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WHY "GO GREEN" WHEN YOU CAN STAY SOONER RED?: AN ANALYSIS OF OKLAHOMA'S ENERGY DISCRIMINATION ACT OF 2022

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I. Summary of House Bill 2034

Oklahoma enacted The Energy Discrimination Elimination Act of 2022 ("House Bill 2034") in May 2022. This bill was designed to "push back against the environmental, social, and governance (ESG) policies of big financial institutions."[1] The bill establishes the oil and gas industry as a vital part of the economy and provides that the "treasurer shall prepare, maintain and provide to each state governmental entity a list of financial companies that boycott energy companies. The state governmental entity must then notify the treasurer of the listed financial companies in which they own direct or indirect holdings.[2] The entity must then send written notice warning that the financial institution may become subject to divestment.[3]

Section 2 of the bill defines important language used throughout the Act. Some of the key terms include "boycott energy companies," "Company," and "state governmental entity."[4] This section states that in any cause of action in connection with House Bill 2034, the state shall "indemnify and hold harmless for actual damages, court costs, and attorney fees."[5] It also states that a state governmental entity is not subject to any of the requirements of the Act if those requirements are determined to be inconsistent with the entity's "fiduciary responsibilities" or "duties imposed by law."[6]

Section 3 sets out the procedure for determining the list of "boycotting companies" and provides the divestment schedule under the Act. Under Section 3 of House Bill 2034, the Treasury will maintain a list of companies that are "boycotting" energy companies. Entities must then disclose their direct and indirect holdings. The bill will force government entities to divest from investments in those institutions unless the institutions

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1. Bonner Cohen, Ph. D., *Oklahoma enacts law to counter ESG policies targeting fossil fuels*, CFact (last visited May 19, 2022), https://www.cfact.org/2022/05/19/oklahoma-enacts-law-to-counter-esg-policies-targeting-fossil-fuels/.
2. H.B. 2034, 58th Legis., 2d Sess. (Okla. 2022).
3. *Id*.
4. *Id.*
5. *Id.*
6. *Id.*

themselves are able to prove they are not discriminating against the fossil-fuel industry. Entities have a period of 360 days to fully divest, with a required benchmark of 50% at the half year period. Exceptions to forced divestment are available to those entities who can prove through "clear and convincing evidence" that divestment has or would result in financial loss.[7]

Section 4 explains what information should be included in the report that each entity is required to submit to the Treasurer. By January 1st of each year, "each state governmental entity shall file a publicly available report with the Treasurer…that: (1) identifies securities sold, redeemed, divested, or withdrawn in compliance with subsection D of Section 3 of this act; (2) identifies prohibited investments under subsection F of Section 3 of this act; and (3) summarizes any changes made under subsection E of Section 3."[8] Section 4 also authorizes the Attorney General to bring "any action necessary" in order to enforce the Act.[9]

Section 5 limits who a state agency or political subdivision of the state can contract with for goods and services. This section only applies to contracts between governmental entities and a company with "ten or more full-time employees," if the value of the contract is "$100,000.000 or more over the term of the contract," and it is to be paid "wholly or partly from public funds of the government entity."[10] Under this section, a governmental entity shall not contract with a company for goods or services "unless the contract contains written verification from the company that it: (a) does not boycott energy companies, and (b) will not boycott energy companies during the term of the contract."[11] The limitations on applicability in this section may be Oklahoma's effort to protect small businesses who are not operating on such a large scale and cannot afford forced divestment practices. This may be the legislature's way of focusing their protection on key players contributing to Oklahoma's economy through the fossil fuel industry.

Section 6 states that Section 5 of the Energy Discrimination Elimination Act of 2022 only applies to contracts entered on or after the effective date of this act, which according to Section 7 is November 1, 2022.[12] Because this bill is newly enacted, the outcome for state and local entities operating throughout Oklahoma's borders will have to be observed in due time.

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7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.

II. Agenda

Oklahoma's Energy Discrimination Act of 2022 (HB 2034) is a drastic response to ESG policies and will have lasting effects on the oil & gas industry, as well taxpayers and residents of the State. This may be a smart financial move for the State of Oklahoma, but what effect will the bill have on Oklahoma's environmental impact? And further, will this open the state to legal vulnerability and social implications?

This comment will be analyzing House Bill 2034. Part II provides a background into what ESG's are and acknowledges the rise in ESG-consciousness as a result of environmental catastrophe and market volatility. Part III analyzes the bill by establishing Oklahoma's history with fossil fuels, discussing the legislative intent to enact the bill, and exploring the benefits and ramifications. Part IV analyzes fossil-fuel dependent government responses to the rise in ESG-consciousness at both the state and international levels. And Part V discusses Oklahoma's future in the industry, post HB 2034.

