

# **The Trump Administration and ESG**

**March 2025**

# Agenda

---

- Executive orders targeting DEI at federal contractors and the private sector
  - False Claims Act implications
  - Litigation update
- FCPA developments
- Enforcement focus
- SEC developments signaling stance on ESG
- Antitrust developments
- Environmental developments
  - Paris Agreement withdrawal
  - EPA priorities
- What to do now

## Presenters

---



**Meagan Bellshaw**  
Antitrust



**Rebecca Grapsas**  
Sustainability & ESG  
Governance & Securities



**Adé Heyliger**  
Governance & Securities



**Matthew Morton**  
Regulatory Transactions -  
Environmental



**Greg Silbert**  
Complex Commercial Litigation  
Appeals & Strategic Counseling



**Robert Stern**  
White Collar

## Executive Orders Targeting DEI

- Unprecedented pressure on corporate diversity, equity and inclusion (DEI) programs since January 2025 executive orders and federal agency directives focusing on illegal DEI preferences, mandates, policies, programs, and activities at federal contractors and the private sector more generally
  - Executive orders subject to court challenge
- **Ending Illegal Discrimination and Restoring Merit-based Opportunity (Executive Order 14173 of January 21, 2025)**
  - **All agencies** to enforce “longstanding civil-rights laws and to **combat illegal private-sector DEI preferences**, mandates, policies, programs, and activities” and “with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work”
  - “The head of **each agency shall include in every contract or grant award**: (A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is **material to the government’s payment decisions for purposes of section 3729(b)(4)** of title 31, United States Code; and (B) A term requiring such counterparty or recipient to **certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws**”
  - **Attorney General to issue report** by late May containing recommendations for **enforcing Federal civil-rights laws** and taking other appropriate measures to encourage the private sector **to end illegal discrimination and preferences, including DEI**; each agency to **identify up to 9 potential civil compliance investigations** of publicly traded corporations, large non-profits, foundations with assets of \$500 million or more, State and local bar and medical associations, and institutions of higher education with endowments over \$1 billion

## Executive Orders Targeting DEI

---

- **Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (Executive Order 14168 of January 20, 2025)**
  - Focuses on biological distinction between men and women, rejection of “gender ideology” (concept of self-assessed gender identity) and related enforcement of sex-based rights, protections, opportunities and accommodations to protect men and women as distinct sexes (including privacy in intimate spaces); federal funds not to be used to promote gender ideology
  - Agencies to prioritize investigations and litigation to enforce rights and freedoms, including “freedom to express the binary nature of sex” and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964”
- **Ending Radical and Wasteful Government DEI Programs and Preferencing (Executive Order 14151 of January 20, 2025)**
  - Directs termination of DEI programs, policies and activities in the federal government; will impact government contractors providing services to advance DEI or environmental justice
- Several other orders focused on DEI including:
  - Reforming The Federal Hiring Process And Restoring Merit To Government Service
  - Keeping Americans Safe in Aviation
  - Rescission of a large number of DEI-related executive orders including Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity)

## DEI Executive Orders – False Claims Act Implications

---

- **The federal False Claims Act (FCA) allows the government to act against any party that knowingly submits a false claim seeking a government payment**
  - FCA suits can be brought directly by the government or by private parties, also called “whistleblowers,” on behalf of the government
  - If a case is successful, a whistleblower can receive a significant financial reward, up to 30% of the total amount recovered
  - In fiscal year 2024 alone, the federal government reported more than \$2.9 billion in FCA settlements and judgments
- **Many FCA cases concern claims for payments that are alleged to be false because the party allegedly misrepresented its compliance with rules imposed by statute, regulation, or contract**
  - Liability under the FCA requires proof that a company knowingly or recklessly submitted a false claim or statement that was material to the government’s decision to pay a claim, which caused the government to pay money
  - These “false-certification” cases can also raise disputes about whether any noncompliance by the defendant with the applicable legal requirement was ultimately “material” to the government’s payment decision
- **EO 14173 expressly contemplates using the FCA as an enforcement tool**
  - EO 14173 explicitly requires companies to certify that compliance with federal antidiscrimination laws is material to the government’s payment decisions
  - By agreeing, private companies who contract with the government are required to admit to the FCA’s materiality requirement

