Action–reaction: US financial regulation meets ESG considerations

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Abstract

In this paper recent legislative trends in the United States in response to environmental, social and governance (ESG) measures adopted by financial institutions are discussed. The paper explores new sources of potential compliance risk associated with states enacting and enforcing so-called anti-ESG laws, which are designed to protect firms such as fossil fuel companies and gun manufacturers from the expected detrimental impact of socially responsible banking and investment policies. It refers to existing anti-discrimination compliance paradigms to provide insights regarding how financial institutions may minimise the compliance risk associated with these anti-ESG measures.

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INTRODUCTION

In an open letter dated January 2020 to chief executive officers (CEOs), BlackRock chairman and CEO Larry Fink said his asset management firm would take climate risk into account when making investment decisions. 'Actions that damage society will catch up with a company and destroy shareholder value', Fink wrote.[1] His letter was part of a broader firm announcement regarding BlackRock's focus on sustainable investing, including environmental, social and governance (ESG) considerations.[2]

In one sense, the BlackRock announcement was just another data point in a documented trendline of investment firms prioritising ESG in portfolio management over the course of more than a decade.[3] Still, as the world's largest asset manager, BlackRock's public statements elevated ESG to a new level of prominence in corporate and government discourse.[4] US lawmakers at the state government level in particular took note, and have responded by introducing legislation in a number of states aimed at protecting local industries from unfavourable treatment by investment companies and other financial institutions that prioritise ESG considerations.

These new corporate anti-discrimination laws designate certain classes of businesses, such as fossil fuel and firearms companies, as protected from boycotts or other unfavourable treatment, including by financial institutions. This concept of establishing protected classes for corporations echoes the USA's long-established protections for classes of individuals under civil rights laws governing accommodations, employment, housing, lending and other circumstances. However, while civil rights protections were unquestionably justified to prevent individuals from being discriminated against based on inherent characteristics such as race or sex, emerging anti-ESG laws present significant risks to financial institutions by limiting their discretion to make critical business decisions and driving conflicting compliance obligations. When governments create protected classes of industries or corporations, financial institutions may face difficult decisions between complying with, on the one hand, safety and soundness, reputational, or fiduciary obligations *restricting* interactions with a given commercial counterparty, and, on the other hand, a legal requirement that they may not refuse to invest in, or transact with, the counterparty because it belongs to a protected industry.

This paper charts the expansion of the concept of creating protected classes in the USA to the fossil fuel and firearms industries in response to the rise of ESG advocates' efforts to punish or shrink those companies for policy reasons. It also references examples of past government actions aimed at furthering social objectives to show how prior efforts to engineer business relationships may have contributed to anti-ESG sentiment, and also have had unintended negative consequences on the financial services industry. Ultimately, the best outcome for financial institutions is considered not to be a system in which ESG considerations are either required or prohibited, but rather one where governments do not unnecessarily restrict companies' discretion in business decisions — recognising that this discretion may, or may not, be used to promote ESG. Finally, as anti-ESG legislation shows little sign of slowing its momentum in the USA, practical steps are also recommended that financial institutions can take to ensure they are meeting the expectations of federal and state regulators, while also upholding their fiduciary duties and satisfying investor requirements.

THE CONCEPT OF 'PROTECTED CLASSES'

Federal and state civil rights and anti-discrimination laws in the USA enumerate various personal characteristics that may not form the basis for discrimination in employment decisions, public accommodations, housing, extensions of credit and a number of other circumstances. Groups of individuals who share these characteristics are often referred to as 'protected classes'.[5] The first protected classes were identified in the Civil Rights Act of 1866, enacted following the Civil War to protect the rights and immunities of freed slaves.[6] In the more than 150 years since, federal and state governments have continued to designate protected classes based on, among other characteristics, race,[7] national origin,[8] religion,[9] sex,[10] disability,[11] veteran status,[12] receipt of public assistance funds[13] and sexual orientation.[14]

The impetus for establishing and maintaining protected classes largely has been the willingness of society to determine that, regardless of a person's personal or business preferences, discrimination against *individuals* on certain enumerated (often demographic) bases is simply impermissible. The general freedom to contract is overridden by a societal need for fairness or non-discrimination. While the protections granted under some anti-discrimination laws may be applied to corporations,[15] courts still typically look to the protected class identity of the corporation's owner(s) to impute protected class status to the business.[16] In other words, US anti-discrimination laws in the past have not contemplated protected classes of businesses based solely on the nature of their business activities, such as selling certain products or offering particular services.

ANTI-ESG LAWS AND 'PROTECTED CLASSES' OF CORPORATIONS

In the past two years, legislatures across the USA have introduced bills that effectively create new protected class designations to shield certain industries from financial harm resulting from ESG-driven business decisions. Thus far, these legislative efforts have focused on insulating two main categories of businesses: (i) fossil fuel companies and (ii) firearm and ammunition manufacturers, distributors and sellers. The following states have enacted laws that would deny state contracting rights and other privileges to companies that it has identified as boycotting or discriminating against these industries:

- *Texas*. In June 2021, Texas led the way in enacting legislation limiting the state's ability to enter into contracts with entities that discriminate against the firearm and ammunition industries,[17] or that boycott fossil fuel-based energy companies.[18] The Texas energy boycott law also restricts state retirement funds' ability to invest in, or remain invested in, companies deemed to be engaged in a boycott. The term 'boycott' is broadly defined to include not only terminating relationships or refusing to deal with fossil fuel companies, but also taking actions that would 'limit' commercial relations with these companies.[19] The Texas law does not, however, require private sources of capital to follow the same rules.
- *Oklahoma*. In May 2021, Oklahoma's legislature issued a concurrent resolution expressing its commitment to ensuring the state would not be able to contract with companies engaged in boycotting the oil and gas industry.[20] This sentiment gained legal force in May 2022, when the state passed the Energy Discrimination Elimination Act, which formally prohibits Oklahoma from investing retirement funds in, or entering into contracts with, financial companies that boycott or otherwise limit relations with fossil fuel companies that do not 'commit or pledge to meet environmental standards beyond applicable federal and state law'.[21]

