



**Labaton**  
Keller Sucharow

# THE IMPACTFUL INVESTOR

NEW YORK • DELAWARE • LONDON • WASHINGTON, D.C.

2024 MID-YEAR REPORT

# CONTENTS

## IN THIS ISSUE

**P 3**                    **EXECUTIVE SUMMARY**

---

**P 4**                    **NOTEWORTHY DEVELOPMENTS**

---

P 4    THE SEC'S FOCUS ON ESG THROUGH RULEMAKING

P11    SHAREHOLDER SOLUTIONS TO THE PLASTIC POLLUTION CRISIS

P 17    ENGAGEMENT: A METHOD FOR COMPLYING WITH THE SFDR

**P 22**                    **CASE WATCH**

---

MCDONALD'S CORPORATION

**P 25**                    **TRENDS IN ESG LITIGATION**

---

**P28**                    **CONTACT US**

---

©2024 Labaton Keller Sucharow LLP. All rights reserved. For contact and other information, please visit us at [www.labaton.com](http://www.labaton.com).  
Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Labaton Keller Sucharow (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome.

# EXECUTIVE SUMMARY

Labaton Keller Sucharow is pleased to present *The Impactful Investor: 2024 Mid-Year Report*.

Labaton Keller Sucharow's ESG Taskforce provides clients with sophisticated advice highlighting the beneficial impact of engaging in securities and shareholder actions. Launched in response to the increasing needs of our clients, the Firm's ESG Taskforce partners with clients to pursue cases based on ESG principles to make a statement about policies, recover money for beneficiaries, and make meaningful corporate reforms. As investors' focus on ESG continues to grow, Labaton Keller Sucharow is partnering with our clients to have a positive impact through litigation.

Featured in this edition:

- ✘ An overview of three key areas of SEC rulemaking focused on ESG;
- ✘ Recommendations for investors concerned with the state of plastic pollution;
- ✘ A path to comply with a European Commission regulation requiring certain managers and investors to specify their method for considering adverse ESG protocols;
- ✘ Analysis of Delaware Chancery Court ruling that extends duty of oversight to corporate officers in addition to directors; and
- ✘ U.S. trends in ESG-focused litigation.

We would be happy to provide comprehensive assessments and recommendations regarding any of the topics discussed or highlighted in *The Impactful Investor*.

By: Alfred L. Fatale III, David Saldamando

---

# The SEC's Focus on ESG Through Rulemaking

SEC



## NOTEWORTHY DEVELOPMENTS

Under the Biden administration and in recent years, the U.S. Securities and Exchange Commission (the “SEC”) has delved into the ESG (Environmental, Social, and Governance) arena with a particular focus—signaling to investors that it seeks to prioritize the protection of ESG investment and ESG goals. This article provides a high-level overview and update on the SEC’s rulemaking activity in three specific areas related to ESG: Climate Disclosure, Proxy-Voting, and Investment Fund Names.

### CLIMATE DISCLOSURE RULES

On March 6, 2024, the SEC adopted a final rule requiring public companies to disclose in their registration statements and annual filings “climate-related risks that have had or are reasonably likely to have a material impact” on the company’s “business strategy, results of operations, or financial condition” (the “Climate Disclosure Rules”).

In addition, the Climate Disclosure Rules also require that the company disclose, *inter alia*, (1) “the actual and potential material impacts of any identified climate-related risks” on the company’s “strategy, business model, and outlook;” (2) “specified disclosures regarding a registrant’s activities, if any, to mitigate or adapt to a material climate-related risk including the use, if any, of transition plans, scenario analysis, or internal carbon prices;” (3) “any oversight by the board of directors of climate-related risks and any role by management in assessing and managing the registrant’s material climate-related risks;” (4) information about a company’s “climate-related targets or goals, if any, that have materially affected or are reasonably likely to affect the registrant’s business, results of operations, or financial condition;” and (5) disclosure of material Scope 1 and Scope 2 greenhouse gas emissions, which would require an assurance report for such emissions.<sup>1</sup> The Climate Disclosure Rules are set to take effect beginning in 2026.

.....  
<sup>1</sup> Press Release, U.S. Securities and Exchange Commission, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6, 2024), <https://www.sec.gov/news/press-release/2024-31>.

The Climate Disclosure Rules represent one of the largest expansions of securities disclosure regulations and requirements in the United States, significantly expanding the breadth and depth to which public companies must report their climate-related risks and associated activities.

The implementation of the Climate Disclosure Rules has met swift opposition in U.S. courts. Indeed, on the same day the SEC voted to approve the final rule, a coalition of ten states filed a petition for review of the final rule with the U.S. Court of Appeals for the Eleventh Circuit. Multiple other lawsuits followed, with petitions seeking review filed in the Fifth, Sixth, Eighth, and Eleventh Circuits.<sup>2</sup> On March 21, 2024, the Judicial Panel on Multidistrict Litigation lottery system selected the Eighth Circuit Court of Appeals as the venue for hearing the consolidated cases. On April 4, 2024, the SEC voluntarily stayed adoption of the Climate Disclosure Rules, pending judicial review.<sup>3</sup>

Investors should pay close attention to the decision of the Eighth Circuit Court of Appeals, which will likely determine the legal validity of the Climate Disclosure Rules before 2026. While the current stay will likely delay the effective date of the Climate Disclosure Rules, public companies should make current preparations for compliance with the Climate Disclosure Rules, given the costs and efforts associated with such compliance. If the Eighth Circuit upholds the Climate Disclosure Rules, then the disclosure requirements for such public companies and issuers will be *significantly* expanded to cover climate and ESG-related initiatives.

## PROXY-VOTING RULES

Currently, investment funds must file their proxy voting records with the SEC annually on Form N-PX. Form N-PX requires these funds to briefly describe each matter voted on.<sup>4</sup>

<sup>2</sup> *Nat. Res. Def. Council, Inc. v. SEC*, No. 24-707 (2d Cir. Mar. 12, 2024); *Liberty Energy, Inc. v. SEC*, No. 24-60109, 2024 WL 1152283 (5th Cir. Mar. 15, 2024); *Louisiana v. SEC*, No. 24-60109 (5th Cir. Mar. 7, 2024); *Tex. All. of Energy Producers v. SEC*, No. 24-60109 (5th Cir. Mar. 11, 2024); *Chamber of Commerce of U.S. of Am. v. SEC*, No. 24-60109 (5th Cir. Mar. 14, 2024); *Ohio Bureau of Workers' Comp. v. SEC*, No. 24-3220 (6th Cir. Mar. 13, 2024); *Iowa v. SEC*, No. 24-1522 (8th Cir. Mar. 12, 2024); *West Virginia v. SEC*, No. 24-10679 (11th Cir. Mar. 6, 2024); *Sierra Club v. SEC*, No. 24-1067 (D.C. Cir. Mar. 13, 2024).

