

Sustainability as the New Business Imperative: How Legal, Market, and Workforce Forces are Shaping Corporate Priorities in the United States

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OVER the past decade, there has been a seismic shift by United States-based corporate clients now prioritizing sustainability. Some of this is driven by increased legal requirements, both domestically and abroad, but more of this focus appears to be motivated by business opportunities; a desire to increase market share or attract investors; and a desire to improve employee satisfaction.

I. Sustainability Defined

The United States Environmental Protection Agency defines sustainability as:

Sustainability is based on a simple principle: Everything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment. To pursue sustainability is to create and maintain the conditions under which

humans and nature can exist in productive harmony to support present and future generations.¹

II. Legal Requirements

Depending on where companies are based and do business, they may face legal requirements that drive disclosure and investment obligations in the areas of environmental, social, and governance (“ESG”), the metrics used to evaluate an organization’s impact and sustainability practices.

In the United States, ESG regulations originate primarily from three sources: (a) the U.S. Securities and Exchange Commission (SEC), (b) the U.S. Department of Labor (DOL),

and (c) state legislatures and agencies. Specifically, the SEC monitors company disclosures, not only in required filings but also in marketing materials, on websites, and in investor documents. On March 6, 2024, the SEC issued a final rule that requires registrants to provide climate-related disclosures in their annual reports and registration statements.² The prior year, the SEC imposed a \$19 million penalty on an investment advisor accused of making materially misleading statements about its ESG investment process.³ Numerous litigants challenged the new rule in court.⁴ Under the second Trump Administration, the SEC has announced that it will no longer defend the rule.⁵ While the climate-related disclosure rule remains in

¹ United States Environmental Protection Agency, *Learn About Sustainability* (Oct. 1, 2024), available at <https://www.epa.gov/sustainability/learn-about-sustainability#what> (last accessed June 13, 2025)).

² United States Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 25804, codified at 17 C.F.R. §§ 210, 229, 230, 232, 239, 249 (Mar. 28, 2024).

³ In the Matter of DWS Inv. Mgmt. Am., Inc., Admin. Proc. File No. 3-21709, SEC Release No. IA-6432 (Sept. 25, 2023).

⁴ Clark Mindock, “Republican led states sue US SEC over climate risk disclosure rules,” *REUTERS* (Mar. 6, 2024), available at <https://www.reuters.com/sustainability/climate-energy/republican-led-states-say-they-will-sue-us-securities-regulator-over-climate-2024-03-06/> (last accessed June 13, 2025).

⁵ “US SEC votes to stop defending climate disclosure rules,” *REUTERS* (Mar. 27, 2025), available at <https://www.reuters.com/business/environment/us-sec-votes-stop-defending-climate-disclosure-rules-2025-03-27/> (last accessed June 13, 2025).

place, it is not being enforced by the SEC, and its future remains uncertain.

The DOL, which oversees the Employee Retirement Income Security Act (ERISA), has been active in regulating whether fiduciaries can consider ESG in investment decision-making for private retirement plans. In 2020, the agency introduced a rule viewed by some as “anti-ESG”⁶ and then shifted course under the Biden administration, deeming ESG an acceptable factor in investing decisions.⁷ That action was recently upheld by a Texas federal district court,⁸ and while DOL has not yet made any formal announcements about the rule, it may reverse course again in the second Trump Administration.

Between 2021 and 2024, 41 states have proposed or enacted ESG-investing laws.⁹ While some states have enacted “pro-ESG” laws that allow ESG factors to be considered in investment decisions, most states have done the opposite, disincentivizing or prohibiting the consideration of ESG factors in investment decisions.¹⁰

While the second Trump Administration in the United States will alter, and likely narrow significantly, the regulatory focus on ESG at the federal agency level, many companies will continue to focus on ESG disclosures and investment decisions because of regulations in certain states and other countries where they do business. But, the legal requirements companies face are not the sole drivers of their focus on sustainability.

⁶ United States Department of Labor, *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72846 (Nov. 13, 2020).

⁷ United States Department of Labor, “US Department of Labor announces final rule to remove barriers to considering environmental, social, governance factors in plan investments” (Nov. 22, 2022), available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20221122> (last accessed June 13, 2025).

⁸ *State of Utah v. Micone*, No. 2:23-cv-016Z (N.D. Tex., Feb. 14, 2025).