- *West Virginia*. In March 2022, West Virginia's legislature passed a law similarly targeting financial institution boycotts of fossil fuel companies.[22] Rather than prohibiting all contracts with financial institutions determined to be engaged in such boycotts, the West Virginia statute instead authorises the state treasurer to decide whether to disqualify an institution placed on the state's 'restricted financial institutions list' from bidding for state contracts, or to refuse to enter into a banking contract with the institution.[23] The West Virginia state senate has also introduced a parallel bill targeting boycotts of firearm companies, though this proposed legislation has not yet been passed.[24]
- *Kentucky*. In April 2022, Kentucky enacted its own anti-ESG law to protect the interests of fossil fuel companies. Like Texas and Oklahoma, Kentucky's law restricts the state from entering into contracts with companies that boycott fossil fuel companies, and imposes divestment requirements on the state with regard to financial companies engaged in such boycotts.[25]
- *Tennessee*. In May 2022, Tennessee enacted its own narrower version of an anti-boycott statute that prohibits the state treasurer from contracting for cash management banking services with a state depository that 'prohibits financing to companies in the fossil fuel industry'.[26] In Tennessee's case, the protected class of businesses covers entities that earn at least 50 per cent of their annual revenue from natural gas, oil, and other hydrocarbon products used to generate electricity.[27]

Most of these statutes contain broadly worded exceptions that would appear, on their face, to still allow financial institutions at least some discretion to make decisions regarding business relationships with counterparties in the fossil fuel or firearm industries. For example, the Texas statute would not penalise financial institutions that decline to transact with firearm companies based on, among other things, a legal or regulatory directive, or 'for any traditional business reason that is specific to the [customer] and not based solely on [a company's] status as a firearm entity or firearm trade association'.[28] Similarly, nearly all of the state energy boycott statutes exclude from the term 'boycott' decisions made for an ordinary or reasonable business purpose, such as 'mitigating risk to a financial institution', 'promoting the financial success or stability of a financial institution', or 'limiting liability of a financial institution'.[29]

While these exceptions would appear to provide a safe harbour for decisions made by financial institutions not to transact with, or invest in, certain entities based on concentration risk, fiduciary duties, or even profitability concerns, at least one state — West Virginia — has nevertheless signalled its intent to aggressively enforce its new legal authority. On 28th July, 2022, state treasurer Riley Moore added five of the world's largest financial institutions, including BlackRock, to West Virginia's list of restricted financial institutions based on their alleged boycotts of fossil fuel companies.[30] Moore's announcement came just over a month after his office initially notified these institutions, along with a sixth bank, that they were at risk of being placed on West Virginia's restricted institutions list.[31] Moore noted that the sixth bank that had initially been considered by the state for restricted status was ultimately excluded from the list because it 'demonstrated to the Treasurer that it has eliminated policies against financing coal mining, coal power and pipeline construction activities from its Environmental and Social Risk Policy'.[32] Speaking to a conservative news website following his announcement, Moore predicted more states would soon follow suit: 'Texas will release their list in the near future, which will be followed by Kentucky, Oklahoma, and Tennessee. . . .

This is how we win. This is how we defeat ESG'.[33]

West Virginia's salvo may well be just the beginning. The trend of states proposing, enacting and actively enforcing new protected classes for carbon energy and firearms companies appears to be gaining momentum. In the past two years, 11 states introduced bills similar to those enacted in Texas, Oklahoma, West Virginia, Kentucky and Tennessee.[34] An additional three states have enacted laws requiring studies of the impacts of boycotts and/or prohibiting state investment boards and agencies from taking ESG into account in their investment strategies.[35] And, at the federal level, a bill was introduced this year that would require contractors to certify they do not 'discriminate [. . .] against a firearm entity or firearm trade association'.[36] The anti-ESG movement, driven by state lawmakers' desire to protect corporate constituents from the impacts of sustainable investing, shows little promise of slowing as the 2022 midterm election season approaches.

PRIOR AND EMERGING GOVERNMENT INTERVENTIONS

Anti-ESG efforts across the USA to create new corporate protected class designations may be viewed, in part, as the logical, if unintended, consequences of federal efforts during recent Democratic presidential administrations to use the federal government's broad supervisory authority over financial institutions to place banks, credit unions and savings associations at the heart of controversial social objectives, such as curtailing the manufacture and distribution of firearms and ammunition, limiting the availability of high-cost credit such as payday loans and combating climate change. These federal initiatives, though widely popular with the Democratic voters who elected Presidents Obama and Biden, have angered the Republicans, who dominate state legislatures, for their perceived overreach and interference with traditional free market principles.

For example, in 2013, the Obama Administration began an initiative, widely known as 'Operation Choke Point', to put pressure on banks, credit unions and savings associations that did business with firearm dealers, payday lenders and other 'high risk' businesses. Pursuant to its authority under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to combat mail or wire fraud 'affecting a federally insured financial institution',[37] the Justice Department issued subpoenas to banks and payment processors ostensibly to 'combat fraud and other unlawful practices in the payment system'.[38] However, internal agency documents revealed that one of the primary targets of the initiative was the short-term lending industry, including payday loans, vehicle title loans and other forms of controversial, high-cost instalment lending.[39] In response to Justice Department subpoenas, many banks terminated their relationships with these companies.

