



**Labaton**  
Keller Sucharow

# THE IMPACTFUL INVESTOR

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2024 YEAR-END REPORT

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# EXECUTIVE SUMMARY

Labaton Keller Sucharow is pleased to present *The Impactful Investor: 2024 Year-End 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:

- ✘ Strategies for investing in an organization that is not currently promoting ESG practices;
- ✘ The rise of modern slavery as an ESG concern;
- ✘ A year-end assessment of risks and opportunities facing institutional investors in U.S. markets;
- ✘ A case study of ESG implications for a company that prioritizes its profits over its people; 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: Carol C. Villegas, Danielle Izzo

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# To Divest, or Not to Divest? A Key Question for Investors Seeking to Promote Sustainability Goals

## NOTEWORTHY DEVELOPMENTS

Environmental, social, and governance (“ESG”) concerns increasingly drive major investment decisions by institutional and retail investors alike. The strategy for investing in companies that already prioritize ESG goals is clear, but the strategy for investing in other organizations is more complicated.

When considering an investment in an organization that is not currently promoting ESG practices (or not sufficiently promoting ESG practices), investors face two options: divest or retain their investment. This article examines the pros and cons of each approach based on recent research and examples and, ultimately, argues that investors can effectuate a greater impact on organizations when they maintain their investments and take an active role in driving internal change.

## BACKGROUND

Over the past seven years, investors have increasingly selected their investments based on ESG goals.<sup>1</sup> ESG broadly stands for sustainable corporate practices and policies relating to critical global issues like climate change, fair labor standards, and sufficient internal controls. Under the ESG framework, corporations are held to a set of standards related to their sustainability efforts, which allow investors to assess each corporation’s ESG impact.<sup>2</sup>

Investors increasingly rely on these standards, and prioritize corporate sustainability, when making investment decisions. This marked increase has been confirmed by several recent studies. For example, in January 2024, Morgan Stanley published a report containing the results of an investor survey that found that “more than half of investors say they plan to increase sustainable investments in the next 12 months.”<sup>3</sup> The same study concluded that climate action was among the most important of the concerns to investors.<sup>4</sup>

The Institute for Energy Economics and Financial Analysis issued a report in June 2024 that confirmed that “inflows into sustainable [investment] funds remain strong, especially in Europe.”<sup>5</sup> In a May 2024 study, ISS-Corporate

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<sup>1</sup> Ramnath N. Iyer, [ESG Investing, Steady Growth Amidst Adversity](#), INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS (June 10, 2024).

<sup>2</sup> Tom Krantz & Alexandra Jonker, *What is Environmental, Social and Governance (ESG)?*, IBM: TOPICS (Jan. 24, 2024).

<sup>3</sup> *Individual Investors’ Interest in Sustainability is on the Rise*, MORGAN STANLEY: INSTITUTE FOR SUSTAINABLE INVESTING (Jan. 26, 2024).

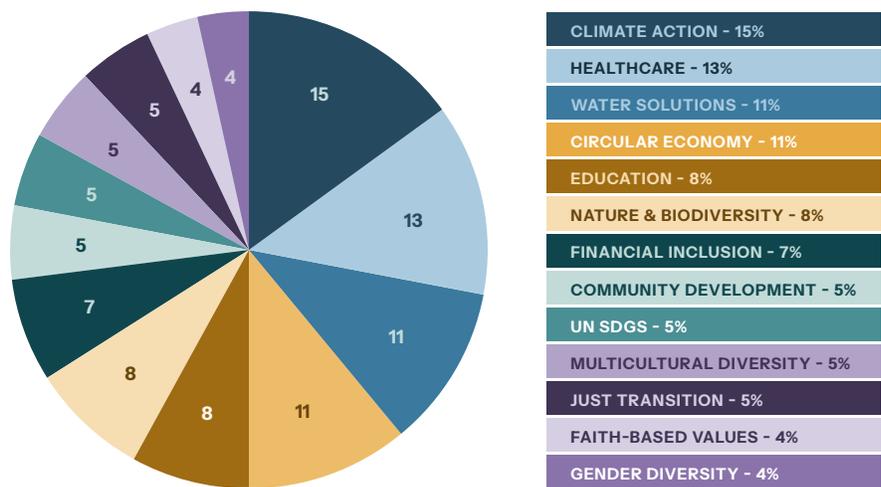
<sup>4</sup> *Id.*

<sup>5</sup> Ramnath N. Iyer, [ESG Investing, Steady Growth Amidst Adversity](#), INSTITUTE FOR ENERGY ECONOMICS AND FINANCIAL ANALYSIS (June 10, 2024).

similarly identified high shareholder interest in governance goals within the United States.<sup>6</sup>

The global rise of ESG-driven investing has prompted institutions and investors to consider the efficacy of various investment strategies in advancing their ESG aims. These considerations beg the question: what strategy has the greater impact on corporations, divestment, or retention?

**TOP SUSTAINABLE INVESTING THEMES RANKED**



Source: Morgan Stanley Institute for Sustainable Investing, January 2024

**THE DIVESTMENT APPROACH**

As investors consider various strategies for enhancing corporations’ commitment to ESG practices, divestment appears to be an obvious option. CNN defines divestment as the practice of “sell[ing] off [] shares of a company to avoid complicity in activities [investors] deem unethical or harmful.” At its core, the goal of this strategy is to signal to corporations that their continued engagement in such practices will result in a loss of shareholder funds.<sup>8</sup> Consider for example, a large institutional investor invested in a variety of publicly traded corporations. If a corporation were found to be engaging in corrupt practices, the institutional investor may vehemently disagree with the company’s corrupt and illegal activities. In order to demonstrate the institution’s disagreement, the institutional investor could sell

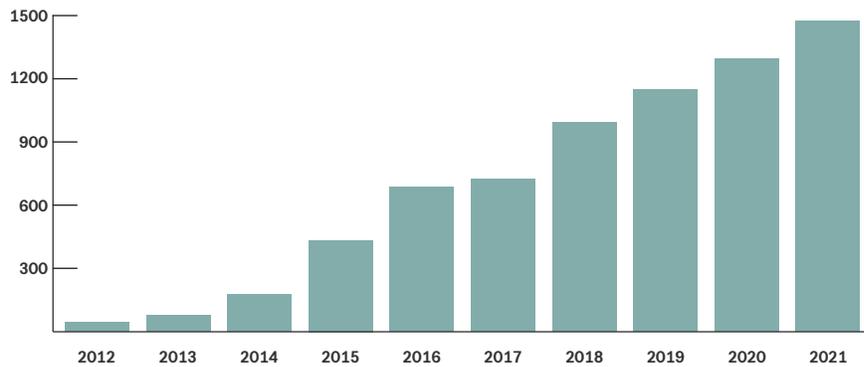
<sup>6</sup>Jun Frank, Pro-ESG Shareholder Proposals Regaining Momentum in 2024, ISS-CORPORATE (May 22, 2024).

