Santa Clara University
School of Law

Santa Clara Journal of International Law

Volume 22 | Issue 2 Article 2

2024

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Recommended Citation

Mendenhall, Allen and Sutter, Daniel, *ESG INVESTING: GOVERNMENT PUSH OR MARKET PULL?*, 22 SANTA CLARA J. INT'L L. 75 (2024).

Available at: https://digitalcommons.law.scu.edu/scujil/vol22/iss2/2

ESG INVESTING: GOVERNMENT PUSH OR MARKET PULL?

Allen Mendenhall and Daniel Sutter*

ABSTRACT

This Article documents various government actions driving the Environmental, Social, and Governance (ESG) movement to offer perspective on the debate regarding whether markets or governments propel ESG. These include mandating an energy transition; promulgating laws, rules, and directives compelling ESG reporting; and providing generous tax incentives and financial subsidies. We document the government push for ESG in the United States, Europe, and other Organisation for Economic Co-operation and Development (OECD) nations, and by international financial institutions. We do not deny that many investors across the globe are interested in ESG as opposed to only private returns. However, the breadth and depth of government action are clearly pushing more investors into ESG. We distinguish between market pull and government push as drivers of the ESG boom by documenting the laws, regulations, mandates, tax credits, and subsidies enacted by governments across North America and Europe. We do not attempt to resolve causality between investor sentiment and government action; our catalog may prove useful in a future attempt to address, statistically, causality. The extensive breadth and depth of government laws and rules suggest that government push is perhaps the more likely driver of the boom.

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INTRODUCTION

Investing is voluntary. In a free market, individuals should be free to choose to lend or invest their funds. Models in economics and finance typically assume that investors seek to maximize the return on investment or return given some level of risk, but this assumption is for coherence in model building and not a normative prescription. Investors may invest in any venture they wish and for any purpose. Some investors have long considered the impact on society as distinct from financial return in their asset management. In 1928, value investor Phillip Carret started what would become the Pioneer Fund, which did not invest in companies producing alcohol or tobacco.[1] By the 1980s, this kind of investing was termed "socially responsible investing" and encompassed both conservatives avoiding "sin" industries and liberals avoiding war profiteering and seeking to help the environment. The Union Carbide chemical plant in Bhopal, India, in 1984 led to the formation of the United States Social Investment Forum.[2] Efforts to end Apartheid in South Africa brought investment as a tool of social policy to the fore. The Sullivan Principles sought to enlist corporations to pressure the Botha regime to reform and potentially stop doing business in South Africa if reform did not occur, while the divestment movement sought to stop investing in companies still doing business in South Africa.[3]

Today socially responsible investing is promoted as the Environmental, Social, and Governance (ESG) movement. By every available measure, the magnitude of ESG investment has increased dramatically in the past decade. Since then, large institutional investors have amassed power and wealth to a degree arguably unprecedented in human history.[4] As of 2020, global assets under

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[1] STEVEN SOUKUP, THE DICTATORSHIP OF WOKE CAPITAL, 82 (Encounter Books, 2021).
[2] *Id*. at 83.
[3] *Id*.
[4] *See generally* JOHN COATES, THE PROBLEM OF THE 12: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING (2023). Coates submits, "We are rapidly moving into a world in which the bulk of the equity capital of large companies will be owned by a small number of institutions, for the indefinite future. Those institutions, in turn, are controlled by a small number of individuals

management exceeded $100 trillion.[5] As of 2021, BlackRock, State Street, and Vanguard—collectively known as "The Big Three"—together "held a median of 27.6% of votes cast at [the] annual meetings" of S&P 500 companies.[6] The Big Three manage nearly $22 trillion in assets, "the equivalent of more than half of the combined value of all shares for companies in the S&P 500."[7] According to *Harvard Business Review*, "One of either Blackrock, Vanguard, or State Street is the largest shareholder in 88% of S&P 500 companies. They are the three largest owners of most DOW 30 companies. Overall, institutional investors (which may offer both active and passive funds) own 80% of all stock in the S&P 500."[8]

The meaning of this dramatic shift remains contentious. Have a large proportion of global investors decided voluntarily to use access to financial resources as a tool for changing society? That is, does ESG represent market pull, with financial institutions meeting market demand? Many observers believe so. Jonathan R. Macey argues that ESG "reflects a significant libertarian turn in the history of American politics."[9] Andrew Winston contends that "customers are demanding ESG and impact investing" and that "[i]nvestors also have to keep offering ESG products and services because their customers demand

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for any given company, the ownership rights—most importantly, the right to vote in an election of directors—will be controlled by a small number of individuals working for those institutions. It is not an exaggeration to say that even if this mega-trend begins to taper off, the majority of the thousand largest US companies could be controlled by a dozen or fewer people over the next ten to twenty years." *Id* at. 42.

5 BRETT CHRISTOPHERS, OUR LIVES IN THEIR PORTFOLIOS: WHY ASSET MANAGERS OWN THE WORLD, 6 (2023). Christophers is a critic of capitalism and not a libertarian; citation of his work does not imply an endorsement of his views of capitalism or markets.

6 Lucian Bebchuk & Scott Hirst*, "Big Three Power, and Why It Matters*," 102 B.U. L. REV. 1557 (2022).

7 Farhad Manjoo, *"What BlackRock, Vanguard and State Street Are Doing to the Economy*,*"* N.Y. TIMES (May 12, 2022), available at: https://www.nytimes.com/2022/05/12/opinion/vanguard-power-blackrock-state-street.html.

8 Jacob Greenspon, *How Big a Problem Is It That a Few Shareholders Own Stock in So Many Competing Companies?*, HARV. BUS. REV. (Feb. 19, 2019), available at: https://hbr.org/2019/02/how-big-a-problem-is-it-that-a-few-shareholders-own-stock-in-so-many-competing-companies.

9 Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L. J. 258 (2022).

it."[10]

Not all observers agree that ESG investing is a genuine market phenomenon. Governments have been pushing ESG in a variety of ways. ESG is, according to one critic, "mainly a top-down initiative of certain elites, not the result of widespread bottom-up demand from individual investors, consumers, and workers."[11] Not the private sector but "national governments are pushing the ESG narrative onto investors—including future retirees—along with the businesses that profit from convincing investors to pay high fees to make ESG investments."[12] "In both Europe and the United States," adds another critic, "there are government officials who push the false narrative of ESG in rhetoric and regulations as a way of pretending progress on the real problem of climate change."[13]

The ESG movement has sparked a backlash with seven states as of early 2023 acting to limit investments using state funds or state pension funds with financial institutions aggressively pursuing ESG.[14] The backlash has been characterized as anti-market, implying that Democrats in Congress are now the champions of capitalism and commerce: "The GOP's war on corporate America's environmental and social agenda is creating an unexpected set of Wall Street allies: Democrats defending free-market capitalism."[15]

By documenting various government actions driving ESG, we offer perspective on the debate regarding whether markets or governments propel ESG. These include mandating an energy

[10] Andrew Winston, *Why Business Leaders Must Resist the Anti-ESG Movement*, HARV. BUS. REV. (Apr. 5, 2023).
[11] Matthew Lau, *ESG Is Mainly Top-Down Planning by Elites*, ESG: MYTHS AND REALITIES 1 (Fraser Institute) (2023).
[12] J. B. HEATON, ESGBS: THE FALSE NARRATIVE OF ENVIRONMENTAL, SOCIAL & GOVERNANCE INVESTING, X (2023).
[13] *Id*. at x.
[14] Leah Malone et al., *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, Harv. L. School Forum on Corp. Governance (Mar. 11, 2023), available at: https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/.
[15] Jasper Goodman, *Wall Street Foes GOP*, POLITICO (July 25, 2023), available at: https://www.politico.com/news/2023/07/25/wall-street-foes-gop-00107808.

transition; promulgating laws, rules, and directives compelling ESG reporting; and providing generous tax incentives and financial subsidies. We document the government push for ESG in the United States, Europe, and other OECD nations, and by international financial institutions. We do not deny that many investors across the globe are interested in ESG as opposed to only private returns. However, the breadth and depth of government action are clearly pushing more investors into ESG.

Discerning cause-and-effect regarding behavior in markets and government policy can be very difficult, if not impossible. Consider child labor and workplace safety. Legislators enacted laws to restrict these practices only after changes were already happening in markets; thus, policies followed social changes rather than leading them.[16] Yet government policy affects the value of businesses, and with efficient financial markets, stock prices will change when investors can reasonably anticipate forthcoming changes in government policy. If investors anticipate forthcoming ESG regulations, investment dollars may move into ESG investments prior to the implementation of legal rules that were the driver even in their purely prospective form.

Part I of this article discusses the challenges involved in distinguishing causation between investors' choices and government regulation. Given the irreducible difficulties in such an endeavor, we document government actions driving ESG. Part II details the role of government in initiating the modern ESG movement almost twenty years ago. Part III documents the role of government mandates, particularly the clean energy transition behind the drive to redirect potentially trillions of dollars of investment. Part IV describes the regulatory burdens that ESG imposes on private business, citing prominent examples from the United States, the European Union, France, the United Kingdom, Australia, and Canada. Part V details the use of subsidies and tax breaks to achieve ESG-related goals. Part VI

[16] On child labor *see* Benjamin Powell, *"A Case Against Child Labor Prohibitions," Cato Institute Economic Development Bulletin No. 21* (July 2014), available at: https://www.cato.org/economic-development-bulletin/case-against-child-labor-prohibitions.

shows that national governments interact with private entities such as non-governmental organizations, or NGOs, to drive ESG. Part VII concludes.

I. REGULATIONS CAN LEAD OR FOLLOW MARKET CHANGES

Establishing direct causation between market demands and government regulation is complicated. In some cases, economic and social change occurred before government rules, which merely codified but did not drive the social changes. The elimination of child labor in Great Britain and the United States largely followed this pattern.[17] For workplace safety, a trend of declining workplace fatality rates predated the establishment of the Occupational Safety and Health Administration in 1970 by decades.[18] The rationale is clear: workers demanded higher wages for dangerous work, everything else equal, and these differentials provided businesses an enormous financial incentive to improve safety. The compensation that workers demand for risky jobs increases with rising prosperity.[19]

The prospect of regulation could still drive market action that occurs before government regulation. Financial markets illustrate the tangled web of causality. Investment is forward-looking, with expected future returns driving the fundamental value of assets. Government regulation, particularly related to climate change, potentially created stranded assets.[20] Climate change policies have led to the premature closing of coal-fired power plants, eliminating their market value and diminishing the value of investments in the mines and rail lines supporting these plants. Because information in financial markets is incorporated into asset prices as soon as it becomes publicly available,

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[17] *Id.*

[18] KIP VISCUSI ET. AL, ECONOMICS OF REGULATION AND ANTITRUST, 3RD EDITION, 390-2 (3rd ed. 2000).

[19] Dora L. Costa & Matthew E. Kahn, *Changes in the Value of Life, 1940-1980*, J. OF RISK AND UNCERTAINTY, 29, 159-180 (2004).

[20] Stranded assets are investments whose economic value is eliminated prior to the end of their useful life. *See* Kip Viscusi et. al, *supra* note 18. Both creative destruction in markets and government policy changes can strand assets.

investors have an incentive to anticipate government decisions, and investment flows will adjust in advance of government action. Private investment may move in ways favored by ESG but entirely due to the prospect of government action.

Disentangling government and private action is further compounded by extensive, existing government regulation and the direction of financial markets. If laissez-faire held in financial markets prior to the rise of ESG, any regulations would clearly demonstrate government push. Yet, in an ecosystem of extensive regulation and control, bureaucratic permission must often be obtained for innovation.[21] In other words, regulations might be required to allow investors to invest their own money in ESG. Such permitting regulations cannot be characterized as a government push. Our review here is informed by the distinction between regulations merely enabling ESG and regulations forcing investors or financial institutions to do what they would not choose voluntarily.