Around the same time, the Federal Deposit Insurance Corporation (FDIC) released guidance to FDIC-supervised depository institutions regarding elevated risks associated with their relationships with third-party payment processors.[40] The agency identified various businesses served by third-party payment processors that posed 'elevated [. . .] legal, reputational, and compliance risks' to depository institutions including, but not limited to, 'credit repair companies, debt consolidation and forgiveness programmes, online gambling related operations, government grant or will-writing kits, payday or subprime loans, pornography, online tobacco or firearms sales, pharmaceutical sales, sweepstakes, and magazine subscriptions'.[41] While maintaining banking relationships with some of these businesses may, in fact, pose elevated legal, reputational and compliance risk for depository institutions, the FDIC never provided an explicit justification for treating legitimate activities such as firearms sales with the same level of scrutiny as activities such as online gambling related operations or pornography.

The predictable consequence of the FDIC's third-party payment processor guidance was that banks began to terminate relationships with payment processors engaged in offering services to firearms dealers and other legitimate businesses deemed 'high risk' by the FDIC under the guise of prudent risk management. This 'de-risking' infuriated Republican lawmakers and their constituents.[42] In response to banks 'de-risking' activities, local media began to increasingly feature news stories about firearms dealers abruptly having their bank accounts frozen or terminated.[43] Even more alarming to these lawmakers was the FDIC's apparent coordination with the Justice Department in Operation Choke Point, leading to an erosion of faith in the independence of the FDIC on the part of Republicans and even some moderate Democratic lawmakers.[44] Former FDIC Chairman William Isaac, for example, who served on the FDIC Board under the Carter Administration until he was appointed Chairman by President Ronald Reagan, accused the agency of acting in bad faith.[45]

In response to Operation Choke Point, US Representative Blaine Luetkemeyer, a Republican from Missouri, introduced a bill that would have limited law enforcement's ability to restrict access to the banking system.[46] However, that bill never became law. The US House of Representatives Committee on Oversight and Government Reform also issued a highly critical staff report concluding that the Justice Department and FDIC had grossly abused their respective authorities as part of Operation Choke Point.[47] Partly in response to the political backlash from Operation Choke Point, the FDIC issued revised guidance in 2015, strongly encouraging supervised institutions to

> take a risk-based approach in assessing individual customer relationships, rather than declining to provide banking services to enter categories of customers without regard to the risks presented by an individual customer or the financial institution's ability to manage the risk.[48]

The letter, according to the *Washington Times*, 'effectively end[ed] Operation Choke Point'.[49]

During the Trump Administration, the federal government took steps to prevent similar actions like Operation Choke Point including the FDIC, then under Republican control, issuing a statement to Congress promising 'additional training' for FDIC examiners.[50] The Office of the Comptroller of the Currency, the federal agency responsible for regulating national banks and federal savings associations, also adopted a final rule requiring its supervised institutions to provide 'fair access' to financial services, effectively prohibiting the kind of industry-wide or blanket bans on access to financial services sought by federal authorities under the Obama Administration.[51] However, that rule has yet to come into effect because its publication in the 'Federal Register', the final step typically necessary for a federal agency to adopt a rule with the force and effect of law, was delayed to allow for confirmation of a new Comptroller under the Biden Administration.[52] There is no sign that the Biden Administration will finalise the rule.

Although the Biden Administration has not engaged in federal action as sweeping as Operation Choke Point, it has drawn considerable criticism from Republicans for its growing support for including climate change as an economic risk factor to consider as part of bank supervision. On 3rd November, 2021, the Federal Reserve Board issued a statement in support of the Glasgow Declaration by the Network of Central Banks and Supervisors for Greening the Financial System (NGFS).[53] The Board noted that 'climate change poses significant challenges for the global economy and financial system, with implications for the structure of economic activity, the safety and soundness of financial institutions and stability of the financial sector more broadly.'[54] The agency also noted its willingness to work within its existing mandates and authorities to address the implications of climate change 'particularly the regulation and supervision of financial institutions and the stability of the broader financial system'.[55]

Since then, the Board and its constituent Federal Reserve Banks have issued a number of reports and research items discussing the implications for climate change on the broader macroeconomy and discussing possible approaches to macroprudential supervision of large banks and financial market participants that incorporates climate change as an explicit factor within the existing supervision framework.[56] For example, Federal Reserve Governor Lael Brainard drew considerable attention for a speech she delivered at the Federal Reserve Bank of Boston in 2021 where she discussed using climate scenario analysis as a potential key analytical tool for measuring the potential implications of climate-related risks for financial institutions and the financial system.[57] Governor Brainard noted that the Federal Reserve has already observed 'growing costs associated with the increasing frequency and severity of climate-related events' with growing implications for financial institutions and insurance companies.[58]

Biden's nomination of Sarah Bloom Raskin to be Federal Reserve Vice-Chair for Supervision was shot down over her aggressively verbalised views on using bank regulatory powers to affect bank behaviour with respect to financing fossil fuels. In 2020, she wrote a *New York Times* op-ed, 'Why Is the Fed Spending So Much Money on a Dying Industry?', which sought to discourage the Federal Reserve from using its special pandemic authorities to assist fossil fuel companies. While this position was popular with many Democrats, it raised too many concerns with representatives of energy-producing states for her to be confirmed.[59] In fact, the decisive blow against Ms Raskin's nomination came from Mr Biden's own party when Democratic Senator Joe Manchin III from West Virginia announced his opposition to her nomination because she had failed to satisfactorily address his concerns about the continuing importance of financing 'an all-of-the-above energy policy' that would include a continuing role for fossil fuels in US energy policy.[60]