<sup>3</sup> SEC, *In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors*, Order Issuing Stay, <https://www.sec.gov/files/rules/other/2024/33-11280.pdf>.

<sup>4</sup> *Texas v. SEC*, No. 23-60079, 2024 WL 2106183 (5th Cir. May 10, 2024).

In 2021, the SEC proposed an amendment to the Form N-PX that would require funds to categorize votes by different subject matters. The proposed rule included seventeen categories, and five of the seventeen proposed categories involved ESG subjects such as “environment or climate” or “diversity, equity, and inclusion.” According to the Fifth Circuit Court of Appeals, “[d]uring the comment period [of the proposed amendment], some commentators voiced concerns about requiring funds to disclose ESG votes. In particular, the state of Utah warned that the use of ESG categories could empower activists to pressure funds into voting for ESG measures while providing limited value to investors.”<sup>5</sup>

In December 2022, the SEC adopted the categorization requirement in its final rule (the “Proxy-Voting Rule”).<sup>6</sup> The Proxy-Voting Rule decreased the number of categories from seventeen to fourteen, and four of the fourteen final categories are ESG focused. The Proxy-Voting Rule is scheduled to take effect on July 1, 2024.<sup>7</sup>

Following the adoption of the Proxy-Voting Rule, various states, including Texas, Louisiana, Utah, and West Virginia, challenged the Proxy-Voting Rule in the Fifth Circuit Court of Appeals. On May 10, 2024, the Fifth Circuit Court of Appeals found that the states do not have standing to assert their claims. Specifically, the court found that the states’ theory of standing was too speculative to provide any proof of actual harm as a result of the Proxy-Voting Rule; indeed, according to the court, the theory proffered by the states relied upon a “highly attenuated chain of possibilities.”<sup>8</sup> Accordingly, the petition was dismissed.

In light of the Fifth Circuit’s dismissal, the Proxy-Voting Rule took effect on July 1, 2024. According to the SEC, the Proxy-Voting Rule “increase(s) transparency regarding proxy voting on ESG matters”<sup>9</sup> and provides investors with transparency as to how funds, “which own roughly 32% of the market

.....  
<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup> SEC, Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Manager, File No. S7-11-21, <https://sec.gov/files/rules/final/2022/33-11131.pdf>.

capitalization of all U.S.-issues equities,” are utilizing their voting power during shareholder votes and proxy disputes.<sup>10</sup>

The successful adoption of the Proxy-Voting Rule, and the Fifth Circuit’s rejection to the challenge of the Rule, is yet another example of the recent focus on ESG-related initiatives by the SEC and how these ESG-related initiatives are finding success within the legal battlefield in the United States.

## INVESTMENT FUND NAMES RULES

The SEC has recognized that the name of an investment fund is unique and important within the context of protecting investor rights, as a fund’s name “is typically the first piece of information that investors receive about a fund.”<sup>11</sup> “Fund names offer important signaling for investors in assessing their investment options.”<sup>12</sup> The Investment Fund Names Rules, first adopted by the SEC in 2001, was designed to address materially deceptive or misleading fund names, “recognizing the concern that investors may focus on a fund’s name to determine its investments and risks. The names rule, in turn, responds to this concern by helping to ensure that investors’ assets in funds are invested in accordance with investors’ reasonable expectations based on the fund’s name.”<sup>13</sup>

Under these rules, if an investment fund’s name suggests a focus in a particular type of investment, or in investments in a particular industry or geographic area, the fund must adopt a policy to invest at least 80% of the value of its assets in the type of investment, or in investments in the industry, country, or geographic area suggested by its name.<sup>14</sup> For example, if a fund has the word “energy” in its name, it is required to invest at least 80% of its assets in energy-related investments.<sup>15</sup>

On September 20, 2023, the SEC adopted new measures and final rules to modernize and expand the scope of the Investment Fund Names Rules to

.....  
<sup>10</sup> Clark Mindock, *Court rejects Republican states’ challenge to SEC’s ESG proxy vote rule*, Reuters (May 13, 2024), <https://www.reuters.com/legal/court-rejects-republican-states-challenge-secs-esg-proxy-vote-rule-2024-05-10/>.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> Cathy Pareto, *Digging Deeper Into Mutual Fund Names*, Investopedia (June 29, 2022), <https://www.investopedia.com/articles/mutualfund/08/mutual-fund-names.asp>.

now cover investment fund names that include (1) terms with ESG or sustainability-related characteristics, (2) the terms “growth” and “value,” or (3) terms that reference a “thematic” investment focus.<sup>16</sup> The SEC recognized that the recent rise of ESG-related investments, or investments in other “themes,” require greater investor protections for such investments.

Most notably, the SEC emphasized that the current attention to ESG investment strategies entails “unique considerations” to this particular thematic area—and specifically discussed the effects of “greenwashing” (*i.e.*, when funds misleadingly exaggerate their ESG practices or ESG focus):<sup>17</sup>

Funds that consider ESG factors in their investment strategies comprise a thematic area that entails unique considerations, and that involves the use of terminology that may be especially powerful in fund names to attract investors. The use of ESG or similar terminology (such as “sustainable,” “green,” or “socially responsible”) in fund names may present particular investor protection concerns for several reasons. Investor interest in—and funds that offer—ESG strategies have rapidly increased in recent years. Asset managers have created and marketed funds that consider ESG factors in their selection process, and these funds can attract significant interest and stand out to investors by using ESG and related terms in their names. Approaches to ESG investing vary, however, and funds that consider ESG factors have strategies that vary in the extent to which ESG factors are considered versus other factors. The breadth of ESG-related terms, as well as evolving investor expectations around terms like “sustainable” or “socially responsible,” compound the possibility of investor confusion and potential “greenwashing” in fund names.<sup>18</sup>

.....  
<sup>16</sup> Investment Company Act Release Nos. 33-11238; 34-98438 at 30.