We distinguish between market pull and government push as drivers of the ESG boom by documenting the laws, regulations, mandates, tax credits, and subsidies enacted by governments across North America and Europe. We do not attempt to resolve causality between investor sentiment and government action; our catalog may prove useful in a future attempt to address, statistically, causality. The extensive breadth and depth of government laws and rules suggest that government push is perhaps the more likely driver of the boom.

II. THE GOVERNMENTAL ORIGINS OF ESG

The role of government in pushing ESG has been apparent from the outset. The acronym ESG emerged from the Who Cares Wins conference in 2004 organized by the United Nations Global Compact.[22] The membership of the United Nations consists, of course, of nation

[21] TIMOTHY SANDEFUR, THE PERMISSION SOCIETY: HOW THE RULING CLASS TURNS OUR FREEDOMS INTO PRIVILEGES AND WHAT WE CAN DO ABOUT IT (Encounter Books eds., 2016).
[22] *Id*. at 261. *See* United Nations Global Compact, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD (2004).

states, not private businesses. The other sponsor of Who Cares Wins was the Swiss Federal Department of Foreign Affairs,[23] another government agency. Although executives from private companies like Goldman Sachs, Deutsche Bank, Banco do Brasil, and Morgan Stanley attended Who Cares Wins,[24] and their companies endorsed the report summarizing the conference's findings and strategies,[25] governments and an intergovernmental organization sponsored the conference itself.

Who Cares Wins established a strategy for governments, institutional investors, financial institutions, pension fund trustees, financial advisers, regulators, and stock exchanges, among others, to work in concert to operationalize ESG.[26] Initially, these goals seemed more aspirational than realistic, but after the 2008 financial crisis and the bank bailouts, financial institutions and institutional investors experienced a public relations and marketing crisis.[27] ESG afforded an opportunity to remake their image.

The Biden Administration has also in public statements stressed government leadership. For example, the goal of net-zero emissions by 2050 "presents an important opportunity *for the Federal Government to partner with the private sector* to help capital flow more quickly to enable the transformations needed in this decade."[28] In fact, the Biden Administration is open about its desire to deploy "public finance and policy in ways that catalyze private finance at scale."[29]

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[23] United Nations Global Compact, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD (2004).
[24] United Nations Global Compact, *supra* note 23.
[25] United Nations Global Compact, *supra* note 23.
[26] United Nations Global Compact, *supra* note 23.
[27] Kasey Wang, *Why Institutional Investors Support ESG Issues*, 22 U.C. DAVIS BUS. L. J. 129, 190 (2021); Lance Ang, *The Start of History for Corporate Law: Shifting Paradigms of Corporate Purpose in the Common Law*, 38 WIS. INT'L L.J. 427, 454 (2021); Josephine M. Balzac, *Corporate Responsibility: Promoting Climate Justice Through the Divestment of Fossil Fuels and Socially Responsible Investment*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10151, 10161 (2017); Sarah W. Gamble, *A Corporate Human Rights Due Diligence Law for California*, 55 U.C. Davis L. Rev. 2421, 2436-37 (2022).
[28] U.S. Climate-Related Financial Risk Executive Order 14030, *A Roadmap to Build a Climate-Resilient Economy* 11 (Oct. 14, 2021) (emphasis added).
[29] *Id*.

Other ESG proponents clearly state that their goal is utilizing public funding and finance to impel behavior in private investing. Consider this call to action:

> Governments can again play a role to stimulate and develop the market—ensuring that adequate, investment grade-deals at scale come to the market for pension funds to invest in. For financial vehicles specializing in early-stage projects, public finance could invest alongside private capital, or institutional investors could take on subordinated equity positions, with public funds taking on the first tranche of risk. Alternatively, government bodies could provide loan guarantees. In addition governments and/or multinational agencies can use 'Public Financing Mechanisms' to provide cover for risks which are new to pension funds or cannot be covered in existing markets (such a[s] political risk, currency risk, regulatory and policy risk etc.). Standardizing and rating green investments would also help.[30]

Since then, organizations like the United Nations and the International Monetary Fund (IMF), the World Bank, and the Organisation for Economic Cooperation and Development have "shaped global governance arrangements around the world" and generated a "sizable body" of international corporate law.[31] In 2015, the United Nations adopted its 2030 Agenda for Sustainable Development, and the Financial Stability Board (comprised of government representatives, central banks, regulators, and regulatory agencies from numerous countries) created the Task Force on Climate-Related Financial Disclosures. The following year, the Paris Agreement under the United Nations Framework Convention on Climate Change ("the Paris

[30] Raffaele Della Croce et al., *The Role of Pension Funds in Financing Green Growth Initiatives*, 1, 6 (OECD Pub., Paris, Working Paper No. 10, 2011), available at: https://www.oecd.org/finance/private-pensions/49016671.pdf.

[31] Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1766, 1768 (2021).

Agreement") was signed.[32] The United States was a signatory.[33]

Klaus Schwab, a professor and the founder and executive chairman of the World Economic Forum, with his coauthor Thierry Malleret, advocates *global governance*, "commonly defined as the process of cooperation among transnational actors aimed at providing responses to global problems."[34] *Global governance*, say Schwab and Malleret, "encompasses the totality of institutions, policies, norms, procedures, and initiatives through which nation states try to bring more predictability and stability to their responses to transnational challenges."[35] According to these men, "any global effort on any global issue or concern is bound to be toothless without the cooperation of national governments and their ability to act and legislate to support their aims."[36] They add, "Nation states make global governance possible (one leads to the other)."[37] Accordingly, nation states, not private industry, catalyze global governance, at least according to Schwab and Malleret,[38] who also state that "ESG can be considered as the yardstick for stakeholder capitalism."[39]

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[32] *Id*. at 1811.
[33] The United States withdrew from the Paris Agreement during the Trump Administration but rejoined under the Biden Administration. *See* Anthony Blinken, *The United States Officially Rejoins the Paris* Agreement, U.S. DEP'T OF STATE (February 19, 2021), available at: https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement.
[34] KLAUS SCHWAB & THIERRY MALLERET, COVID-19: THE GREAT RESET 82 (World Econ. Forum eds., 2020).
[35] *Id*. at 114.
[36] *Id*.
[37] *Id*.
[38] Note that "global governance" is a term of art that appears in a wide range of literature (too numerous to cite) regarding ESG. The term is so commonly used that the Association to Advance Collegiate Schools of Business (AACSB) hosted a conference in August 2022 titled, "Global Governance Summit 2022: ESG – Driving Positive Change." Assoc. to Advance Collegiate Schools of Bus., *Global Gov. Summit 2022: ESG- Driving Positive Change,* (AACSB Conf. on "global governance," 2019), available at: https://www.aacsb.edu/-/media/documents/events/ggs-2022-agenda.pdf.
[39] Schwab & Malleret*, supra* note 34, at 129 (2020).

III. GOVERNMENT MANDATES

Climate change has provided much of the momentum for ESG. The financial capital needed for a transition to clean or renewable energy has catalyzed much of the desire to harness private investment. A clean energy transition has been estimated to require $7 trillion in annual investment, or $200 trillion by 2050.[40] The International Energy Agency estimates that 70% of this funding will need to come from private investment.[41] The Trump Administration's withdrawal from the Paris Climate Treaty and the continuing legal ambiguity of the U.S. commitment, given that the treaty has never been ratified by the Senate, spurred much interest in imposing ESG requirements on companies and financial institutions.[42] Carbon emissions disclosure requirements have been another significant element of the Environmental component.

Government mandates are driving the renewable energy transition. The Paris Climate Treaty has been formally adopted by the EU, which has set a target of a 55 percent emissions reduction relative

[40] BloombergNEF, *The $7 Trillion a Year Needed to Hit Net-Zero Goal*, BLOOMBERGNEF (Dec. 7, 2022), available at: https://about.bnef.com/blog/the-7-trillion-a-year-needed-to-hit-net-zero-goal.

[41] International Energy Agency, *The Cost of Capital in Clean Energy Transitions*, IEA 50 (Dec. 17, 2021), available at: https://www.iea.org/articles/the-cost-of-capital-in-clean-energy-transitions.

[42] According to Natalie Nowiski, "[t]he announcement by the United States of its intention to withdraw from the Paris Agreement only appears to have emboldened the international community to continue with their commitments to reduce global warming and to transition towards a low-carbon economy. Given this commitment, international support for the development of standardized industry guidelines for climate-related disclosure will continue, and it is likely that other countries will be implementing enhanced financial reporting regulations of climate-related risks in the future." Natalie Nowiski, *Rising Above the Storm: Climate Risk Disclosure and its Current and Future Relevance to the Energy* Sector, 39 ENERGY L. J. 1, 11-12 (2018). *See also* Adam Sulkowski & Ruth Jebe, *Evolving ESG Reporting Governance, Regime Theory, and Proactive Law: Predictions and Strategies*, 59 AM. BUS. L.J. 449 (2022) (regarding growth of ESG requirements on companies and financial institutions); Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77 (2022) (regarding how asset management firms adopted disclosure requirements and other regulatory functions in compliance with the Paris Agreement, among other standards); Kamari Koonce, *The Race to Net Zero: How ESG Investors are Driving Corporations to Ethically Lower Greenhouse Gas Emissions*, 46 SPF ENVIRONS Entl. L. & Pol'y J. 111, 113-15, 123, 133-34 (2023); Colin Myers & Jason J. Czarneki, *Sustainable Business Law? The Key Role of Corporate Government and Finance*, 51 ENVTL. L. 991, 1013-14 (2021).

to 1990 levels by 2030. In addition, the European Climate Law commits the EU to be net zero by 2050.[43] Australia has committed to a 43 percent emissions reduction from 2005 levels by 2030.[44] The Biden Administration, upon rejoining the Paris Agreement in 2021, set a goal of 50-52 percent emissions reduction by 2030.[45]

The U.S. has enacted a series of additional government mandates to force an energy transition. The Biden Administration has a stated goal that 50 percent of new car sales must be electric vehicles by 2030.[46] The EPA has proposed emissions requirements for new cars that critics claim could effectively ban gas powered cars.[47] Proposed EPA emissions requirements for electric utilities would force the closure of coal-fired power plants.[48] Natural gas stoves and appliances have been targeted for elimination, with numerous cities and New York state implementing bans in new construction.[49]

Perhaps the most extensive mandates to date in the U.S. involve state renewable portfolio or clean energy standards. These laws require that a specified portion of electric power generation or generation

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[43] Submission by Spain and the European Commission on Behalf of the European Union and its Member States (Oct. 16, 2023), available at: https://unfccc.int/sites/default/files/NDC/2023-10/ES-2023-10-17%20EU%20submission%20NDC%20update.pdf.

[44] Australia's Nationally Determined Contribution (2022), available at: https://unfccc.int/sites/default/files/NDC/2022-06/Australias%20NDC%20June%202022%20Update%20%283%29.pdf

[45] Reducing Greenhouse Gases in the United States: A 2030 Emissions Target, available at: https://unfccc.int/sites/default/files/NDC/2022-06/United%20States%20NDC%20April%2021%202021%20Final.pdf.

[46] *FACT SHEET: Biden-Harris Administration Announces New Private and Public Sector Investments for Affordable Electric Vehicles*, THE WHITE HOUSE (Apr. 17, 2023), available at: https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/17/fact-sheet-biden-harris-administration-announces-new-private-and-public-sector-investments-for-affordable-electric-vehicles/.