Several industry experts expect the Federal Reserve to be in a position to begin running formal 'scenario analysis and release broad findings to the public in 2023'.[61] Such findings could put significant pressure — both from the public and through quiet bank supervision — on US-based financial institutions to review their existing portfolios for climate change risks and to decrease concentrations in markets such as the oil and gas industry, which could be heavily affected by policy actions to reduce climate change. In fact, many of the largest, most interconnected financial institutions have already pledged to support the transition to net zero financing.[62] Thus, it should be no surprise that some states that produce fossil fuels are attempting to shield industries that are susceptible to reduced access to capital if the Federal Reserve begins to consider climate change as an explicit negative factor in its bank supervision framework and, by extension, if banks react to that supervision by further re-evaluating their relationships with these companies in an effort to manage their potential supervisory exposure to perceived climate change-related risks.[63]

LOOKING AHEAD

During the remainder of the Biden Administration, US-based financial institutions can expect continued pressure from the federal government to consider ESG, particularly with respect to climate change. Some states, particularly those governed by Democratic lawmakers, may also try to adopt their own ESG initiatives, such as recent actions in Maine[64] and Connecticut[65] to divest from the fossil fuel industry and the firearms industry, respectively. Conversely, it can be expected that states governed by Republicans will continue to attempt to shield certain industries from harm resulting from those efforts by adopting new corporate protected classes as part of their anti-discrimination laws.[66] Moreover, should Republicans capture the Presidency and Congress, US-based financial institutions can expect swift anti-ESG legislation at the federal level. The potential for such extreme shifts in federal policy, as well as contradictory state policies, complicates the ability of US-based financial institutions to engage in meaningful long-term business planning regarding ESG.

The potential for more anti-ESG legislation raises understandable concerns about government-mandated concentration risk, particularly in industries such as the oil and gas industry, which are highly susceptible to climate change-related risks. The federal banking agencies explicitly require US-based financial institutions to manage concentrations of credit risk as a matter of safety and soundness.[67] Accordingly, the process of charting a path clear of the Scylla and Charybdis of federal and state ESG and anti-ESG requirements can be expected, while managing ordinary prudential regulatory expectations, at least in the near term, will increase compliance complexity for US-based financial institutions and could even lead to litigation as some states seek to protect their favoured industries and federal agencies seek not only to enforce their historic prudential regulatory expectations, but also, along with some other states, to promote (or require) institutions' acceptance of ESG responsibilities. Financial institutions operating in the USA can navigate this increasingly polarised environment through clear communication and expectation-setting with their regulators, investors and clients, while also maintaining strong regulatory change management to identify any emerging 'protected classes' of businesses proposed by state legislators seeking to push back on ESG.

Financial institutions may also consider taking an advocacy position against state anti-ESG restrictions on their business judgment. New Hampshire's financial services industry, for example, was successful in pushing back against a 2021 bill that would have prohibited financial institutions from discriminating against companies or individuals based on 'social credit, [ESG], or similar values-based or impact criteria', and would have imposed civil and criminal penalties for violations.[68] The bill was in response to concerns about the Social Credit System being developed in the People's Republic of China.[69] The president of the New Hampshire Bankers Association testified before a state senate committee that the bill might result in banks 'mak[ing] loans that they otherwise wouldn't', which could 'increase the cost of lending and doing business'.[70] The director of public policy at the Business & Industry Association characterised the proposed law as 'a solution in search of a problem', and one Republican senator expressed concerns that it 'could drive up the cost of credit and drive out potential lenders in a state that relies on small business'.[71] Ultimately, the state adopted a significantly amended version of the bill that establishes a committee to study the need for anti-discrimination legislation in the state's financial services industry, but other states are considering legislation similar to the original New Hampshire bill.[72]

WHAT CAN INSTITUTIONS DO?

If states or federal agencies implement anti-discrimination rules similar to those that

New Hampshire originally considered, or the OCC's Fair Access rule, institutions have to be ready to document their reasonable business judgment in implementing their lending policies and decisions. For institutions that choose not to lend or provide capital to businesses that raise environmental concerns (or to diminish their exposure), the reasons they chose not to do so need to be documented. One of the mechanisms that would seem likely to be used as an enforcement tool for 'anti-ESG' requirements are the usual tools for anti-discrimination laws — prohibitions against (i) overt discriminatory treatment (eg 'this bank does not lend to fracking companies'), (ii) disparate treatment (eg proof that a qualified borrower in a disfavoured business received worse treatment than a similarly situated regular business), (iii) disparate impact (eg applying a neutral policy that has a disparate effect on the disfavoured businesses), and (iv) engaging in a pattern or practice of discrimination (eg a combination of statistical and anecdotal evidence that the bank is treating a disfavoured business worse than others, such as a lower percentage of loan assets going to the disfavoured businesses). Banks have developed compliance mechanisms to mitigate concerns for each of these anti-discrimination theories in their consumer and mortgage lending areas, which can also be used to mitigate the risk of facing accusations of discrimination against disfavoured businesses, including:

- carefully drafted policies and procedures and annual training to ensure employees are aware of the risk and understand their role in managing it;
- enhanced monitoring and testing, including through periodic data analysis to identify statistically significant differences in pricing and underwriting outcomes for protected businesses;
- where statistical analysis shows disparities that disfavour protected businesses, performing a file review to confirm that legitimate underwriting concerns led to the denial of credit or other financial services and
- robust documentation of decisions not to lend to protected industries more broadly, particularly in states where laws explicitly protect certain businesses from discrimination in financial services.