<sup>17</sup> *Id.* at n.37.

<sup>18</sup> *Id.* at 13-14 (internal citations omitted).

The rulemaking activity by the SEC during the last few years, as described above with these three ESG-related rules, clearly highlights SEC Chairman Gary Gensler's and the Administration's focus on ESG-related initiatives. Investors should be aware that further activity and additional ESG-related proposals are likely on the horizon, depending on the direction and goals of the SEC and the ability for such proposals and rules to be finalized in light of the frequent litigation that results from adoption of ESG rules.

By: Jonathan Gardner, Wesley Mann

---

# Shareholder Solutions to the Plastic Pollution Crisis

## NOTEWORTHY DEVELOPMENTS

The world is facing a plastic pollution crisis that shows no signs of stopping. According to a recent study that analyzed branded plastic pollution collected in 84 countries between 2018 and 2022, approximately 56 companies produced over half of the branded plastic pollution collected, with five companies accounting for nearly a quarter of the world’s plastic waste: The Coca-Cola Company (11%), PepsiCo (5%), Nestlé (3%), Danone (3%), and Altria (2%).<sup>1</sup> While mitigating this crisis will require the involvement of lawmakers, consumers, and large food and beverage companies, shareholders should consider the various options they have to hold these companies accountable for their contribution to the plastic pollution crisis.

Plastic waste accounts for 80% of all marine pollution.<sup>2</sup> Experts estimate that between 8 and 11 million metric tons of plastic waste enter our planet’s oceans each year—as if a garbage truck dumped its full load into the ocean every minute.<sup>3</sup> Worse yet, global plastic production doubled from 2000 to 2019 and is expected to triple by 2050.<sup>5</sup> In 2016, the United States was the largest producer of plastic waste at 34 million tons. Currently, the United States is the second largest producer of plastic waste, with China taking over the number one spot.<sup>6</sup>

Not only does plastic clutter our environment, but it also depletes natural resources and releases toxic waste. 99% of plastics are made from fossil fuels, which are the greatest contributor to global climate change, and the manufacturing process releases greenhouse gases.<sup>7</sup> Plastic production, waste management, and recycling release microplastics—tiny plastic particles—into the environment.<sup>8</sup> Microplastics contaminate our drinking water, soil, and food.<sup>9</sup> Researchers have detected microplastics in human lungs, breast milk, blood, and maternal and fetal placental tissues.<sup>10</sup> One study estimated that the average person could be consuming five grams of microplastics per week—approximately the weight of a credit card.<sup>11</sup>

.....  
<sup>1</sup> Win Cowger, et al., *Global producer responsibility for plastic pollution*, 10 *Sci. Advances* (May 9, 2024), <https://www.science.org/doi/10.1126/sciadv.adj8275>.

<sup>2</sup> Marter Fava, *Ocean plastic pollution an overview: data and statistics*, UNESCO (May 9, 2022), <https://oceanliteracy.unesco.org/plastic-pollution-ocean/>.

<sup>3</sup> *Reckoning with the U.S. Role in Global Ocean Plastic Waste*, Nat’l Acad. of Scis. (2022), at 1.

<sup>4</sup> *Reducing Plastic Production to Achieve Climate Goals*, Ctr. for Int’l Env’t L. (Sept. 2023), at 1.

<sup>5</sup> *Plastic Pollution by Country 2024*, World Population Rev. (2024), <https://worldpopulationreview.com/country-rankings/plastic-pollution-by-country>.

<sup>6</sup> *Id.*

<sup>7</sup> *Reducing Plastic Production to Achieve Climate Goals*, Ctr. for Int’l Env’t L. (Sept. 2023), at 1.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *No Plastic in Nature: Assessing Plastic Ingestion from Nature to People*, WWF (June 2019), at 10.

<sup>10</sup> LaMotte, Sandee, *Which foods have the most plastics? You may be surprised*, CNN (Apr. 22, 2024, 10:53 AM), <https://www.cnn.com/2024/04/22/health/plastics-food-wellness-scn/index.html>.

<sup>11</sup> *No Plastic in Nature: Assessing Plastic Ingestion from Nature to People*, WWF (June 2019), at 7.

Plastics are also harmful to human health. Indeed, plastics are carcinogenic materials and ingesting them can negatively impact the body's endocrine system, causing developmental, neurological, reproductive, and immune disorders.<sup>12</sup> A recent study found that those with microplastics and nanoplastics in their carotid artery tissues were twice as likely than those without to have a heart attack, stroke, or die from any cause over the next three years.<sup>13</sup>

Acceptance of a plastic material by a recycling facility, or a material recovery facility, does not guarantee that the plastic will be repurposed into another product.<sup>14</sup> The Federal Trade Commission states that it is “deceptive” to claim that “a product or package” is recyclable “unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.”<sup>15</sup> Absent sufficient market demand for recycled plastic and adequate repurposing capability, manufacturers will not purchase plastic material nor will they process the material into another product.<sup>16</sup> The reality in the United States is that at least 85% of plastic waste ends up in landfills<sup>17</sup>

Recycling is a false remedy to the plastic pollution crisis—credible estimates show that only 9% of plastic waste was recycled globally in 2019 and only 5–6% of plastic waste was recycled in the United States in 2021.<sup>18</sup> There are various reasons why plastic recycling faces insurmountable hurdles. Mixed plastic waste cannot be recycled together, and it is impossible to collect and sort through the trillions of pieces of plastic manufactured and distributed by retail stores and fast-food restaurants.<sup>19</sup>

The Coca-Cola Company, PepsiCo, and Nestlé have been among the top four global plastic polluters every year since the Break Free From Plastic Movement began its annual Global Brand Audit in 2018.<sup>20</sup> However, big beverage companies distract from this reality by spending millions on marketing campaigns that misleadingly claim recycling is the solution to the plastic crisis.<sup>21</sup>

<sup>12</sup> Fava, Marter, *Ocean plastic pollution an overview: data and statistics*, UNESCO (May 9, 2022), <https://oceanliteracy.unesco.org/plastic-pollution-ocean/>.