III. Background

A. What Are ESG's?

The term ESG has predominantly been used in the financial sector, however we are starting to see its use throughout multiple industries, especially the energy industry. Used primarily by financial investors, the term ESG refers to environmental, social, and governance factors used to "assess the behavior of entities they are considering for investment."[13] ESGs are non-financial factors that focus on a corporate entity's impact on environmental, social, and governance criteria.[14] These criteria are not commonly disclosed as part of companies' mandatory financial reporting, and instead are disclosed as part of sustainability initiatives. There is no definitive classification for the ESG factors, and often the factors can overlap with one another. However, a basic breakdown would organize environmental as focusing on conservation of the natural world, social as

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13. Paul Davies & Michael Green, note, *Environmental, social and governance (ESG): introduction*, Thomson Reuters (last visited Nov. 13, 2022), https://uk.practicallaw.thomsonreuters.com/Document/I78a13e337ae611e8a5b3e3d9e23d7429/View/FullText.html?comp=pluk&transitionType=SearchItem&contextData=(sc.Search)&firstPage=true&OWSessionId=92665cbcfc5c4a53bf38a63836d2eb08&skipAnonymous=true.

14. Paul Davies & Michael Green, *supra* note 13.

considering people and their relationships, and governance as standards for running a company.[15]

Environmental criteria consider how a company safeguards the environment by measuring its impact on the natural environment.[16, 17] The criteria "takes into account factors including a companies' carbon footprint, its impact on biodiversity and its production of wastes and pollution."[18] Environmental issues may include "corporate climate policies, energy use, waste, pollution, natural resource conservation, and treatment of animals."[19] Energy efficiency, waste management, water scarcity, and deforestation may also be analyzed under environmental factors.[20] For example, companies that source lithium from the Andes region of South America contribute to rapid evaporation of drinking water.[21] Under environmental criteria, an investment fund may assess their efforts to implement more sustainable energy sources or its ability to reduce their carbon footprint.

Social criteria examine how a company manages relationships with employees, suppliers, customers, and the communities where it operates.[22] These can include customer satisfaction, data protection and privacy, gender and racial diversity, employee engagement, human rights, labor standards, and community relations.[23] Another aspect of social criteria is socially responsible investing (SRI). SRI "promotes ethical and socially conscious themes including diversity, inclusion, community-focus, social justice, and corporate ethics . . . in addition to fighting against racial, gender, and sexual discrimination."[24] Note that only about ten percent of the

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15. CFA Inst., *ESG Investing and Analysis* (2023), https://www.cfainstitute.org/en/research/esg-investing.

16. *What is Environmental, Social, and Governance (ESG) Investing?*, Investopedia (last updated Sept. 27, 2022), https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp#:~:text=Environmental%2C%20social%2C%20and%20governance%20(ESG)%20investing%20refers%20to,addressing%20climate%20change%2C%20for%20example.

17. Paul Davies & Michael Green, *supra* note 13.

18. *Id.*

19. *What is Environmental, Social, and Governance (ESG) Investing?*, *supra* note 16.

20. CFA Inst., *ESG Investing and Analysis*, *supra* note 15.

21. Fred Pearce. *Why the Rush to Mine Lithium Could Dry Up the High Andes.* Yale Environment 360 (Sept. 19, 2022), https://e360.yale.edu/features/lithium-mining-water-andes-argentina.

22. *What is Environmental, Social, and Governance (ESG) Investing?*, *supra* note 16.

23. CFA Inst., *ESG Investing and Analysis*, *supra* note 15.

24. *Id.*

Fortune 500 companies have female CEOs.[25] Leadership statistics like these would be assessed under social criteria.

Governance criteria deal with how a company operates, including a company's leadership, audits, internal controls, and shareholder rights.[26,27] Governance criteria may also include board composition, bribery and corruption, executive compensation, lobbying, and whistleblower schemes.[28] These criteria help ensure accountability amongst companies and encourage them to practice activities that reduce their impact on these ESG factors. Recently large institutional investors are establishing new proxy voting guidelines and highlighting shareholders' interests in "political spending and environmental issues."[29]

ESGs are used as a way for investors to ensure "the companies they fund are responsible stewards of the environment, good corporate citizens, and are led by accountable managers."[30] ESG considerations seem to be a mechanism for investors to voluntarily internalize otherwise externalized costs. ESG policies can be set by companies themselves or by external entities, including investors, lenders, and regulators.[31] Policymakers are tying ESG incentives directly to capital and influencing company decisions and behavior by utilizing tools such as performance-based sustainability-linked bonds, loans, pension plans, and other financial devices.

B. ESG Criteria Case Study

Trillium Asset Management provides a case study for ESG-criteria integration.[32] With over $5.6 billion in assets under advisements, Trillium prides itself on providing "investment strategies and services that advance humankind towards a global sustainable economy, a just society, and a

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25. Emma Hinchliffe, *Women CEOs run more than 10% of Fortune 500 companies for the first time in history,* Fortune (Jan. 12, 2023), https://fortune.com/2023/01/12/fortune-500-companies-ceos-women-10-percent/.

26. *What is Environmental, Social, and Governance (ESG) Investing?*, *supra* note 16.

27. Paul Davies & Michael Green, *supra* note 13.

28. *Id*.

29. Ciara Torres-Spelliscy, *More Shareholders Seek Transparency on Corporate Political Spending and Climate Change.* Brennan Center for Justice (June 16, 2021), https://www.brennancenter.org/our-work/analysis-opinion/more-shareholders-seek-transparency-corporate-political-spending-and.

30. *What is Environmental, Social, and Governance (ESG) Investing?*, *supra* note 16.