As with traditional fair lending compliance management systems, these mechanisms, as used in the context of ESG-related risk management, will be likely to vary based on the size, complexity and risk profile of each institution.

CONCLUSION

The politicisation of ESG in the USA has resulted in efforts by lawmakers from both sides seeking to impose requirements on financial institutions to further their respective political objectives. Given the uncertainty and significant compliance burdens that arise from increased and rapidly changing legal expectations, lawmakers should question the wisdom of favouring or disfavouring certain industries by requiring financial institutions to invest in, or transact with, particular categories of businesses. Still, as states and even the federal government are likely to continue using legislative avenues to fight back against the rising importance of ESG, financial institutions must prepare to navigate this challenging environment through clear communication and expectation-setting with their regulators, investors and clients, and strong regulatory change management to identify emerging 'protected classes' of businesses.

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APPENDIX

Table A1: Recent US State Legislation proposing corporate protected classes in response to ESG

State	*Bill no.*	*Protected class*	*Date introduced*	*Current status*
Alaska	HB 394	Fossil fuel	2/2/2022	Failed
Arizona	HB 2473	Firearms	24/1/2022	Failed
Arizona	HB 2472	Firearms	25/1/2022	Failed
Idaho	HB 737	Fossil fuel	3/3/2022	Failed
Indiana	HB 1224	Fossil fuel	6/1/2022	Failed
Indiana	SB 397	Firearms	12/1/2022	Failed
Indiana	HB 1409	Firearms	13/1/2022	Failed
Kansas	SB 482	Firearms	9/2/2022	Failed
Kansas	SB 518	Fossil fuel	16/2/2022	Failed
Kentucky	SB 205	Fossil fuel	22/2/2022	Enacted (8/4/2022)
Kentucky	HB 123	Firearms	4/1/2022	Failed
Louisiana	HB 978	Firearms	5/4/2022	Failed
Louisiana	HB 141	Fossil fuel	23/2/2022	Failed
Louisiana	HB 25	Fossil fuel	26/1/2022	Failed
Louisiana	HB 597	Firearms	2/4/2022	Vetoed
Louisiana	SCR 55	Fossil fuel	16/5/2022	Failed
Minnesota	HF 4574	Fossil fuel	24/3/2022	Failed
Minnesota	SF 4441	Fossil fuel	4/4/2022	Failed
Minnesota	HF 4904	Fossil fuel	23/5/2022	Failed
Missouri	SB 1048	Firearms	12/1/2022	Failed
Missouri	SB 492	Firearms	10/2/2021	Failed
Ohio	HB 297	Firearms	11/5/2021	Failed
Oklahoma	HCR 1011	Fossil fuel	17/5/2021	Enacted (26/5/2021)
Oklahoma	HB 2034	Fossil fuel	1/2/2021	Enacted (9/5/2022)
Oklahoma	SB 1572	Fossil fuel	7/2/2022	Failed
Oklahoma	HB 3144	Firearms	7/2/2022	Failed
New Hampshire	HB 1469	All Corporations	5/1/2022	Amended/ Enacted (17/6/2022)
South Carolina	HB 4996	Fossil fuel	17/2/2022	Failed
South Carolina	HB 3506	Firearms	12/1/2021	Failed
South Dakota	SB 182	Firearms	1/2/2022	Failed
Tennessee	HB 2672	Fossil fuel	2/2/2022	Enacted (25/5/2022)

(Continued)

Table A1: Recent US State Legislation proposing corporate protected classes in response to ESG (*cont*)

State	*Bill no.*	*Protected class*	*Date introduced*	*Current status*
Tennessee	SB 2649	Fossil fuel	2/2/2022	Enacted (11/5/2022)
Texas	SB 13	Fossil fuel	11/3/2021	Enacted (14/6/2021)
Texas	SB 19	Firearms	3/3/2021	Enacted (14/6/2021)
Texas	HB 2189	Fossil fuel	24/2/2021	Failed
West Virginia	SB 262	Fossil fuel	13/1/2022	Enacted (12/3/2022)
West Virginia	SB 555	Firearms	2/2/2022	Failed
West Virginia	SB 255	Fossil fuel	13/1/2022	Failed
West Virginia	HB 3084	Fossil fuel	12/1/2022	Failed
West Virginia	HB 4618	Fossil fuel	10/2/2022	Failed

References and notes

(1) Fink, L. (2020) 'Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance', BlackRock, available at https://www.blackrock.com/us/individual/larry-fink-ceo-letter (accessed 10th August, 2022).

(2) Fink, L. and BlackRock's Global Executive Committee (2020), 'Letter to Clients: Sustainability as BlackRock's New Standard for Investing', available at https://www.blackrock.com/us/individual/blackrock-client-letter (accessed 10th August, 2022).

(3) In 2010, the Social Investment Forum (SIF) reported that US$2.51tn in US assets were being 'managed under policies that explicitly incorporate ESG criteria into investment analysis and portfolio construction'. Social Investment Forum (2010) 'Report on Socially Responsible Investing Trends in the United States', available at https://www.ussif.org/files/Publications/10_Trends_Exec_Summary.pdf, p. 7 (accessed 10th August, 2022). By 2018, this figure had increased to US$12tn and climbed to US$17tn by 2020, representing a 42 per cent increase in just two years. Social Investment Forum (2018) 'Report on US Sustainable, Responsible and Impact Investing Trends', available at https://www.ussif.org/files/Trends/Trends%202018%20executive%20summary%20FINAL.pdf, p. 1 (accessed 9th August, 2022). Social Investment Forum (2020) 'Report on US Sustainable, Responsible and Impact Investing Trends', available at https://www.ussif.org/files/US%20SIF%20Trends%20Report%202020%20Executive%20Summary.pdf, p. 5 (accessed 9th August, 2022).