<sup>13</sup> Sandee LaMotte, *Nanoplastics linked to heart attack, stroke and early death, study finds*, CNN (Mar. 7, 2024, 10:40 AM), <https://www.cnn.com/2024/03/06/health/nanoplastics-heart-attack-study-wellness/index.html>.

<sup>14</sup> *Circular Claims Fall Flat Again*, GREENPEACE (2022), at 7.

<sup>15</sup> *Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62122, 62129 (Oct. 11, 2012), Fed. Trade Comm'n, § 260.12(a), (To be codified at 16 C.F.R. pt. 260).

<sup>16</sup> *Circular Claims Fall Flat Again*, GREENPEACE (2022), at 7.

<sup>17</sup> Katharine Gammon, *US is recycling just 5% of its plastic waste, studies show*, The Guardian (May 5, 2022), <https://www.theguardian.com/us-news/2022/may/04/us-recycling-plastic-waste>.

<sup>18</sup> *Global plastic waste set to almost triple by 2060, says OECD*, Org. for Econ. Coop. & Dev. (Mar. 6, 2022), <https://www.oecd.org/environment/global-plastic-waste-set-to-almost-triple-by-2060.htm>; *Circular Claims Fall Flat Again*, Greenpeace (2022), at 3.

<sup>19</sup> *Circular Claims Fall Flat Again*, Greenpeace (2022), at 19–20.

<sup>20</sup> BFFP Global Brand Audit 2023, *Holding the World's Worst Plastic Polluters Accountable Annually Since 2018* (2023), at 2.

Companies have an incentive to promote plastic recycling instead of investing in technology or materials to reduce the use of single-use plastic because implementing necessary systemic changes could hurt their bottom line. Virgin plastic is significantly cheaper than glass and aluminum, and companies that use, produce, or commercialize plastics have no reason to discontinue the use of virgin plastic since they are rarely held accountable for the impact plastic pollution has had on our environment and communities.<sup>22</sup> In the face of pressure to reduce their plastic footprints, companies such as The Coca-Cola Company, PepsiCo, and Nestlé pledged to increase the percentage of recycled content in their plastic packaging.<sup>23</sup> Yet, The Coca-Cola Company has publicly complained about high costs associated with recycled plastics and actively lobbied against recycling schemes that place greater accountability on manufacturers.<sup>24</sup> While PepsiCo has marginally improved its ratio of recycled materials, its use of virgin plastics has actually increased.<sup>25</sup>

In recent years, government regulators have increased their use of enforcement efforts to hold large companies accountable for greenwashing (*i.e.*, a marketing tactic used by companies to falsely convey to the public that their products or services are environmentally friendly when they are not).<sup>26</sup> On June 14, 2022, Connecticut Attorney General William Tong sued Reynolds Consumer Products claiming that the company falsely and deceptively marketed Hefty “Recycling Bags” as being recyclable while knowing that their bags were incompatible with recycling facilities in Connecticut.<sup>27</sup> On November 15, 2023, the Attorney General of the State of New York, Letitia James, filed a landmark lawsuit against PepsiCo and certain of its North American subsidiaries alleging, among other things, that the company’s use of single-use plastic packaging was detrimental to public health and the environment and for making false and misleading statements to the public about PepsiCo’s commitment to reducing the use of single-use virgin plastic in its product packaging while increasing the use of recycled content.<sup>28</sup>

.....  
<sup>21</sup> Kirstie L. Pecci, et al., *The Big Beverage Playbook for Avoiding Responsibility*, CONSERVATION L. FOUND. (Feb. 2022), at 3, 11.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> Robin Hicks, *Recycled plastic at virgin prices? Asian recyclers say market volatility making it hard to meet brands’ demands*, Eco-Bus. (Jan. 30, 2024), <https://www.eco-business.com/news/recycled-plastic-at-virgin-prices-asian-recyclers-say-market-volatility-making-it-hard-to-meet-brands-demands/>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Kelly A. Smith, *Greenwashing And ESG: What You Need To Know*, FORBES (Aug. 25, 2022, 9:54 AM), <https://www.forbes.com/advisor/investing/greenwashing-esg/>.

<sup>27</sup> Press Release, Attorney General Tong Sues Reynolds Over Non-Recyclable Hefty “Recycling” Trash Bags, Off. of the Att’y Gen. of Conn. (June 14, 2022), [AG Tong sues reynolds over hefty bags \(ct.gov\)](https://www.ct.gov/ag/tong-sues-reynolds-over-hefty-bags).

Banning single-use plastics can be an effective solution for reducing virgin plastic from entering the commerce stream. Indeed, one study that assessed plastic bag bans in the United States found that well-designed policies can eliminate nearly 300 single-use plastic bags per person per year.<sup>29</sup> Current bans have reduced plastic bag litter by at least one-third, and in certain high-population jurisdictions, bans have averted nearly 6 billion single-use bags per year.<sup>30</sup>

Another potential solution involves shareholder action. Indeed, shareholders are already asking companies to disclose data concerning their plastic usage. For example, in 2022, General Mills filed its proxy statement with the SEC containing a shareholder proposal from Green Century Capital Management Inc. seeking information relating to the company's plastic usage. The proposal stated that General Mills uses plastic packaging, including flexible plastics, which are typically not curbside recyclable. The proposal requested that General Mills issue a report (1) assessing how the company can increase the scale and pace of its sustainable packaging efforts by reducing its absolute plastic packaging use, (2) setting forth goals to reduce absolute and virgin plastic use and increase post-consumer recycled plastic use, and (3) containing annual disclosures of metrics related to the company's plastic use.<sup>31</sup> Notably, despite the company urging shareholders to vote down the proposal, a majority of General Mills' shareholders voted in favor of the proposal, demonstrating that shareholders are demanding more transparency from companies on environmental issues.<sup>32</sup>

Shareholders have multiple avenues to hold companies accountable, including:

1. Submitting a shareholder proposal in advance of an annual shareholder meeting requiring a company to publicly disclose high-level data concerning its plastic production, use, and disposal, which would enable shareholders to monitor improvements, determine which companies are disproportionately contributing to the plastic pollution problem, and hold those companies accountable;

.....  
<sup>28</sup> *New York v. PepsiCo, Inc.*, No. 814682/2023 (N.Y. Sup. Ct. Nov. 15, 2023).

