).
42. See, for example, "Investor Signatories," Climate Action 100+, https://web.archive.org/web/20230315025153/https://www.climateaction100.org/whos-involved/investors/ (accessed December 19, 2024) ("Climate Action 100+ is made up of 700 global investors who are responsible for more than $68 trillion in assets under management across 33 markets."); "Signatories," Net Zero Asset Managers Initiative, https://www.netzeroassetmanagers.org/signatories/ (accessed December 19, 2024) ("More than 315 asset managers, with USD 57 trillion in assets, have committed to achieve net zero alignment by 2050 or sooner."); "The Net Zero Asset Managers Commitment," https://www.netzeroassetmanagers.org/commitment/ (accessed December 19, 2024); and "Amount of Finance Committed to Achieving 1.5°C Now at Scale Needed to Deliver the Transition," Glasgow Financial Alliance for Net Zero (GFANZ), November 3, 2021, https://www.gfanzero.com/press/amount-of-finance-committed-to-achieving-1-5c-now-at-scale-needed-to-deliver-the-transition/ (accessed December 19, 2024) ("Today, through the Glasgow Financial Alliance for Net Zero (GFANZ), over $130 trillion of private capital is committed to transforming the economy for net zero.").
43. *BlackRock Investment Stewardship Annual Report, January 1–December 31, 2023*, BlackRock, https://www.blackrock.com/corporate/literature/publication/annual-stewardship-report-2023.pdf (accessed December 23, 2024); *Accelerating Growth: 2021 ESG Report*, State Street, https://www.statestreet.com/web/about/our-impact/documents/SSC-ESG-2021-Final-Full.pdf (accessed December 19, 2024); "Sustainable Investing at Fidelity," Fidelity, https://www.fidelity.com/sustainable/overview (December 19, 2024); "Snapshot of Most Popular ESG Proposals 2021–2022," 1792 Exchange, https://1792exchange.com/esg-proposals_2021-22 (accessed December 19, 2024); Kenneth P. Pucker, "Vanguard Confronts an Inconvenient Truth," *Harvard Business Review*, April 24, 2023, https://hbr.org/2023/04/vanguard-confronts-an-inconvenient-truth (accessed December 19, 2024); Terrence Keeley, "Vanguard's CEO Bucks the ESG Orthodoxy," *Wall Street Journal*, February 27, 2023, https://www.wsj.com/articles/vanguards-ceo-bucks-the-esg-orthodoxy-tim-buckley-net-zero-emissions-united-nations-initiative-nzam-f6ae910d (accessed December 19, 2024); and Bob Rubin, "BlackRock and Vanguard Were Once ESG's Biggest Proponents—Now They Seem to Be Reversing Course," *Fortune*, September 13, 2023, https://fortune.com/2023/09/13/blackrock-vanguard-were-once-esg-reversing-course-finance-bob-rubin/ (accessed December 19, 2024).
44. This phrase, of course, is an echo of the analogous "corporate social responsibility" initiatives of the 1970s and 1980s.
45. See, for example, Chip Cutter and Emily Glazer, "The Latest Dirty Word in Corporate America," *Wall Street Journal*, January 9, 2024, https://www.wsj.com/business/the-latest-dirty-word-in-corporate-america-esg-9c776003 (accessed December 19, 2024).
46. Adam McCann, "Top 15 Largest U.S. Banks Based on Total Domestic Deposits," WalletHub, September 6, 2023, https://wallethub.com/edu/sa/bank-market-share-by-deposits/25587 (accessed December 19, 2024) (using FDIC data).
47. See, for example, Allysia Finley, "Debanking and the Return of Operation Choke Point," *Wall Street Journal*, December 15, 2024, https://www.wsj.com/opinion/debanking-and-the-return-of-operation-choke-point-finance-money-government-8d507083 (accessed December 19, 2024); Sam Brownback and Jeremy Tedesco, "Stop the Troubling Trend of Politically Motivated Debanking," *Newsweek*, March 15, 2023, https://www.newsweek.com/stop-troubling-trend-politically-motivated-debanking-opinion-1787639 (accessed December 19, 2024); Stephen Morris and George Parker, "Nigel Farage Moves Accounts to Lloyds After Coutts 'Debanking' Scandal," *Financial Times*, October 13 2023, https://www.ft.com/content/9c2ec1b4-4cf5-4c10-af3a-8d6e9f942e5b (accessed December 19, 2024); "Federal Deposit Insurance Corporation's Involvement in 'Operation Choke Point,'" Committee on Oversight and Government Reform, U.S. House of Representatives, December 8, 2014, https://oversight.house.gov/wp-content/uploads/2014/12/Staff-Report-FDIC-and-Operation-Choke-Point-12-8-2014.pdf (accessed December 19, 2024).
48. There are approximately 4,100 banks in the U.S. (2022) and 4,800 credit unions (2022, federally insured). See "BankFind Suite: Find Annual Historical Bank Data," Federal Deposit Insurance Corporation, https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2022&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc (accessed December 19, 2024), and "Quarterly Credit Union Data Summary 2022 Q4," National Credit Union Administration, https://ncua.gov/files/publications/analysis/quarterly-data-summary-2022-Q4.pdf (accessed December 19, 2024).
49. Investment advisers are regulated pursuant to the Investment Advisers Act of 1940 (IAA). Note: In the Act and the relevant Securities and Exchange Commission regulations, adviser is spelled with an "e" not an "o." Regarding the scope of RIAs' statutory fiduciary duties under the IAA, see *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), and *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). See also Hester M. Peirce, "There's a Fund for That: Remarks Before FINRA's Certified Regulatory and Compliance Professional Dinner," November 15, 2022, https://www.sec.gov/news/speech/peirce-finra-remarks-111522 (accessed December 18, 2024).