(4) Rosenbaum, R. (21st January, 2021, 7.57am) 'Bank of America CEO says Clients Want to Invest in Companies "Doing Right by Society"', CNBC, available at https://www.cnbc.com/2020/01/21/bank-of-america-ceo-all-clients-are-becoming-esg-investors.html (quoting Bank of America CEO Brian Moynihan as saying his bank had '$25 billion in ESG funds, and more is going there', and that 'the key is to think about the balance and let industry and owners drive it'), available at https://www.ft.com/content/cfc12366-3c62-11ea-b232-000f4477fbca (quoting Citibank CEO Mike Corbat as stating that '[a] bank's job is . . . not to dictate outcomes' and Goldman Sachs CEO David Solomon as indicating his bank would not stop raising money for fossil fuel companies); Cruise, S. *et al.* (14 January, 2020, 4.52am) 'BlackRock Vows Tougher Stance on Climate After Activist Heat', Reuters, available at https://www.reuters.com/article/us-blackrock-fink-idUSKBN1ZD12B (quoting Montana Senate majority leader as saying 'Any effort in my opinion to try to placate this environmental agenda just to get along and go along is a bad decision for any business') (accessed 8th August, 2022).

(5) See eg Smith *v.* City of Jackson, Miss., 544U.S. 228, 223, n.3 (2005) (referring to the categories of personal characteristics set forth in Title VII of the Civil Rights Act of 1964, including race, as 'protected classes').

(6) Civil Rights Act of 1866, 42U.S.C. § 1981.

(7) See eg 42U.S.C. § 2000e–2(a) (employment); 42U.S.C. § 2000a(a) (public accommodations); 42U.S.C. § 3604–3605 (housing and real estate transactions); 15U.S.C. § 1691(a) (credit transactions); Cal. Civ. Code § 51 (state-level public accommodations law).

(8) *Ibid*.

(9) *Ibid*.

(10) See eg 42U.S.C. § 2000e–2(a) (employment); 42U.S.C. § 3604–3605 (housing and real estate transactions); 15U.S.C. § 1691(a) (credit transactions); Cal. Civ. Code § 51 (state-level public accommodations law).
(11) See eg 42U.S.C. § 12101 (discrimination in employment, public services, and public accommodations); Cal. Civ. Code § 51 (state-level public accommodations law).
(12) See eg 38U.S.C. § 4311(a) (employment).
(13) See eg 15U.S.C. § 1691(a) (credit transactions).
(14) See eg Cal. Civ. Code § 51 (state-level public accommodations law).
(15) See eg 15U.S.C. § 1691a(b) (including corporations in the definition of an 'applicant' protected under the Equal Credit Opportunity Act).
(16) See 15U.S.C. § 1691c–2 (effort to facilitate enforcement of fair lending laws as applied to small business lending); Amber Pyramid, Inc. *v.* Buffington Harbor Riverboats, LLC, 129 Fed Appx. 292, 295 (7th Cir. 2005) (holding in a Section 1981 claim that a 'minority-owned corporation, like Amber–Pyramid, assumes an 'imputed racial identity' from its shareholders'); New Louisiana Holdings, LLC *v.* Arrowsmith, 2012 WL 6061710, at *6 (E.D. Ill. 2012) (summarising federal circuit court decisions imputing racial identity based on the identities of shareholders or owners).
(17) Tex. S.B. 19, 87th Leg., R.S. (2021) available at https://capitol.texas.gov/tlodocs/87R/billtext/html/SB00019F.HTM (accessed 8th August, 2022).
(18) Tex. S.B. 13, 87th Leg., R.S. (2021). https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00013I.pdf (accessed 23rd February, 2023).
(19) *Ibid*.
(20) Okla. H. Con. Res. 1011, 58th Leg., R.S. (2021).
(21) Okla. H.B. 2034, 58th Leg., R.S. (2021).
(22) W.Va. S.B. 262, 85th Leg., R.S. (2022) Available at https://legiscan.com/WV/text/SB262/id/2548950/West_Virginia-2022-SB262-Enrolled.html (accessed 8th August, 2022).
(23) *Ibid*.
(24) W.Va. S.B. 555, 85th Leg., R.S. (2022).
(25) Ky. S.B. 205, R.S. (2022). (eff. 8th April, 2022).
(26) Tenn. S.B. 2649, 112th Leg., R.S. (2022), available at https://legiscan.com/TN/text/SB2649/2021 (accessed 8th August, 2022).
(27) *Ibid*.
(28) Tex. S.B. 19, 87th Leg., R.S. (2022), available at https://capitol.texas.gov/tlodocs/87R/billtext/html/SB00019F.HTM (accessed 8th August, 2022).
(29) W.Va. S.B. 262, 85th Leg., R.S. (2022), available at https://legiscan.com/WV/text/SB262/id/2548950/West_Virginia-2022-SB262-Enrolled.html (accessed 8th August, 2022); see also Ky. S.B. 205, R.S. (2022) (energy company boycott does not include decisions made with an 'ordinary business purpose').
(30) West Virginia State Treasurer (2022) 'Restricted Financial Institution List', available at https://www.wvtreasury.com/portals/wvtreasury/content/legal/memorandum/Restricted-Financial-Institutions-List.pdf (accessed 9th August, 2022); West Virginia State Treasurer (28th July, 2022) Press Release, 'Treasurer Moore Publishes Restricted Financial Institution List', available at https://wvtreasury.com/About-The-Office/Press-Releases/ID/452/Treasurer-Moore-Publishes-Restricted-Financial-Institution-List (accessed 9th August, 2022).
(31) West Virginia State Treasurer (13th June, 2022) Press Release, 'Treasurer Moore Warns Six Financial Institutions of Potential Inclusion on Fossil Fuel Boycott List', available at https://www.wvtreasury.com/About-The-Office/Press-Releases/ID/437/Treasurer-Moore-Warns-Six-Financial-Institutions-of-Potential-Inclusion-on-Fossil-Fuel-Boycott-List (accessed 8th August, 2022).
(32) West Virginia State Treasurer, ref. 30 above.
(33) Foster, M. (5th August, 2022) 'WV State Treasurer Riley Moore: US Bank Has Reversed Its Anti-Energy Lending Policy- 'This is How We Win', Breitbart, available at https://www.breitbart.com/economy/2022/08/05/wv-state-treasurer-riley-moore-u-s-bank-reversed-anti-energy-lending-policy/ (accessed 8th August, 2022).
(34) Those states are Alaska, Arizona, Idaho, Indiana, Kansas, Louisiana, Minnesota, Missouri, Ohio, South Carolina and South Dakota. A complete list of states that introduced anti-ESG legislation, and the disposition of those proposed laws, over the past two years is included as an appendix (Table A1) to this paper.
(35) Those states are Florida, Idaho and North Dakota.
(36) H.R.6970 – 117th Congress (2021–22): Firearm Industry Non-Discriminatory Act ('FIND Act'), H.R.6970, 117th Cong. (2022), available at https://www.congress.gov/bill/117th-congress/house-bill/6970/text (accessed 8th August, 2022).
(37) Section 951 of FIRREA (codified as 12U.S.C. § 1833a).
(38) See Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, Office of Legis. Affairs, US Department of Justice, to Representative Blaine Luetkemeyer (12th September, 2013) (stating '[t]he Department seeks to combat fraud and other unlawful practices in the payment system, and our efforts are focused on all those engaged in illegal activity.').
(39) 113th Congress (29th May, 2014) 'The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Business?', available at https://web.archive.org/web/20141206072928/http://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf (accessed 8th August, 2022).
(40) Federal Deposit Insurance Corporation (31st January, 2012) 'Payment Processor Relationships: Revised Guidance, FIL-3-2012', available at https://www.fdic.gov/news/financial-institution-letters/2012/fil12003.pdf (accessed 8th August, 2022).
(41) *Ibid*.
(42) House of Representatives, Judiciary Committee (10th August, 2017) Press Release, 'Goodlatte,