[47] Matthew Daly & Tom Krischer, *Stiff EPA emission limits to boost US vehicle sales*, THE ASSOC. PRESS (Apr. 12, 2023), available at: https://apnews.com/article/biden-electric-vehicles-epa-tailpipe-emissions-climate-406d74e18459bc135f089c681ba9e224

[48] Darrell Proctor, *Carbon Capture Key to EPA's New Power Plant Emissions Rule*, POWER MAGAZINE (May 11, 2023), available at: https://www.powermag.com/carbon-capture-key-to-epas-new-power-plant-emissions-rule.

[49] Rachel Ramirez and Elia Nilsen, *New York becomes the first state to ban natural gas stoves and furnaces in most new buildings*, CNN (May 3, 2023), available at: https://www.cnn.com/2023/05/03/us/new-york-natural-gas-ban-climate/index.html.

capacity be from renewable fuels. The power sources qualifying as renewable vary across states, but all include wind and solar. Twenty-nine states and the District of Columbia have adopted binding standards, with 17 now having a 100 percent renewable generation goal.[50]

Economics is not driving the clean energy transition. The U.S. Energy Information Administration in a projection of U.S. energy use in 2050 still expects 75 percent to come from fossil fuels despite government mandates.[51] State energy regulators can manipulate the reporting of costs to make clean energy appear more affordable. Economist Michael Greenstone and coauthors concluded that "in the absence of substantial greenhouse gas policies, the US and the global economy are unlikely to stop relying on fossil fuels as the primary source of energy. … the current, business-as-usual combination of markets and policies doesn't seem likely to diminish greenhouse gases on their own."[52]

IV. REGULATION AND ESG

ESG involves numerous governmental guidelines and regulations requiring or incentivizing private companies to report their ESG data regarding policies and practices ranging from carbon emissions to board diversity.[53] "Demand for ESG disclosure reform has risen rapidly over the past decade," reports one observer, "driven by growing consensus among mainstream investors that all companies should disclose material ESG information in their public filings, even though the

[50] Galen L. Barbose, U.S. State Renewables Portfolio & Clean Electricity Standards: 2023 Status Update, ENERGY MARKETS & POLICY-BERKLEY LAB (June 2023), available at: https://emp.lbl.gov/publications/us-state-renewables-portfolio-clean.
[51] *EIA Releases Its Annual Energy Outlook 2020*, IER (Feb. 5, 2020), available at: https://www.instituteforenergyresearch.org/fossil-fuels/eia-releases-its-annual-energy-outlook-2020/.
[52] Thomas Covert, Michael Greenstone, & Christopher R. Knittel, "*Will We Ever Stop Using Fossil Fuels?"*, 30 J. OF ECON. PERSPECTIVES, No. 1, 135, (2016).
[53] *See generally* Satyajit Bose, *Evolution of ESG Frameworks*, VALUES AT WORK, (D.C. Etsy & T. Cort ed., 2020)

specific information that is material may vary by firm and industry."[54] The trend is for policies regarding finance-related ESG disclosures to seek uniformity, harmony, and standardization of non-financial reporting requirements: "Policymakers have . . . been active in launching numerous regulatory and non-regulatory initiatives at the global or local level. To avoid market fragmentation, there is a demand for greater harmonization among different measures. There is also a need to increase the standardization and disclosure of non-financial information published by companies and used to evaluate the risks."[55]

Although private non-profit organizations like the Climate Disclosure Standards Board,[56] which folded into the International Financial Reporting Standards Foundation in 2022,[57] seek to standardize ESG ratings, most regulatory efforts to direct ESG involve government rather than purely private actors. As of 2017, "Over 60 jurisdictions on every continent, including all of the members of the G20," required or encouraged "corporate disclosure of ESG issues in some form," mostly "through financial regulation, corporate law, or stock exchange listing rules rather than through environmental regulation or other agency mandates."[58] Given the inconsistency among private ESG ratings agencies,[59] this call for regulation should not be surprising.

[54] Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 286 (2022).
[55] Jill Atkins, et al., *Exploring the Effectiveness of Sustainability Measurement: Which ESG Metrics Will Survive COVID-19?*, J. OF BUS. ETHICS 629, 630 (2022).
[56] *See* Climate Disclosure Standards Board, *homepage*, CDSB (last updated January 31, 2022), available at: https://www.cdsb.net/.
[57] *See* International Financial Reporting Standards Foundation's, *homepage*, IFRSF, available at: https://www.ifrs.org/ (describing the organization as a "not-for-profit, public interest organisation established to develop high-quality, understandable, enforceable and globally accepted accounting and sustainability disclosure standards.") (last accessed May 2023).
[58] Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 318 (2017) (hereinafter "Ho, Comply or Explain").
[59] Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 767-68 (2019); *see* Frederico Fornasari, *Knowledge and Power in Measuring the Sustainable Corporation: Stock Exchange as Regulators of ESG Factors Disclosure*, 19 WASH. U. GLOBAL STUD. L. REV. 167, 184-192 (2020); Virginia Harper Ho and Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 254-55 (2019); *see* Florian Berg, "*Why Do ESG Ratings Vary So Widely—and How Can Investors Make Sense of Them?"*, WALL STREET J. (Nov. 2, 2022), available at: https://www.wsj.com/articles/esg-ratings-investing-data-raters-11667229384.

Proponents of ESG regulation suggest that it "can act as a motivating factor to drive investment in the people, processes and systems required to gather and report ESG data."[60]

The G20 consists of 19 countries and the European Union.[61] Its finance ministers and Central Bank Governors requested that the Financial Stability Board create a public-private partnership to consider the incorporation of sustainability and environmental factors within the financial sector.[62] The Task Force on Climate-Related Financial Disclosures grew out of this effort.[63]

According to the Task Force on Climate-Related Financial Disclosures, "as part of Climate Action 100+, 700 investors with over $68 trillion in assets under management are engaging the world's largest corporate greenhouse gas emitters to strengthen their climate-related disclosures by implementing the [Task Force on Climate-Related Financial Disclosures] recommendations."[64] Moreover, the Carbon Disclosure Project, an international non-profit organization that receives substantial funding from governments and public grants,[65] "announced that over 680 financial institutions with more than $130 trillion in assets have asked over 10,000 companies to disclose through [the Carbon Disclosure Project], which has aligned its climate change disclosures with the [Task Force on Climate-Related Financial Disclosures] recommendations."[66]

Put simply, large national governments and intergovernmental organizations are driving or subsidizing efforts to compel private financial disclosures, and countries are beginning to consider or adopt internal regulatory mandates that reflect these efforts. Consider the

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[60] Aideen O'Dochartaigh, *The Regulation Revolution: How Firms Can Prepare for ESG Disclosure Requirements*, CALIFORNIA R. MANAGEMENT (Oct. 31, 2022).
[61] G20 Brasil 2024, About G20, available at: https://www.g20.org/en.
[62] Task Force on Climate-Related Financial Disclosures, *Task Force on Climate-Related Financial Disclosures 2022 Status Report*, TCFD, 2 (2022) (hereinafter, "TCFD"), available at: https://assets.bbhub.io/company/sites/60/2022/10/2022-TCFD-Status-Report.pdf.
[63] *Id*.
[64] *Id*. at 3.
[65] Carbon Disclosure Project, *CDP Europe income and expenditure 2021-22*, CDP, available at: https://www.cdp.net/en/info/finance/europe (last accessed Apr. 7, 2024).
[66] TFCD, *supra* note 62, at 3.

following ESG directives in some of the world's leading economies as evidence of the trend towards "governmentalizing" ESG ratings.

A. The United States

In 2021, President Joe Biden issued executive orders mandating certain federal agencies to drive ESG throughout the economy.[67] Since then, The Financial Stability Oversight Council—which includes the heads of the Federal Reserve Board, The United States Department of Treasury, The Securities and Exchange Commission, and The Office of the Comptroller of the Currency—has pushed ESG regulations at the federal level.[68]

The Securities and Exchange Commission announced the creation of the Climate and ESG Task Force and proposed new regulations requiring ESG disclosures.[69] It also proclaimed that it would consider proposed regulations requiring ESG disclosures for certain publicly traded companies.[70]

The Department of Labor instituted a controversial new rule regarding 401(k) management.[71] Twenty-five states with Republican attorneys general sued to block this politicization of retirement

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[67] Exec. Order No. 14030, 3 C.F.R. 574 (2022); Exec. Order No. 14035, 3 C.F.R. 597 (2022).

[68] U.S. Dep't. of the Treas., *Fact Sheet: The Financial Stability Oversight Council and Progress in Addressing Climate-Related Financial Risk*, (Jul. 28, 2022), available at: https://home.treasury.gov/system/files/261/FSOC_20220728_Factsheet_Climate-Related_Financial_Risk.pdf.

[69] Press Release, U.S Sec. and Exch. Comm'n, SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies About ESG Investment Practices (May 25, 2022), available at: https://www.sec.gov/news/press-release/2022-92.

[70] *See* Gary Gensler, *Statement on ESG Disclosures Proposal*, U.S. SEC. AND EXCH. COMM'N (May 25, 2022), available at: https://www.sec.gov/news/statement/gensler-statement-esg-disclosures-proposal-052522. The SEC's proposal on climate-change disclosure, tied to the environmental prong of ESG, faced resistance, delaying its adoption for several months. The persistence of the SEC resulted in the approval of a modified version of the rule on March 6, 2024, mandating specific disclosures. *See* SEC Final Rules, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Rel. No. 33-11275, and Securities Exchange Act Rel. No. 34-99678 (Mar. 6, 2024).available at: https://www.sec.gov/files/rules/final/2024/33-11275.pdf.

[71] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 738822-86 (Jan. 30, 2023) (codified in 29 C.F.R. 2550).

investments.[72] In response to this new regulatory environment coordinated between federal agencies, Nasdaq instituted a new board diversity rule requiring disclosures regarding diversity within companies listed on Nasdaq,[73] and Dow Jones offers sustainability investment indices.[74]

B. The European Union

The European Union has "taken the lead" in driving "reforms of the financial markets legislation" to channel resources "towards sustainability."[75] It mobilizes private investment through public policy.[76] "[A]fter numerous actions aimed at harmonizing the accounting rules for the preparation of financial statements," submits a group of European scholars, "the European Union . . . has begun to regulate the disclosure of [non-financial information] such as social and environmental aspects of the business activity."[77]

The Green New Deal is an example of the European Union's "holistic approach . . . to an increasingly ambitious objective" of reducing "greenhouse gas admissions" to shape "a sustainable recovery from the

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[72] *See* Matt Egan, *GOP-led States Sue Biden Administration to Block ESG Investment*, CNN BUSINESS (Jan. 27, 2023), available at: https://www.cnn.com/2023/01/27/investing/biden-esg-lawsuit/index.html (consisting of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, South Carolina, North Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming).

[73] Nasdaq, *Nasdaq's Board Diversity Rule: What Companies Should Know*, NASDAQ (Feb. 28, 2023), available at: https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf

[74] *Investment Theme: Sustainability*, S&P DOW JONES INDICES, available at: https://www.spglobal.com/spdji/en/landing/investment-themes/sustainability (last visited Apr. 7, 2024).

[75] Lucia Alessi & Claudia Guagliano, *Sustainable Growth in the European Framework and the Role of Finance*, INFORMATION AS A DRIVER OF SUSTAINABLE FINANCE 8 (2022).

[76] *Id*. at 23.

[77] Silvia Testarmata et al., 4 *Harmonization of Non-financial Reporting Regulation in Europe: A Study of the Transposition of the Directive 2014/95/EU*, *in* ACCOUNTABILITY, ETHICS AND SUSTAINABILITY OF ORGANIZATIONS 4 (2020) (S. Brunelli & E. Di Carlo, eds., 2020).