50. Investment companies are regulated pursuant to the Investment Company Act of 1940.
51. Notably broker-dealers under SEC Regulation BI and corporate directors. See the discussion at note 3.
52. To the extent that these are within the ambit of federal law. Although federal securities and other laws are increasingly intruding on corporate governance, the core legal relationship between directors, officers, shareholders, and the corporation is (and should be) governed by state law.
53. Perhaps as much as 70 percent to 85 percent of all shares are held in street name. See, for example, Marcel Kahan and Edward B. Rock, "The Hanging Chads of Corporate Voting," *Georgetown Law Journal*, Vol. 96, No. 4 (2008), pp. 1227–1281, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1163&context=faculty_scholarship (accessed December 19, 2024), and "Roundtable on Proxy Voting Mechanics," U.S. Securities and Exchange Commission, May 23, 2007, https://www.sec.gov/spotlight/proxyprocess/proxyvotingbrief.htm (accessed December 19, 2024). Broker-dealers who are NYSE members are not currently authorized to vote shares held in street name on "non-routine" matters. So long as this does not change, this will be of relatively little importance on ESG or DEI matters. If it were to change, then it would become critical. See New York Stock Exchange Rule 452.11 "Equities. Giving Proxies by Member Organization, When Member Organization May Not Vote Without Customer Instructions," https://nyseamericanguide.srorules.com/rules/bbc2403e7cb810008cbed8d385ad169404e (accessed December 23, 2024). Incorporating a provision like NYSE Rule 452 into the Securities Exchange Act may be advisable.
54. Most notably the Financial Industry Regulatory Authority (FINRA), the National Futures Association (NFA), the Municipal Securities Rulemaking Board (MSRB), and the national securities and commodities exchanges. FINRA, the primary regulator of broker-dealers, is no longer industry controlled and is in no meaningful sense an actual SRO. It is, however, an opaque and unaccountable regulator. See David R. Burton, "Reforming FINRA," Heritage Foundation *Backgrounder* No. 3181, February 1, 2017, https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf. Nasdaq has promulgated a racist "board diversity" rule. See Burton, "Nasdaq's Proposed Board-Diversity Rule Is Immoral." The NYSE has, among other things, proposed new listing standards for so-called "Natural Asset Companies" that would jettison generally accepted accounting standards to further ESG objectives. This proposal has, at least for now, been withdrawn. See "Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies," U.S. Securities and Exchange Commission, September 29, 2023, https://www.sec.gov/files/rules/sro/nyse/2023/34-98665.pdf (accessed December 19, 2024). Provided, however, that the nature of these companies is fully and honestly disclosed to investors, natural asset companies are less problematic than many other ESG initiatives. They will, however, pose unique and potentially difficult enforcement issues since the metrics employed are quite amorphous and reject ordinary accounting principles.
55. See "Model Legislation," ESG Hurts, https://esghurts.com/state-legislation (accessed December 19, 2024) (contains some examples of what could be done). For a thoughtful discussion of the interaction of state and federal laws governing the proxy process, see Mark T. Uyeda, "Remarks at the Society for Corporate Governance 2023 National Conference," June 21, 2023, https://www.sec.gov/news/speech/uyeda-remarks-society-corporate-governance-conference-062123 (accessed December 19, 2024).
56. There is a voluminous literature exploring the implications of the separation of ownership and control in large, modern corporations going back to at least the 1930s. This literature addresses fiduciary duties, the market for corporate control, and the agent-principal problem (i.e., the interest of corporate boards and management are not congruent with those of shareholders). See, for example, Adolfe A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: The Macmillan Company, 1933). Berle and Means regarded this as largely a positive development. Others were less sanguine. In modern finance, there really is an agent of an agent of an agent–principal problem because of the very large role of fund managers and proxy advisers play in addition to the role of corporate boards. Effective control of modern large corporations is two to three steps removed from ownership.
57. See, for example, the "Purpose of a Corporation" Business Roundtable, https://opportunity.businessroundtable.org/ourcommitment/ (accessed December 19, 2024) ("Since 1978, Business Roundtable has periodically issued Principles of Corporate Governance that include language on the purpose of a corporation. Each version of that document issued since 1997 has stated that corporations exist principally to serve their shareholders. It has become clear that this language on corporate purpose does not accurately describe the ways in which we and our fellow CEOs endeavor every day to create value for all our stakeholders, whose long-term interests are inseparable."), and "Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'" Business Roundtable, August 19, 2019, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans (accessed December 19, 2024). See also "About Business Roundtable," Business Roundtable, https://www.businessroundtable.org/about-us (accessed December 19, 2024) ("Business Roundtable is an association of more than 200 chief executive officers (CEOs) of America's leading companies."). For an example of criticism of the BRT statement, see "Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose," Council of Institutional Investors, August 19, 2019, https://www.cii.org/aug19_brt_response (accessed December 19, 2024) ("Accountability to everyone means accountability to no one.").
58. See footnote 2 for a detailed discussion.
59. 29 U.S. Code §1104 provides, in relevant part:

    a fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries and—

    (A) for the *exclusive* purpose of:

    (i) providing benefits to participants and their beneficiaries; and

    (ii) defraying reasonable expenses of administering the plan" (emphasis added).