31. Paul Davies & Michael Green, *supra* note 13.

32. Trillium Asset Management, ESG Criteria (December 2021), https://www.trillium invest.com/documents/positive-negative-screens.

better world."[33] Analysts follow a risk-based screening process, evaluating companies based on either "Positive Attributes" or "Exclusionary Screens."[34] The Positive Attributes are split into ESG categories: environmental,[35] social,[36] and governance[37]. Trillium's Exclusionary Screens analyze both industries and products. This data is then used to exclude companies with "material involvement" in high-risk activities from consideration.[38] While Trillium Asset Management considers exclusionary screening as critical in mitigating risk, it also focuses its efforts on using ESG information to help identify the best companies to invest in, rather than screening out the worst.[39]

C. Benefits of ESG Policies

Adopting and implementing ESG policies increases social value. The ability for a business to connect its operations and "'purpose' with future society changes (such as the transition to a low carbon economy) are seen as increasingly important indicators of the future profitability of a business."[40] A new generation of investors have entered the markets and many millennials believe their investments can have a substantially positive impact.[41, 42] United States investors in particular are migrating toward ESG-

33. *Id*.

34. *Id*.

35. *Id.* The environmental characteristics Trillium seeks may include limiting harmful pollutants and chemicals, responsible raw material management, or a business model aligned with a low carbon economy.

36. *Id.* The social characteristics Trillium seeks may include paying employees fair wage, deploying a robust human capital management strategy, encouraging diversity and inclusion, supporting LGBTQ rights, or operating a more ethical supply chain.

37. *Id.* The governance characteristics Trillium seeks may include implementing a more diverse board, valuing separation of CEO roles from that of the board chair, paying executives reasonable wages, or dedication to corporate transparency.

38. *Id.* Trillium highlights a few of the high-risk" industries to include agricultural biotechnology, coal mining/ hard rock mining/ tar sands, and historic fossil fuel capacity without a demonstrated commitment to a business model designed to succeed in a low-carbon economy, and private prisons. The noted "high-risk" products included tobacco, weapons and firearms, gaming, and pornography.

39. *Id*.

40. Paul Davies & Michael Green, *supra* note 13.

41. 75% of investors say their investments can influence climate change. See *Millennials Drive Growth in Sustainable Investing*, Morgan Stanley (last updated Aug. 9, 2017), https://www.morganstanley.com/ideas/sustainable-socially-responsible-investing-millennials-drive-growth.

42. 84% of investors say their investments can help lift people out of poverty. See *Millennials Drive Growth in Sustainable Investing*, Morgan Stanley (last updated Aug. 9,

conscious financial decisions.[43, 44] Additionally, ESG criteria provide padding in the case of crisis management, helping "investors avoid [incidents] that [can] occur when companies operating in a risk or unethical manner are ultimately held accountable for their consequences."[45] Consider BP's 2010 oil spill in the Gulf of Mexico which slashed stockholders value by 60% and cost them billions of dollars.[46], [47]

D. Drawbacks of ESG Policies

While the push for ESG activity is holding companies more accountable for their decisions, there seems to be a lack of accountability for the outcome of companies' decisions. ESG data is "largely unregulated, leading to a lack of transparency and loss of confidence."[48] Namely, activity referred to as "greenwashing." Essentially the inverse of corporate social responsibility (CSR), greenwashing is a process by which companies are "conveying a false impression or misleading information about how a company's products are environmentally sound."[49] Greenwashing is an "unsubstantiated claim," with its purpose to "deceive consumers into believing that a company's products are environmentally friendly or have a greater positive environmental impact than what is actually true."[50, 51]

2017), https://www.morganstanley.com/ideas/sustainable-socially-responsible-investing-millennials-drive-growth.

43. With 90% of millennials wanting sustainable investment options as part of their 401(k) plans. See *Millennials Drive Growth in Sustainable Investing*, Morgan Stanley (last updated Aug. 9, 2017), https://www.morganstanley.com/ideas/sustainable-socially-responsible-investing-millennials-drive-growth.

44. While recognizing that these policies do not come cheap, a 2021 survey shows that "nearly half of ESG [minded] investors said they'd be willing to take a 10% loss over a five-year period to invest in a company that aligns with their values." See Kara Greenberg, *Pollution and Working Conditions Top ESG Investor Concerns*, Investopedia (last updated July 20, 2021), https://www.investopedia.com/pollution-and-working-conditions-top-esg-investor-concerns-5193407.

45. *What is Environmental, Social, and Governance (ESG) Investing?*, *supra* note 16.

46. *Id*.

47. Company Profile of BP P.L.C, https://www.investopedia.com/markets/quote?tvwidgetsymbol=BP.

48. Ross Kerber, *Ex-Blackrock exec starts row over value of sustainable investing* (Mar. 22, 2021 12:16 PM CDT), https://www.reuters.com/business/sustainable-business/ex-blackrock-exec-starts-row-over-value-sustainable-investing-2021-03-22/.

49. Adam Hayes, *What is Greenwashing? How it Works, Examples, and Statistics*, Investopedia (last updated Nov. 8, 2022), https://www.investopedia.com/terms/g/greenwashing.asp.