<sup>29</sup> Louis Sokolow, et al., *Plastic Bag Bans Work: Well-designed single-use plastic bag bans reduce waste and litter* (Jan. 2024), at 4.

<sup>30</sup> *Id.*

<sup>31</sup> General Mills Corp., Proxy Statement, (Form 14-A) (Aug. 8, 2022), [sec.gov/Archives/edgar/data/40704/000120677422002021/gis4069791-def14a.htm](https://sec.gov/Archives/edgar/data/40704/000120677422002021/gis4069791-def14a.htm).

<sup>32</sup> Lily Meier, *General Mills Faces Criticism Over Use of Plastic Packaging*, BLOOMBERG L., (Apr. 16, 2021, 3:29 PM).

2. Demanding under state laws (including Delaware law) to inspect a company’s books and records in connection with its plastic usage, disposal, and commitment to sustainability;
3. Sending a letter to the board of directors demanding that the company take action to address and mitigate its production and use of single-use plastic and implement corporate governance reforms designed to target and address the misconduct; and
4. Initiating legal action against the board of directors and management for misrepresentations and mismanagement.

Studies have shown that disclosure mandates have resulted in positive changes. One study found that companies that were required to disclose their greenhouse gas emissions actually reduced their emissions by approximately 8% relative to a control group—without experiencing any significant impact to their gross margins.<sup>33</sup> In spring 2023, the Carbon Disclosure Project (the “CDP”), the charity responsible for administering the most widely used carbon disclosure ratings, launched a new function for companies to report their plastic production and use.<sup>34</sup> After nearly 3,000 companies voluntarily disclosed plastics-related data, the results indicated that companies are both overlooking and underestimating risks associated with their plastic waste, such as supply-chain disruptions, waste management costs, and regulatory scrutiny.<sup>35</sup>

In sum, plastic pollution is a global crisis that requires immediate attention by multiple stakeholders, including legislators, consumers, shareholders, and large food and beverage companies. Rather than waiting for others to act, shareholders should consider utilizing the various legal options available to them to demand more transparency from companies on the environmental impact of their operations and hold companies accountable for their actions. By pushing companies to implement meaningful changes, shareholders can do their part to help find a solution to this overarching issue.

.....

<sup>33</sup> Benedikt Downar, et al., *The impact of carbon disclosure mandates on emissions and financial operating performance*, Rev. of Acct. Studies (Aug. 5, 2021), at 1137.

<sup>34</sup> *Plastics*, CDP (2024), <https://www.cdp.net/en/plastics>.

<sup>35</sup> *Plastics disclosure 2023 snapshot*, CDP (2024), <https://www.cdp.net/en/plastics/disclosure-data>.

By: Carol C. Villegas, Danielle Izzo

---

# Engagement: A Method for Complying with the SFDR

## NOTEWORTHY DEVELOPMENTS



THE IMPACTFUL INVESTOR

## OVERVIEW

In 2021, the European Commission introduced the Sustainable Finance Disclosure Regulation (“SFDR”), a regulation aimed at augmenting transparency for investors when weighing entities’ environmental, social, and governance (“ESG”) efforts. Specifically, the SFDR set forth a standardized method for financial market participants to disclose information about their ESG practices. This uniform disclosure framework allows investors to more easily compare sustainable investment options based on the degree to which the entity considers sustainability as part of its practices.

The SFDR requires entities like asset managers and institutional investors to disclose their efforts to address ESG initiatives. Covered entities are required to specify their method of considering adverse ESG protocols with reference to indicators related to climate, the environment, social, governance, and human rights issues. For example, an asset manager must report its methodology for assessing the sustainability impact of its investment with disclosure of any adverse impacts.

## SFDR FUNDS

Under the SFDR, all funds are classified into one of three categories. These categories are defined by the regulation under Articles 6, 8, and 9.

The classifications are based on a fund’s stated approach to sustainability. For this reason, funds are encouraged to memorialize their policies concerning sustainability efforts and must disclose such policies to investors.

.....  
<sup>1</sup> European Parliament. 2019. “Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector (Text with EEA Relevance).” Official Journal of the European Union 317 (1): 1-16.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *What is SFDR?*, Nordea Funds.

**THERE ARE THREE CATEGORIES OF FUNDS:  
ARTICLE 6 FUNDS, ARTICLE 8 FUNDS, AND ARTICLE 9 FUNDS.**

<b>CATEGORY OF FUNDS</b>	
<b>Article 6 Funds</b>	Funds determine that sustainability risk is relevant to their investment strategies and, as a result, must disclose their policy for sustainability risk assessment.
<b>Article 8 Funds</b>	Funds (referred to as “Light Green” funds) are aimed at promoting ESG goals. Article 8 funds should implement the SFDR’s principal adverse sustainability indicators to integrate into their investment strategy.
<b>Article 9 Funds</b>	Funds (referred to as “Dark Green” funds) are expressly intended to promote sustainable investments or reduce carbon emissions. Article 9 funds assess investment opportunities based on the SFDR’s principal sustainability indicators to carefully evaluate corporate governance and ensure that sustainability goals are being fulfilled by the target company.

**COMPLYING THROUGH ENGAGEMENT**

Since the SFDR took effect, asset managers have considered options to take affirmative action to comply with the regulation. While there is no explicit framework for compliance, several options have emerged as best practices for compliance. One way asset managers may comply with the SFDR is through company engagement.

The regulation defines engagement as a strategic approach focused on purposeful, targeted communications with companies to address ESG issues and drive systemic change through active dialogue. This involves direct communication with companies to clearly express concerns and desired outcomes, setting the stage for constructive dialogue and establishing clear ESG objectives.

**SECTION 220 – A PURPOSEFUL METHOD FOR CORPORATE ENGAGEMENT**

Many asset managers subject to the SFDR take large financial positions in publicly traded companies and thus, through ownership as investors, have the ability to effectuate change at the board level by engaging directly with board members to shape corporate policy. However, even large financial positions may not command the type of influence that would allow asset managers to demand the type of change that would, standing alone, further the goals of the SFDR. This is increasingly true in the face of competing political agendas for companies incorporated in the U.S.