<sup>7</sup>Nicole Goodkind, What is Divestment? And Does it Work?, CNN: BUSINESS (Apr. 28, 2024).

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

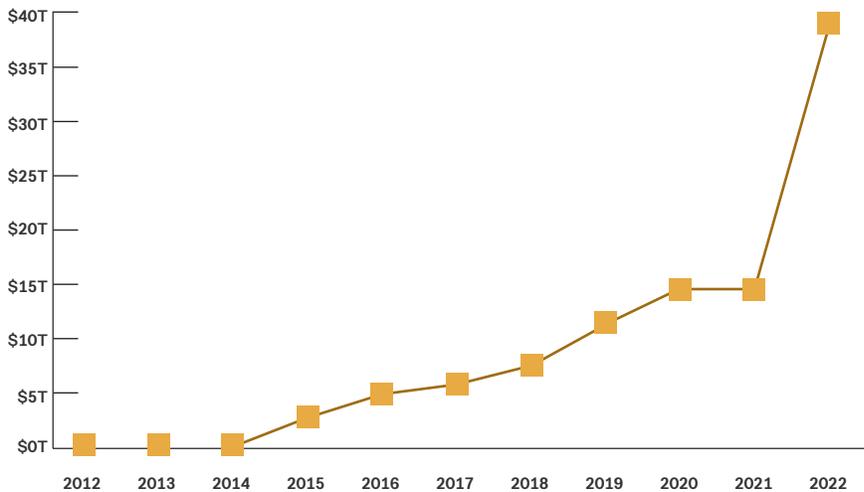
off all of its shares (in some cases totaling millions of dollars) to send a clear message that the institution would not stand idly by as the corrupt practices continue. Calls for the implementation of this divestment strategy were widely publicized in 2024—particularly on college campuses. That is, students called upon their universities to divest from various corporations associated with poor environmental standards.

#### TOTAL PUBLIC INSTITUTIONAL COMMITMENTS TO FOSSIL FUEL DIVESTMENT



Source: Global Divestment Commitments Database

#### TOTAL ASSETS UNDER MANAGEMENT COMMITTED TO FOSSIL FUEL DIVESTMENT



\*2021 Figures represent an update of some institutions' total assets under management See Methodology section. Source: Global Divestment Commitments Database

A group of students at Columbia University, known as “Sunrise Columbia,” are working to fight the climate crisis and have called for complete divestment from fossil fuel companies.<sup>9</sup> To support their calls for divestment, the students

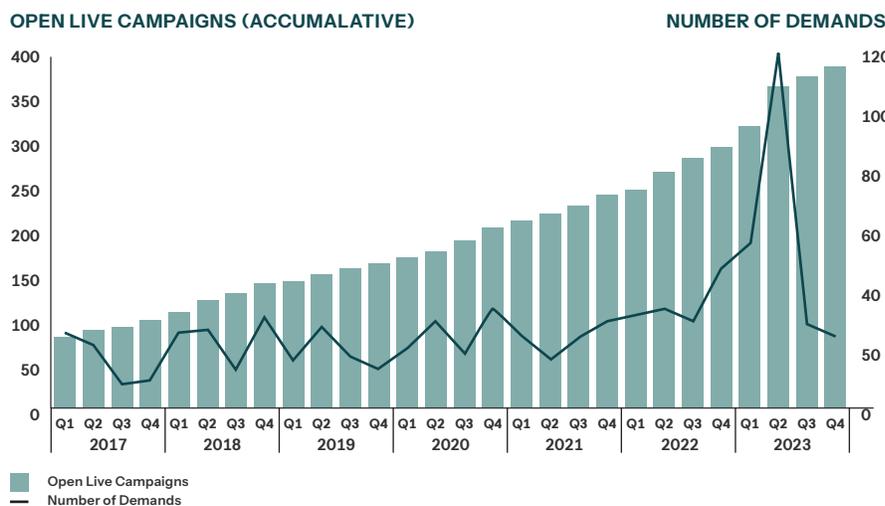
<sup>9</sup>Sunrise Columbia, Divestment Unites Us, From Environmental Justice to a Free Palestine, COLUMBIA SPECTATOR (Mar. 28, 2024).

cited to several points in the university’s history where officials divested from organizations that failed to align with the university’s mission. As other examples, in 2015, Columbia University made the decision to divest from the private prison industry in the wake of student protests, and in 2017, the university made a similar divestment decision to cut ties with companies generating over 35% of their revenue from thermal coal production. Now, students are pointing to these examples to call for complete divestment from fossil fuel companies.<sup>10</sup>

Harvard University faced similar calls for divestment in 2021 when the Climate Defense Project, together with local officials, faculty, and alumni, filed a complaint against the university alleging that its continued investment in fossil fuel companies violated its fiduciary duty.<sup>11</sup>

Universities are not the only institutions willing to divest from organizations like fossil fuel companies. Indeed, a joint report by the Institute for Energy Economics and Financial Analysis, Stand.earth, C40, and the Wallace Global Fund found that 1,485 institutions involving \$39 trillion in assets have publicly committed to divesting from fossil fuel companies.<sup>12</sup>

## LIVE CAMPAIGNS IN EUROPE



<sup>10</sup> *Id.*

<sup>11</sup> *Invest Divest 2021: A Decade of Progress Towards a Just Climate Future*, DIVESTINVEST (Oct. 26, 2021).

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

## DOES DIVESTMENT HAVE INVESTORS' DESIRED EFFECT?

As evidenced by the above examples, the divestment strategy has gained traction among many investors and institutions. Even so, several experts question the true impact of divestment in reshaping organizations' commitment to ESG practices.

One working paper, *The Impact of Investing*, published in 2021, concluded that divestment does not have the desired effect that ESG-minded investors are seeking.<sup>13</sup> Mainly, the paper found that too few investors were divesting from the at-issue organizations to have a significant impact—meaning that, in most cases, organizations could continue on with existing practices without feeling compelled to change. In addition to eliminating shareholders' voices in calls for change, divestment also consolidates ownership into the hands of the remaining investors who are likely indifferent to concerns about climate change or other critical issues.<sup>14</sup>

While seemingly attractive on its face, divestment may not have the desired impact unless the level of divestment is significant enough to hinder a company's overall financial structure. Bill Gates acknowledged this reality in 2019 when he stated that “[d]ivestment, to date, probably has reduced about zero tons of emissions. It's not like you've capital-starved [the companies] making steel and gasoline.”<sup>15</sup>

## RETAINING INVESTMENTS TO PROMOTE INTERNAL CHANGE

While divestment has not had the full, desired effect, investors do have an alternative strategy: maintain their investments and push for change. At first glance, such a strategy may appear counterintuitive, but research and industry examples demonstrate that investors have made significant progress by advocating for change within organizations—*i.e.*, in their capacity as shareholders. Indeed, when analyzing this strategy, Harvard Business School senior lecturer Mark Kramer stated “[i]f you want to do impact investing with publicly traded securities, you have to be actively engaged with management.”<sup>16</sup>

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<sup>13</sup> Jonathan B. Berk & Jules H. Van Binsbergen, *The Impact of Investing*, STANFORD GRADUATE SCHOOL OF BUSINESS: FACULTY & RESEARCH (Aug. 27, 2011).