50. Amish Shah, *How Companies can Avoid Greenwashing And Make A Real Difference In Their Environmental Impact*, Forbes, https://www.forbes.com/sites/forbes

However, it is important to note that legal battles are underway in an attempt to hold companies accountable for greenwashing activity.[52]

ESG initiatives and goals can also be expensive and difficult to implement. The *ESG Global Survey 2021*, identified data and the complexity of social factors as some of the key challenges to ESG integration.[53] "Challenges with quality and consistency of data" as well as the "lack of a definite, industry wide definition of what social factors" encompass are only exacerbated by the increased incentives for entities to meet ESG goals.[54] Critics "also suggest that there is less overlap between ESG purpose and investment profit than proponents for ESG investment claim, in part because ESG issues are often very long term and so are not relevant to the short timelines of many investment strategies."[55] States with strong ties to the fossil fuel industry lack an incentive to participate in discriminatory activity against their industries, as they won't see returns on the "green" initiatives any time soon.

E. The Shift Towards ESG-Consciousness

So, what triggered the increase of ESG-minded policies? Recently, the world has experienced a shift towards more sustainability.[56] This trend has been observed across multiple industries, including transportation, consumer goods, and food and beverage. Industries are driven by consumers, and it has become more important than ever for companies to listen to the social changes their consumers are demanding. The younger generation of investors are leading the push toward more sustainable investing because "millennial investors…are twice as likely as the overall population to invest in companies targeting social or environmental

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businesscouncil/2022/08/08/how-companies-can-avoid-greenwashing-and-make-a-real-difference-in-their-environmental-impact/?sh=51211c4552b8 (Aug. 8, 2022 07:45 am EDT).

51. Adam Hayes, *supra* note 49.

52. *See, e.g.,* Massachusetts v. ExxonMobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020).

53. The ESG Global Survey 2021, *The Path to ESG: No Turning Back For Asset Owners And Managers,* BNP Paribas, https://securities.cib.bnpparibas/app/uploads/sites/3/2021/09/bnp-paribas-esg-global-survey-2021.pdf.

54. *Id*.

55. Ross Kerber, *supra* note 48.

56. The *2021 World Federation of Exchanges Seventh Annual Sustainability Survey* found that "85.2% [of] responding stock exchanges either encouraged or required issuers to disclose ESG information." The World Federation of Exchanges 7th Sustainability Survey, *Exchanges step up efforts to support a sustainable recovery*, https://www.world-exchanges.org/storage/app/media/WFE%20Annual%20Sustainability%20Survey%202021%20Final%20v2.pdf.

goals."[57] The Covid-19 pandemic "led to an increased focus on business resilience, which is now routinely seen to be directly connected to good ESG management."[58]

Besides an overall "greener" and more environmentally-conscientious mindset, the introduction of ESG-minded investing in the fossil-fuel industry can also be attributed to many recent national crises. Multiple areas across the country face rising concerns about blackouts throughout power grids during times of extreme summer and winter weather.[59] Consider the recent electric grid blackouts in Texas. An extreme winter storm in February 2021 caused "a massive electricity generation failure" within the state, resulting in "a loss of power for more than 4.5 million homes"[60, 61] While many factors led to this incident, the disruption of the natural gas supply chain only aggravated problems because "wells were unable to produce as much natural gas due to the freezing conditions."[62] Rising energy prices (gas prices) and the shortage of diesel fuel have also created a push towards ESG-minded investing, because they lower consumers purchasing power and contribute to market volatility. National average diesel prices "have surged 56% in 2022, outstripping rises in the benchmark price for crude oil."[63] And "retail unleaded gasoline prices have risen 35%."[64]

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57. *Millennials Drive Growth in Sustainable Investing*, Morgan Stanley (last updated Aug. 9, 2017), https://www.morganstanley.com/ideas/sustainable-socially-responsible-investing-millennials-drive-growth.

58. Paul Davies & Michael Green, *supra* note 13.

59. *The Timeline and Events of the February 2021 Texas Electric Grid Blackouts*, The University of Texas at Austin Energy Institute, https://energy.utexas.edu/research/ercot-blackout-2021 (July 2021).

60. *Id*.

61. *How Texas' power grid failed in 2021 – and who's responsible for preventing a repeat*, The Texas Tribune, Fort Worth Report (Feb. 15, 2022 5:00 am), https://fortworthreport.org/2022/02/15/how-texas-power-grid-failed-in-2021-and-whos-responsible-for-preventing-a-repeat/?amp&gclid=Cj0KCQiAgribBhDkARIsAASA5bsRFJ7g5ckEP9PEl8HvwzL6_vb25e8tZXPRL3FqCpScqE9neALFMV8aAjLaEALw_wcB.

62. *Id*.

63. Bonner Cohen, Ph. D., *Oklahoma enacts law to counter ESG policies targeting fossil fuels*, CFact (May 19, 2022), https://www.cfact.org/2022/05/19/oklahoma-enacts-law-to-counter-esg-policies-targeting-fossil-fuels/.

64. *Id*.

F. Legal Liability of ESG-Consciousness

Because of the push towards sustainability, we have also experienced a rise in liability issues by enforcement agencies, the Department of Justice, and shareholders about companies ESG strategies and disclosures.[65] Companies and their officers face both "investor and regulatory scrutiny when it comes to corporate policies and disclosures on climate-related risks."[66] Liability issues can lead to lawsuits, regulatory fines, or even damage to a company's reputation.