COVID-19 crisis."[78] The European Union Climate Law is another example.[79] Yet the European Union initiatives to standardize and harmonize ESG disclosure requirements are many and involve a dizzying array of mandates and institutions from the Non-Financial Reporting Directive[80] to the European Climate Law,[81] the Directive on Corporate Sustainability Reporting[82] of the European Union Action Plan,[83] the European Laboratory established by the European Financial Reporting Advisory Group (EFRAG),[84] and the aforementioned Task Force on Climate-related Financial Disclosures of the Financial Stability Board.[85]

The European Green New Deal is expansive. Its main elements, "over and above the 2030 and 2050 emission objectives, cover the following: supplying clean, affordable and secure energy; mobilising industry for a clean and circular economy; building and renovating in an energy- and resource-efficient way; accelerating the shift to sustainable and smart mobility; designing a fair, healthy and environmentally friendly food system; preserving and restoring ecosystems and

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78 Alessi, *supra* note 75, at 8. *See also* Alessi, *supra* note 75, at 17 ("The EU commitment to become the first climate-neutral continent in the world by 2050 underpins the European Green Deal, an action plan aiming at making the EU's economy sustainable").

79 Alessi, *supra* note 75, at 17.

80 Council and Parliament Directive 2014/95, 2014 O.J. (L 330) (EU). According to S. Testarmata et al., *supra* note 77, at 4, "[T]his Directive represents an important regulatory action towards harmonising the CSR [corporate social responsibility] reporting practices of all European Member States and marks the shift in CSR reporting from a voluntary exercise to one that is mandatory for the EU companies concerned."

81 European Commission, *European Climate Law*, available at: https://climate.ec.europa.eu/eu-action/european-climate-law_en (last accessed May 10, 2024).

82 *See* European Commission, *Corporate sustainability reporting*, available at: https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (last accessed May 10, 2024).

83 *See* European Commission, *Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth*, https://finance.ec.europa.eu/publications/renewed-sustainable-finance-strategy-and-implementation-action-plan-financing-sustainable-growth_en (last accessed May 10, 2024).

84 *See* EFRAG (European Financial Reporting Advisory Group), *European Lab Facts*, available at: https://www.efrag.org/Activities/1807101446085163/European-Lab-facts.

85 For more information on these efforts, *see* Atkins et al., *Exploring the Effectiveness of Sustainability Measurement*, J. OF BUS. ETHICS, 629, 631-634 (2022).

biodiversity and creating a toxic-free environment."[86]

The European Commission, which consists of a College of Commissioners populated by one representative from each European Union member country,[87] adopted the European Sustainability Reporting Standards on July 31, 2023.[88] These standards take effect on January 1, 2024, and mandate ESG disclosures and third-party audits for companies in European Union member states.[89] Such reporting focuses on sustainability and information regarding value chains, financial statements, reporting structures, and the qualitative and quantitative data used to complete the report.[90] Companies subject to these standards must conduct materiality assessments that require extensive collection and evaluation of data regarding value chains, pollution, water and marine resources, biodiversity and ecosystems, workplace conditions, sanitation, privacy, and anticorruption and antibribery practices, among other things.[91] The breadth of this regulatory mandate is extraordinary.

The European Union has committed to investing public money in ESG. The European Green New Deal Investment plan, for instance, "aims at mobilising at least €1 trillion in sustainable investments over the next decade, with half of the financing coming directly from the EU budget."[92] Moreover, "the InvestEU fund will dedicate at least 30% of mobilised investments to climate- and environment-related projects,

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[86] Enhesa, *European Green Deal: 8 key policy areas*, available at: https://www.enhesa.com/resources/article/european-green-deal-key-policies/.

[87] European Union, *European Commission*, available at: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-commission_en (last accessed May 10, 2024).

[88] The European Commission, *The Commission adopts the European Sustainability Reporting Standards* (July 31, 2023), available at: https://finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en (last accessed May 10, 2024).

[89] The European Commission, *Questions and Answers on the Adoption of European Sustainability Reporting Standards* (July 31, 2023), available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda

[90] *Id*.

[91] The European Commission, *The Commission adopts the European Sustainability Reporting Standards* (July 31, 2023), available at: https://finance.ec.europa.eu/news/commission-adopts-european-sustainability-reporting-standards-2023-07-31_en. (last accessed May 10, 2024).

[92] Alessi, *supra* note 75, at 23.

and provide an EU budget to guarantee to partially cover the risk of financing and investment operations."[93] The European Investment Bank's investment in ESG is considerable:

> [The European Investment Bank] will gradually increase the share of its financing dedicated to climate action and environmental sustainability to reach 50% of its operations in 2025. The Just Transition Mechanism is the part of the European Green Deal Investment Plan targeted to ensure a fair and just green transition. It will mobilise at least €3 billion in investments over the period of 2021-2027 to support the regions most impacted by the transition.[94]

Since its early years, the European Investment Bank has managed subsidies.[95] Its aim is "to generate private investment via the mobilisation of public money."[96] Otherwise stated: "The main idea is to provide greater risk-bearing capacity through public money in order to encourage project promoters and attract private finance to viable investment projects which would not have happened otherwise."[97] The ambition to mobilize public actors and utilize public coffers to transform private-sector conditions is not libertarian. Nor is the complex web of regulatory bodies that purportedly desire the standardization and harmonization of ESG disclosure mandates across and among European nations. In fact, not private businesses or individuals but "the State and supranational institutions, such as the European Union, play a crucial

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[93] Alessi, *supra* note 75, at 23.

[94] Alessi, *supra* note 75, at 23. For a succinct, useful history on the creation of the European Investment Bank, see Carl Lankowski, *Financing Integration: The European Investment Bank in Transition*, LAW & POL'Y INT'L BUS. 999,1001-1009 (1996).

[95] Patrick Honohan, *The Public Policy Role of the European Investment Bank within the EU*, J. OF COMMON MARKET STUDIES 327-329 (1995).

[96] The European Investment Bank, *Fact Sheets on the European Union*, THE EUROPEAN PARLIAMENT, available at: https://www.europarl.europa.eu/factsheets/en/sheet/17/the-european-investment-bank (last accessed May 10, 2024).

[97] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN CENTRAL BANK, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK, *An Investment Plan for Europe*, COM (2014), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0903.

role in … supporting the ideology for legitimising [corporate social responsibility] reporting."[98] That is not libertarian.

C. France

France has long mandated disclosures regarding corporate social responsibility.[99] In 2015, it instituted its own ESG-disclosure mandate, Article 173-VI of the French Energy Transition Law,[100] which "considerably extended the French state's regulatory steering."[101] With this legislation, France became the first European country to compel ESG disclosures for private companies.[102] Article 173-VI provided a model for The Taskforce on Climate-Related Financial Disclosures as it contemplated viable frameworks for mandatory climate-related disclosures.[103] This article requires ESG disclosures from publicly traded companies, banks, credit providers, and institutional investors but is short on enforcement details[104] and will likely serve as a model for other EU-member countries seeking to harmonize their laws and regulations with the European Sustainability Reporting Standards.

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[98] Testarmata & Ciaburri, *Harmonization of Non-financial Reporting Regulation in Europe: A Study of the Transposition of the Directive 2014/95/EU*, *in* ACCOUNTABILITY, ETHICS, AND SUSTAINABILITY OF ORGANIZATIONS: NEW THEORIES, STRATEGIES, AND TOOLS FOR SURVIVAL AND GROWTH, 71 (Sandro Brunelli & Emiliano Di Carlo eds., 2020).
[99] *Id*. at 78.
[100] *See* text in French: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031740341. For an English summary of this provision, s*ee* Principles for Responsible Management, *French Energy Transition Law: Global Investor Briefing* 6-8 (2016), available at: https://www.unepfi.org/fileadmin/documents/PRI-FrenchEnergyTransitionLaw.pdf.
[101] Stéphanie Giamporcaro, Jean-Pascal Gond, Niamh O'Sullivan, *Orchestrating Governmental Corporate Social Responsibility Interventions through Financial Markets: The Case of French Socially Responsible Investment*, BUS. ETHICS QUARTERLY 288, 310 (2020).
[102] Cheri Hasz, *The U.S. Oil and Gas Industry Should be a Leader and Follow the EU's Lead on ESG Disclosure*, 29 TUL. J. INT'L & COMP. L. 135, 147 (2021); Karianne de Bruin et al., *Physical Climate Risks and the Financial Sector—Synthesis of Investor's Climate Information Needs*, in HANDBOOK OF CLIMATE SERVICES 142, (Walter Leal Filho and Daniela Jacob, eds., 2020)
[103] Brenda Hannigan, *Non-financial Reporting: Evolving Demands for Transparent Enterprises*, in TRANSPARENCY OF STOCK CORPORATIONS IN EUROPE 185, (Vassilios Tountopoulos & Rüdiger Veil, eds., 2019).
[104] *See* Principles for Responsible Investment, *French Energy Transition Law: Global Investor Briefing* 7-8 (2016), available at: https://www.unepfi.org/fileadmin/documents/PRI-FrenchEnergyTransitionLaw.pdf (last accessed May 10, 2024).

D. United Kingdom

In the United Kingdom, the Streamlined Energy and Carbon Reporting mandates disclosures of company data on energy and carbon usage as well as the methodology used to amass and report that data.[105] The United Kingdom may use those disclosures to exclude companies from government contracts.[106]

To comply with Streamlined Energy and Carbon Reporting, companies report on two factors: "The first factor requires reporting the organisation's greenhouse gas emissions and their energy efficiency, while the second requires the organisation to consider how they would be affected by climate change."[107] The Streamlined Energy and Carbon Reporting binds "large companies," which include firms that meet at least two of these three criteria: "turnover (or gross income) of 36 million or more," "balance sheet assets of 18 million or more," and "250 employees or more."[108] Ecometrica, a firm that helps businesses collect and report ESG data, states that the Streamlined Energy and Carbon Reporting mandate brought "almost 8,000 more businesses into the UK's mandatory carbon reporting."[109] That figure will surely grow.

[105] *See* Government of the United Kingdom, *Guidance: Streamlined Energy and Carbon Reporting (SECB) for academy trusts,* Gov. UK, (Sept. 28, 2022) (hereinafter "Gov. UK Guidance") available at: https://www.gov.uk/government/publications/academy-trust-financial-management-good-practice-guides/streamlined-energy-and-carbon-reporting.

[106] Press release: Companies bidding for major government contracts face green rules, Gov.UK, (September 30, 2021), available at: https://www.gov.uk/government/news/companies-bidding-for-major-government-contracts-face-green-rules.

[107] Ottilia Csoti et al.,, *The Role of Lawyers in Achieving the Transition to Net Zero*, 24 BUS. L. INT'L 105, 107 (2023).

[108] *See* Gov. UK Guidance, *supra* note 105.