60. See, for example, Hester M. Peirce, "Tow Truck Taxonomies: Remarks Before Eurofi," U.S. Securities and Exchange Commission, April 28, 2023, https://www.sec.gov/news/speech/peirce-remarks-eurofi-042823 (accessed December 19, 2024).
61. As of late, the underperformance by ESG or other environmentally motivated investments has accelerated. See, for example, Greg Ip, "Why No One Wants to Pay for Green Transition," *Wall Street Journal*, November 30, 2023, https://www.wsj.com/business/autos/why-no-one-wants-to-pay-for-the-green-transition-aed6ba74 (accessed December 19, 2024) (The Nasdaq Clean Edge Green Energy Index and the S&P Global Clean Energy Index declined approximately 50 percent from January 2021 to November 2023 compared to the S&P 500, which increased 20 percent.). See also Bradford Cornell and Aswath Damodaran, "Valuing ESG: Doing Good or Sounding Good?," NYU Stern School of Business, March 20, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3557432 (accessed December 19, 2024) ("Telling firms that being socially responsible will deliver higher growth, profits and value is false advertising," p. 22.); Ulrich Atz et al., "Does Sustainability Generate Better Financial Performance? Review, Meta-analysis, and Propositions," *Journal of Sustainable Finance and Investment*, July 29, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708495 (accessed December 19, 2024) (This paper surveyed 1,141 primary peer-reviewed papers and 27 meta-reviews [based on approximately 1,400 underlying studies] published between 2015 and 2020. Aggregate conclusions from a sample suggest that the financial performance of ESG investing has on average been indistinguishable from conventional investing [with one in three studies indicating superior performance].); Samuel M. Hartzmark and Abigail B. Sussman, "Do Investors Value Sustainability? A Natural Experiment Examining Ranking and Fund Flows," *Journal of Finance*, Vol. 74, No. 6 (December 2019), pp. 2789–2837, https://www.jstor.org/stable/45222766 (accessed December 19, 2024). Since most ESG funds are heavy on tech company stocks and the performance of tech companies relative to the general market is no longer strong, ESG funds are now almost universally performing worse. The continued unreliability and unpopularity of electric vehicles and the realization by investors that alternative energy hype does not match engineering or financial reality is not helping, either. See, for example, Carol Ryan, "The Bill for Offshore Wind Power Is Rising," *Wall Street Journal*, November 24, 2023, https://www.wsj.com/business/energy-oil/the-bill-for-offshore-wind-power-is-rising-68fb5524 (accessed December 19, 2024), and David Uberti and Joe Wallace, "Wind Giant's Woes Rattle U.S. Market," *Wall Street Journal*, November 21, 2023. See also Carrie McCabe, "Recent ESG Fund Underperformance and Data Inconsistency—And How The U.S. and Europe Differ in Approach," *Forbes*, May 11, 2023, https://www.forbes.com/sites/carriemccabe/2023/05/11/recent-esg-problems-include-fund-underperformance-and-data-inconsistency-and-how-the-us-and-europe-differ-in-esg-fund-approach/?sh=1ca237a663de (accessed December 19, 2024), and Tommy Wilkes and Patturaja Murugaboopathy, "ESG Funds Set for First Annual Outflows in a Decade After Bruising Year," Reuters, December 19, 2022, https://www.reuters.com/business/sustainable-business/esg-funds-set-first-annual-outflows-decade-after-bruising-year-2022-12-19/ (accessed December 19, 2024).
62. Paul H. Tice, *The Race to Zero: How ESG Investing Will Crater the Global Financial System* (New York: Encounter Books, 2023).
63. See, for example, "The Social Costs of ESG," in Comment Letter of David R. Burton to the Securities and Exchange Commission, June 13, 2022 https://www.sec.gov/comments/climate-disclosure/cll12-8914466-244728.pdf (accessed December 19, 2024) (using conventional price theoretic or public finance analytics applied in an ESG context).
64. Sanjai Bhagat, "An Inconvenient Truth About ESG Investing," *Harvard Business Review*, March 31, 2022, https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing (December 29, 2024).
65. As discussed above, broker–dealers are not strictly fiduciaries but have a heightened legal duty towards investors pursuant to, among other things, SEC Regulation Best Interest. RIAs have a fiduciary duty.
66. Congress should also mandate that the SEC modify 17 Code of Federal Regulations § 275.206(4)–6 (Proxy Voting) to reflect these changes.
67. Section 404 of ERISA (29 U.S. Code § 1104) currently provides:

    a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

    (A) for the exclusive purpose of:

    (i) providing benefits to participants and their beneficiaries; and

    (ii) defraying reasonable expenses of administering the plan.
68. And of RICs' officers, directors, advisory board members, investment advisers, depositors, or principal underwriters.
69. The model State Pension Fiduciary Duty Act would require that plan trustees and advisers act in the financial interest of plan beneficiaries. This is analogous to requirements imposed by ERISA on federally regulated plans. See The Heritage Foundation, "State Pension Fiduciary Duty Act," https://www.heritage.org/article/state-pension-fiduciary-duty-act.
70. The model amendment to the Prudent Management of Institutional Funds Act would protect the charitable purpose of institutional funds managed and invested by state universities and other government institutions holding funds for charitable purposes. See The Heritage Foundation, "Proposed UPMIF Amendment," https://www.heritage.org/article/proposed-upmifa-amendment.
71. "Business and Financial Disclosure Required by Regulation S–K," U.S. Securities and Exchange Commission, April 13, 2016, p. 33, https://www.sec.gov/rules/concept/2016/33-10064.pdf (accessed December 19, 2024), and "Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission," Committee Print 95–29, House Committee on Interstate and Foreign Commerce, 95th Congress, 1st Session, November 3, 1977, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf (accessed December 19, 2024).
72. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), and *Basic Inc. vs. Levinson*, 485 U.S. 224 (1988).

73. *Matrixx Initiatives, Inc. v. Siracusano*, 131 U.S. 1309 (2011).
74. See, for example, Allison Herren Lee, "Living in a Material World: Myths and Misconceptions About 'Materiality,'" May 24, 2021, https://www.sec.gov/news/speech/lee-living-material-world-052421 (accessed December 19, 2024) (Especially, the discussion of "Myth #4: Climate and ESG are matters of social or 'political' concern, and not material to investment or voting decisions."), and Brian Tomlinson and Lucy Godshall, "Doubling Down: ESG Regulation Gives Materiality a Bigger Stake," Ernst & Young LLP, August 22, 2023, https://www.ey.com/en_us/assurance/esg-regulation-gives-materiality-a-bigger-stake (accessed December 19, 2024).
75. "Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022," European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464 (accessed December 19, 2024) (see especially paragraphs 29, 37 and 39 of the "whereas" preamble).
76. See, for example, Shane Shifflett, "Wall Street's ESG Craze Is Fading: Investors Pulled More than $14 Billion from Sustainable Funds this Year," *Wall Street Journal*, November 19, 2023, https://www.wsj.com/finance/investing/esg-branding-wall-street-0a487105 (accessed December 19, 2024).
77. This could be accomplished by amending section 2 of the Securities Act to define "material" as follows:

    (20) The term "material" means, when used to qualify a requirement for the furnishing of information as to any subject, information limited to those matters regarding which there is a substantial likelihood that a reasonable investor would attach importance when—

    (i) evaluating the potential financial return and financial risks of an existing or prospective investment, or

    (ii) exercising, or declining to exercise, any rights appurtenant to securities for the purpose of earning a financial return or managing financial risk.