Consider a 2019 lawsuit, which was "the result of field research conducted by anti-slavery economist Siddharth Kara, accus[ing] the companies of aiding and abetting in the death and serious injury of children who they claim were working in cobalt mines in their supply chain."[67] Apple, Google, Dell and Microsoft were among some of the tech firms named in the case brought by "International Rights Advocates, on behalf of 14 parents and children from the Democratic Republic of the Congo."[68]

In June 2022, plaintiff shareholder brought a securities class action against Wells Fargo regarding their hiring practices. Some of the claims alleged included (i) misrepresenting "its commitment to diversity in the Company's workplace" (ii) conducting "fake job interviews in order to meet its Diverse Search Requirement," and (v) making "materially false and misleading" public statements.[69]

Legal responsibilities are becoming increasingly more important for companies, as the demand for transparency and accountability in business operations continues to follow trends towards sustainability. By adding ESG criteria into their decision-making and implementing procedures for compliance, companies will be able to benefit from efficient business practices, while still maintaining trust and loyalty from their shareholders.

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65. Celeste Montague and Christopher M. Quinlan. *A Changing Climate: The Rising Tide of ESG Liability And Implications for D&O Coverage,* Financial Lines Alert, White and Williams LLP (Aug. 2, 2022), https://www.whiteandwilliams.com/resources-alerts-A-Changing-Climate-The-Rising-Tide-of-ESG-Liability-and-Implications-for-DO-Coverage.

66. *Id.*

67. Annie Kelly. *Apple and Google named in US lawsuit over Congolese child cobalt mining deaths,* The Guardian (Dec. 16, 2019), https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths.

68. *Id*.

69. Celeste Montague and Christopher M. Quinlan, *supra* note 65.

IV. Analysis of House Bill 2034

After discussing the benefits and rationales behind ESG policies, it is worth examining how these considerations apply at the state level. Specifically, Oklahoma's application in light of the broader context.

A. History of Fossil Fuels in Oklahoma

Oklahoma has a long history in the fossil fuel industry. By "the time Oklahoma became a state in 1907, it was the largest crude oil producer in the nation."[70] The Interstate Oil and Gas Compact Commission (IOGCC), headquartered in Oklahoma City, was created in 1935 to ensure responsible development of crude oil resources through the coordinated efforts of crude oil-producing states.[71] The voluntary IOGCC has since grown from 6 crude oil-producing member-states in 1935 to 31 member-states and 7 associate member-states in 2021.[72]As a state, Oklahoma now produces three times more energy than it consumes.[73] The majority of Oklahoma's excess production is shipped out of state.[74] With such a long history and strong ties to the fossil fuel industry, Oklahoma has a strong interest in protecting itself against policy and investment decisions that will have such a substantial impact on the state economy. The fossil fuel industry in Oklahoma brings companies to the state and creates jobs for its citizens, establishing itself as one of the key components of Oklahoma's economy.[75]

70. Gib Knight, *A Look Back at One of The Biggest Oil and Gas Fields*, Oklahoma Minerals (November 30, 2016).

71. Interstate Oil and Gas Compact Commission, About Us, History, Our History (last accessed October 21, 2022).

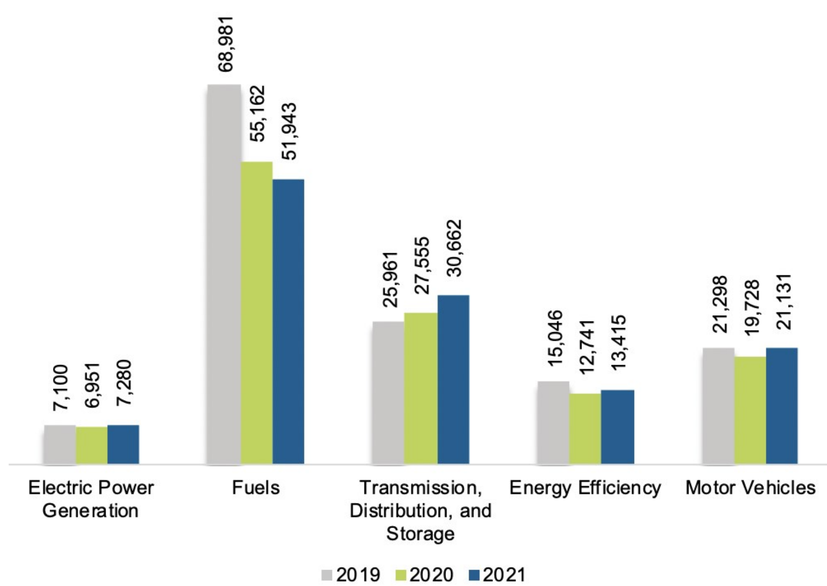
72. *Id*.

73. U.S. EIA, State Energy Data System, Table P3, Total Primary Energy Production and Total Energy Consumption Estimates in Trillion Btu, 2019.

74. *Id*.

75. Oklahoma Energy and Employment – 2022, USEER State Report, https://www.energy.gov/sites/default/files/2022-06/USEER%202022%20-%20Oklahoma.pdf (The energy section in Oklahoma currently represents about 7.9% of total state employment. Of these energy jobs, "7,280 are in electric power generation; 51,943 in fuels, 30,662 in transmission, distribution, and storage; 13,415 in energy efficiency; and 21,131 in motor vehicles.").

