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Sustainability Recalibration: What Insurers and Policyholders Should Know About ESG Under Trump 2.0

Part 1

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Table of Contents

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I. Introduction to the Evolving ESG Landscape

Environmental, social, and governance (ESG) considerations or standards – also known as sustainability – have been impacting all sectors of society, including corporate and professional entity policyholders and insurers, for a long time. Under the Biden Administration's "all of government" approach, ESG considerations played an oversized role – dominating corporate activity and impacting virtually all aspects of corporate strategy, positioning, and operations. The second Trump Administration has signaled that it will dial back significantly the excesses of ESG in favor of an environmentally responsible "drill baby drill" energy approach and replace the focus on Diversity, Equity, and Inclusion (DEI) with merits-based hiring.

The reality is that environmental, social, and governmental considerations existed long before the Biden Administration and will continue long after the second Trump Administration, but the focus and emphases will change substantially. Although the approach and policy of these administrations will likely differ sharply, federal law applicable to environmental, social, and governance considerations will remain. Further, the existence of state and international law and the demands of various corporate stakeholders ensures that ESG will neither die nor disappear, though it likely will be approached with more moderation, at least at the federal level.

In these early days of the second Trump Administration, it is clear that insurers and other companies will be afforded greater latitude to act in their own interests on ESG-related issues with a rolling back of regulatory demands. The particulars and durability of the Trump Administration's ESG policies are subject to change as policies are adopted and subjected to judicial scrutiny. The sustainability of President Trump's approach to ESG will depend, at least in part, on what policies are enacted into law by Congress, as many policies made through executive orders and regulations can be readily changed by the next administration.

This two-part commentary examines the components of ESG and its impact on insurers and corporate policyholders. Part one discusses navigating the ESG landscape, including the importance of environmental, social, and governance issues and their impact on insurers and policyholders. It compares the "all of government" approach of the Biden Administration with the "drill baby drill" and "merits-based" employment approach of the second Trump Administration.

Finally, it examines the significant impact of U.S. Supreme Court jurisprudence on ESG, including decisions directly involving ESG and decisions more broadly addressing the authority of administrative agencies by ending *Chevron* deference, requiring agencies to litigate in federal court in some instances rather than before their internal tribunals, and applying a statute of limitations more friendly to companies challenging agency action. We end by looking at a case before the Court that has the potential to reinvigorate the dormant non-delegation doctrine.

Part two will explore the countervailing balance to federal rules and policies provided by state law, the impact of international law and the role of stakeholders in ESG policymaking, and the impact of ESG policy and regulation on risk profiles and claims activity.

II. Navigating the Evolving ESG Landscape

The landscape surrounding ESG is evolving and presents numerous regulatory and business opportunities and challenges to insurers and corporate policyholders. The current environment affords companies greater flexibility to act in accordance with their own interests as compared to the recent past.

A. The Importance of Sustainability and ESG Considerations

ESG criteria or standards or sustainability issues have impacted all sectors of society, including corporate and professional policyholders and their risk managers and, insurance underwriters, and claims personnel. Many of the same societal factors driving social inflation are also involved in driving ESG. [i]

It is hardly surprising that insurance companies have had a leading role in ESG. ESG considerations have been in play for many years. Most companies value social responsibility and take their role as responsible corporate citizens seriously. The legacy of corporate generosity, philanthropy, and volunteerism has been very impactful. In the past, attention to environmental, social, and governance considerations above and beyond legal and regulatory compliance was largely voluntary. Historically, it was done for altruistic reasons or simply because it was considered "good business" to be responsible corporate citizens. Companies have always faced pressure from various stakeholders, but these pressures have ramped up considerably in recent years.

In the contemporary corporate world, as insurers and policyholders were tackling ESG, they were increasingly told that components of ESG were mandatory or "essential business. European companies and regulators have, in large measure, been ahead of U.S. companies and regulators with respect to ESG. The focus, intensity, and pace of ESG increased substantially in the U.S. under the Biden Administration. However, a marked rollback at the federal level now appears at hand.

Fueled in part by events in 2020, activist groups, investors, regulators, customers, suppliers, rating entities, and others called upon companies to act in what these external "stakeholders" deem to be "socially responsible" or "fair and just" with greater frequency, more intensity, and at a higher volume. They sought to have corporate policies and practices align with their standards or criteria (which sometimes differ or conflict among stakeholders and within members of the same stakeholder) and to impose consequences for conformance or non-conformance with their ESG standards. It seems fair to say that ESG topped the list of matters that received attention from many executives and boards of directors of insurance companies and corporate policyholders, at least for several years.

The deep and widespread momentum of the ESG movement triggered Newton's Third Law of Motion – which posits that "[f]or every action, there is an equal and opposite reaction – gave rise to a strong anti-ESG movement. This emerged with some state legislatures, along with stockholder demands targeting ESG policies and practices. Decisions of the U.S. Supreme Court have imposed some limitations on administrative agencies – the unelected arms used by the federal government to impose its regulatory will. The second Trump Administration is poised to roll back ESG regulations and target ESG for budget cuts. Competing pressures further complicate the substance and approach companies take to ESG.