[109] Streamlined Energy and Carbon Reporting, What is SECR?, ECOMETRICA available at: https://ecometrica.com/solutions/reporting/secr/ (last visited Apr. 7, 2024),

E. Australia

The Australian Securities Exchange Corporate Governance Council, also known as the ASX Corporate Governance Council, describes itself as "an independent body that brings together a wide range of business, shareholder and industry groups, each offering their individual insights and perspectives on governance issues."[110] A private entity, the ASX Corporate Governance Council, regulates companies listed on the Australian Securities Exchange, the ASX. It first convened in 2002 and, the following year, introduced the Corporate Governance Principles and Recommendations, which have undergone four editions since.[111] Non-compliance with the ASX Corporate Governance Principles and Recommendations may result in ASX-imposed penalties or even removal from the ASX[112] that enforces its own principles and recommendations, some of which have been integrated into Australian law.[113]

One critic accuses the ASX Corporate Governance Council of adopting an "anti-capitalist and pro-socialist or even communistic stance"[114] regarding corporate governance, pointing to areas in which the ASX Corporate Governance Council has influenced Australian law.[115] This hyperbolic complaint about "socialism" and "communism" underscores frustration with the private regulatory function of the ASX

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[110] Australian Securities Exchange, *About the Council, ASX Corporate Governance Council,* ASX, available at: (last visited Apr. 7, 2024).
[111] ASX Corporate Governance Council, Corporate Governance Principles and Recommendations, 4th Ed., 1 (Feb. 2019), available at: https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf.
[112] Jacob L. Barney, *Corporate Scandals, Executive Compensation, and International Corporate Governance Convergence: A U.S.-Australia Case Study*, 23 TEMP. INT'L & COMP. L. J. 231, 252 (2009).
[113] Jennifer G. Hill et al., *Comparing CEO Employment Contract Provisions: Differences Between Australia and the United States*, 64 VAND. L. REV. 559, 564-579 (2011); *see* Luke Nottage and Fady Aoun, *The Rise of Independent Directors in Australia: Adoption, Reform, and Uncertainty*, 23 U. MIAMI INT'L & COMP. L. REV. 571 (2016); *see also*, Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 WIS. INT'L L.J. 367, 412-23 (2005).
[114] Peter L. Swan, *Mandated divorce: company boards, incentives and performance*, 10 L. & FIN. MARKETS REV. 133, 135 (2016).
[115] *Id*. at 137.

Corporate Governance Council over listed companies,[116] but it could lead to confusion regarding the public regulatory function of the Australian Securities Investments Commission (ASIC), the government regulator of securities. In fact, ASIC regulates the ASX Corporate Governance Council.[117]

The Corporations Act of 2001 and the Australian Securities and Investments Commission Act 2001 provide the regulatory framework within which ASIC and the ASX Corporate Governance Council operate. The ASX Corporate Governance Council is a private firm—itself publicly traded—within a vast regulatory web consisting of the ASIC, the Reserve Bank of Australia, the Australian Department of Treasury, the Australian Prudential Regulatory Authority (APRA), and the Council of Financial Regulators.[118] The ASIC regulates all business entities in Australia, but its relationship with the ASX Corporate Governance Council is complex insofar as the former regulates the regulations of the latter. In other words, public regulations control private regulations, a situation requiring harmony between both sets of regulations.

The ASX Corporate Governance Council has impacted the content of laws and regulations in Australia. In fact, the APRA has relied on the ASX Corporate Governance Principles and Recommendations in its own regulations.[119] The point here is not to elucidate the complicated details of Australian corporate law but to suggest a complex interaction between public and private regulation of securities in Australia.[120] The rise of large institutional investors arguably shifted corporate

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[116] *Id*. at 137 ("The tragedy is that almost universally regulators have come to believe that companies are better run by boards made up of independent non-executive directors who provide governance and set strategy while tasks are carried out by executives.").

[117] *See* Austl. Sec. Exch., *Corporate Governance Statement 2023* 1 (2023), available at: https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/2023-asx-limited-corporate-governance-statement.pdf. *See also* Austl. Sec. Exch., *ASX regulatory framework*, ASX, available at: https://www.asx.com.au/about/regulation.html.

[118] *See ASX regulatory framework*, *supra* note 117.

[119] Judith Fox, *ASX Corporate Governance Council review of Corporate Governance Principles and Recommendations*, 66 GOVERNANCE DIRECTIONS 142, 143-44 (2014).

[120] *See* MEREDITH EDWARDS, JOHN HALLIGAN, BRYAN HORRIGAN &, GEOFFREY NICOLL, PUBLIC SECTOR GOVERNANCE IN AUSTRALIA 167-29 (2012), on the frequent difficulties of teasing out distinctions between the public and private sector in Australian corporate law.

governance in that continent from the private to the public sector.[121] Moreover, private-sector governance—such as that of the ASX Corporate Governance Principles and Recommendations—has found its way into the public sector through laws and regulations.[122]

F. Canada

In October 2021, the Canadian Securities Administrators published the Proposed National Instrument 51-107 regarding climate-related securities and investment disclosures.[123] The comment period for the proposed regulation remained open for around four months, expiring on February 16, 2022. The regulation would mandate climate-related disclosures for publicly traded companies. The Canadian Securities Administrators cited the inadequacy of private rating agencies as a need for governmental regulation in this area.[124] According to the Canadian Securities Administrators, "Securities Regulators have a role to play in promoting disclosures that yield decision-useful information for investors. This is achieved by requiring reporting issuers to disclose material information, which can be used by investors to inform their investment and voting decisions."[125] The newly formed Canadian

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[121] *Id*. at 42. ("A less well-appreciated influence upon the evolution of corporate governance in the private sector was the rise of large, publicly responsible shareholders, such as superannuation and investment funds, to displace small, individual shareholders in public companies. It is arguable that this circumstance brought corporate governance in the private sector close to public sector and public governance.").

[122] *Id*. at 43-44.

[123] *See* Annex A, Proposed National Instrument 51-107, Disclosure of Climate-Related Matters, available at: https://www.bcsc.bc.ca/-/media/PWS/New-Resources/Securities-Law/Instruments-and-Policies/Policy-5/51107-NI-Proposed-October-18-2021.pdf.

[124] "The CSA note concerns about current climate-related disclosures, including: issuers' climate-related disclosures may not be complete, consistent, and comparable; quantitative information is often limited and not necessarily consistent; issuers may 'cherry pick' by reporting selectively against a particular voluntary standard and/or frameworks; and sustainability reporting can be siloed and is not necessarily integrated into companies' periodic reporting structures." Can. Sec. Adm'rs *Consultation Climate-related Disclosure Update and CSA Notice and Request for Comment*, *Proposed National Instrument 51-107, Disclosure of Climate-Related Matters* 2 (October 18, 2021) (bullet point format removed from the original).

[125] *Id*.

Sustainability Standards Board exists to further this goal.[126] Canada is well on its way to regulatory financial disclosure mandates for businesses traded on capital markets.

V. GOVERNMENT INCENTIVES AND SUBSIDIES

Governments can use carrots in addition to regulatory sticks. A large body of literature in economics finds that government taxes and incentives, adopted to spur the development of state and local economies, fail to do so.[127] In addition to mandates and regulations, national governments promote ESG through both targeted incentive programs and public investments.

We detail the programs of the European Union, the United States, the United Kingdom, Germany, and Canada here. Yet this sampling is merely due to space limitations and the diminishing marginal utility of readers. We could easily add examples from Asia, South America, Africa, and the Middle East to our tally.

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[126] Can. Sec. Adm'rs, *Canadian Securities Administrators statement on proposed climate-related disclosure requirements*, Can. Sec. Adm'rs. (July 5, 2023), available at: https://www.securities-administrators.ca/news/canadian-securities-administrators-statement-on-proposed-climate-related-disclosure-requirements/.

[127] *See, e.g.*, Matthew Mitchell et al., *The Political Economy of Targeted Economic Development Incentives*, 48 REV. REGIONAL STUDIES 1 (2018) (study supported by the libertarian Mercatus Institute); Russell S. Sobel et al., *The Political Economy of State Economic Development Incentives: A Case of Rent Extraction*, ECON. & POLITICS (2022); Andrew Jason Cohen, *The Harm Principle and Corporate Welfare (or Market Libertarianism vs. Promotionism*, 19 GEO. J. L. PUB. POL'Y 787 (2021); Michael J. Hicks & Michael LaFaive, *The Influence of Targeted Economic Development Tax Incentives on County Economic Growth: Evidence from Michigan's MEGA Credits*, 25 ECON. DEV. QUARTERLY 193 (2011); Michael J. Hicks & Michael LaFaive, *MEGA: A Retrospective Assessment* (2005) (study by the free-market Mackinac Center for Public Policy); NATHAN M. JENSEN & EDMUND J. MALESKY, INCENTIVES TO PANDER: HOW POLITICIANS USE CORPORATE WELFARE FOR POLITICAL GAIN (2018). Economists who are not libertarians are also critical of targeted economic incentive programs based upon available evidence; *see e.g.*, TIMOTHY J. BARTIK, MAKING SENSE OF INCENTIVES: TAMING BUSINESS INCENTIVES TO PROMOTE PROSPERITY (2019); William F. Fox & Matthew N. Murray, *Do Economic Effects Justify the Use of Fiscal Incentives?* 71 SOUTHERN ECON. J. 78 (2004).

A. Economic Incentives

The European Union facilities ESG through economic incentives tied to the European Investment Bank, the multilateral lending arm of the European Union that allegedly issued the first green bond in 2007.[128] It did not take long for lawyers to call for increased regulation of this green bond market through international oversight bodies such as a Green Standards Committee[129] or for standardizing government regulation of green bonds according to the Paris Agreement.[130] Nor was it long before governments—from nation states to local municipalities—followed the European Investment Bank's example by issuing green bonds.[131] China, in 2015, through its central bank, became the first nation state to regulate green bonds.[132] Previously, regulatory pluralism consisting of a combination of non-state actors and quasi-public entities collaborated with private companies to develop a complex governing system characterized by regulatory hybridity, i.e., by rules and standards that were neither fully public nor fully private.[133] Today, however, momentum is towards absolute public regulation.[134]

The European Investment Bank loans to the public sector, which includes sovereign states; national agencies, departments, institutions,

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[128] European Investment Bank, *Climate Awareness Bonds*, EIB, available at: https://www.eib.org/en/investor-relations/cab/index.htm.

[129] *See e.g.*, Cristina M. Banahan, *The Bond Villains of Green Investment: Why An Unregulated Securities Market Needs Government to Lay Down the Law*, 43 VT. L. REV. 841 (2019).

[130] Nathan Bishop, *Green Bond Governance and The Paris Agreement*, 27 N.Y.U. Envtl. L.J. 377 (2019).

[131] Stephen Kim Park, *Investors as Regulators: Green Bonds and the Governance Challenges of the Sustainable Finance Revolution*, 54 STAN. J. INT'L L. 1, 15-17 (2018).

[132] *Id*. at 35.

[133] *Id*. at 7, 39-46. Michael P. Vandenbergh & Jonathan A. Gilligan, *Beyond Gridlock*, 40 COLUM. J. ENVTL. L. 217, 220 (2015) (describing different forms of private governance regarding environmental matters and concluding, "These types of public-private activities are an important form of governance, but they all require government action").