    The term "material" does not include, when used to qualify a requirement for the furnishing of information as to any subject, information that—

    (i) primarily furthers non-pecuniary, non-economic or non-financial social, political or ideological goals or objectives, or

    (ii) primarily relates to events that—

    (A) involve a high degree of uncertainty regarding what may or may not occur in the distant future, and

    (B) are systemic, general or not issuer specific in nature.
78. Employee Retirement Income Security Act, 29 U.S. Code § 1104, § 404.
79. See 29 Code of Federal Regulations § 2550.404a–1(c)(2) adopted at *Federal Register*, Vol. 87, No. 230 (December 1, 2022), pp. 73822–73886, https://www.federalregister.gov/documents/2022/12/01/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights (accessed December 19, 2024) ("If a fiduciary prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment, or investment course of action, based on collateral benefits other than investment returns.").
80. There is some variance in the number of operating companies listed in the U.S. that various sources report. Methodology and time period account for the variation. Five thousand is an approximate midpoint of the estimates. Funds that invest in other companies and American depositary receipts (ADRs) are not counted. ADRs are negotiable certificates issued by a U.S. depositary bank representing a specified number of shares of a foreign company traded on a foreign exchange. For various estimates, see, for example, Christine Dobridge, Rebecca John, and Berardino Palazzo, "The Post-COVID Stock Listing Boom," FEDS Notes, June 17, 2022, https://www.federalreserve.gov/econres/notes/feds-notes/the-post-covid-stock-listing-boom-20220617.html (accessed December 19, 2024); Kirk Kardashian, "Where Did All the Public Companies Go?" Tuck School of Business, Dartmouth, September 26, 2024, https://www.tuck.dartmouth.edu/news/articles/where-did-all-the-public-companies-go (accessed December 19, 2024); and Craig Doidge, G. Andrew Karolyi, and René M. Stulz, "The U.S. Listing Gap," National Bureau of Economic Research *Working Paper* No. 21181, May 2015, http://www.nber.org/papers/w21181 (accessed December 19, 2024).
81. This is the basic methodology that Value Line, for example, uses in its recommendations to subscribers.
82. "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," *Federal Register*, Vol. 87, No. 230 (December 1, 2022), https://www.govinfo.gov/content/pkg/FR-2022-12-01/pdf/2022-25783.pdf (accessed December 19, 2024). A resolution of disapproval (H.J. Res 30) was passed by the House (216–204) and the Senate (50–46) and subsequently vetoed by President Biden on March 20, 2023. "President's Veto of H.J. Res 30," March 20, 2023, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/20/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-30/ (accessed December 19, 2024). The rule was challenged by 25 Attorneys General and the U.S. District Court for the Northern District of Texas, and the Department of Labor prevailed. The decision has been appealed to the Fifth Circuit Court of Appeals. See also David R. Burton, "The Biden–Harris Department of Labor Is Politicizing Your Retirement Savings," *The Hill*, November 3, 2024, https://thehill.com/opinion/4967027-biden-dol-rule-political-goals/ (accessed December 19, 2024).
83. See, for example, the model legislation at The Heritage Foundation, "State Pension Fiduciary Duty Act," https://www.heritage.org/article/state-pension-fiduciary-duty-act.
84. Prior to 2003, the Pension and Welfare Benefits Administration was the subagency at the DOL that enforced ERISA. See "History of EBSA and ERISA," Employee Benefits Security Administration, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa (accessed December 19, 2024).
85. See, for example, Paul N. Watkins and Kathleen Barceleau, "The 30-Year History of Diluting ERISA's Fiduciary Duty," *Federalist Society Review*, Volume

25 (January 16, 2024), https://fedsoc.org/fedsoc-review/the-30-year-history-of-diluting-erisa-s-fiduciary-duty (accessed December 19, 2024); Mark T. Uyeda, "Statement on Final Rule Amendments on Proxy Voting Advice," July 13, 2022, https://www.sec.gov/news/statement/uyeda-statement-amendments-proxy-voting-advice-071322 (accessed December 19, 2024); and James K. Glassman and Hester Peirce, "How Proxy Advisory Services Became So Powerful," Mercatus Center, June 18, 2014, https://www.mercatus.org/media/45496/download?attachment (accessed December 19, 2024).

86. This rule is predicated on § 206(4) of the Investment Advisers Act found at 15 U.S. Code § 80b–6.
87. 17 CFR §275.206(4)–6 Proxy Voting ("If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)), for you to exercise voting authority with respect to client securities, unless you:

    (a) Adopt and implement written policies and procedures that are reasonably designed to ensure that you vote client securities in the best interest of clients, which procedures must include how you address material conflicts that may arise between your interests and those of your clients.").
88. Ibid.
89. "Investment Advisers Act of 1940, Rule 206(4)–6, No-Action Letter to Egan-Jones Proxy Services," May 27, 2004, https://www.sec.gov/divisions/investment/noaction/egan052704.htm#6 (accessed December 19, 2024). ("[T]he Commission indicated that an investment adviser could demonstrate that its vote of its clients' proxies was not a product of a conflict of interest if the adviser voted the proxies in accordance with a pre-determined policy based on the recommendations of an independent third party. An investment adviser that votes client proxies in accordance with a pre-determined policy based on the recommendations of an independent third party will not necessarily breach its fiduciary duty of loyalty to its clients even though the recommendations may be consistent with the adviser's own interests. In essence, the recommendations of a third party that is in fact independent of an investment adviser may cleanse the vote of the adviser's conflict."). This letter was withdrawn on September 13, 2018. See U.S. Securities and Exchange Commission, "Division of Investment Management: Modified of Withdrawn Staff Statements," https://www.sec.gov/divisions/investment/im-modified-withdrawn-staff-statements (accessed December 19, 2024). See also "Investment Advisers Act of 1940, Rule 206(4)–6, No Action Letter to Mari Anne Pisarri (on behalf of Institutional Shareholder Services, Inc.)," September 15, 2004, https://www.sec.gov/divisions/investment/noaction/iss091504.htm (accessed December 19, 2024). This letter was withdrawn September 13, 2018. See "Division of Investment Management: Modified of Withdrawn Staff Statements," cited above.
90. See Letter to Helmuth Fandl, Chairman of the Retirement Board of Avon Products. Inc., February 23, 1988, at *Federal Register*, Vol. 59, No. 145 (July 29, 1994) https://www.govinfo.gov/content/pkg/FR-1994-07-29/html/94-18198.htm (accessed December 19, 2024) (often referred to as the "Avon Letter"); Letter to Robert A. G. Monks of Institutional Shareholder Services, Inc., January 23, 1990, at *Federal Register*, Vol. 59, No. 145 (July 29, 1994), https://www.govinfo.gov/content/pkg/FR-1994-07-29/html/94-18198.htm (accessed December 19, 2024); and Interpretative Bulletin (IB) 94–2 (formerly codified at 29 Code of Federal Regulations 2509.94–2) at *Federal Register*, Vol. 59, No. 145 (July 29, 1994), pp. 38863–38864. See also "Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines," *Federal Register*, Vol. 81, No. 250 (December 29, 2016), p. 95880 (footnote 1), https://www.govinfo.gov/content/pkg/FR-2016-12-29/pdf/2016-31515.pdf (accessed December 19, 2024).
91. 15 U.S. Code § 80b–6.
92. 17 Code of Federal Regulations § 275.206(4)–6.
93. 17 Code of Federal Regulations § 240.14a–9.
94. Examples of such groups would include the GFANZ, the Sustainability Accounting Standards Board, Climate Action 100+, The Net Zero Asset Managers Initiative, and the Institutional Investors Group on Climate Change.
95. 15 U.S. Code § 78n.
96. "Exemptions From the Proxy Rules for Proxy Voting Advice," U.S. Securities and Exchange Commission, Final Rule, *Federal Register*, Vol. 85, No. 172 (September 3, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf (accessed December 19, 2024). See also news release, "SEC Adopts Rule Amendments to Provide Investors Using Proxy Voting Advice More Transparent, Accurate and Complete Information," U.S. Securities and Exchange Commission, https://www.sec.gov/news/press-release/2020-161 (accessed December 19, 2024). This rule was partially rescinded in 2022. See "Proxy Voting Advice," Final Rule, U.S. Securities and Exchange Commission, *Federal Register*, Vol. 87, No. 137 (July 19, 2022), https://www.govinfo.gov/content/pkg/FR-2022-07-19/pdf/2022-15311.pdf (accessed December 19, 2024).
97. See "What Is Critical Race Theory?" in Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction*, 3rd ed. (New York: New York University Press, 2017), p. 3, and Kevin R. Johnson, "Richard Delgado's Quest for Justice for All," *Minnesota Journal of Law & Inequality*, Vol. 33, No. 2 (2015), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1213&context=lawineq (accessed December 19, 2024) ("A brief, simple commentary cannot do justice to Delgado's pioneering legal scholarship—he is nothing less than a legend, a sort of LeBron James or Michael Jordan among legal academics."). See also Jonathan Butcher and Mike Gonzalez, "Critical Race Theory, the New Intolerance, and Its Grip on America," Heritage Foundation *Backgrounder* No. 3567, December 7, 2020, https://www.heritage.org/sites/default/files/2020-12/BG3567.pdf. For a Thomist critique of wokeism and critical theory, see Robert Barron, "The Philosophical Roots of Wokeism," *Religion and Liberty*, Vol. 34, No. 1 (January 2024), https://www.acton.org/religion-liberty/volume-34-number-1/philosophical-roots-wokeism (accessed December 19, 2024).
98. For this formulation of the problem, see Mike Gonzalez, *The Plot to Change America: How Identity Politics Is Dividing the Land of the Free* (New York: Encounter Books, 2020).

99. Burton, "Nasdaq's Proposed Board-Diversity Rule Is Immoral." The Fifth Circuit held that the Nasdaq is not a state actor subject to constitutional constraints and could issue the rule. See *Alliance for Fair Board Recruitment v. Securities and Exchange Commission*, United States Court of Appeals for the Fifth Circuit, October 18, 2023, https://law.justia.com/cases/federal/appellate-courts/ca5/21-60626/21-60626-2023-10-18.html (accessed December 19, 2024).

100. *Alliance for Fair Board Recruitment v. Securities and Exchange Commission,* United States Court of Appeals for the Fifth Circuit, December 11, 2024, https://www.ca5.uscourts.gov/opinions/pub/21/21-60626-CV0.pdf (accessed December 30, 2024).

101. "Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More," Federal Deposit Insurance Corporation, Notice of Proposed Rulemaking and Issuance of Guidelines, *Federal Register*, Vol. 88, No. 195 (October 11, 2023), pp. 70391–70409, https://www.govinfo.gov/content/pkg/FR-2023-10-11/pdf/2023-22421.pdf (accessed December 19, 2024) ("However, in determining the appropriate number of directors and the board's composition, the board should consider how the selection of and diversity among board members collectively and individually may best promote effective, independent oversight of covered institution management and satisfy all legal requirements for outside and independent directors. Important aspects of diversity may include: social, racial, ethnic, gender, and age differences. However, in determining the appropriate number of directors and the board's composition, the board should consider how the selection of and diversity among board members collectively and individually may best promote effective, independent oversight of covered institution management and satisfy all legal requirements for outside and independent directors. Important aspects of diversity may include: social, racial, ethnic, gender, and age differences.").

102. *Alliance for Fair Board Recruitment v. SEC* (5th Cir. 2023), https://www.ca5.uscourts.gov/opinions/pub/21/21-60626-CV0.pdf (accessed December 19, 2024). On February 19, 2024, the Fifth Circuit granted the petition for a rehearing en banc. See Petition for Review from an Order of the Securities & Exchange Commission, No. 34–92590, https://www.ca5.uscourts.gov/opinions/unpub/21/21-60626-CV1.pdf (accessed December 19, 2024).

103. The Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to "limit, segregate, or classify his employees or applicants for employment...because of such individual's race, color, religion, sex, or national origin." Specifically, it reads as follows:

    Unlawful Employment Practices (a) Employer practices. It shall be an unlawful employment practice for an employer—

    (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

    (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

    Civil Rights Act of 1964, § 703, 42 U.S. Code § 2000e–2.

104. 42 U.S. Code § 2000e–2(j) provides:

    Preferential Treatment Not to be Granted on Account of Existing Number or Percentage Imbalance

    (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor–management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.