Hensarling, Marino Luetkemeyer & Issa Ask DOJ to Repudiate Operation Choke Point', available at https://republicans-judiciary.house.gov/press-release/goodlatte-hensarling-marino-luetkemeyer-issa-ask-doj-repudiate-operation-choke-point/ (accessed 8th August, 2022).
(43) See eg Ballasy, N. (3rd April, 2015) 'Operation Choke Point Accuser Speaks Out', *C.U. Times*, available at https://www.cutimes.com/2015/04/03/operation-choke-point-accuser-speaks-out/?slreturn=20220718100836 (accessed 8th August, 2022).
(44) 113th Congress (8th December, 2014) 'Federal Deposit Insurance Corporation's Involvement in "Operation Choke Point"', available at https://republicans-oversight.house.gov/wp-content/uploads/2014/12/Staff-Report-FDIC-and-Operation-Choke-Point-12-8-2014.pdf (accessed 8th August, 2022).
(45) Isaac, W. (21st November, 2014) 'Don't Like An Industry? Send a Message to Its Bankers', WSJ.com, available at https://online.wsj.com/articles/william-isaac-dont-like-an-industry-send-a-message-to-its-bankers-1416613023 (accessed 8th August, 2022).
(46) 113th Congress (2014) H.R.4986 – 113th Congress (2013–14) End Operation Choke Point Act of 2014, available at https://www.congress.gov/bill/113th-congress/house-bill/4986 (accessed 8th August, 2022).
(47) 113th Congress, ref. 44 above.
(48) Office of Inspector General (September 2015) 'The FDIC's Role in Operation Choke Point and Supervisory Approach to Institutions that Conducted Business with Merchants Associated with High-Risk Activities', Federal Deposit Insurance Corporation, available at https://www.fdicoig.gov/publications/fdics-role-operation-choke-point-and-supervisory-approach-institutions-conducted (accessed 8th August, 2022).
(49) Riddell, K. (28th January, 2015) 'FDIC Attempts to End Operation Choke Point with Letter, Action', *The Washington Times*, available at https://www.washingtontimes.com/news/2015/jan/28/fdic-attempts-end-operation-choke-point-letter-act/ (accessed 8th August, 2022).
(50) Statement of the Federal Deposit Insurance Corporation (2019) available at https://www.fdic.gov/news/press-releases/2019/pr19040a.pdf (accessed 8th August, 2022).
(51) Office of the Comptroller of the Currency (14th January, 2021) News Release, 'OCC Finalizes Rule Requiring Large Banks to Provide Fair Access to Bank Services, Capital, and Credit', available at https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html (accessed 8th August, 2022).
(52) Office of the Comptroller of the Currency (28th January, 2021) News Release, 'OCC Puts Hold on Fair Access Rule', available at https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html (accessed 8th August, 2022).
(53) Board of Governors of the Federal Reserve System (3rd November, 2021) 'Federal Reserve Board Issues Statement in Support of the Glasgow Declaration by the Network of Central Banks and Supervisors for Greening the Financial System (NGFS)', available at https://www.federalreserve.gov/newsevents/pressreleases/other20211103a.htm (accessed 8th August, 2022).
(54) *Ibid*.
(55) *Ibid*.
(56) Federal Reserve Bank of New York (13th May, 2022) 'Climate Change: Implications for Macroeconomics', available at https://www.newyorkfed.org/research/conference/2022/climate-change (accessed 4th August, 2022); Brunetti, C. *et al.* Board of Governors of the Federal Reserve System (19th March, 2021) 'Climate Change and Financial Stability', available at https://www.federalreserve.gov/econres/notes/feds-notes/climate-change-and-financial-stability-20210319.htm (accessed 3rd August, 2022); Federal Reserve Bank of San Francisco (n.d.) 'Why Climate Risk Matters to Us', available at https://www.frbsf.org/our-district/about/climate-risk/ (accessed 3rd August, 2022).
(57) Brainard, L. (7th October, 2021) 'Building Climate Scenario Analysis on the Foundations of Economic Research', Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/newsevents/speech/brainard20211007a.htm (accessed 3rd August, 2022).
(58) *Ibid*.
(59) Raskin, S. B. (28th May, 2020) 'Why Is the Fed Spending So Much Money on a Dying Industry?', *New York Times*, available at https://www.nytimes.com/2020/05/28/opinion/fed-fossil-fuels.html
(60) Hiltzik, M. (16th March, 2022) 'Fossil Fuel Barons Killed Biden's Fed Pick Because She Talked Sense on Climate Change', *L.A. Times*, available at https://www.latimes.com/business/story/2022-03-16/fossil-fuel-barons-killed-sarah-raskins-fed-appointment-over-her-views-on-climate-change (accessed 8th August, 2022).
(61) Schroeder, P. (17 November, 2021, 8.39pm) 'Wall Street Sees First Fed Climate Change Review in 2023', Reuters, available at https://www.reuters.com/business/cop/wall-street-sees-first-fed-climate-change-review-2023-2021-11-17/ (accessed 8th August, 2022).
(62) United Nations (n.d.) 'Climate Action: Biggest Financial Players Back at Net Zero', available at https://www.un.org/en/climatechange/biggest-financial-players-back-net-zero (accessed 3rd August, 2022). However, some bankers believe that climate risks are being exaggerated by central banks and others, and one major global bank's (now former) head of responsible investing stated that was not only his view, but also the unstated view of the market more generally. See Reuters (7th July, 2022) 'HSBC's Head of Responsible Investing Quits After Climate Speech Controversy', available at https://www.reuters.com/business/hsbcs-head-responsible-