Although often viewed as presenting challenges, ESG considerations also presented numerous opportunities for insurers and policyholders. Indeed, the ability to respond and lead effectively in these areas was seen as a major determinant of the success of corporations and insurance companies. This includes taking action where companies believe action is appropriate. Equally important is the ability of companies to effectively resist action where they believe it to be unwarranted.

Either way, it is important for companies to minimize collateral damage associated with their decisions. Companies performing well in ESG tended to lower their probability of sustaining workforce-related accidents, reputation-damaging controversies, fines, and other adverse actions by regulators. Companies at both ends of the ESG spectrum – those inattentive to ESG and those crossing the line into ESG advocacy at the expense of their core missions – face risks.

ESG considerations remain important to legal, corporate, and financial risk assessment. Under the Biden Administration, ESG moved from being siloed within some aspects of corporate behavior and appeared to become embedded in the DNA, strategy, identity, and operations of entire companies. Stakeholders have used the full panoply of vehicles to achieve their goals, including traditional media, social media, investment decisions, purchase decisions, boycotts, threats, pressure, intimidation, lobbying, legislation, regulation, and cancel culture. Some of the goals and tactics were laudable, while others were not.

It is important to understand that ESG pressures were not only being applied by external forces, but increasingly internal forces sought to exact change. The reality is that Millennials, Generation X, and Generation Z are now, by the numbers, dominant members of the workforce and management as they replace Baby Boomers. The educational, experiential, methodological, values and demographic differences between generations are undoubtedly having a large influence on internal decision-making within risk management and insurers alike.

Not only have corporations adjusted to create a workplace that attracts and retains Millennial, Generation X, and Generation Z talent, but these workers are increasingly becoming the corporate decision-makers. Thus, corporations are now becoming entities that will effect change rather than resist change. In recent years, this has added to the momentum of ESG. With President Trump having received increased support from younger voters, it will be interesting to see what impact younger workers and managers will have on ESG over time.

The great resignation and significant attrition following the pandemic have impacted the insurance industry workforce, making companies more responsive to employee values and providing employees with greater leverage. A McKinsey & Company study found that 65 percent of those who resigned from a job in insurance or finance between April 2020 and April 2022 left the industry entirely. These departures from the insurance industry come as the industry is experiencing and will continue to experience a high level of retirements of baby boomers.[ii] There also is a skill gap that younger workers seem to present.

Some commentators have argued that to attract and retain a younger workforce, the insurance industry must expand upon its conservative image and show the breadth of opportunities and the diversity of people who drive the industry forward.[iii] This commentator suggests that "Gen Z talent are drawn to businesses who uphold and promote values that reflect a greater effort to create an equitable future and push society and the environment in the right direction." Work/life balance is critical for these younger workers. The insurance industry faces at least the same level of challenges confronting many industries in attracting and retaining employees.

According to a 2021 study, 70 percent of employees now demand purposeful work.[iv] Additionally, 86 percent of employees say they would prefer to support or work for companies that care about the same issues they do.[v]

In some instances, ESG considerations are laden with political and generational considerations. This commentary does not intend to express any normative views on the political or social aspects or on the propriety of any specific ESG measure. Rather, it attempts simply to outline the realities confronting insurers and corporate policyholders and the corresponding challenges and opportunities presented.

B. The Key Components of ESG

ESG considerations are not static. ESG encompasses a broad range of topics and implicates most corporate departments and business operations. Below is a general overview of the components.

Environmental Considerations

The first component – environmental considerations – concerns how a company performs as a steward of nature and the environment. These considerations may include a company's energy use; waste and pollution streams and volumes, as well as disposal practices; natural resource conservation; carbon and greenhouse gas blueprint; use of renewable energy; use of raw materials; ownership of contaminated land; environmentally compatible production; compliance with environmental regulators and laws; and treatment of animals.

Social Criteria

The second component – social criteria – concerns how a company manages relationships with employees, suppliers, customers, and the communities in which it operates. Social factors include occupational safety practices and loss history; inclusion and diversity; equity in hiring, pay, opportunity, and advancement; compliance with labor laws; community engagement; employee engagement; training and development; respect for employee rights; working environment and conditions; unionization and labor practices; and freedom of association.

This may include an examination of aspects such as whether, to whom, and how much the company is donating to nonprofit organizations; whether the company encourages and supports employee volunteer work; whether the company's working conditions show high regard for its employees' health and safety; whether there are allegations of trafficking, human rights violations, or child labor; and whether the interests of various other stakeholders are taken into account.

Social criteria may extend beyond a company to the company's business relationships with suppliers, customers, regulators, unions, and others and involve an examination of the business practices of those entities. It will be interesting to see the extent to which stakeholders focus on the human rights and other practices of countries in which a company does business. DEI primarily falls under this area of ESG, although it also spills into governance concerning the composition of management and boards of directors.