Therefore, in some cases, it makes sense for asset managers to avail themselves of a set of investor protection laws that compel engagement versus simply encouraging it. Many Fortune 500 companies are incorporated in the state of Delaware in the U.S. to take advantage of a robust set of laws that have developed for corporate governance. Because these major companies are subject to Delaware law, investors, like asset managers subject to the SFDR, may initiate engagement with U.S. corporations by availing themselves of various jurisprudence in Delaware developed to effectuate good governance. Specifically, Delaware General Corporation Law Section 220 provides investors with the ability to access corporate books and records to, amongst other things, investigate breaches of fiduciary duty, suspected corporate wrongdoing, or mismanagement.<sup>5</sup> In the context of the SFDR, this process provides another avenue for asset managers to engage with companies incorporated in Delaware to the extent that mere communications do not appear to be furthering the

.....  
<sup>5</sup> See 8 Del. C. § 220.

goals of the SFDR. With relevant documentation provided by the company on the identified topic, this will allow the asset manager to better understand each company’s ESG practices and sustainability efforts.

Under Section 220, investors may seek corporate books and records by establishing that they (1) are stockholders of the corporation, (2) complied with the demand requirements set forth by the statute, and (3) have a “proper purpose” for conducting the inspection. Section 220 defines “proper purpose” broadly, including “a purpose reasonably related to such person’s interest as a stockholder.” The bar for demonstrating a “proper purpose” under Section 220 is low. Courts routinely find efforts to investigate possible corporate mismanagement or wrongdoing sufficient.<sup>6</sup> Thus, efforts aligned with the SFDR’s goals are almost certainly sufficient to establish a “proper purpose” under Section 220—providing asset managers with an opportunity to investigate possible ESG issues and initiate contact with corporations to effectuate change.

Through a Section 220 demand, asset managers can directly investigate ESG practices and sustainability efforts, engage with companies on these issues, and then propose and negotiate specific corporate initiatives or reforms to address these issues. To the extent that these negotiations fail, litigation (or the threat thereof) to compel reforms may be another tool useful to asset managers to ensure they are complying with the SFDR.

In any event, if preliminary dialogues do not result in corporate changes or if these communications are taking too long to manifest in real change, a Section 220 demand provides a meaningful way to obtain documents from the company to educate the asset manager and provide actionable information as to whether reforms are needed. Therefore, a robust Section 220 program in and of itself is furthering the goals of the SFDR by taking the level of corporate dialogue and potential action to the next level.

.....  
<sup>6</sup> See *AmerisourceBergen Corporation v. Lebanon Cnty. Emps’ Ret. Fund*, 243 A.3d 417, 423 (Del. 2020).

# CASE WATCH

By: Domenico “Nico” Minerva, James Fee

## McDonald’s Corporation

---

**CITATION:** *In re McDonald’s Corporation Stockholder Derivative Litigation*, C.A. No. 2021-0324-JTL

**COURT:** Delaware Court of Chancery

**ESG FOCUS:** Social, Governance

**INDUSTRY:** Entertainment and Hospitality

In *In re McDonald’s Corporation Stockholder Derivative Litigation*<sup>1</sup> the Delaware Chancery Court expanded the population of defendants who can be liable for their breach of fiduciary duty of oversight. For the first time, the Court held that officers of a corporation have the same fiduciary duty of oversight to such corporation as corporate directors. The case involved allegations related to rampant sexual harassment and other toxic workplace elements at McDonald’s taking place without adverse consequences or action from the company or its executives.

Specifically, *McDonald’s* focused on the conduct of Defendant David Fairhurst, who was Executive Vice President and Global Chief People Officer at McDonald’s from 2015 to 2019. In that role, Fairhurst was responsible for establishing and maintaining a safe and respectful work environment for all employees. However, as alleged in the *McDonald’s* complaint, McDonald’s experienced a plethora of incidents of workplace sexual harassment during Fairhurst’s tenure. According to the *McDonald’s* complaint, Fairhurst himself

.....  
<sup>1</sup> *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343 (Del. Ch. 2023).

engaged in multiple acts of sexual harassment; the McDonald's human resources department turned a blind eye to sexual harassment complaints, which opened the door for retaliation against victims of sexual harassment; and workers commenced labor strikes in several cities to call attention to the sexual harassment problems at McDonald's.

Based on this pleading, in a groundbreaking January 2023 opinion,<sup>2</sup> Vice Chancellor Travis J. Laster held that corporate officers owe a duty of oversight similar to that owed by directors under the Delaware Chancery Court's landmark 1996 *Caremark* decision.<sup>3</sup> Under *Caremark*, the duty of oversight requires a good faith effort by directors to ensure information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board to reach informed judgments concerning both the corporation's compliance with the law and its business performance. In addition to expanding the duty of oversight to officers, *McDonald's* signals a willingness to consider sexual misconduct or toxic culture as grounds for claims of fiduciary duty violations. These issues have become a significant focus for some investors in recent years.

Under *Caremark*, as elaborated on in *Stone v. Ritter*<sup>4</sup> and expanded now in *McDonald's* to encompass officers, plaintiffs alleging violations of the duty of oversight must allege facts supporting an inference that either (1) the director or officer "utterly failed" to implement any reporting or information system or controls, or (2) the director or officer "consciously failed" to monitor or oversee such reporting system and thus was disabled from being informed of risks or problems requiring attention. The *McDonald's* court made clear that the same reasoning for subjecting directors to a duty of oversight—that managing the corporation factors prominently into the seriousness of legal actions against them related to that management—applies with equal or more force to the officers who oversee a corporation's day-to-day operations.

.....  
<sup>2</sup> *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343 (Del. Ch. 2023).

<sup>3</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

<sup>4</sup> In *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006), the Delaware Supreme Court stated that *Caremark* set forth two types of claims for violation of the duty of oversight: "Information-Systems Claims" and "Red-Flags Claims." Information-Systems Claims can be found where directors "utterly failed to implement any reporting or information system or controls." Red-Flags Claims result where directors implement reporting or information systems but "consciously fail[] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." The plaintiffs in *McDonald's* pled a Red-Flags Claim.