<sup>14</sup> Adam Aston, *Why Divestment Doesn't Work — and Just Won't Die*, TRELIS (Jul. 24, 2024).

<sup>15</sup> *Id.*

<sup>16</sup> Lane Lambert, *ESG Activists Met the Moment at ExxonMobil, But Did They Succeed?*, HARVARD BUSINESS SCHOOL: WORKING KNOWLEDGE (Feb. 16, 2023).

Shareholders are uniquely positioned to engage with management due to several specific rights that legally allow them to vote on company proposals, raise concerns about corporate management, and advocate for solutions.<sup>17</sup> In the case of divestment, investors relinquish these key rights upon the sale of their shares. However, when investors maintain their shares, they may utilize these privileges to advance ESG aims.

This strategy gained significant media attention in 2024 when Engine No. 1, a small hedge fund aimed at fighting climate change,<sup>18</sup> engaged in activist activities in an effort to create long-term change at ExxonMobil—initiating a battle for board seats. However, Engine No. 1 is just one example of many institutions engaging in activist investing that vary by form and degree of hostility. For example, in 2023, German investment institution, Union Investment, was key in initiating seven activist campaigns against German companies. European shareholders have continued to follow suit, as evidenced by their increasing engagement in activist efforts.<sup>19</sup>

In addition to taking an activist role, shareholders of publicly traded U.S. corporations may avail themselves of other rights. For example, in some cases, it makes sense for shareholders to utilize U.S. investor protection laws that compel engagement rather than simply encouraging it. Many Fortune 500 companies are incorporated in the jurisdiction of Delaware in the United States 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 may initiate engagement with U.S. corporations via various jurisprudence in Delaware laws developed to effectuate good governance. Specifically, Delaware General Corporation Law Section 220 provides investors with the ability to access corporate books and records to, among other things, investigate breaches of fiduciary duty, suspected corporate wrongdoing, mismanagement, or governance shortfalls. Thus, in the event that collective shareholder action and corporate communications prove ineffective, investors can demand direct documentation

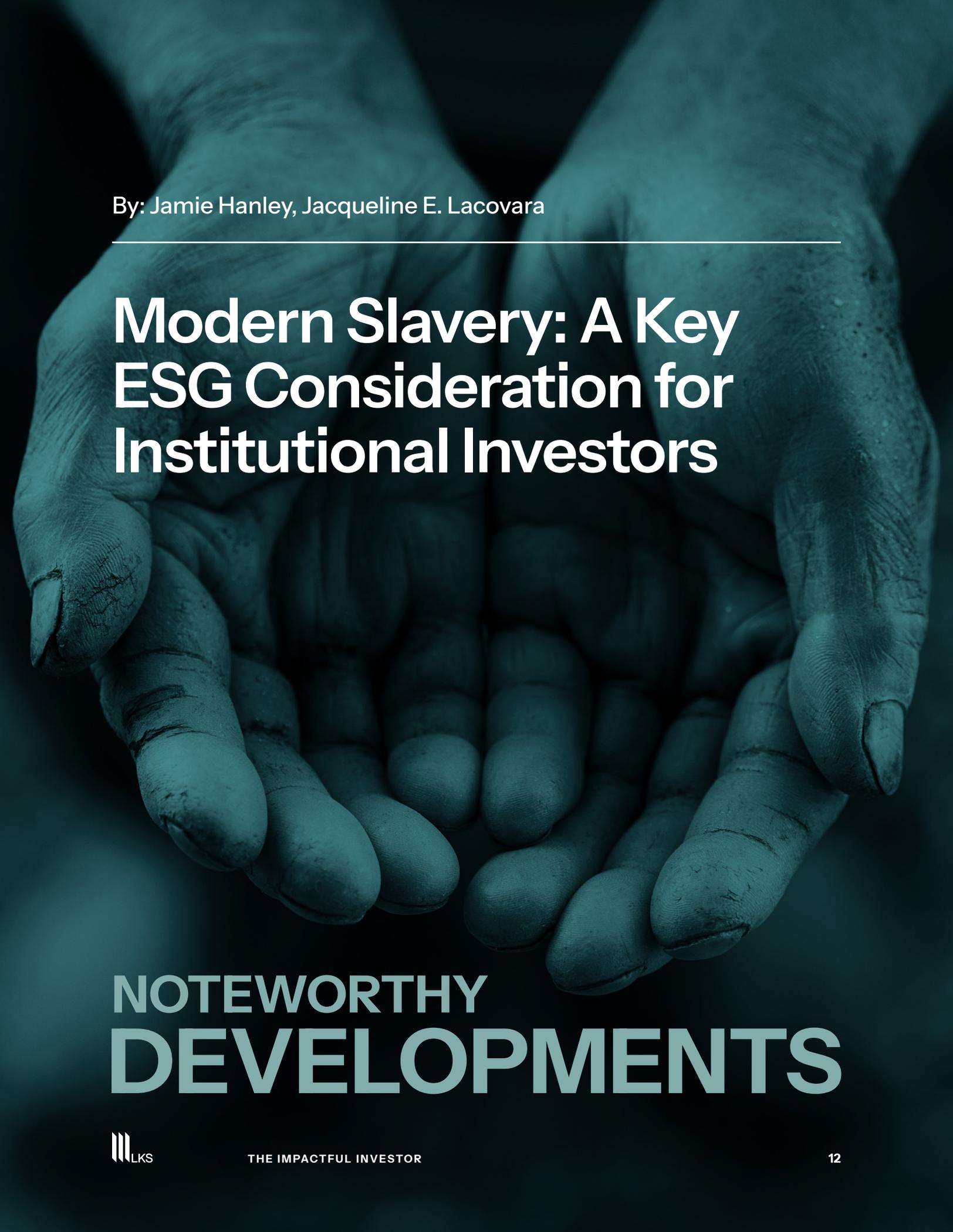
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<sup>17</sup> See generally Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j; Securities Act of 1933, Section 11, 15 U.S.C. § 77k; 8 Del. C. § 220.

<sup>18</sup> *Id.*

<sup>19</sup> *Activist Investing in Europe 2024*, Skadden & Mergermarket (2024).

by the company. This documentation will allow the asset manager to better understand each company's ESG practices and sustainability efforts and will help engagement efforts because investors will then be armed with relevant company documents. 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. And, beyond investigations, investors are afforded the opportunity to engage in litigation as needed to compel reforms.

With these avenues for engagement and effective change, the case for the retention strategy is becoming increasingly strong in both the United States and Europe. Shareholders' continued investment and involvement in these efforts will drive meaningful internal change to promote sustainability efforts worldwide and continue to preserve, and in many cases, drive up shareholder value.