⁹ Mana Behbin, Kelly L. Gibson, and Elizabeth S. Goldberg, “ESG Investing: The US Regulatory Perspective,” MORGAN LEWIS (Mar. 12, 2024), available at <https://www.morganlewis.com/pubs/2024/03/esg-investing-the-us-regulatory-perspective> (last accessed June 13, 2025).

¹⁰ *Navigating State Regulation of ESG*, ROPES & GRAY LLP (June 6, 2025), available at <https://www.ropesgray.com/en/sites/navigating-state-regulation-of-esg> (last accessed June 13, 2025).

III. Customer Growth and Premium Prices

Sustainability is, at its core, an effort to produce products as efficiently as possible, with as little impact as possible, while returning the highest value the market will support. Certain branded products that promote their sustainability may cost more to produce, but can command higher prices in the marketplace. For example, Unilever's Sustainable Living Brands, such as Seventh Generation, Dove, and Ben & Jerry's, are priced above competitors, but are growing 69% faster than the rest of the business and delivering 75% of the company's growth.¹¹ Customers are enthusiastic about the growth of sustainable product availability in the market. According to a study published in the *Harvard Business Review*, customers who prefer sustainable products may be more loyal than other customers, serving as "superpromoters" who recommend products to 10 or more people.¹²

¹¹ Ralph Tathagata, "Unilever's purpose-led brands outperform," *MARKETING EDGE* (June 11, 2019).

¹² Leah Johns, Harry Morrison, Jenny Davis-Peccoud, and Daniela Carbinato, "How Brands Can Sell to Environmentally Conscious Nonconsumers," *HARVARD BUS. REV.* (June 5, 2023).

IV. Employee Activism

Companies know the value of a strong talent pool. Making sustainability a priority can expand an employer's talent advantage. A 2023 Deloitte survey found that 69% of employed adults want their companies to invest in sustainability efforts, such as reducing carbon, using renewable energy, and reducing waste.¹³ The workforce is also being more selective about companies' sustainability positions in deciding whether to accept jobs: 27% will consider a potential employer's position on sustainability before taking a job.¹⁴ It is unsurprising that employee activism is motivating corporate leaders. Fifty-nine percent of corporate leaders say that employee activism has driven their sustainability efforts.¹⁵

V. Investor Demands

More than 95% of S&P companies issue a sustainability

¹³ Jennifer Steinmann, Kathryn Alsegaf, Derek Pankratz, David R. Novak, and Nirmal Kijur, "Engaged employees are asking their leaders to take climate action," *DELOITTE CTR. INTEG. RESEARCH* (Nov. 9, 2023), available at <https://www2.deloitte.com/us/en/insights/environmental-social-governance/importance-of-sustainability-to-employees.html> (last accessed June 13, 2025).

¹⁴ *Id.*

¹⁵ *Id.*

report.¹⁶ Investors are using ESG factors—particularly those related to governance and climate change—to reduce risks associated with investments.¹⁷ Likewise, investors believe that strong ESG practices can lead to higher returns, an opinion that is growing. According to a Morgan Stanley report, 77% of investors say they are interested in investing in companies and funds that consider positive social and/or environmental impact; 57% say that their interest has increased over the last two years; and 54% plan to grow allocations in sustainable investments in the coming year.¹⁸ Regardless of whether laws mandate a focus on sustainability, customers, employees, and investors appear to be strong forces in setting sustainability as a high priority for companies.

¹⁶ Jay Gelb, Rob McCarthy, Werner Rehm, and Andrey Voronin, “Linking ESG initiatives to financial performance,” MCKINSEY (Sept. 15, 2023), available at <https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/investors-want-to-hear-from-companies-about-the-value-of-sustainability> (last accessed June 13, 2025).

¹⁷ Alexander Gelfand, “Big Investors Say They Use ESG to Reduce Risk (But Mostly Focus on the E and G) | Stanford Graduate

School of Business,” STANFORD BUSINESS (May 2, 2024), available at <https://www.gsb.stanford.edu/insights/big-investors-say-they-use-esg-reduce-risk-mostly-focus-e-g> (last accessed June 13, 2025).

¹⁸ “Sustainable Investment Interest on the Rise in 2024,” MORGAN STANLEY (Jan. 26, 2024), available at <https://www.morganstanley.com/ideas/sustainable-investing-on-the-rise> (last accessed June 13, 2025).