Furthermore, “[f]or relevant and timely information to reach the board, the officers who serve as the day-to-day managers of the entity must make a good faith effort to ensure that information systems are in place so that the officers receive relevant and timely information that they can provide to the directors.” Additionally, because the duty of oversight stems from the duty of loyalty, “officers will be liable for violations of the duty of oversight if a plaintiff can prove that they acted in bad faith and hence disloyally.”

For nearly thirty years, the *Caremark* doctrine recognized the duty of oversight for directors of Delaware corporations. Now, after *McDonald’s*, corporate officers, and not just directors, owe a duty of oversight within the scope of each officer’s responsibilities. Officers will be liable for violating that duty if, within their area of responsibility, they consciously fail to make a good faith effort to establish information reporting systems or they consciously ignore red flags that arise from those reporting systems or otherwise come to their attention. In *McDonald’s*, Fairhurst’s area of responsibility as Global Chief People Officer encompassed human resources and work culture, and the plaintiffs successfully alleged that Fairhurst consciously ignored red flags of a toxic culture and widespread complaints of sexual harassment and misconduct, which were well within his areas of responsibility at the company. Going forward, stockholders seeking to replicate the success of the *McDonald’s* case can successfully allege violations of the duty of oversight for officers provided that the allegations focus on that officer’s areas of responsibility, not simply general allegations of business oversight or negligence. Thus, plaintiffs seeking to advance these claims against officers must plead facts that meet the high pleading standard sufficient to support an inference of bad faith on the part of a director or officer.

# TRENDS IN ESG LITIGATION

2022-2024

## ESG CASES BY YEAR: SECURITIES CLASS ACTIONS

INITIAL COMPLAINT FILING	ESG CASES	TOTAL CASES	PERCENTAGE ESG CASES
2022	39	221	16.3%
2023	33	257	12.8%
JAN-JUN 2024	34	114	29.8%
TOTAL	106	592	17.9%

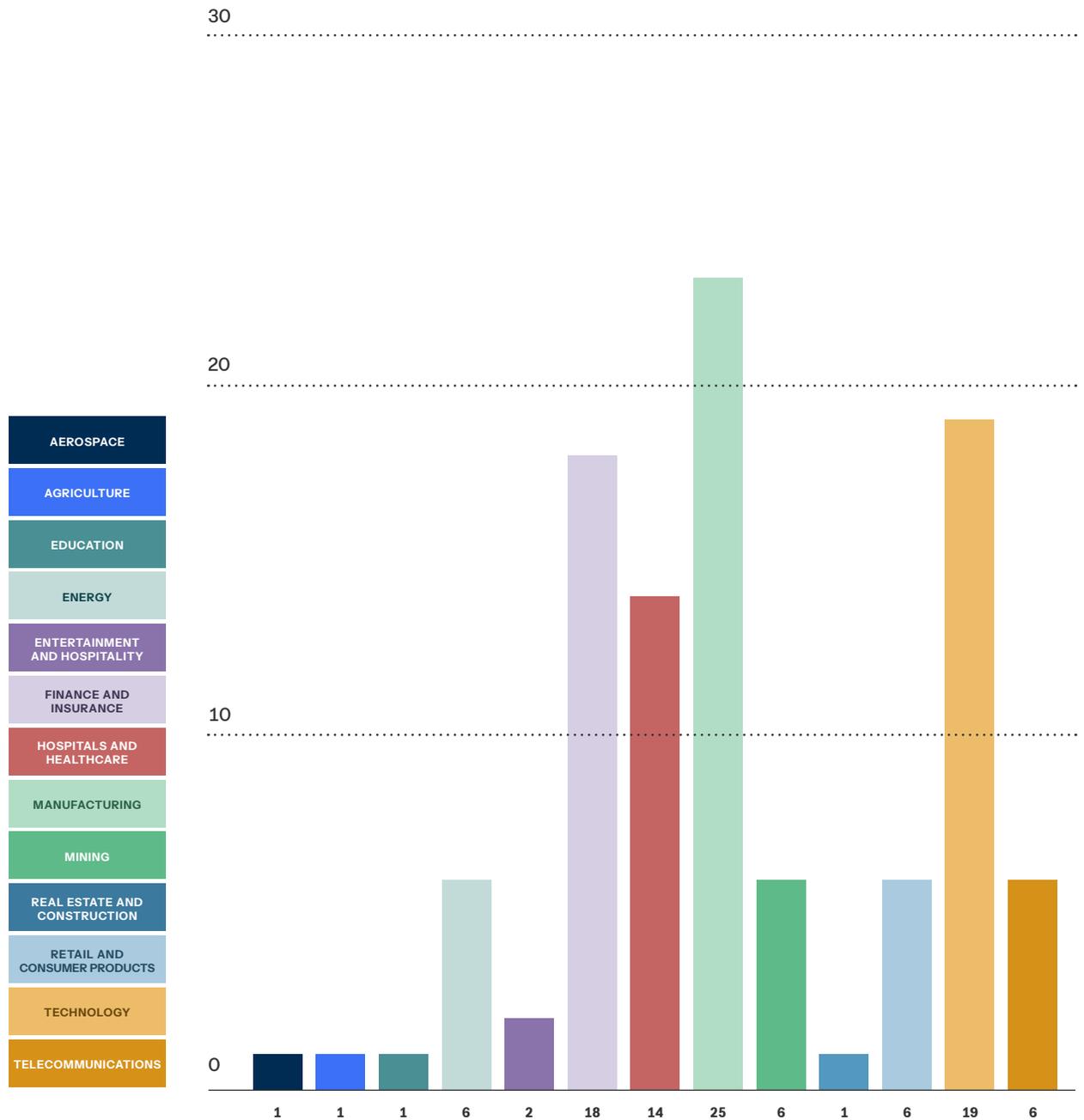
## ESG CASES BY YEAR: SHAREHOLDER OVERSIGHT ACTIONS

INITIAL COMPLAINT FILING	ESG CASES	TOTAL CASES	PERCENTAGE ESG CASES
2022	38	210	18%
2023	39	243	16%
JAN-JUN 2024	44	178	24.7%
TOTAL	121	631	19.2%