105. Defined objectively and not as self-identified gender identity.

106. Possible legislative language: Sec. xxx.

    (a) Discrimination by Financial Regulators Unlawful. —It shall be unlawful for a financial regulator to—

    (1) promulgate any rule, (2) provide guidance, (3) issue a no action letter, private letter ruling or take similar action, (4) initiate or pursue any enforcement action; or (5) take any other action

    that would

    (1) discriminate for or against any individual or entity on the basis of any individual's race, color, religion, sex, or national origin; or (2) limit, segregate, or classify employees, applicants, officers, board members, management, customers, clients, regulated individuals or regulated entities in any way which would deprive or tend to deprive any individual of opportunities or otherwise adversely affect such individual because of any individual's race, color, religion, sex, or national origin.

    (b) Financial Regulator Definition. — Financial Regulator means–

    (1) the Department of the Treasury (including, but not limited to (i) the Office of the Comptroller of the Currency, (ii) the Financial Crimes Enforcement Network, and (iii) the Internal Revenue Service), (2) the Federal Reserve Board, (3) the Consumer Financial Protection Bureau, (4) the Securities and Exchange Commission, (5) the Federal Deposit Insurance Corporation, (6) the Commodity Futures Trading Commission, (7) the Federal Housing Finance Agency, (8) the National Credit Union Administration, (9) any state banking commissioner, (10) any state

insurance commissioner, (11) any state securities commissioner, (12) any national securities association, and (13) any other self-regulatory organization (as defined in xxx).

(c) Enforcement. (1) Any person alleging a violation of this section may bring a civil action in any United States District Court. (2) Relief. In a civil action brought under this subsection in which the plaintiff prevails, the court may award — (i) a Writ of Mandamus or other equitable or declaratory relief; (ii) a minimum of $1,000 per violation per day; (iii) reasonable attorney's fees and litigation costs; (iv) compensatory damages; and (v) all other appropriate relief.

Congress may also want to consider liability comparable to that under 42 U.S. Code §1983 for regulators that violate the forgoing.

107. This could be accomplished by amending 42 U.S. Code § 2000e(f) (relating to the definition of employee) by adding "or is a paid member of the employer's Board of Directors," immediately after the existing language: "The term 'employee' means an individual employed by an employer...." For a general discussion of Board-related issues, see Dionne Rousseau and Emily Gauthier, "How the Supreme Court's Recent Decisions on Affirmative Action Affect the Board," *Directors and Boards*, July 28, 2023, https://www.directorsandboards.com/articles/how-the-supreme-courts-recent-decisions-on-affirmative-action-affect-the-board/ (accessed December 19, 2024). For a discussion of state government board diversity actions, see Michael Hatcher and Weldon Latham, "States Are Leading the Charge to Corporate Boards: Diversify!" Harvard Law School Forum on Corporate Governance, May 12, 2020, https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/ (accessed December 19, 2024).
108. Biden, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."
109. Biden, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."
110. Biden, "Establishment of the White House Gender Policy Council."
111. Biden, "Executive Order on Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders."
112. Biden, "Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce."
113. Biden, "Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."
114. Biden, "Revitalizing America's Foreign Policy and National Security Workforce, Institutions, and Partnerships."
115. Biden, "Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World."
116. Potential statutory language might read as follows:

(d) Racism in Government Prohibited

(1) Racist behavior and racist training in government is prohibited, including, but not limited to, the following:

(A) discriminating for or against any person on the basis of race, color, ethnicity, or national origin;

(B) training, education, course work or other pedagogy that asserts that a particular race, color, ethnicity, biological sex or national origin is inherently or systemically superior, inferior, oppressive or oppressed, privileged or unprivileged;

(C) maintaining an office, bureau, division or other organization to further, promote or enforce prohibited diversity, equity or inclusion practices (as defined in section 8801 of Title 41);

(D) retaining or employing consultants or advisors to further, promote or enforce prohibited diversity, equity or inclusion practices (as defined in section 8801 of Title 41);

(E) maintaining rules, regulations, policies, guidance, guidelines, management control, practices, requirements, training, education, coursework or similar device to further, promote or enforce prohibited diversity, equity or inclusion practices (as defined in section 8801 of Title 41);

(F) requiring –

(i) as a condition of employment,

(ii) as a condition for promotion or advancement,

(iii) as a condition for speaking, making a presentation or submitting written materials

the signing of or assent to a —

(iv) statement,

(v) code of conduct,

(vi) work program or plan,

(vii) or similar device

that requires assent by the employee that a particular race, color, ethnicity, biological sex or national origin is inherently or systemically superior, inferior, oppressive or oppressed, privileged or unprivileged.

117. See, for example, 10 U.S. Code § 147 and 10 U.S. Code § 656 (relating to Department of Defense Chief Diversity Officer and Officer Diversity).
118. Glassman and Verret, "How to Fix Our Broken Proxy Advisory System."