[134] European Investment Bank, *EIB Group Climate Bank Roadmap 2021-2025*, EIB, xii, 8, 37, 52, 55, 58, 60, 71, 95, 101-102, 113-114 (regarding aligning the European Investment Bank with the EU Taxonomy regulation); 26-27 (regarding the European Investment Bank's use of mandates to induce climate action and sustainability efforts); 52-53, 98, 102 (regarding portfolio and investment screening); 60, 62, 97 (regarding financial-related disclosures), available at: https://www.eib.org/attachments/thematic/eib_group_climate_bank_roadmap_en.pdf

or ministries; regional or local authorities; and public utilities companies.[135] It calls on national governments to increase their public investments[136] and has tightened the parameters of eligibility for investment to achieve climate-related goals.[137] In November 2020, it issued the Climate Bank Roadmap for building green alliances with member countries, reducing greenhouse gas emissions, aligning developing countries with environmental and sustainability goals, and financing activities that support climate action.[138] The Climate Bank Roadmap ensured that the European Investment Bank supports only projects that conform with the Paris Agreement.[139] Accordingly, the European Investment Bank stopped lending to fossil-fuel energy projects.[140]

In the United States, the federal government has long used tax credits and subsidies to incentivize environmental sustainability. Examples abound; our list is far from exhaustive. Of course, these examples are not all framed as ESG-related incentives, but because they fit squarely within the "E" prong of ESG, they serve ESG-related ends and, we predict, will become targeted ESG initiatives if ESG continues to proliferate within federal agencies. The most recent illustration is the Inflation Reduction Act, which provides numerous grants and loan

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135 European Investment Bank, *Loans for the Public Sector*, EIB, available at: https://www.eib.org/en/products/loans/public-sector/index. (last visited May 10, 2024)
136 European Investment Bank, *Resilience and Renewal in Europe: Investment Report 2022-23,* EIB Investment Report, 2-3, available at: https://www.eib.org/attachments/lucalli/20230024_economic_investment_report_2022_2023_key_findings_en.pdf. (last visited May 10, 2024).
137 Bishop, *supra* note 130, at 385. *See* European Investment Bank Group, *EIB Group Climate Bank Roadmap 2021-2025*, EIB vi-xiv, available at: https://www.eib.org/attachments/thematic/eib_group_climate_bank_roadmap_en.pdf. (last visited May 10, 2024).
138 European Investment Bank Group, *EIB Group Climate Bank Roadmap 2021-2025*, EIB, available at https://www.eib.org/attachments/thematic/eib_group_climate_bank_roadmap_en.pdf.
139 European Investment Bank, *Loans for the Public Sector*, European Investment Bank, available at: https://www.eib.org/en/products/loans/public-sector/index. *See also EIB Climate Action Explained*, EIB, available at: https://www.eib.org/en/about/priorities/climate-action/explained/index.htm. (last visited May 10, 2024).
140 Barnali Choudhury, *Climate Change as Systemic Risk*, 18 BERKELEY BUS. L.J. 52, 85 (2021) (citing an online press release of the European Investment Bank).

guarantees for qualifying energy projects.[141] This Act "infused significant investment into ESG-related initiatives, with a particular focus on clean energy."[142]

The Internal Revenue Service (IRS) recognizes a residential clean energy credit for households investing in "solar, wind, geothermal, fuel cells or battery storage technology."[143] It offers tax credits (e.g., the Energy Efficient Home Improvement Credit or the Residential Clean Energy Property Credit) to those who make qualifying, energy-related improvements to their home,[144] including altering doors and windows and installing certain heat pumps, biomass stoves, and biomass boilers.[145] Other tax credits involve sustainable aviation,[146] alternative fuels,[147] qualifying electric vehicles,[148] previously owned electric and fuel

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141 See *Inflation Reduction Act Guidebook*, THE WHITE HOUSE, https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/ (last visited May 10, 2024).

142 Leah Malone &Emily Holland, *ESG in Mid-2023: Making Sense of the Moment*, Harvard Law School Forum on Corporate Governance (August 31, 2023), available at: https://corpgov.law.harvard.edu/2023/08/31/esg-in-mid-2023-making-sense-of-the-moment/#30b (last visited May 10, 2024).

143 Internal Revenue Service, *Residential Clean Energy Credit*, IRS, available at: https://www.irs.gov/credits-deductions/residential-clean-energy-credit (last visited May 10, 2024).

144 Internal Revenue Service, *Home Energy Credits: Good for the environment and your wallet*, IRS, available at: https://www.irs.gov/newsroom/home-energy-credits-good-for-the-environment-and-your-wallet (last visited May 10, 2024); Internal Revenue Service, *Home Energy Tax Credits*, IRS, available at: https://www.irs.gov/credits-deductions/home-energy-tax-credits (last visited May 10, 2024).

145 Internal Revenue Service, *Energy Efficient Home Improvement Credit*, available at: https://www.irs.gov/credits-deductions/energy-efficient-home-improvement-credit (last visited May 10, 2024).

146 Internal Revenue Service, *Sustainable Aviation Fuel Credit*, IRS, available at: https://www.irs.gov/credits-deductions/businesses/sustainable-aviation-fuel-credit (last visited May 10, 2024).

147 Internal Revenue Service, *Internal Revenue Bulletin: 2022-40*, IRS, available at: https://www.irs.gov/irb/2022-40_IRB (last visited May 10, 2024); Internal Revenue Service, *Fuel Tax Credits*, available at: https://www.irs.gov/businesses/small-businesses-self-employed/fuel-tax-credits (last visited May 10, 2024).

148 Internal Revenue Service, *Taxpayers may qualify for the new Clean Vehicle Tax Credit*, IRS, available at: https://www.irs.gov/newsroom/taxpayers-may-qualify-for-the-new-clean-vehicle-tax-credit (last visited May 10, 2024).

cell vehicles,[149] and other clean vehicles.[150] Solar tax credits have mobilized an entire industry[151] and are claimable by individuals, businesses, and manufacturers[152] for residential solar photovoltaics or energy storage devices.[153] Businesses in the United States may qualify for commercial clean vehicles.[154] Manufacturers of such vehicles,[155] as well as sellers and dealers of such vehicles,[156] may qualify for tax credits.

The other side of an economic incentive is an economic disincentive, including tax penalties for petroleum and crude oil[157] or

[149] Internal Revenue Service, *Taxpayers may qualify for the new Previously Owned Clean Vehicle Credit*, IRS, available at: https://www.irs.gov/newsroom/taxpayers-may-qualify-for-the-new-previously-owned-clean-vehicle-credit (last visited May 10, 2024); Internal Revenue Service, *Used Clean Vehicle Credit*, IRS, available at: https://www.irs.gov/credits-deductions/used-clean-vehicle-credit (last visited May 10, 2024).

[150] Internal Revenue Service, *Credits for New Clean Vehicles Purchased in 2023 or After*, IRS, available at: https://www.irs.gov/credits-deductions/credits-for-new-clean-vehicles-purchased-in-2023-or-after (last visited May 10, 2024).

[151] Lauren Murphy &Lexie Pelchen, *Solar Tax Credit by State in 2023: A Residential Solar Energy Tax Credit Guide*, FORBES (July 3, 2023), available at: https://www.forbes.com/home-improvement/solar/solar-tax-credit-by-state/.

[152] Dep't of Energy, Office of Energy Efficiency & Renewable Energy, Dep't of Energy, available at: https://www.energy.gov/eere/solar/articles/federal-solar-tax-credit-resources (last visited May 10, 2024).

[153] Office of Energy Efficiency & Renewable Energy, *Federal Solar Tax Credit Resources*, Dep't of Energy, available at: https://www.energy.gov/eere/solar/homeowners-guide-federal-tax-credit-solar-photovoltaics (last visited May 10, 2024).

[154] Internal Revenue Service, *Businesses and tax-exempt organizations may qualify for the new Commercial Clean Vehicle Credit*, IRS, available at: https://www.irs.gov/newsroom/businesses-and-tax-exempt-organizations-may-qualify-for-the-new-commercial-clean-vehicle-credit (last visited May 10, 2024); Internal Revenue Service, *Commercial Clean Vehicle Credit*, IRS, available at: https://www.irs.gov/credits-deductions/commercial-clean-vehicle-credit (last visited May 10, 2024).

[155] Internal Revenue Service, *Clean Vehicle Credit Qualified Manufacturer Requirements*, IRS, available at: https://www.irs.gov/credits-deductions/clean-vehicle-credit-qualified-manufacturer-requirements (last visited May 10, 2024).

[156] Internal Revenue Service, *Clean Vehicle Credit Seller or Dealer Requirements*, IRS, available at: https://www.irs.gov/credits-deductions/clean-vehicle-credit-seller-or-dealer-requirements (last visited May 10, 2024).

[157] Internal Revenue Service, *Petroleum Tax – Crude Oil Exports; Reinstatement of Hazardous Substance Superfund Financing Rate*, IRS, available at: https://www.irs.gov/businesses/small-businesses-self-employed/petroleum-tax-crude-oil-exports-reinstatement-of-hazardous-substance-superfund-financing-rate (last visited May 10, 2024).

certain chemical substances.[158] We could go on.

These sorts of tax credits appear in the United Kingdom as well: capital allowances on energy-efficient items,[159] reduced levies and energy bills for sectors entering into a Climate Change Agreement,[160] carbon price supports,[161] reduced duties and special deductions for certain vehicles,[162] government grants for low-emission vehicles,[163] grants for energy-related home improvements,[164] and so forth. Disincentive penalties in the United Kingdom also abound, including climate change levies,[165] landfill taxes,[166] and plastic packaging taxes.[167]

The same holds for Germany, which offers tax credits for solar

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[158] Internal Revenue Service, S*uperfund Chemical Excise Taxes*, IRS, available at: https://www.irs.gov/businesses/small-businesses-self-employed/superfund-chemical-excise-taxes (last visited May 10, 2024).

[159] United Kingdom, *Environmental Taxes, Reliefs, and Schemes for Businesses,* UK, available at: https://www.gov.uk/green-taxes-and-reliefs/capital-allowances-on-energyefficient-items (last visited May 10, 2024).

[160] *See generally*, Dep't for Energy Security & Net Zero, *Climate Change Agreements: consultation on extension to 31 March 2027 & further proposals on any potential future scheme*, Dep't for Energy Security & Net Zero (May 10, 2023), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1142487/cca-consultation-on-extension-to-31-mar-2027-proposals-for-future-scheme.pdf (last visited May 10, 2024).

[161] United Kingdom, *Compensation for the indirect costs of the UK ETS and the CPS mechanism: guidance for applicants*, UK, available at: https://www.gov.uk/government/publications/uk-emissions-trading-scheme-and-carbon-price-support-apply-for-compensation/compensation-for-the-indirect-costs-of-the-uk-ets-and-the-cps-mechanism-guidance-for-applicants (last visited May 10, 2024).

[162] United Kingdom, *Vehicle tax rates*, UK, available athttps://www.gov.uk/vehicle-tax-rate-tables (last visited May 10, 2024).

[163] United Kingdom, *Low-emission vehicles eligible for a plug-in grant*, UK, available at: https://www.gov.uk/plug-in-vehicle-grants (last visited May 10, 2024).

[164] United Kingdom, *Green Deal: energy saving for your home*, UK, available at: https://www.gov.uk/green-deal-energy-saving-measures (last visited May 10, 2024).

[165] United Kingdom, *Environmental Taxes, Relief and Schemes for Businesses,* UK, available at: https://www.gov.uk/green-taxes-and-reliefs/climate-change-levy (last visited May 10, 2024).

[166] United Kingdom, *Landfill Tax*, Subsection to *Environmental Taxes, Reliefs and Schemes for Business*, Gov.uk, available at: https://www.gov.uk/green-taxes-and-reliefs/landfill-tax (last visited Mar. 31, 2024).

[167] United Kingdom, *Plastic Packaging Tax,* available at: https://www.gov.uk/green-taxes-and-reliefs/plastic-packaging-tax (last visited Mar. 31, 2024).

and wind energy,[168] as well as energy-efficient home improvements,[169] and which until recently paid generous subsidies for electronic vehicles.[170] Canada, too, offers green tax credits.[171] In short, governments around the world incentivize activity that aligns with ESG-related goals. Government incentives and subsidies are antithetical to libertarianism, even if they aim to mobilize private activity.

B. Investments

Ordinary tax incentives are not the only means by which the public-private nexus pursues ESG-related goals. Governments also subsidize or invest in infrastructure in which asset management firms have likewise invested.[172] The chief beneficiaries of government infrastructure investments are the asset management firms that amass wealth by investing government money in private equity. Asset managers invest government money (sovereign wealth funds, pension funds, government bonds) in capital markets for returns and then buy shares in public companies focusing on infrastructure (energy, water,

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[168] Petra Sorge, *Germany Wants Tax Credits for Green Energy to Counter US IRA*," BLOOMBERG (Feb. 21, 2023), available at: https://www.bloomberg.com/news/articles/2023-02-21/germany-wants-tax-credits-for-green-investments-to-counter-ira?in_source=embedded-checkout-banner; Assoc. Press, *Germany eyes tax credits for renewable energy companies*, ASSOC. PRESS (Feb. 21, 2023), available at: https://apnews.com/article/germany-europe-business-renewable-energy-dc5a4533085e51967d96179bcfebeb42.