Figure OK-1.
Employment by Major Energy Technology Application



[76]

The increase in anti-fossil fuel efforts have made it increasingly difficult for companies to fund and support projects that do not meet sustainability criteria. House Bill 2034 ("HB 2034") was enacted to protect the oil and gas industry in Oklahoma in response to companies being denied capital because government entities and the State economy felt it had no other choice.

B. Legislative Intent Behind HB 2034

In enacting HB 2034 the state legislature addressed its responsibility to protect and benefit the state and its residents, despite rising societal pressure to prioritize sustainability. Based on the language of the bill, it is evident that the legislatures' intent was to provide government protection to a vital industry and to fulfill its duties to its citizens.

The oil and gas industry typically argues against green energy by claiming that green initiatives aren't as economically competitive without government protection. Conversely, it is now the oil and gas industry

76. Figure OK-1. *Employment by Major Energy Technology Application*. Oklahoma Employment – 2022 USEER State Report. (Nov. 12, 2023), https://www.energy.gov/sites/default/files/2022-06/USEER%202022%20-%20Oklahoma.pdf.

seeking protection. As a significant contributor to the state economy, the industry maintains jobs and provides economic growth. Oil and gas also carry a strong association with power. Oklahoma is highly incentivized to provide government protection to the oil and gas industry as a means of maintaining geopolitical power and influence on a larger stage.

It is the responsibility of the state legislature to introduce and enact laws and statutes to benefit and protect both the state, and the people within its borders. With politics comes the potential for bias. Legislators have personal beliefs and party agendas to consider, as well as latent pressure from lobbyists and interest groups. Despite these considerations, legislators' primary responsibility is the duty they owe to the people of Oklahoma. By enacting HB 2034 are legislators helping or harming their people?

On one hand, because the oil and gas industry makes up such a substantial portion of the economy, enacting this bill enables the state to protect its economy and thousands of in-state jobs. However, is the state legislature prioritizing financial stability over the quality of Oklahoma’s land, water, and air? Further, is protecting the oil and gas industry in Oklahoma harmful to the health and safety of its citizens? In 2018, five Oklahoma oilfield workers died in a drilling rig explosion.[77] An investigation by the U.S. Chemical Safety and Hazard Investigation Board concluded that “the failure of safety devices” contributed to the explosion and fire.[78] Should incidents like this militate against these anti-ESG bills in Oklahoma?

C. Overall Benefits of HB 2034

Oklahoma’s purpose in proposing and enacting House Bill 2034, is to limit who the state does business with by reducing discrimination against the fossil fuel industry within its’ borders. The fossil fuel industry is responsible for a significant portion of state revenue, and Oklahoma wants to protect the companies and employees operating within its borders. Oklahoma wants companies to make decisions for the best interest of its employees, rather than worrying about public opinion or forcing companies to play into political agendas. Reducing ESG regulatory burdens enables Oklahoma to protect jobs and may increase domestic energy production within the state. This will not only help Oklahoma maintain market

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77. *Trial underway over 2018 rig blast that killed 5 workers in Oklahoma*, OK Energy Today, Radio Oklahoma Network (January 13, 2020), https://www.okenergytoday.com/2020/01/trial-underway-over-2018-rig-blast-that-killed-5-workers-in-oklahoma/.

78. *Id.*

competitiveness, but it could lead to greater energy independence, lowering energy prices for its residents.

D. Overall Ramifications of HB 2034

This bill results in Oklahoma companies' withdrawing cooperation from financial institutions pushing for ESG-minded investing or in their view, discriminating against fossil fuel companies. While the enactment of House Bill 2034 provides benefits in terms of Oklahoma's economic vulnerability, what effect will this have on the state's environmental impact, and further on its current goals for renewable energy? Initiatives that weaken environmental policies could lead to increased pollution and negative health impacts for Oklahoma's residents. Oklahomans may not be able to reap the environmental and health benefits that ESG-consciousness brings. Opposers to the bill are also worried about creating barriers to capitalism. Limiting the availability of funding to state entities in the current economy could create serious disadvantages in the competitive market, such as a lack of funding for new technology and innovation.

Is House Bill 2034 Oklahoma's admission ticket into an ESG race to the bottom? While Oklahoma's house bill creates mainly environmental ramifications, social and governance initiatives could suffer if the State continues to enact similar "discriminatory" bills. Initiatives weakening social policies could affect labor standards, decrease access to healthcare, and negatively impact the quality of life for Oklahomans. Initiatives weakening governance policies could lead to a lack of transparency and accountability in government decision-making. Following the example set by the oil and gas industry, the state could produce bills targeting other industries that Oklahoma has ties with. Consider pending House Bill 3144, which will prohibit "the state from entering into six-figure contracts with banks if those lenders' policies have qualifying conditions when loaning money to gun manufacturers."[79] The original rationale behind the Energy Discrimination Act was to prevent companies from allowing ideological opinions to get in the way of the citizen's economy. However, it seems by proposing "anti-discriminatory" bills supporting industries such as fossil fuels and guns, the state's actual concern is preventing ideological opinions that don't align with its narrative from getting in the way of its economy.