## DEI Executive Orders – Litigation

---

- **On 21 February 2025, the United States District Court for the District of Maryland issued a nationwide preliminary injunction enjoining multiple directives in the DEI EOs, including:**
  - (1) canceling or freezing any awards, contracts, or obligations for government contractors engaging in illegal DEI
  - (2) requiring contractors to make certifications with respect to illegal DEI
  - (3) bringing False Claims Act enforcement actions against federal contractors based on such certifications
- **On 14 March 2025, the Fourth Circuit stayed the injunction, allowing the orders to be enforced while a lawsuit challenging them plays out**
- **Two of the judges anticipated that the orders could eventually raise constitutional concerns, but said that the District Court’s nationwide block went too far**
  - Judge Abelson (district court), who issued the preliminary injunction, found that the orders likely violated free-speech rights and are unconstitutionally vague since they don’t have a specific definition of DEI
  - Judge Harris (4<sup>th</sup> Circuit) partially agreed with Judge Abelson but still voted to stay the injunction, saying, “My vote to grant the stay comes with a caveat. What the orders say on their face and how they are enforced are two different things. Agency enforcement actions that go beyond the orders’ narrow scope may well raise serious First Amendment and due process concerns, for the reasons cogently explained by the district court. This case, however, does not directly challenge any such action, and I therefore concur”
  - Judge Diaz (4<sup>th</sup> Circuit) shared the same sentiment, writing, “I too reserve judgment on how the administration enforces these executive orders, which may well implicate cognizable First and Fifth Amendment concerns”

## FCPA Developments

---

- **Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security (Executive Order 14209 of February 10, 2025)**
  - For a period of 180 days following the EO, the AG is directed to:
    - Review guidelines and policies governing investigations and enforcement actions under the FCPA
    - Cease initiation of any new FCPA investigations or enforcement actions, unless the AG determines that an individual exception should be made
    - Review in detail all existing FCPA investigations or enforcement actions and take appropriate action with respect to such matters to restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives
    - Issue updated guidelines or policies, as appropriate, to adequately promote the President's Article II authority to conduct foreign affairs and prioritize American interests, American economic competitiveness with respect to other nations, and the efficient use of Federal law enforcement resources
  - FCPA and anti-bribery laws at the State level and internationally remain in place, as do corporate compliance programs
    - However, note recent dismissal of bribery charges against a high-profile public official
- AG Pam Bondi memo of February 5, 2025 directs the Criminal Division's FCPA unit to prioritize investigations related to foreign bribery that facilitates the criminal operations of cartels and Transnational Criminal Organizations, and shift focus away from investigations without such a connection



## Enforcement Focus – SEC

---

- Regulatory environment in flux with withdrawal of the US from the Paris Agreement and new SEC and DOJ leadership who are not expected to prioritize enforcement actions relating to environmental topics
  - SEC under former Chair Gensler brought charges against advisory firms for failing to adhere to investment criteria for ESG-marketed funds, as well as against companies for misleading ESG-related disclosures
  - “Greenwashing” suits continue to be brought by private consumers or environmentally-focused NGOs alleging that these representations are misleading
- Current SEC may scrutinize disclosures in line with Trump Administration priorities such as those relating to DEI that are commonly included in human capital management disclosure in annual reports on Form 10-K, and other ESG-related disclosures
- Enforcement overall expected to decline
  - Significantly less use of Administrative Law Judges in light of Supreme Court decision in *SEC v. Jarkesy*
  - Revocation of delegated authority to the Enforcement Director
  - SEC Staff departures