[169] International Energy Agency, *Tax deductions for building renovations*, IEA (July 15, 2021), available at: https://www.iea.org/policies/11633-tax-deductions-for-building-renovations.

[170] Reuters, *Germany to reduce electric car subsidies in 2023*, REUTERS (July 26, 2022), https://www.reuters.com/technology/german-coalition-parties-agree-reduce-e-car-subsidies-handelsblatt-2022-07-26/.

[171] Steve Scherer &Nia Williams, *Canada offers C$35 bln green tax credits but still trails generous US incentives*, REUTERS (March 29, 2023), available at: https://www.reuters.com/business/sustainable-business/canada-offers-c35-bln-green-tax-credits-still-trails-generous-us-incentives-2023-03-29/.

[172] Aleksandar Andonov et al. *Institutional Investors and Infrastructure Investing*, 34 REV. FINANCIAL STUDIES 3881 (2021) ("Over the past decade, there has been a surge in the allocation of institutional investor assets to infrastructure investments. As a result, institutional investors, such as pension funds, sovereign wealth funds, endowments, and insurance companies, are becoming increasingly important alongside governments in the provision of the capital that finances infrastructure projects.").

transportation, telecommunications, food) that receive government subsidies. The entire business model of asset management is based on government or taxpayer money. Brett Christophers explains how this process works:

> What of infrastructure? Asset managers' move into direct investment in infrastructures of various kinds began around the same time as their entry into home ownership, in the 1990s—it, too, in other words, is a relatively recent phenomenon. It encompasses six main infrastructure categories, all integral to quotidian social reproduction . . . . The first category is *energy* infrastructures, which include power generation facilities and fuel storage and distribution networks. The second is *water* and *wastewater* infrastructure, such as water mains and pumping stations. The third is *transportation* infrastructure—roads, tunnels, bridges, parking facilities, train rolling-stock, and so on. The fourth is *telecommunications* infrastructure, including broadcast towers, data centres and fibre networks. The fifth category is *social* infrastructure—principally schools and hospitals. And the sixth and final category is the main infrastructure of *food production*: farmland.[173]

Christophers invokes pathos to emphasize his frustration with this system: "In asset-management society, . . . BlackRock not only owns your home; it also owns the land from which your food originates, the wind farm that generates your electricity, the road you drive on to work, and much else besides."[174]

[173] Christophers, *supra* note 5, at 17.
[174] Christophers, *supra* note 5, at 17.

This trend is bigger than BlackRock and not limited to the United States. Christophers describes this "thoroughly multinational constellation of investment institutions"[175] as follows:

> Housing? Blackstone owns rental properties in Paddock Wood. Student housing? Chicago-headquartered Harrison Street owns digs in Canterbury. Care homes? New York-based Safanad controls homes in Dartford and Gravesend. Electricity generation? The UK's Foresight Group owns solar farms at Abbey Fields and Paddock Wood. Transportation? Legal & General Investment Management owns parking spaces; Sweden's EQT Partners owns rapid-charging stations for electric vehicles; PSP Investments of Canada owns train rolling-stock. Telecommunications? Luxembourg's Cube Infrastructure Managers owns a large ultra-fast fibre broadband network. Last but not least, there is social infrastructure: asset managers whose investment portfolios contain Kent hospitals or schools include Amber Infrastructure, Innisfree and Semperian PPP Investment Partners, all UK companies.[176]

In the United States, investors touted Build Back Better[177] and

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[175] Christophers, *supra* note 5, at 19.

[176] Christophers, *supra* note 5, at 18-19.

[177] Shelley Giberson, *Ways and Means Reconciliation Bill Includes Numerous ESG Tax Proposals,* PRICEWATERHOUSECOOPERS (hereinafter "PwC") (Sept. 2021) available at: https://thesuite.pwc.com/insights/ways-and-means-reconciliation-bill-includes-numerous-esg-tax-proposals; Ron Kinghorn, *Revised 'Build Back Better' Bill Retains Most ESG Tax Proposals, Adds New Credits*, PWC (Nov. 16, 2021), available at: https://thesuite.pwc.com/insights/us-revised-build-back-better-bill-retains-most-esg-tax-proposals-adds-new-credits; *ESG Investing: Momentum Moves Mainstream*, J.P. MORGAN (Jan. 20, 2021), available at: https://www.jpmorgan.com/insights/global-research/esg/build-back-better-esg-investing; Julie Moret, *"Build Back Better": COVID-19 Brings the "S" From ESG Into Focus*, FRANKLIN TEMPLETON (June 24, 2020) available at: https://www.franklintempleton.com.au/articles/blogs/build-back-better-esg-focus; Bonnie M. Wongtrakool, *"Build Back Better" to Boost ESG*, FRANKLIN TEMPLETON (Jan. 15, 2021), available at: https://www.franklintempleton.com.sg/articles/western-asset/build-back-better-to-boost-esg; Lindsay Patrick, *Will Biden's Build Back Better Plan be the ESG Tipping Point?*, RBC CAPITAL MARKETS (Dec. 15, 2020), available at: https://www.rbccm.com/en/insights/story.page?dcr=templatedata/article/insights/data/2020/12/will_bidens_build_back_better_plan_be_the_esg_tipping_point.

the Green New Deal[178] as ESG advancements. The idea of a Green New Deal flourished in Europe long before that.[179] According to one proponent, the Green New Deal "entails re-regulating finance and taxation" and identifying "policies and novel funding mechanisms that will reduce emissions contributing to climate change."[180] Examples of mass governmental infrastructure projects akin to the Green New Deal in the United States include the Connecting Europe Facility ("the EU funding instrument for strategic investment in transport, energy and digital infrastructure"[181]) and the Canada Plan (involving Canadian federal funding for public transport and infrastructure projects).[182]

Private asset management firms support these public infrastructure projects because "they own, and extract income from, things—schools, bridges, wind farms and homes—that are nothing less than foundational to our daily being."[183] In fact, as asset managers increasingly invest public money, they also increasingly exercise control and even ownership over public infrastructure, from real estate to

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[178] *See* H.R. 332, 117th Cong. (2021), which recognizes the duty of the Federal Government to create a Green New Deal, not for the ESG connection, but for the general substance of the Green New Deal; *see also* Mark D. Sloss, *Why the Green New Deal Could be ESG's Moon Landing*, CITYWIRE (Apr. 4, 2019), available at: https://citywire.com/pro-buyer/news/why-the-green-new-deal-could-be-esg-s-moon-landing/a1212961; Daniel Aldana Cohen, *Idea #30: Mitigate Housing and Climate Risk Through a Green New Deal for Housing*, Article in *Environmental, Social and Governance Initiative*, Wharton School (Sept. 11, 2019) available at: https://esg.wharton.upenn.edu/climate-center/mitigate-housing-and-climate-risk-through-a-green-new-deal-for-housing/; *Green New Deals: The Role of Business*, The Sustainability Institute, available at: https://www.sustainability.com/thinking/green-new-deals-the-role-of-business/.

[179] *See* Edward Barbeier, *A Global Green New Deal*, U.N. Environment (2009), available at: https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=670&menu=1515.

[180] The Green New Deal Group, *A Green New Deal* 1 (July 2008), available at: https://neweconomics.org/uploads/files/8f737ea195fe56db2f_xbm6ihwb1.pdf.

[181] Alessi & Guagliano, *supra* note 75, at 21.

[182] *See* Oliver Cuenca, *Canada announces $C 14.9bn of funding for public transport over next eight years*, INT'L RAILWAY J. (February 16, 2021), available at: https://www.railjournal.com/financial/canada-announces-c-14-9bn-of-funding-for-public-transport-transport/; Kamaal Zaidi, *Public-Private Partnerships as a Model for High Speed Rail Development in Canada—Towards Efficient and Alternative Public Infrastructure*, 19 OR. REV. INT'L. L. 131, 142 (2018) ("The current federal new Building Canada Plan [. . .] is a ten-year plan to fund $53 billion to the provinces, territories, and municipalities for public infrastructure projects.")

[183] Christophers, *supra* note 5, at 7.

energy and transportation.[184]

Government investment in ESG is not limited to infrastructure. Critics of ESG warn that it could lead to Chinese-style social credit scores.[185] That is not hyperbole. China has extended its social credit scores to corporations,[186] and its "state-owned enterprises (SOEs) are . . . expected to integrate ESG factors into their fundamental investment analysis."[187] The Chinese government provides a glimpse into what the symbiotic relationship between business and government could look like if ESG continues to proliferate in the West. For purposes of this section, China's Belt and Road Initiative represents the activation of ESG through government.[188]

VI. PARTNERSHIPS WITH PRIVATE ORGANIZATIONS AND NGOS

Governments interact with the private sector and NGOs to advance ESG, further blurring the line between public and private activity. Here, briefly, are illustrative examples. Private companies join the Principles for Responsible Investment (PRI), a United Nations-backed global network promoting ESG investment practices involving

[184] Christophers, *supra* note 5, at 292.

[185] *See, e.g.*, Teny Sahakian, *ESG scores similar to China's social credit system, designed to transform society, think tank director says*, FOX BUS. (May 18, 2022), available at: https://www.foxbusiness.com/economy/esg-scores-similar-china-social-credit-system-designed-to-transform-society-think-tank-director-says; Ryan Bangert, *Pushing back on ESG-fueled social credit score banking before it's too late*, THE WASH. TIMES (Nov. 10, 2022), available at: https://www.washingtontimes.com/news/2022/nov/10/pushing-back-on-esg-fueled-social-credit-score-ban/; Jack McPherrin & Justin Haskins, *ESG Social Credit Scores and the Threats They Pose to Freedom*, THE J. OF THE JAMES MADISON INST. (Fall 2022), available at: https://jamesmadison.org/wp-content/uploads/2022/10/McPherrin-Haskins.pdf; The Heritage Foundation, *What is ESG?*, The Heritage Foundation, available at: https://www.heritage.org/progressivism/heritage-explains/what-esg (last accessed Apr.13, 2024).

[186] Alice de Jonge, *A Relational Governance Perspective on the Politics of China's Social Credit System for Corporations*, 44 HASTINGS INT'L & COMP. L. REV. 111 (2021).

[187] Qinhua Xu and William Chung, *Risk assessment of China's Belt and Road Initiative's sustainable investing: a date development analysis approach*, 6 ECON. AND POLITICAL STUDIES 319, 321 (2018).

[188] *See* Jan-Alexander Posth, *The Belt and Road Initiative and its Potential for an ESG Revolution: a network view*, In: Sustainable Investment Along the Belt and Road: Comparative Perspectives, SWISSNEXT CHINA (July 16, 2019).

pension funds and asset management.[189] Signatories to PRI commit to integrating ESG investment factors and aligning investment strategies with sustainable development goals.[190]

The United Nations Environment Programme Finance Initiative (UNEP FI) represents another partnership between the public sector and the financial sector (banks, institutional investors, and insurance companies) that transcends national boundaries to integrate sustainability principles into financial practices.[191] UNEP FI and its members promote or facilitate "sustainable finance"[192] and "responsible banking"[193] while advancing the UN's sustainability agenda.[194]

Created in 2011, the Sustainability Accounting Standards Board (SASB), a non-profit corporation, focuses on developing industry-specific ESG accounting standards throughout the United States.[195] It became part of the International Financial Reporting Standards Foundation, a private NGO, in August 2022.[196] The International Financial Reporting Standards Foundation formed the International Sustainability Standards Board in November 2021.[197] The International Reporting

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[189] Principles for Responsible Investment, *About the PRI, Principles for Responsible Investment*, PRI, available at: https://www.unpri.org/about-us/about-the-pri (last accessed Apr. 13, 2024)..