By: Jamie Hanley, Jacqueline E. Lacovara

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# Modern Slavery: A Key ESG Consideration for Institutional Investors

NOTEWORTHY  
DEVELOPMENTS

## THE SCOURGE OF MODERN SLAVERY

How can it be that in the 21st century, an estimated 50 million people across the world are trapped in “modern slavery,” and what has that got to do with institutional investors?

In a potential case we were reviewing recently, it emerged that a global company knew (or at least ought reasonably to have known) that its supply chains regularly engaged in forced labor, human trafficking, child labor, and exploitation under coercive conditions. Our client—a UK-based multi-billion-dollar institutional investor—was rightly appalled that a company in which they were invested could tolerate such practices.

Our client understood that not only was there a moral imperative to address these revelations, but that they clearly posed a material financial risk to them as an institutional investor.

Our children learn that slavery existed before the genesis of written records, was practiced by different cultures in virtually every corner of the globe, and was accepted as an established institution in the earliest civilizations, but also that today slavery has no place in our modern society—it is rightly regarded as “the greatest evil.”<sup>1</sup> Yet, despite widespread consensus among nations, leading corporates, the public, and human rights groups that slavery should be a bygone atrocity, recent estimates indicate that 50 million people around the world are trapped in conditions of modern slavery<sup>2</sup> and suffer forced labor, forced marriage, human trafficking, debt bondage, and many other exploitative situations, which they cannot escape because of threats, violence, deception, abuse of power, or some other form of coercion.<sup>3</sup>

Modern slavery is pernicious, much less glaring than the slavery depicted in history book images littered with chains, whips, and human beings clad in threadbare garments. In place of the shackles that characterized the slavery

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<sup>1</sup> Miguel de Cervantes Saavedra, DON QUIXOTE, 58 (2014) (ebook) (“[C]aptivity is the greatest evil that can fall to the lot of man.”).

<sup>2</sup> International Labour Organization, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE, (Sept. 2022) at 19; see also *Walk Free, What is modern slavery?*, 2024.

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

found in our history books, today’s victims of modern slavery are denied water breaks, forbidden from using the bathroom, and forced to wear diapers;<sup>4</sup> are confined to mass detention “re-education” centers;<sup>5</sup> have their wages garnished;<sup>6</sup> and are subjected to forced medical treatment and sexual violence.<sup>7</sup>

That slavery has not met obsolescence might not be too surprising when one considers the International Labour Organization’s (“ILO”) most recent estimate that annual forced labor generates a staggering \$236 billion in illegal profits each year.<sup>8</sup> These profits are wages taken from vulnerable workers and tax revenue withheld from the government.<sup>9</sup> With such money at stake, criminal networks are emboldened, and exploitation is further incentivized. And, because illegal profits increased by \$64 billion since the ILO’s last report in 2014, eradicating modern slavery will likely require greater collaboration among governments, consumers, businesses, and institutional investors.

## ESG AS A KEY CONSIDERATION IN INVESTMENT DECISIONS

Institutional investors have a particularly crucial role to play in combatting modern slavery as organizations increasingly include environmental, social, and governance (“ESG”) metrics in their annual reports.<sup>10</sup> Despite some criticism,<sup>11</sup> sustainable investment has undergone tremendous growth in recent years—with global ESG assets on pace to surpass \$40 trillion by 2030.<sup>12</sup> With the rise of ESG indexes and emergence of hundreds of ESG funds, financial professionals advise companies that “having a comprehensive ESG strategy is no longer a luxury but a requirement.”<sup>13</sup> Indeed, when recent surveys indicate that 84% of 18 to 24 year olds prioritize ethical buying,<sup>14</sup> businesses should be prepared today and in coming years to demonstrate that their goods aren’t the products of child labor.

Furthermore, securities commissions and stock exchanges are increasingly providing sustainability rules and guidance to issuers to improve reporting on

<sup>4</sup> Nadine Mena Michollek, Nemanja Rujevic, & Radmilo Markovic, *Are German carmakers exploiting Serbian workers?*, Deutsche Welle, (Nov. 27, 2024).

<sup>5</sup> Matt Murphy, Flora Drury, & Tessa Wong, Uyghurs: *China may have committed crimes against humanity in Xinjiang* – UN, BBC News (Sept. 1, 2022).

<sup>6</sup> Kenzi Abou-Sabe & Adiel Kaplan, *Starbucks sued for allegedly using coffee from farms with rights abuses while touting its ‘ethical’ sourcing*, NBC News (Jan. 10, 2024).

<sup>7</sup> Matt Murphy, Flora Drury, & Tessa Wong, Uyghurs: *China may have committed crimes against humanity in Xinjiang* – UN, BBC News (Sept. 1, 2022).

<sup>8</sup> Kelsey Morgan, *Modern slavery is a \$236 billion business: It’s time for business leaders to take action*, Fast Company (Nov. 26, 2024).

<sup>9</sup> Modern Slavery UK Benchmark at 12.

<sup>10</sup> Tom Krantz & Alexandra Jonker, *What is Environmental, Social and Governance (ESG)?*, IBM: TOPICS (Jan. 24, 2024).

<sup>11</sup> James Surowiecki, *The Hottest Trend in Investing is Mostly a Sham*, THE ATLANTIC (May 26, 2023), (characterizing ESG investing as “mostly smoke and mirrors”).

<sup>12</sup> BLOOMBERG, *Global ESG assets predicted to hit \$40 trillion by 2030, despite challenging environment, forecasts Bloomberg Intelligence* (Feb. 8, 2024). See also London Stock Exchange Group, *The rise and rise of sustainable investment*, THE FINANCIAL TIMES.

<sup>13</sup> Tom Krantz & Alexandra Jonker, *What is Environmental, Social and Governance (ESG)?*, IBM: TOPICS (Jan. 24, 2024).

<sup>14</sup> OpenText, [The Importance of an Ethical Supply Chain](#).

modern slavery prevention.<sup>15</sup> In fact, several human rights groups concluded that disclosure about modern slavery in ESG reports is becoming a standard market practice—with more than two-thirds of the stock exchanges surveyed including modern slavery-related references or metrics.<sup>16</sup>

## LEGAL INCENTIVE TO COMBAT MODERN SLAVERY

Recent legislation around the globe has further amplified the incentive for companies to abide by modern slavery compliance measures. In 2015, for example, the United Kingdom enacted the UK Modern Slavery Act—one of the first pieces of legislation in the world to specifically address slavery in the 21st century.<sup>17</sup> The act requires businesses to disclose on an annual basis actions taken to ensure there are no indicia of modern slavery in their business or supply chains.<sup>18</sup> In 2019, Australia adopted its own Modern Slavery Act, requiring businesses with annual revenue exceeding A\$100 million to publish annual statements that identify and address the risks that modern slavery poses to supply chains.<sup>19</sup> Since the act's original adoption, the Australian government has further intensified efforts to combat modern slavery by engaging in 285 targeted consultations with NGOs, business organizations, and academics to review the efficacy of its Modern Slavery Act.<sup>20</sup> In 2023, the government published a review of those consultations and recommended introducing penalties for non-compliance with the reporting requirements and lowering the reporting threshold for businesses with annual revenue of A\$100 million to A\$50 million.