## Enforcement Focus – DOJ

---

- DOJ is focused on implementing the Trump Administration’s DEI-related priorities including targeting DEI programs at federal contractors, other companies and nonprofits, and participation in athletic events
  - On her first day in office in February, AG Pam Bondi released a flurry of internal memos including “Ending Illegal DEI and DEIA Discrimination and Preferences” that focuses on the private sector and educational institutions receiving federal funds, and “Eliminating Internal Discriminating Practices” relating to DEI within DOJ, each calling for reports recommending actions to be taken
  - Letters have already been issued to various groups including the American Bar Association, educational institutions and State Governors
  - DOJ is a member of the Joint Task Force to Combat Anti-Semitism, along with Department of Health and Human Services, Department of Education and US General Services Administration
- Other agencies following suit including FCC sending letters to various companies relating to promotion of DEI and allegedly discriminatory practices, and EEOC sending letters to 20 large law firms requesting information about DEI-related employment practices (after Executive Orders issued during March targeting large law firms)
  - Letters being posted to X accounts of agency leaders

# SEC Developments Signaling Stance on ESG

- Acting Chair Mark Uyeda issued a statement indicating that the SEC would be pausing its legal defense of the Climate Rules
- Statements send clear indication that the Commission in its current composition, does not support the Climate Rules
- Climate rules would require public companies to disclose copious information re. climate-related risks and impacts, including GHG

- Staff issued guidance on how institutional shareholders should engage with company boards, and addresses certain “pressure” tactics that may disqualify such shareholders’ use of the short-form Schedule 13G
- C&DIs are consistent with Acting SEC Chair Uyeda’s previously expressed 2022 views, where he questioned whether a Schedule 13G should be available to an asset manager that “(1) develops ESG policies, (2) meets with companies to discuss how they are not following such policies, and (3) then votes against directors because the company’s ESG practices do not match the asset manager’s policies”



- SLB 14M revises guidance on the exclusion of shareholder proposals submitted under “economic relevance” and “ordinary business” grounds
- Most notably, SLB 14M rescinds prior Staff guidance that had resulted in an increase in the number and scope of shareholder ESG-related shareholder proposals
- SLB 14M reinstates framework under which proponent must establish a nexus between the policy issue raised by the proposal and a particular company’s business

- Loss of institutional knowledge
- Slower/ lengthier Enforcement proceedings (along with recently-announced revocation of delegated authority to the Enforcement Director)
- Delays in SEC Staff reviews (and perhaps fewer and/ or less exhaustive reviews)

## Antitrust Developments: Why is Antitrust Relevant to ESG?

---

- Standalone unilateral ESG initiatives are not likely to implicate the antitrust laws
- ESG is an area where there can be real benefits to standard setting and/or collaboration. When competitors are involved, antitrust risk may be raised
- ***Standard-setting and/or collaborations with competitors, regardless of intention, will create antitrust risk for participants***
- ESG initiatives have been top of mind for antitrust regulators globally
- In the US, ESG initiatives have also faced scrutiny by members of Congress and State Attorneys General and more recently the FTC

## Antitrust Developments: Federal Antitrust Scrutiny

---

- Congress has led recent federal antitrust scrutiny of ESG alliances
  - In December 2024, a House Judiciary Committee report alleged certain financial institutions formed a “climate cartel” to pressure ExxonMobil board members to commit to net zero climate initiatives
  - The Committee sent demands for information from 61 asset managers regarding their involvement in the Net Zero Asset Managers initiative, which the Committee referred to as an “ESG cartel”
- Newly-appointed FTC Chair, Andrew Ferguson, has continued scrutiny of ESG activity, particularly DEI initiatives
  - Prior to his appointment, Chair Ferguson identified investigating and prosecuting collusion on DEI and ESG as areas of priority for the FTC
    - In November 2024, then-Commissioner Ferguson tweeted that “[c]oncerted refusal to deal can violate the antitrust laws. We’ve seen similar things with ESG and DEI coordination. . . Antitrust enforcers should take this seriously.”
  - This month, Chair Ferguson announced the formation of the Joint Labor Task Force that, among other things, “will scrutinize . . . unlawful coordination on DEI employment metrics”

## Antitrust Developments: State AGs Leading the Charge

---

- In November 2024, a group of eleven State Attorneys General sued BlackRock Inc., Vanguard Group Inc., and State Street Corp. for alleged antitrust violations related to their participation in Climate Action 100+ and the Net Zero Asset Managers initiative
  - The complaint alleged Defendants shared information concerning their coal output goals and collectively applied pressure to reduce coal production via engagement with company management and proxy voting
- BlackRock and State Street's pre-complaint withdrawal from Climate Action 100+ was not enough to prevent a lawsuit
  - The States argued withdrawal did not remove "the ongoing and future threat of Defendants' coordinated anticompetitive conduct or absolve Defendants of their legal liability for past violations"