119. See, for example, U.S. Government Accountability Office, *Antitrust: DOJ and FTC Jurisdictions Overlap, But Conflicts Are Infrequent*, GAO–23–105790, January 2023, https://www.gao.gov/assets/gao-23-105790.pdf (accessed December 19, 2024).
120. As discussed above, discrimination in employment is prohibited by the Civil Rights Act. See § 703 of the Civil Rights Act of 1964, 42 U.S. Code § 2000e-2. Discrimination in admissions is generally unlawful. See also *Students For Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. _____ (2023), https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf (accessed December 19, 2024).
121. The relevant agencies would include the Consumer Financial Protection Bureau, the Federal Reserve Board, the FDIC, the Office of the Comptroller of the Currency at the U.S. Treasury, the National Credit Union Association (NCUA), as well as the Department of Justice.
122. Most notably FINRA, the NFA, the MSRB, and the national securities and commodities exchanges. FINRA, the primary regulator of broker-dealers, is no longer industry controlled and is in no meaningful sense an actual SRO. It is, however, an opaque and unaccountable regulator. See David R. Burton, "Reforming FINRA," Heritage Foundation *Backgrounder* No. 3181, February 1, 2017, https://www.heritage.org/sites/default/files/2017-02/BG3181.pdf. Nasdaq has promulgated a racist "board diversity" rule. See Burton, "Nasdaq's Proposed Board-Diversity Rule Is Immoral." The NYSE has, among other things, proposed new listing standards for so-called Natural Asset Companies that would jettison generally accepted accounting standards to further ESG objectives, although that proposal was withdrawn on January 17, 2024. See "Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies," September 29, 2023, https://www.sec.gov/files/rules/sro/nyse/2023/34-98665.pdf (accessed December 19, 2024). The rule may or may not be reproposed in altered form.
123. See, for example, "Principles for Climate-Related Financial Risk Management for Large Financial Institutions," *Federal Register*, Vol. 87, No. 235 (December 8, 2022), pp. 75267–75271, https://www.govinfo.gov/content/pkg/FR-2022-12-08/pdf/2022-26648.pdf (accessed December 19, 2024); "Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions," *Federal Register*, Vol. 87, No. 64 (April 4, 2022), pp. 19507–19512, https://www.govinfo.gov/content/pkg/FR-2022-04-04/pdf/2022-07065.pdf (accessed December 19, 2024); "Climate-Related Financial Risk," *Federal Register*, Vol. 88, No. 79 (April 25, 2023), pp. 25028–25031, https://www.govinfo.gov/content/pkg/FR-2023-04-25/pdf/2023-08715.pdf (accessed December 19, 2024); "Risk Management: Principles for Climate-Related Financial Risk Management for Large Banks; Request for Feedback," Office of the Comptroller of the Currency Bulletin 2021–62, December 16, 2021, https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62.html (accessed December 19, 2024); "Principles for Climate-Related Financial Risk Management for Large Banks," Office of the Comptroller of the Currency, 2021, https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62a.pdf (accessed December 19, 2024); and "Guidelines for Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More," *Federal Register*, Vol. 88, No. 195 (October 11, 2023), pp. 70391–70409, https://www.govinfo.gov/content/pkg/FR-2023-10-11/pdf/2023-22421.pdf (accessed December 19, 2024) ("[I]n determining the appropriate number of directors and the board's composition, the board should consider how the selection of and diversity among board members collectively and individually may best promote effective, independent oversight of covered institution management and satisfy all legal requirements for outside and independent directors. Important aspects of diversity may include: social, racial, ethnic, gender, and age differences."). See The Heritage Foundation, "Comments on Federal Regulations," https://www.heritage.org/comments-federal-regulations, for a discussion of these and other rules.
124. For the Congressional Review Act, see 5 U.S. Code § 802.
125. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Federal Procurement After* Adarand, U.S. Commission on Civil Rights, September 2005, https://www.usccr.gov/pubs/docs/080505_fedprocadarand.pdf (accessed December 19, 2024).
126. "Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk," *Federal Register*, Vol. 87, No. 218 (November 14, 2022), pp. 68312–68334, https://www.govinfo.gov/content/pkg/FR-2022-11-14/pdf/2022-24569.pdf (accessed December 19, 2024).
127. See, for example, Comment Letter of David R. Burton to the Department of Defense, "General Services Administration and National Aeronautics and Space Administration regarding Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk," February 13, 2023, https://static.heritage.org/2023/Regulatory_Comments/David_Burton_Federal_Acquisition_Regulation_Disclosure_Greenhouse_Gas_Emissions_Climate-Related_Financial_Risk021323.pdf (accessed December 23, 2024).
128. A model Eliminate Economic Boycotts Act is available here: https://www.heritage.org/article/eliminate-economic-boycotts-act.
129. Firms that deserve particular scrutiny are large tech companies that control dominant operating systems; dominant search engines; dominant social media platforms; and cell phone manufacturing and software; and large financial services companies (notably dominant registered investment advisers, dominant proxy advisory firms, and dominant credit card or payment processing companies).
130. Firearms producers or sellers, fossil fuel producers, and agriculture are typical targets.
131. Age limitations preventing minors from gaining access to certain lawful products (alcohol, tobacco, cannabis, and pornography, for example) should be explicitly permitted.
132. Here are some examples:

    Maritime Transportation

    46 U.S. Code § 41104(a)(a) In General. — A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not —

    …

    (10) unreasonably refuse to deal or negotiate.

Communications

47 U.S. Code § 202(a)

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

See also 47 U.S. Code § 151.

Rail Carriers

49 U.S. Code § 11101(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.

Transportation Common Carriers

Code of Virginia § 46.2–2087. Refusal of service.

No common carrier regulated pursuant to this chapter shall refuse service without good cause. The Department may, at any time, require an explanation from such carrier for its refusal to provide service.

For an introduction to the case law regarding common carriers, see the cases and law reviews cited in footnote 8 above.

133. While the mandates are broad, courts, regulators, and legislatures have allowed for exceptions. An innkeeper need not admit a man who has previously engaged in drunken brawls in the establishment, a trucking firm or railroad need not pick up a load if their trucks or railcars are already full, among others.
134. "Prudent Management of Institutional Funds Act," Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3 (accessed December 19, 2024).
135. Model statutory language can be found at "Proposed UPMIFA Amendment."
136. The Affordable and Reliable Electricity Act, The Heritage Foundation, https://www.heritage.org/model-legislation/affordable-and-reliable-electricity-act.
137. Prioritizing Economic Growth Over Woke Policies Act, H.R. 4790, 118th Cong. 1st Sess., https://www.congress.gov/bill/118th-congress/house-bill/4790 (accessed December 19, 2024). This bill was reported (as amended) out of the House Financial Services Committee on December 22, 2023.
138. This could be accomplished by amending § 2 of the Securities Act to define "material" as follows:

    (20) The term "material" means, when used to qualify a requirement for the furnishing of information as to any subject, information limited to those matters regarding which there is a substantial likelihood that a reasonable investor would attach importance when —

    (i) evaluating the potential financial return and financial risks of an existing or prospective investment, or

    (ii) exercising, or declining to exercise, any rights appurtenant to securities for the purpose of earning a financial return or managing financial risk.