Numerous other governments have followed suit. Since 2017, Canada, Switzerland, Norway, France, the Netherlands, and the state of California have adopted similar laws that require businesses to report risk assessments and address vulnerabilities in their supply chains.

## THE IMPORTANCE OF PROMOTING AN ETHICAL SUPPLY CHAIN

These legislative efforts not only underscore a global commitment to combatting modern slavery, but also present institutional investors with an effective tool

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<sup>15</sup> Sustainable Stock Exchanges Initiative, *Stock exchanges promote corporate disclosure on modern slavery: exchange guidance on topic growing, but more needed* (Nov. 29, 2023).

<sup>16</sup> *Id.*

<sup>17</sup> United Kingdom Government, *Historic law to end Modern Slavery passed* (Mar. 26, 2015).

<sup>18</sup> United Kingdom Government, *Modern Slavery Act 2015* (July 30, 2018).

<sup>19</sup> Australian Government Attorney-General's Department, [Modern Slavery: Modern Slavery Act 2018](#).

<sup>20</sup> *Id.*

to analyze their own investment decisions. Aside from the moral imperative to review and consider companies' compliance with modern slavery reporting requirements, institutional investors expose themselves to financial and legal risks when they invest in companies with weak ESG indicators. For one thing, businesses that set ESG targets and track their results are shown to demonstrate revenue growth and stronger EBITDA margins.<sup>21</sup> In addition, businesses that take ESG goals seriously can avoid the financial and reputational harm that accompany being vulnerable to suit.

Consider Starbucks, a public company traded on the Nasdaq, which has been embroiled in a lawsuit since the beginning of this year. In January 2024, the consumer advocacy group National Consumers League (“NCL”) lodged a complaint against Starbucks for violating D.C.’s Consumer Protection Procedures Act.<sup>22</sup> In particular, the NCL alleged the coffee powerhouse has been sourcing coffee beans and tea leaves from farms that engaged in child labor, sexual abuse, and forced labor.<sup>23</sup> According to the complaint, Starbucks capitalized on “significant and growing consumer demand for ethically sourced goods and services” by misleadingly branding itself and several of its products as being “Committed to 100% Ethical Coffee Sourcing.”<sup>24</sup>

The commencement of litigation against public corporations like Starbucks can have detrimental effects on a company’s financial health. Not only do such lawsuits cause reputational damage and erode investor confidence—effects that can cause a plummeting stock price—but they also incur sizeable legal costs that may divert funds previously allocated for dividends or reinvestment towards the payment of hefty legal settlements.<sup>25</sup> Studies show that a company’s mere announcement that it has been sued causes an average 5% drop in stock price.<sup>26</sup> The more protracted and public the litigation, the greater the likelihood that investor confidence, cash flow, and company reputation will suffer.<sup>27</sup>

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<sup>21</sup> Axel Seeman, Sylvain Guyoton, Anna Bianchi, & Jacqueline Han, *Do ESG Efforts Create Value?*, BAIN & COMPANY (Apr. 17, 2023).

<sup>22</sup> Complaint at 27, *National Consumers League v. Starbucks Corp.*, No. 1:24-cv-00421 (D.D.C. Feb. 12, 2022).

<sup>23</sup> *Id.* at 1.

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

<sup>25</sup> Wolper Law Firm, *SECURITIES LITIGATION IMPACT ON PUBLICLY TRADED COMPANIES: A DEEP DIVE* (Sept. 14, 2023).

<sup>26</sup> Emma Carr, *New study reveals the impact of litigation on company value*, Gowling WLG (Sept. 23, 2022).

<sup>27</sup> Dan Schmidt, *How Does a Lawsuit Impact a Stock Price?*, Benzinga (Dec. 9, 2024).

## LOOKING AHEAD

Legal battles like the one forged against Starbucks this past year are likely to surface more often, especially as states expand legislation that protects consumers and promotes ethical supply chains. As such, institutional investors have not only an ethical and moral obligation to address modern slavery within their investing portfolios, but also a financial and legal imperative to adopt ESG frameworks that address modern slavery metrics directly. With millions living under the scourge of forced labor around the world, institutional investors must join governments and NGOs alike by being engaged shareholders that advocate for vigorous anti-slavery policies. I predict that awareness around modern slavery will continue to rise in 2025, and more institutional investors will recognize their influence in ensuring that their investments contribute to a more just and ethical global economy.

By: Jonathan Gardner, Jacqueline R. Meyers

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# Emerging Risks & Opportunities for Institutional Investors



## NOTEWORTHY DEVELOPMENTS

In 2024, U.S. stock indices climbed to record highs. As share prices continue to tick up, securities class actions remain an invaluable tool for institutional investors. Given the record increase in U.S. market capitalization, settlements on behalf of shareholders have grown exponentially. Recent studies estimate that two-thirds of corporate frauds go undetected, burdening shareholders with losses attributable to corporate deceit. Nevertheless, uncertainty looms over bullish U.S. markets as we enter the final months of 2024. Specifically, the artificial intelligence (“AI”) frenzy and judicial curtailment of government agencies’ power stand to impact the way adept institutional investors approach surging U.S. markets. We analyze these emerging risks and opportunities below, with an eye toward maximizing shareholder value through securities class actions.

## SURGING VALUATION IN U.S. MARKETS AND RISING RECOVERIES

Since 2014 the NASDAQ Composite Index has increased over 300%.<sup>1</sup> More than half of that growth occurred during the last five years.<sup>2</sup> Because shareholders may allege securities fraud claims looking back up to five years, this tremendous growth in market valuation and individual share prices represents a significant opportunity for monetary recovery. This is partially due to steep stock drops driving greater shareholder recoveries. Put simply, surging U.S. markets mean that companies have more to lose.

For example, on multiple days in September 2024 the NASDAQ broke 18,000 points—signaling that this once record-breaking high is becoming a common occurrence. In 2023, closing values hovered near 13,000 points, reflecting an approximately 38% increase in the past year alone. The NASDAQ—weighted heavily in technology stocks—reflects the meteoric rise of individual share prices such as NVIDIA, which has more than tripled since the start of the year.<sup>3</sup> Exchange traded funds such as Global X Robotics & Artificial Intelligence ETF (NASDAQ: BOTZ) reflect a collection of AI-based stocks also on a booming trajectory.

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<sup>1</sup> NASDAQ Composite Index - 10-Year Daily Chart, MACROTRENDS.

<sup>2</sup> Trevor Jennewine, *Here's the Average Stock Market Return Over the Last 15 Years*, THE MOTLEY FOOL (June 27, 2024).

<sup>3</sup> Trefis Team, *NVIDIA Stock: The Road to \$200*, FORBES (Sept. 26, 2024).