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79. Hogan Gore & Carmen Forman, *Capital Notebook: Lawmakers aim to block state deals with anti-gun and anti-fossil fuel firms*, The Oklahoman (May 1, 2022 5:02 am CT), https://www.oklahoman.com/story/news/2022/05/01/oklahoma-legislature-may-block-deals-anti-gun-fossil-fuel-companies/9555183002/.

V. Alternative Reactions to ESG Investment Policies

A. State Level

1. Anti-discriminatory States

Oklahoma's house bill was modeled after that of Texas. There are currently 15 pending bills in other states with similar regulations to Oklahoma and Texas. The key question is whether these states are passing this legislation for purposes of state interests or if they feel compelled to do so to remain regionally competitive in the oil and gas industry? Is this one-upmanship fueling states' race to the bottom?

This regulation leans toward divesting from financial institutions tying funding to ESGs. Florida Governor, Ron DeSantis, "approved a resolution to bar the state's $186 billion pension fund from considering environmental, social or governance factors when making investment decisions."[80] If codified, Florida's proposed bill would encourage the state's pension fund to prioritize maximizing financial return over and above all other considerations.[81] The rationale behind the proposed legislature is to bring the highest returns for Florida's taxpayers and retirees, rather than forcing an "ideological agenda" on the American people.[82]

2. Pro-green States

States such as California, Vermont, and Connecticut are leaning into the push for green energy and are promoting divestment from the fossil fuel industry. California's proposed Senate Bill 1173 which applies to the Public Employees' Retirement System and the State Teacher's Retirement System, will prohibit investments in 200 of the largest publicly traded fossil fuel companies.[83] Vermont's pending bill, S. 251, is an act relating to the divestment of State pension funds from fossil fuel companies.[84] Further, Connecticut recently passed a policy applying to the Connecticut Retirement Plans and Trust Funds, prohibiting investment in civilian

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80. Karin Rives, *Florida adopts anti-ESG rule for state's $186B pension plan*, S&P Global Market Intelligence (Aug. 24, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/florida-adopts-anti-esg-rule-for-state-s-186b-pension-plan-71569179.

81. *Id.*

82. *Governor Ron DeSantis Eliminates ESG Considerations from State Pension Investments* (Aug. 23, 2022), https://www.flgov.com/2022/08/23/governor-ron-desantis-eliminates-esg-considerations-from-state-pension-investments/.

83. S.B. 1173, 118th Leg., Reg. Sess. (Cal. 2022).

84. S.B. 251, Reg. Sess. (Va. 2022).

firearms manufacturers.[85] They are encouraging state and local entities to adopt ESG policies.

B. European Union and the United Kingdom

The European Union is at the forefront of corporate sustainability, with emerging requirements focused on the climate and ESG-minded reporting. The European Green Deal is the continent's approach "to make Europe the first carbon neutral continent on the globe by 2050" with the "intermediate goal of reducing greenhouse gas (GHG) emissions by at least 55 percent."[86, 87] The EU has established "sustainable finance" as the key to harnessing investments toward a cleaner economy. Some of the initiatives under the EU's sustainable finance framework include the Taxonomy Regulation, the Sustainable Finance Disclosure Regulation (SFDR), the Corporate Sustainability Reporting Directive (CSRD), the Green Bond Standard, and the Benchmark labeling and ESG disclosure requirements.[88] The Taxonomy Regulation establishes a classification system, identifying companies' sustainable activities based on contribution and harm to the environment.[89] The SFDR "imposes ESG disclosure requirements on financial market participants and products in the EU."[90] The rationale behind the disclosures protect investors from greenwashing.[91] The CSRD expands on previous disclosure requirements, forcing large companies to disclose information under the economic, social, and governance categories.[92] The Green Bond Standard encourages issuance and investment "in green bonds to help finance Europe's low carbon transition" by setting a standard to ensure "sustainability and investor protections."[93] And finally, the Benchmark labeling and ESG disclosure initiatives "serve to increase

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85. Connecticut Responsible Gun Policy, The Office of Treasurer Erick Russell (Jan. 20, 2022), https://portal.ct.gov/OTT/About-the-Treasury/Responsible-Gun-Policy.

86. *A European Green Deal*, European Commission (May 14, 2023), https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

87. Samuel L. Brown & Alexandra Hamilton, *Emerging EU ESG Requirements: Transatlantic Implications for Multinational Companies*, XIII The Nat'l L. Rev. 15 (2022), https://www.natlawreview.com/article/emerging-eu-esg-requirements-transatlantic-implications-multinational-companies (January 20, 2023).

88. *Id*.

89. *Id*.

90. *Id*.

91. *Id*.

92. *Id*.

93. *Id*.

the ESG transparency of benchmark methodologies."[94] Corporate sustainability disclosure requirements are not new in the European Union, however, the requirements of the CSRD, will have farther-reaching effects. More companies will now be required to report, including some US-based companies with current operations in the EU.