investing-quits-after-climate-speech-controversy-2022-07-07/ (accessed 3rd August, 2022), and *Financial Times* (20th May, 2022) 'HSBC's Stuart Kirk tells FT Investors Need Not Worry About Climate Risk', available at https://www.youtube.com/watch?v=bfNamRmje-s (accessed 3rd August, 2022).

(63) We note that the Bank of England's Prudential Regulatory Authority has already issued climate-related supervisory expectations for UK-based banks. See Bank of England (27th June, 2022) 'Climate Change', available at https://www.bankofengland.co.uk/climate-change (accessed 8th August, 2022).

(64) State of Maine (2021) H.P. 65 – L.D. 99, available at https://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0065&item=4&snum=130 (accessed 8th August, 2022).

(65) The Office of the Treasurer Shawn T. Wooden (December 2019) 'Responsible Gun Policy', available at https://portal.ct.gov/OTT/About-the-Treasury/Responsible-Gun-Policy#:~:text=The%20costs%20and%20risks%20associated%20with%20gun%20violence%20are%20urgent.&text=The%20policy%20includes%20three%20core,invest%20in%20gun%20safe%20technologies (accessed 8th August, 2022).

(66) For example, North Dakota has ordered a study of the potential implications of boycotts of both energy companies and agricultural commodity producers. See 67th Legislative Assembly of North Dakota (2021) ND S.B. 2291, available at https://legiscan.com/ND/text/2291/id/2345495/North_Dakota-2021-2291-Enrolled.pdf (accessed 8th August, 2022).

(67) See 12 C.F.R. pts. 30 (OCC), 208 (Federal Reserve), and 364 (FDIC).

(68) N.H. H.B. 1469, R.S. (2022), available at https://legiscan.com/NH/text/HB1469/id/2462053/New_Hampshire-2022-HB1469-Introduced.html (accessed 8th August, 2022).

(69) Kobie, N. (6th July, 2019) 'The Complicated Truth about China's Social Credit System', *Wired* available at https://www.wired.co.uk/article/china-social-credit-system-explained (accessed 8th August, 2022).

(70) Sanders, B. (13th April, 2022) 'NH Senate Panel Hears Bill Targeting "Self-Appointed Financial Elites"', *NH Business Review*, available at https://www.nhbr.com/nh-senate-panel-hears-bill-targeting-self-appointed-financial-elites/ (accessed 3rd August, 2022).

(71) *Ibid*.

(72) New Hampshire HB 1469-FN – As amended by the Senate (2022) Available at https://legiscan.com/NH/text/HB1469/id/2577069/New_Hampshire-2022-HB1469-Amended.html (accessed 8th August, 2022).