[190] *See generally* Principles for Responsible Investment, *A Blueprint for Responsible Investment,* PRI (2017), available at: https://www.unpri.org/download?ac=5330.

[191] United Nations Environment Programme *About Us*, UN Environment Programme Finance Initiative, available at: https://www.unepfi.org/about/about-us/ (last accessed Apr. 21, 2024).

[192] United Nations Environment Programme, *Sustainable Finance*, UN Environment Programme Finance Initiative, available at: https://www.unepfi.org/training/training/sustainable-finance-training-programme/ (last accessed Apr. 21, 2024).

[193] United Nations Environment Programme, *Principles for Responsible Banking*, UN Environment Programme Finance Initiative, available at: https://www.unepfi.org/banking/bankingprinciples/ (last accessed Apr. 21, 2024).

[194] *See generally* United Nations Environment Programme Finance Initiative, Guide to Banking and Sustainability, 2, UNEP Finance Initative, (2016), available at: https://www.unepfi.org/fileadmin/documents/guide_banking_statements.pdf.

[195] Susan N. Gary, *Values and Value: University Endowments, Fiduciary Duties, and ESG Investing*, 42 J.C. & U.L 247, 302-03 (2016); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG*, 90 U. COLO. L. REV. 731, 772-73 (2019).

[196] *About Us*, SASB STANDARDS, available at: https://sasb.org/about/ (last visited Mar. 29, 2024).

[197] *About*, INT'L FIN. REPORTING STANDARDS FOUND., available at: https://www.ifrs.org/groups/international-sustainability-standards-board/ (last visited Mar. 29, 2024).

Standards Foundation promulgated ESG-related financial reporting standards that countries across the globe have adopted as operative law.[198] These private actors precipitated public regulations across nations, continents, and cultures.[199]

The Canadian Coalition for Good Governance describes itself as representing the interests of institutional investors.[200] With around $4.5 trillion of assets under management among its members,[201] including pension funds,[202] it seeks to improve "the regulatory environment to," in its words, "align the interests of boards and management with those of their shareholders, and to promote the efficiency and effectiveness of the Canadian capital markets."[203] Historically, Canada aligned its securities laws with those of the United States,[204] so it was predictable that the Canadian Coalition for Good Governance would comment on and support the proposed SEC regulation regarding ESG disclosures in the United States. "We would encourage the SEC," wrote Marcia Moffat, Chair of the Canadian Coalition for Good Governance, "to take a phased approach to implementation of ESG disclosure supported by periodic reviews to assess the quality of disclosure following the issuance of a rule or further guidance and further supported by additional

198 For a full account of this occurrence, *see* Zehra G. Kavame Eroglu, *Global Adoption of IFRS as an Example of International Financial Law Making*, 53 GEO. WASH. INT'L L. REV. 239 (2021); Zehra G. Kavame Eroglu, *The Political Economy of International Standard Setting in Financial Reporting: How the United States Led the Adoption of IFRS Across the World*, 37 NW. J. INT'L. & BUS. 457 (2017).

199 Cara Beth Musciano, *Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing*, 57 GA. L. REV. 427, 457-463 (2022).

200 *Our Mission and Objectives*, CANADIAN COAL. FOR GOOD GOVERNANCE, https://ccgg.ca/mission-and-objectives/ (last visited Mar. 29, 2024).

201 Press Release: CCGG Stewardship Principles, GLOBENEWSWIRE (October 14, 2022), available at: https://www.globenewswire.com/en/news-release/2020/10/14/2108357/0/en/CCGG-Stewardship-Principles.html.

202 Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs. Activist Wolf Packs*, 14 Ohio St. Bus. L.J OHIO ST. BUS. L.J. 135, 174 (2020); Janis Sarra, *Rose-Colored Glasses, Opaque Financial Reporting, and Investor Blues: Enron as Con and the Vulnerability of Canadian Corporate Law*, 76 ST. JOHN'S L. REV. 715, 761 (2002).

203 *Our Mission and Objectives*, CANADIAN COAL. FOR GOOD GOVERNANCE, https://ccgg.ca/mission-and-objectives/ (last visited Mar. 29, 2024).

204 Janis Sarra, *Class Act: Considering Race and Gender in the Corporate Boardroom*, 79 ST. JOHN'S L. REV. 1121, 1144 (2005).

consultation with investors, until disclosure is mature enough to become auditable."[205]

The Canadian Coalition for Good Governance may be a private organization, but it advocates for increased government regulation while its members invest public money for private returns.[206] As such, it exemplifies the cardinal problem of labeling ESG as privately driven—namely, that ESG depends upon government regulation and funding for its practical realization.

Public-private partnerships[207] represent an ambiguous mix of markets and government. Should they be characterized as government push or market pull? Market actors have long approached governments to seek assistance because government laws and regulations can benefit some at the expense of rivals or consumers, a fundamental element of the public choice theory of regulation.[208] And the partnerships regarding ESG invariably seek government regulation. The Canadian Coalition

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[205] Sec. and Exchange Com., Request for Public Comment by The Canadian Coalition for Good Governance (June, 9, 2021), available at: https://www.sec.gov/comments/climate-disclosure/cll12-8901050-242166.pdf.

[206] *See id.*

[207] Such public-private partnerships are sometimes called PPPs. The United Nations Economic Commission for Europe recently released a ratings system for PPPs tied to sustainability development goals. United Nations Economic and Social Council for Europe, *Public-Private Partnerships and Infrastructure Evaluation and Rating System (PIERS): An Evaluation Methodology for Sustainability Development Goals*, ECE/CECI/2023/4 (Mar. 2023), available at: https://unece.org/sites/default/files/2023-04/ECE_CECI_2023_4_2305092E.pdf. *See* AMANDA CHAO & JOEL FARRIER, PUBLIC-PRIVATE PARTNERSHIPS FOR ENVIRONMENTAL, SOCIAL, AND GOVERNANCE PROJECTS: HOW PRIVATE FUNDING FOR INFRASTRUCTURE CAN PRODUCE MUTUAL BENEFITS FOR COMPANIES AND THE PUBLIC (2022); Veronica Vecchi et al., *Do Public-Private Partnerships Still Have a Future?* 27 Pub. Works Management & Policy (2022). "With the growing prominence of ESG, companies may already be incentivized to participate meaningfully in public-private partnerships." Jayne Piana, *Diffusion of Green Technology: Patents, Licenses, and Incentives*, 52 TEX. ENVTL.L. J. 37, 55 (2022). *See* Ziad Alexandre Hayek, *An ESG Primer for PPP Units*, UNOSD NVR-SDGs (Mar. 2021), available at: https://unosd.un.org/sites/unosd.un.org/files/session_5_mr._ziad_hayek.pdf. One critic of ESG warns: "The partnership between for-profit investment managers seeking fees and non-profit governments seeking credit for little work is a very dangerous one for investors." J.B. HEATON, ESGBS: THE FALSE NARRATIVE OF ENVIRONMENTAL, SOCIAL & GOVERNANCE INVESTING (2023). A simple Google search yields numerous hits tying PPPs and ESGs together or promoting their mutually constructive aims.

[208] George J. Stigler, *"The Economic Theory of Regulation*," *Bell Journal of Economics and Management Science,* 1971, 3-21. BELL J. OF ECON. AND MANAGEMENT SCIENCE, 1971, 3-21.

for Good Governance may be a private organization, but it advocates for increased government regulation while its members invest public money for private returns. "Government acting implicitly and indirectly through asset managers is not state capitalism," Jeff Schwartz correctly submits, "but it poses similar risks,"[209] notably the susceptibility to shareholder voting according to actual or perceived regulatory and political interests. "If large asset managers are voting to please regulators and politicians," Schwartz continues, "then regulators and politicians control these votes. This gives government officials an extraordinary say over the operations of public companies, which threatens the sacred, and somewhat imprecise, line between government and business."[210]

Viewed in this light, public-private partnerships can be interpreted as government pull, regardless of the exact details of the initiation of the agreement. Indeed, some critics suggest that such partnerships and the government-dictated control of corporate disclosures threaten the proper operation of the market economy. This is not merely our opinion. It is the consensus view. "Global regulators, international organizations, and investor coalitions," says one scholar, "are expressing growing concern that markets lack access to material nonfinancial information that is decision-useful."[211] The alternative to markets is a corporate-government nexus that blurs the distinction between private and public actors, especially among asset managers and banks that invest pension funds, municipal bonds, and sovereign wealth funds—all government money.[212]

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[209] Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV.. 393, 400 (2022).
[210] Schwartz, *supra* note 209, at 449.
[211] Ho, Comply or Explain, *supra* note 58, at 349.
[212] *See* Gerard Lyons, *State Capitalism: The Rise of Sovereign Wealth Funds*, 14 L. & BUS. REV. AM. 179 (2008) for commentary on how government-controlled sovereign wealth funds represent state capitalism. *See generally* Paul Rose, *Catalyzing Sustainable Investment,* 51 ENVTL. L. 1221 (2021) (regarding how sovereign states invest pension money, bonds, and sovereign wealth funds).

VII. CONCLUSION

From the origin of the term to the clean energy transition and mandated reporting, governments have driven ESG. Governments *drive* the ESG movement in conjunction with some of the world's wealthiest and most powerful companies, in particular asset management firms and banks, the latter of which, in the United States, enjoy "access to emergency funds from the Federal Reserve," [213] "protection for retail deposits through deposit insurance,"[214] "ready access to funds and the provision of a federal safety net,"[215] and public subsidies.[216]

But, as noted above, in an economy with significant government intervention – as opposed to a laissez-faire economy – government permission may be required for investors to do what they wish with their own money, particularly in a dynamic economy with new investment opportunities emerging not covered by existing regulations. Are any of the regulations we have chronicled arguably only enabling regulations?

The vast majority of rules to date are self-evidently prescriptive and not enabling. Even regulatory efforts to mandate carbon emissions disclosure (as opposed to forcing the reduction of a business's carbon footprint) are primarily prescriptive. Nonprofit organizations have long offered various forms of green business certification, and all businesses are free to report their carbon emissions with third-party certification if desired. Voluntary carbon disclosures by firms would constitute market pull; mandated disclosure constitutes government push.

One of the only regulations arguably merely enabling investors to pursue ESG is the Department of Labor's rules allowing pension plans to invest based on ESG considerations. Yet, even here, voluntary market push is not necessarily evident. ESG investing arguably violates the fiduciary duty of pension managers to members and may represent the desire of progressive pension plan trustees to advance their goals

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[213] Yesha Yadav, *Too-Big-To-Fail Shareholders*, 103 MINN. L. REV. 587, 605 (2018).
[214] *Id.*
[215] *Id.*
[216] Prasad Krishnamurthy, *Regulating Capital*, 4 HARV. BUS. L. REV. 21-25 (2014).

using other people's money.

Even the contention that government efforts merely seek to enact policies preferred by a large majority of Americans runs into serious difficulties. A majority of Americans oppose racial quotas for hiring or for college admissions. Americans also only wish to spend modest sums annually fighting climate change. As Matthew Lau contends, "Much of the ESG charge is led by governments and elite non-governmental organizations like the World Economic Forum."[217]

[217] Mathew Lau, *ESG Is Mainly Top-Down Planning by Elites (ESG: Myths and Realities),* Fraser Institute, (Jan. 20, 2023), available: https://www.fraserinstitute.org/studies/esg-is-mainly-top-down-planning-by-elites-esg-myths-and-realities.