## Antitrust Developments: ESG Antitrust Best Practices

---

**You should approach any ESG activities that involve competitors with the same caution that you would consider for any other activity that involves competitor(s)**

- Exercise particular caution with the following type of ESG activities:
  - Agreements with competitors (direct or indirect)
  - Information exchanges with competitors
  - Trade association activities
  - Standard setting activities



## Trump Administration Actions on Environmental and Climate Regulation

---

- The Trump Administration has taken rapid and sweeping actions aimed at rolling back environmental and climate regulation, funding and programs
  - Withdrawal of the U.S. from the Paris Climate Agreement
  - SEC Climate Disclosure Rule
  - Announcing its intent to reconsider and reverse major environmental regulations curbing pollution and GHG emissions
    - 2009 Endangerment Finding and regulations and actions that rely on that finding
    - Power plant regulations (Clean Power Plan 2.0)
    - Mercury and Air Toxics Standards
    - Light-duty, medium duty and heavy duty vehicle regulations intended to spur electric vehicle production
    - Social Cost of Carbon
    - “Good Neighbor Rule” intended to regulate downwind air pollution
  - Cancelling \$20 billion in congressionally approved grant funding for climate change projects
  - Dissolving the environmental justice and civil rights office at EPA
  - Additional DOGE-driven staff and funding cuts at EPA



## Trump Administration Actions on Environmental and Climate Regulation – What Comes Next?

---

- Virtually all Trump Administration environmental and climate actions are likely to be challenged in court
- Sweeping nature of EPA actions, and resulting litigation could drive substantial regulatory uncertainty for businesses and industry, at least in the short term
- Remember that, in theory, Executive Branch power is limited
  - Executive Branch can direct EPA to revoke or amend regulations, issue new or revoke past executive orders and determine federal funding for environmental matters, but it cannot unilaterally change federal law – that is Congress' job
  - EPA also can be sued for failing to act where it is statutorily required to do so
- We expect certain states, foreign jurisdictions and private parties will continue to focus on environmental and climate regulatory initiatives
  - California Climate Disclosure Rules set to take effect in 2026
  - New York, New Jersey, Colorado and Illinois have introduced similar disclosure bills
  - EU Corporate Sustainability Reporting Directive (CSRD), requiring extensive sustainability-related disclosures

## Trump Administration Actions on Environmental and Climate Regulation – Further Considerations

---

- State level actions to combat climate change, such as GHG reduction pledges and renewable energy mandates will continue unabated
- Citizen Suits – courthouses remain open and NGOs know how to find them
  - A weakened EPA is likely to lead to an increase in private plaintiff environmental litigation
  - Watch environmental-focused NGO funding, which reached record levels during the first Trump Administration
- Bad Publicity Stings and News Travels Fast – the “Newspaper” or “Front Page” test should remain an important reality check for any business deemphasizing environmental, health and safety activities
- Do not forget the ESG pledges and promises made to your constituencies
  - Investor interest in the ability of companies to manage ESG and sustainability considerations likely will remain prevalent
- SEC reporting obligations with respect to traditional environmental matters remain in effect
- Business case for continued focus on sustainability remains strong

## What To Do Now

---

- Stay abreast of developments; review information sources
- Review company practices and policies including around DEI and environmental topics, and corporate compliance program more generally
- Assess the state and accuracy of current ESG disclosures, and related risks
  - Take stock of what is being disclosed publicly, whether in SEC filings, sustainability reports, the company's website or elsewhere, and ensure information is consistent across various disclosures
  - Understand how the company intends to meet any goals -- don't overpromise
  - Review peer company disclosures and changes to practices
- Ensure risk factors, forward-looking statements and other disclaimers are current and protective
- Provide context for ESG-related claims and goals and where possible, disclose key definitions, standards, metrics, or certifications as support
- Review internal controls and disclosure controls and procedures
- Keep senior management and the board updated as appropriate