Similarly, in the last five years, the S&P 500 Index jumped over 90%.<sup>4</sup> This increase has translated to the S&P 500 trading from around 3,000 points in September 2019 to approximately 5,700 points in September 2024. In the first half of 2024 alone, the S&P 500 gained a staggering 14.5%.<sup>5</sup> Even the S&P 500's Price/Earnings ("P/E") ratio—a way to value a company by comparing the price of a stock to its earnings—was 27.45 in September 2024.<sup>6</sup> This represents a massive percentage increase above the modern-era average.<sup>7</sup>



NASDAQ COMPOSITE (*IXIC) LEVEL % CHANGE	VAL = 126.5%
S&P 500 (*SPX) LEVEL % CHANGE	VAL = 94.16%
DOW JONES INDUSTRIAL AVERAGE (*DJI) LEVEL % CHANGE	VAL = 58.65%
GLOBAL X ROBOTICS & A.I. ETF (BOTZ) PRICE % CHANGE	VAL = 59.80%

OCTOBER 1, 2024, 5:53 PM EDT POWERED BY Y CHARTS

Finally, the Dow Jones Industrial Average rose approximately 57% over the last five years, from approximately 26,820 to 42,200 points between September 2019 and September 2024.<sup>8</sup>

Accordingly, average settlements recovered through securities class actions are steadily climbing in dollar amount. A July 2024 report attributed an over 14% rise in corporate exposure to securities fraud litigation from the second half of 2023 to the first half of 2024.<sup>9</sup> This translated to investor Plaintiffs claiming nearly \$285 billion in market capitalization losses in the first half of the year.<sup>10</sup>

<sup>4</sup> S&P 500 Chart, 5 Year Historical Data, YAHOO! FINANCE.

<sup>5</sup> Krystal Hur, *Stocks Surged During the First Half of 2024*, CNN Business (July 1, 2024).

<sup>6</sup> S&P 500 Earnings, Y CHARTS.

<sup>7</sup> Price/Earnings Ratio, CURRENT MARKET VALUATION.

<sup>8</sup> Dow Jones Industrial Average, *5 Year Historical Data*, YAHOO! FINANCE.

<sup>9</sup> Securities Class Action, SCA Rule 10b-5 Exposure Report, SAR (July 10, 2024); Ellen Bardash, *Securities Fraud Losses Claimed Balloon in First Half of 2024*, Law.com (July 15, 2024).

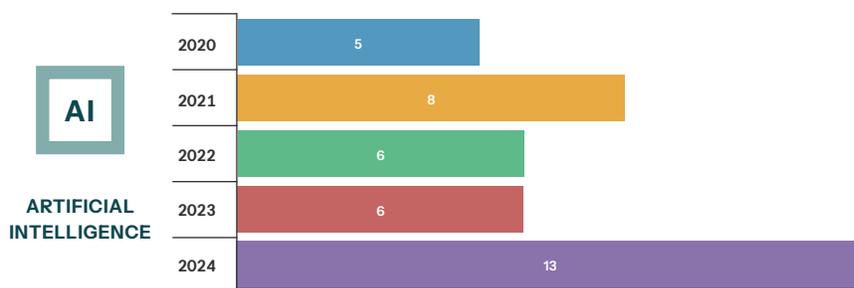
<sup>10</sup> *Id.*

Another study noted that several large securities class action settlements reached during the first half of 2024—approaching and exceeding the \$100 million mark—are slated for settlement approval hearings in the second half of 2024.<sup>11</sup> In the aggregate, these high-value settlements are expected to exceed the total of all settlements generated during the first half of the year (excluding individual settlements of \$1 billion or higher).<sup>12</sup> Projecting out at this rate, potential damages are multiples ahead of what they once were and poised to climb higher. From a business standpoint, this increase in damages correlates to record-breaking settlements resulting from securities class actions.<sup>13</sup>

### AI'S IMPACT ON SECURITIES CLASS ACTIONS

AI has become a market driver. While investors view AI as a value proposition, it is among the hardest trends to predict. AI is technology that enables computers and machines to simulate human learning, processing, analysis, and other functions. Its novelty, complexity, and unfamiliarity create many unknowns. Historically, products described similarly—such as residential mortgage-backed securities (“RMBS”)—have resulted in dramatic fallouts. AI generates risk and opportunity with arguably equal force. Though we have only scratched the surface of AI’s capabilities, it has meaningfully impacted securities class actions, considering that those involving AI are poised to double in 2024.<sup>14</sup>

AI-RELATED CASES BY FILING YEAR<sup>15</sup>



<sup>11</sup> Edward Flores & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation, 2024 H1 Update*, NERA.

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

<sup>13</sup> Cornerstone Research, *Securities Class Action Filings, 2024 Midyear Assessment*, Stanford Law School Securities Class Action Clearinghouse.

<sup>14</sup> Stanford Law School, *Current Trends in Securities Class Action Filings* (Jan. 3, 2025).

<sup>15</sup> *Id.*

In the last five years, public company disclosures mentioning AI have steadily risen. As a result, many companies are beginning to face securities class action lawsuits based on false and misleading statements about their use of AI.<sup>16</sup> These include allegations that a company overstated its AI functionality as a marketing tactic (also known as “AI washing”) or failed to inform investors of certain risks associated with AI.<sup>17</sup> Through securities class actions, institutional investors have a unique opportunity to hold companies accountable for fraudulently capitalizing on the buzzword of the moment.

AI’s rapid growth also raises an interesting question with respect to the mechanics of securities class actions—can AI “speak” false and misleading statements? This question raises concerns regarding liability for officers and directors under U.S. securities laws. As AI generates media and delivers automated messaging, market participants must begin to consider whether any natural person can be held accountable for fraudulent misstatements made by AI.

On the flip side of such futuristic concerns, investors have greater capabilities at their disposal to sift through voluminous public company filings. AI-based platforms are increasingly useful tools for investors looking to target or track specific company information over time.

Institutional investors must strike a balance. On one hand, it is to investors’ benefit to embrace AI’s ability to synthesize data into a digestible format aligned with their goals. On the other, investors should remain aware of the ways that AI allows companies to profit from fraudulent and misleading tactics.

## SUPREME COURT CURTAILS THE SEC’S ENFORCEMENT POWERS & JUDICIAL DEFERENCE

In June 2024 the Supreme Court issued two opinions that altered the U.S. Securities and Exchange Commission’s (“SEC”) powers. First, on June 27, 2024, the Supreme Court decided *SEC v. Jarkesy*.<sup>18</sup> The case centered on hedge fund manager George Jarkesy, whom the SEC charged with fraud.

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<sup>16</sup> Elizabeth Gingold Clark, Courtney Quiros & Carissa Lavin, *Shareholders Sharpen Focus on AI-Related Securities Disclosures*, BLOOMBERG LAW (Sept. 12, 2024).

<sup>17</sup> Brad Marcus, David Rhinesmith & Sarah Schaedler, *AI Washing Enforcement Continues, Highlighting Risks to Companies and Investors*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 19, 2024).

<sup>18</sup> *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117 (2024).