    The term "material" does not include, when used to qualify a requirement for the furnishing of information as to any subject, information that —

    (i) primarily furthers non-pecuniary, non-economic or non-financial social, political or ideological goals or objectives, or

    (ii) primarily relates to events that —

    (A) involve a high degree of uncertainty regarding what may or may not occur in the distant future, and

    (B) are systemic, general or not issuer specific in nature.
139. "Corporate Sustainability Due Diligence," European Commission, https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en (accessed December 19, 2024).
140. "Corporate Sustainability Reporting," European Commission, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (accessed December 19, 2024).
141. "The Enhancement and Standardization of Climate-Related Disclosures for Investors," *Federal Register*, Vol. 87, No. 69 (April 11, 2022), pp. 21334–21473, https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf (accessed December 19, 2024).
142. Given the "all of government" push by the Biden Administration to impose climate change orthodoxy in every executive branch agency, this may prove to be impossible. The Bureau of Economic Analysis at the Commerce Department is one possibility. The Government Accountability Office (GAO), which is an Article I agency, is another. The GAO, however, is unlikely to take much of a position given the high profile of the climate change issue and the divisions within Congress.
143. 17 Code of Federal Regulations §229.10(f)(1).

144. Securities Act, § 2(a)(19).
145. Protecting Americans' Retirement Savings from Politics Act, H.R. 4767, 118th Cong., 1st Sess. (2023). This bill was reported (as amended) out of the House Financial Services Committee on December 19, 2023.
146. See discussion below under the heading "INvestor Democracy Is EXpected Act (INDEX) Act."
147. See 17 Code of Federal Regulations § 240.14a–8(h)(12)...

    (i) Less than 5 percent of the votes cast if previously voted on once;

    (ii) Less than 15 percent of the votes cast if previously voted on twice; or

    (iii) Less than 25 percent of the votes cast if previously voted on three or more times.

148. Codifying 17 Code of Federal Regulations § 240.14a–8(h)(10).
149. Codifying 17 Code of Federal Regulations § 240.14a–8(h)(11).
150. See 17 Code of Federal Regulations § 240.14a–8(h)(11), and "Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)," U.S. Securities and Exchange Commission, November 3, 2021, https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals (accessed December 19, 2024).
151. Businesses Over Activists Act, H.R. 4655, 118th Cong., 1st Sess. (2023). This bill was reported (as amended) out of the House Financial Services Committee on December 19, 2023.
152. Retirement Proxy Protection Act, H.R. 5337, 118th Cong., 1st Sess. (2023). This bill was reported (as amended) out of the House Education and the Workforce Committee on September 26, 2023.
153. 29 U.S. Code § 1104.
154. Section 2(a) of the bill adding a subsection (f)(2)(B) to 29 U.S.C. § 1104.
155. Division A of the Protecting Americans' Investments from Woke Policies Act, H.R. 5339, 118th Cong., 1st Sess. (2023) is the "Roll Back ESG To Increase Retirement Earnings Act." This bill was reported (as amended) out of the House Education and the Workforce Committee on September 26, 2023.
156. This is similar to the Trump DOL final rule that was never implemented by the Biden DOL. See "Financial Factors in Selecting Plan Investments," *Federal Register*, Vol. 85, No. 220 (November 13, 2020), pp. 72846–72885 https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf (accessed December 19, 2024).
157. Index Act, S. 2700, 118th Cong., 1st Sess. (2023), https://www.govtrack.us/congress/bills/118/s2700/text (accessed December 19, 2024). A version of this bill was incorporated into H.R. 4767 (cited above) as Title X. This bill was reported out of the House Financial Services Committee on December 19, 2023. See also Index Act, H.R. 8521, 117th Cong., 1st Sess. (2022), https://www.congress.gov/bill/117th-congress/house-bill/8521 (accessed December 19, 2024).
158. See, for example, Jamie Gordon, "Passive Ownership of S&P 500 Doubles in Seven Years," ETF Stream, June 8, 2022, https://www.etfstream.com/articles/passive-ownership-of-sp-500-doubles-in-seven-years (accessed December 19, 2024).
159. Notably BlackRock, Vanguard, State Street, and Fidelity. See the discussion of financial concentration above in the introduction under the heading "Fiduciaries."
160. See § 2 of S. 2700, 118th Congress, adding new Investment Advisers Act § 208A; H.R. 4767, 118th Congress, § 1001 enacting new Investment Advisers Act § 208A.
161. Mirror or echo voting is when an RIA or broker–dealer vote shares it controls (but has not received voting instructions with respect to) in the same proportion as shares for which it did receive voting instructions.
162. Dismantle DEI Act, S. 4516, 118th Cong., 2nd Sess. (2024), and Dismantle DEI Act of 2024, H.R. 8706, 118th Cong., 2nd Sess. (2024).
163. David Burton, "Dismantling DEI = Restoring Equal Protection of the Law," *Daily Signal*, June 12, 2024, https://www.dailysignal.com/2024/06/12/dismantling-dei-restoring-equal-protection-law/ (accessed December 19, 2024), and Mike Gonzalez, "Dismantle DEI Act of 2024," Heritage Foundation *Fact Sheet* No. 277, November 18, 2024, https://www.heritage.org/sites/default/files/2024-11/FS277.pdf.
164. The Dismantle DEI Act, H.R. 8706, cited above. The bill was reported out of committee by a recorded vote of 23–17 on November 20, 2024. See Amendment in the Nature of a Substitute, H.R. 8706, https://docs.house.gov/meetings/GO/GO00/20241120/117737/BILLS-118-HR8706-C001108-Amdt-10.pdf (accessed December 19, 2024).
165. See § 3 of the Amendment in the Nature of a Substitute, H.R. 8706, 118th Congress, § 3 of H.R. 8706, 118th Congress as originally introduced and § 3 of S. 4516, 118th Congress.
166. The Heritage Foundation, "State Pension Fiduciary Duty Act," https://www.heritage.org/article/state-pension-fiduciary-duty-act.
167. The Heritage Foundation, "Eliminate Economic Boycotts Act," https://www.heritage.org/article/eliminate-economic-boycotts-act.
168. Ibid., § 2(1)(d).
169. The Heritage Foundation, "Affordable and Reliable Electricity Act," https://www.heritage.org/model-legislation/affordable-and-reliable-electricity-act.
170. These would be primarily wind and solar energy sources.

171. Uniform Law Commission, "Prudent Management of Institutional Funds Act," https://www.uniformlaws.org/committees/community-home?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3 (accessed December 19, 2024).

172. "Proposed UPMIFA Amendment."

214 Massachusetts Ave., NE | Washington, DC 20002
(202) 546-4400 | heritage.org