Similar to Oklahoma, Norway's sovereign wealth fund management provides an example of the ESG investment dilemma. Excluding Russia, Norway is the largest producer of oil in Europe.[95] It is an energy-progressive state and holds one of the largest sovereign wealth funds, valuing about $1.2 trillion.[96] The fund has now set goals to be "net-zero" by 2050.[97, 98] However, with a spike in oil and natural gas prices over the past year, these decisions come with political risk and pressure to focus solely on immediate financial returns.[99]

VI. Moving Forward

The practical disadvantages of an anti-ESG bill can be condensed into three main categories: legal vulnerability, financial vulnerability, and social implications. This bill was a drastic reaction to the movement towards ESG investing. In an era that favors sustainability initiatives, more investors and consumers are making decisions based on the social and environmental impact of companies' activities. As an entirely new generation enters the industry and workforce, ESG-tied funding is forcing states and companies to draw hard lines in their investing communities.

The adoption of sustainable ESG policies doesn't have to exclude the development of the fossil fuel industry in Oklahoma. Oklahoma is in the perfect position for middle ground regulation. Despite being one of the top fossil fuel-producing states, Oklahoma has not turned a blind eye to renewable energy. In 2010, Oklahoma passed the Energy Security Act (OES), establishing new energy goals for the state's electric utility use. The

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94. *Id*.

95. Peter Eavis. *Norway's $1.2 Trillion Investment Fund Sets 2050 Climate Target*. The New York Times. (Sept. 20, 2022), https://www.nytimes.com/2022/09/20/business/norway-investment-fund-climate.html.

96. *Id.*

97. Peter Eavis. *Norway's $1.2 Trillion Investment Fund Sets 2050 Climate Target*. The New York Times. (Sept. 20, 2022), https://www.nytimes.com/2022/09/20/business/norway-investment-fund-climate.html ("Net-zero", meaning they either emit no carbon or offset their emissions by removing equivalent amounts of carbon from the atmosphere).

98. *Id.*

99. *Id.*

OES required that 15% of all installed electric capacities within the state be generated from renewable energy sources.[100] The OES sought to establish a new energy standard, supplementing renewable energy as the preferred choice for any new fossil fuel-based electric capacity's beginning January 2011 through January 2020.[101] Pushing for energy sources such as wind, solar, hydropower, hydrogen, biomass, and geothermal, Oklahoma emerged as a rising leader in wind energy, and now ranks third, behind Texas and Iowa, in the amount of electricity generated from wind.[102] "About 91% of the state's renewable generation came from wind energy, but other renewable energy resources contributed to in-state generation, including hydropower and, to a lesser extent, biomass and solar energy."[103,104]

Expanded ESG reporting is emerging throughout the EU, from the SEC, and across states. State and local entities with far-reaching operations may have to deal with conflicting regulations and adopt business strategies, as needed. Just because entities must divest from financial institutions in Oklahoma, it doesn't protect them against regulation and reporting requirements if they choose to do business in other states or countries.

Implementing ESG policies requires a lot of work and there are many legal issues that fall within the ESG umbrella. Companies will need help from lawyers in areas such as risk management, regulatory compliance, performance improvement, supply chain management, ESG reporting and disclosure, ESG litigation, transactional support, and overall assistance with developing and implementing policy and procedures. Other areas of practice that may arise are obligations under human rights laws, employee law, and board oversight. As ESG-consciousness continues to evolve, it is likely that new areas of legal work will continue to emerge. Based on pending bills, companies and states also need to prepare for litigation concerning state-level regulation as it relates to ESGs.

100. The Oklahoma Corporation Commission's Report on the Oklahoma Energy Security Act – Year Ending 2012, Oklahoma Department of Libraries, https://digitalprairie.ok.gov/digital/collection/stgovpub/id/216170/.

101. *Id.*

102. U.S. EIA, Electricity Data Browser, Net generation for all sectors, Oklahoma, Check all Fuel Types, Annual, 2001-21.

103. U.S. EIA, Electricity Data Browser, Net generation for all sectors, Oklahoma, All fuels, Fuel Type, Annual, 2001-21.

104. U.S. Department of Energy, Energy Efficiency and Renewable Energy, WINDExchange, Oklahoma 80-Meter Wind Resource Map, accessed October 11, 2022.

VII. Conclusion

Right now, the oil and gas industry must address its stance on the shift towards environmental, social, and governance policies. While many states, such as California, Vermont, and Connecticut are leaning into the policies and encouraging their state entities to participate in initiatives such as performance-based sustainability-linked bonds and loans, there are currently 15 states with pending bills, similar to that of Texas and Oklahoma's. By enacting The Energy Discrimination Elimination Act of 2022 (House Bill 2034), Oklahoma made a strong statement. They chose to protect their state entities and employees by limiting who the state does business with. As a significant contributor to the economy, protecting the oil and gas industry may secure Oklahoma's financial stability, energy security, and geopolitical power. But at what cost? With a trend towards sustainability, adopting ESG policies improves reputation and brand value among the new generation of consumers and helps mitigate risks such as regulatory fines and damage to the state's land, air, and water. Are state legislators helping or hurting the people of Oklahoma in the long run? Are they protecting the oil and gas industry or merely looking out for themselves by protecting the companies which fund their campaigns? Also, what effect will this bill have on the state's sustainability goals, and their rising status as a producer of renewable energy? Oklahoma's anti-discrimination bill only went into effect November 1st, 2022, so now less than 3 months out, it is necessary to wait and see what is in store for the state, its people, and their position in the energy industry.