<sup>19</sup> Shirin Ali & Mark Joseph Stern, *Meet the Hedge Fund Sleazebag Who Just Got SCOTUS to Kneecap the Government*, SLATE (June 27, 2024).

<sup>20</sup> *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

Pursuant to its administrative powers, the SEC brought an enforcement action against Jarkesy in its administrative court, before an Administrative Law Judge (“ALJ”). Following a twelve-day hearing, the ALJ found Jarkesy civilly liable and imposed various penalties. Jarkesy filed an appeal with the Fifth Circuit—a bench stacked with Trump-appointed Article III judges—that overturned the ruling.<sup>19</sup> Jarkesy claimed that the SEC’s administrative proceedings created an unfair advantage for the government by not allowing juries to hear civil cases. The SEC appealed the ruling to the Supreme Court.

The Supreme Court held that the U.S. Constitution entitles defendants to a jury trial in fraud cases seeking civil penalties brought by the SEC. The decision hobbles the power of the SEC to bring cases against Defendants in front of an ALJ rather than a traditional federal court. It also gives administrative agencies a strong incentive to decline enforcement rather than proceed with a federal action. The day after *Jarkesy*, the Supreme Court dealt a further blow to administrative power through its *Loper Bright* decision—whereby Courts may now rely on their own interpretations of ambiguous laws, without deference to applicable federal agencies like the SEC. That decision overturned the longstanding *Chevron* doctrine.<sup>20</sup>

.....  
<sup>16</sup> Elizabeth Gingold Clark, Courtney Quiros & Carissa Lavin, *Shareholders Sharpen Focus on AI-Related Securities Disclosures*, BLOOMBERG LAW (Sept. 12, 2024).

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<sup>20</sup> *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

# CASE WATCH

By: Domenico “Nico” Minerva, Tae Kyung “TK” Yang

## EXP Realty, Inc.

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**CITATION:** *Los Angeles City Employees’ Retirement System, on behalf of EXP World Holdings, Inc., v. Glenn Sanford, Randall Miles, Dan Cahir, Jason Gesing, Eugene Frederick, and James Bramble and EXP World Holdings, Inc., C.A. No 2024-0998-KSJM*

**COURT:** Delaware Court of Chancery

**ESG FOCUS:** Social, Governance

**INDUSTRY:** Real Estate

The case<sup>1</sup> highlights an important role and function within ESG initiatives: ensuring that effective corporate governance includes the proper care and well-being of all company employees. Fiduciary duties and obligations are not solely limited to prototypical business decisions that often dominate the news.

The complaint alleges that EXP Realty, Inc. (“EXP” or the “Company”), a subsidiary of EXP World Holdings, systematically allowed several of its top performing real estate agents (“Influencers”) to continuously sexually assault and harass numerous employees for years. The Company leadership, including the Board of Directors (the “Board”), knew and ignored the horrific acts of sexual violence that certain senior members were perpetrating against employees and agents. Since at least 2018, these Influencers would drug and sexually abuse agents at Company events, yet the Company failed to take any meaningful actions to intervene. The Board chose to do so because removing these Influencers would have meant reducing their profits. At bottom, the Board prioritized protecting their profits over their people.

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<sup>1</sup> *Los Angeles City Employees’ Retirement System, on behalf of EXP World Holdings, Inc., v. Glenn Sanford, Randall Miles, Dan Cahir, Jason Gesing, Eugene Frederick, and James Bramble and EXP World Holdings, Inc., C.A. No 2024-0998-KSJM.*

Multiple agents have bravely stepped forward to report these acts and informed the Board. Not once. Not twice. But on multiple occasions from at least seven different victims. The Board's response was as underwhelming as the acts themselves were indefensible: The Board chose to deflect and doubt credible allegations against these Influencers until the amount of evidence became too large to ignore. Only when it became impossible to defend did the Board take any steps to address the issues.

This case may demonstrate where and how companies will be allowed to draw the line between actively addressing issues that are flagged to them and the systems in place that either facilitate or hinder these potential solutions.

The complaint filed alleges that neither the Board nor the Company implemented a reasonably appropriate method or system by which individuals could report anonymously the inappropriate behavior or actions that took place. Moreover, the Board is being charged with violating their fiduciary duties for, among other things, failing to implement reasonable policies to ensure the safety of their agents. A key issue is what, when, and to what extent the Board knew or should have known of the factual circumstances that led to the lawsuit. But as the complaint makes clear, the Board knew or at least should have known what was happening. However, not only did the Board fail to act, but the Board also actively hindered the victims' efforts through cover-ups. By failing the victims, the Board failed the Company. Essentially, the Board's response was tantamount to doing nothing. And doing nothing violated their fiduciary duties.

While one can debate the morally or ethically *ideal* response, this case highlights an overlooked aspect of why ESG is so important: Corporate governance litigation can serve a vital role in protecting workers' rights and safety. A company must investigate wrongdoings and strive to protect its workers, not its assailants, even if, perhaps especially if, the call comes from within the house.

.....  
<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.

# TRENDS IN ESG LITIGATION

2022-2024

## ESG CASES BY YEAR: SECURITIES CLASS ACTIONS

INITIAL COMPLAINT FILING	ESG CASES	TOTAL CASES	PERCENTAGE ESG CASES
2022	38	221	17.2%
2023	33	257	12.8%
2024	67	230	29.1%
TOTAL	143	708	20.2%