# TRENDS IN ESG LITIGATION

## 2022-2024

### ESG CASES BY INDUSTRY: SECURITIES CLASS ACTIONS



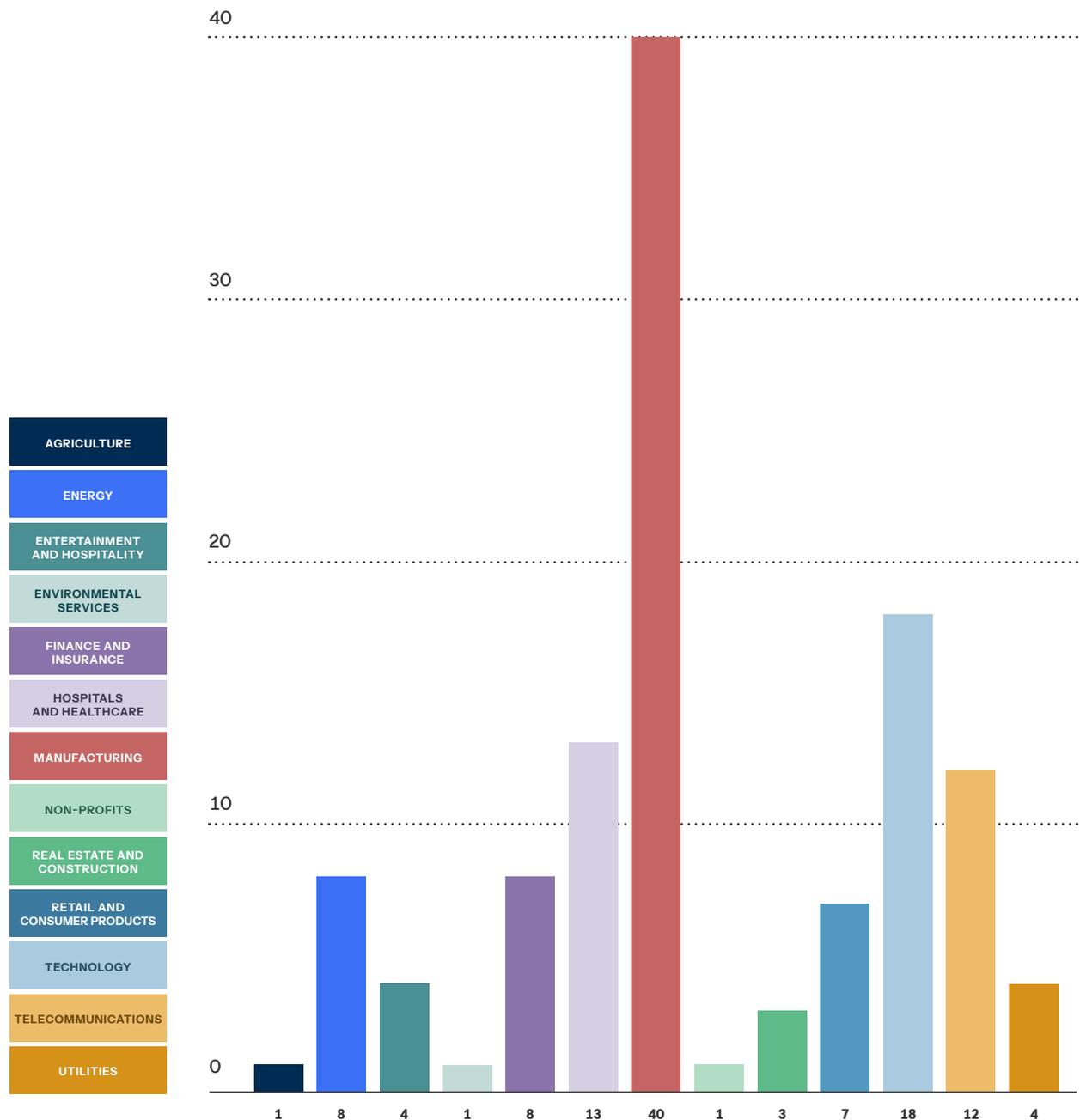
ESG CASES JAN 2022 TO JUN 2024

TOTAL = 106

# TRENDS IN ESG LITIGATION

## 2022-2024

### ESG CASES BY INDUSTRY: SHAREHOLDER OVERSIGHT ACTIONS



ESG CASES JAN 2022 TO JUN 2024

TOTAL = 105

# CONTACT US

ESG-focused litigation seeks to recover damages, improve corporate governance, and otherwise address corporate misconduct. Labaton Keller Sucharow has counseled clients who have used litigation to engage on a wide range of fronts: improving a corporation's basic governance, addressing poor stewardship of the environment and climate-related concerns, advancing and safeguarding worker rights, and improving companies that are not aligned with their shareholders' societal objectives. Our attorneys are available to address any questions you may have regarding ESG-focused litigation. Please contact the Labaton attorney with whom you usually work or a member of the Firm's ESG Taskforce.



Jonathan Gardner, Managing Partner  
Email: [JGardner@Labaton.com](mailto:JGardner@Labaton.com)  
Tel: +1 212.907.0839



Carol C. Villegas, Partner  
Email: [CVillegas@Labaton.com](mailto:CVillegas@Labaton.com)  
Tel: +1 212.907.0824



Guillaume Buell, Partner  
Email: [GBuell@Labaton.com](mailto:GBuell@Labaton.com)  
Tel: +1 212.907.0873



Alfred L. Fatale III, Partner  
Email: [AFatale@Labaton.com](mailto:AFatale@Labaton.com)  
Tel: +1 212.907.0884



Jamie Hanley, Partner in Charge, London  
Email: [JHanley@Labaton.com](mailto:JHanley@Labaton.com)  
Tel: +44 20 3582 0981



Domenico "Nico" Minerva, Partner  
Email: [DMinerva@Labaton.com](mailto:DMinerva@Labaton.com)  
Tel: +1 212.907.0887

**NEW YORK**

140 BROADWAY  
NEW YORK, NY 10005  
TEL: +1 212.907.0700

---

**DELAWARE**

222 DELAWARE AVENUE, SUITE 1510  
WILMINGTON, DE 19801  
TEL: +1 302.573.2540

---

**LONDON**

1 KING WILLIAM STREET  
LONDON, EC4N 7AF UNITED KINGDOM  
TEL: +44 20.3582.0981

---

**WASHINGTON, D.C.**

1050 CONNECTICUT AVENUE NW, SUITE 500  
WASHINGTON, D.C. 20036  
TEL: +1 202.772.1881