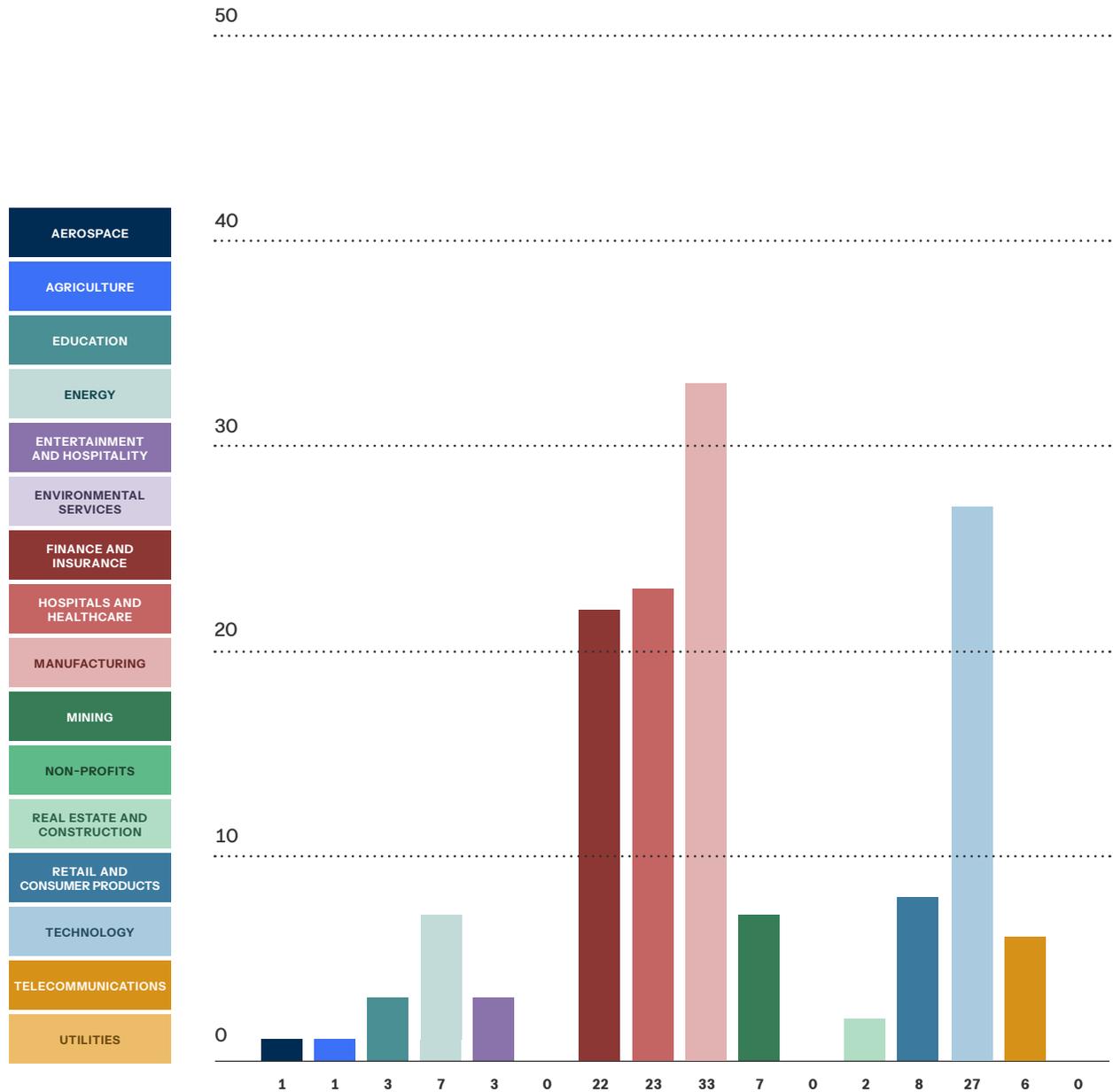
## ESG CASES BY YEAR: SHAREHOLDER OVERSIGHT ACTIONS

INITIAL COMPLAINT FILING	ESG CASES	TOTAL CASES	PERCENTAGE ESG CASES
2022	34	210	16.2%
2023	30	243	12.3%
2024	101	402	25.1%
TOTAL	165	855	19.3%

# TRENDS IN ESG LITIGATION

## 2022-2024

### ESG CASES BY INDUSTRY: SECURITIES CLASS ACTIONS



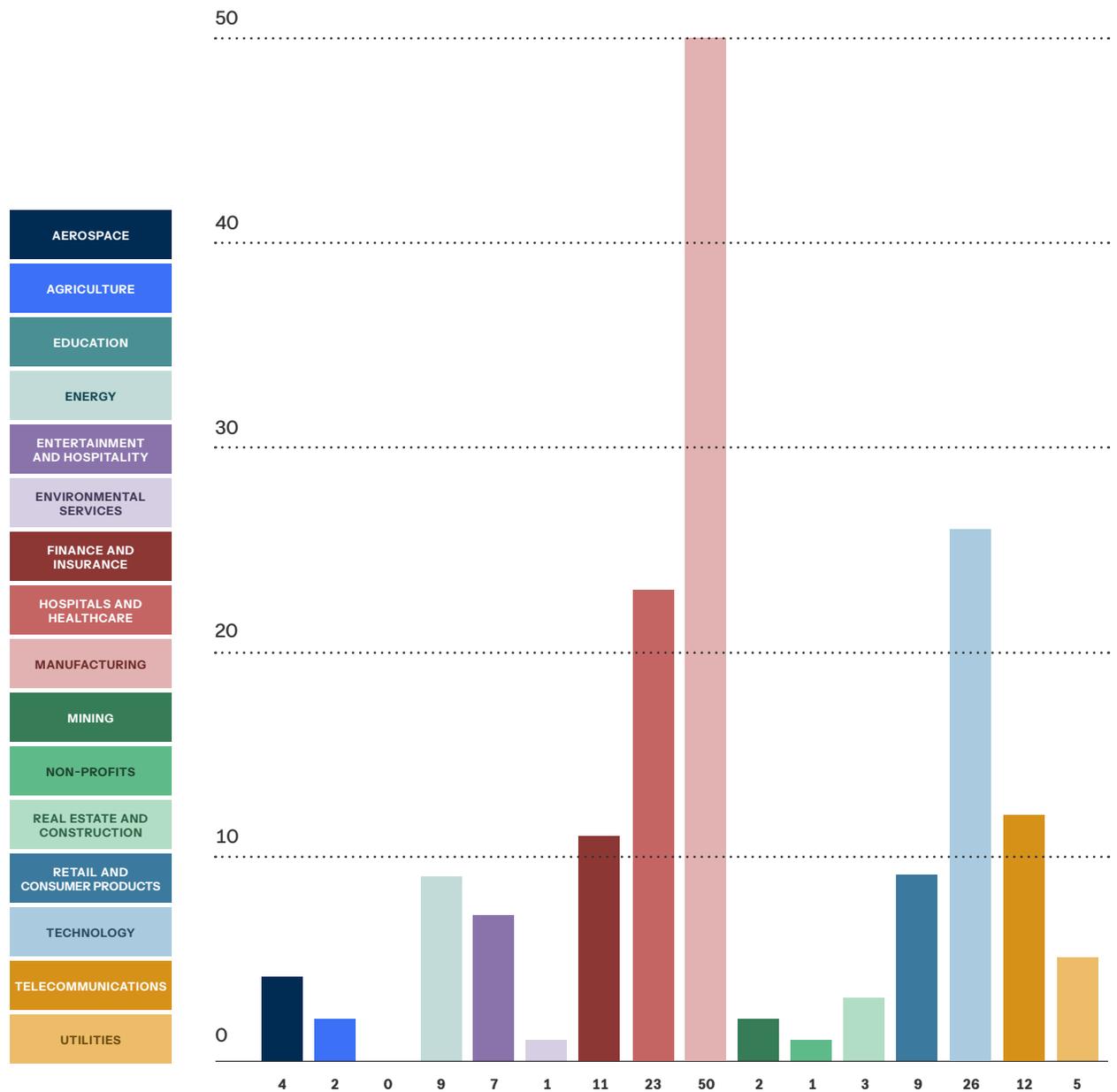
ESG CASES JAN 2022 TO DEC 2024

TOTAL = 143

# TRENDS IN ESG LITIGATION

## 2022-2024

### ESG CASES BY INDUSTRY: SHAREHOLDER OVERSIGHT ACTIONS



ESG CASES JAN 2022 TO DEC 2024

TOTAL = 165

# 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.



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