Governance

The third component – governance – includes practices and policies regarding anti-bribery; corruption; money laundering; executive pay; transparency in financial and public reporting; gender pay gaps; composition of management and the board; risk management and oversight; board actions and obligations; cyber and data security; regulatory compliance; allowing shareholders to vote on significant issues; and avoiding conflicts of interests.

It must be acknowledged that the core components of ESG have been subject to longstanding state and federal law and regulation. For example, compliance with environmental laws, regulations, and labor laws has been a focus for decades.

C. The Impact of ESG on Insurers

Insurers Qua Businesses

First and foremost, insurers (and insurance brokers) – like all companies – focus on their own practices and operations. Many insurers made commitments regarding their own operations. In the recent past, Zurich, for example, planned to be a net-zero emissions company by 2050 and developed science-based targets for underwriting.[vi] Aon committed to becoming a net-zero carbon emissions producer by the end of the decade.[vii] It is committed to setting science-based targets and adopting achievable objectives by setting out plans focused on sustainable sourcing, energy efficiency, business travel, and renewable energy.

Aon established an internal ESG committee to play a central role in reaching the 2030 target. Aon stated it was also committed to the "social" element of ESG by building diverse and thriving teams with the brightest talent. In August 2022, thirteen major UK insurers and brokers vowed to cut their supply chain emissions as part of the Sustainable Markets Initiative's sustainable supply chain pledge. The initiative was established by King Charles (then Prince Charles) to accelerate the "transition of a sustainable future."

The shift in focus is evidenced in part by insurer panel counsel calls. Traditionally, these calls focused on billing practices, compliance with litigation management guidelines, and legal trends implicating liability and coverage claims and lawsuits. More recently, however, ESG dominated the agenda of these calls with insurers spelling out their ESG and DEI targets and letting their counsel and vendors know what will be expected of them. Over the past year or so, these calls appeared to focus more on the traditional agenda items. As a result of the pandemic, many companies and courts have reduced travel, and remote hearings and meetings become prevalent.

Corporate travel has returned, and remote work has been scaled back. It will be interesting to see the extent to which insurers, companies, and courts may continue to have less of an appetite for travel and whether remote hearings, discovery, meetings, and work will continue. Reducing carbon emissions, as well as cost savings and worker expectations, may continue to motivate reduced travel in the future and impact the use and demands for commercial real estate space.

The Net-Zero Insurance Alliance, which was launched in 2021 as part of the Glasgow Financial Alliance for Net-Zero set up by United Nations climate envoy Mark Carney, required members to commit to reducing their greenhouse gas emissions. This and similar alliances have come under fire as of late. In May 2023, 23 state attorneys general advised members that the Net-Zero Insurance Alliance's targets and requirements appeared to violate both federal and state antitrust laws. Several members of the alliance have since withdrawn. Munich Re, Zurich, Hanover Re, and Swiss Re have been joined by Allianz SE, Axa SA, and Scor SE in withdrawing from the alliance. This does not mean that the former members are not adjusting their own policies, programs, practices, or proceeding as planned with regard to their individual net zero commitments.

Additionally, national security concerns may have influenced major insurance companies to leave the Net-Zero Insurance Alliance.[viii] A concern is that, without the insurance industry underwriting the risks in the gas and oil industry, the costs of energy and availability of petroleum products for a populace and/or national defense could significantly increase.[ix]

Six major banks, including Goldman Sachs, Wells Fargo, Citi, Bank of America, and Morgan Stanley, reportedly left the Net-Zero Banking Alliance in the time between the U.S. 2024 election and the presidential inauguration in 2025.[x] Of note, Ken Paxton, the Attorney General of Texas, opened a review of Bank of America, Morgan Stanley, J.P. Morgan, and other entities in October 2023 under a Texas law

(Texas Senate Bill 13) that prohibits governmental entities from entering into contracts with companies that boycott the oil and gas industries.[xi] Further, in March of 2024, the Texas Permanent School Fund withdrew $8.5 billion in state money from BlackRock, terminating its contract to manage those funds with accusations that BlackRock was boycotting Oil and Gas energy producers, which are a large part of Texas' industry.[xii] While insurance companies are not banks and investment entities, they are no less vulnerable to such policies.

Insurance companies were being viewed – with increasing frequency and severity – as agents for imposing affirmative ESG change on others, such as their policyholders and vendors, as well as implementing change in their own operations. In essence, the insurance industry was targeted because many stakeholders believe it can effect change by not insuring companies that harm the environment, engaging in anti-competitive practices, lacking sufficient diversity in the management ranks (or company-wide), or increasing costs of insurance on these companies. "Globally, the insurance industry is in a unique position when it comes to climate risk as insurers are exposed on both sides of the balance sheet: Their investments face climate risk on the asset side of the balance sheet, and they face underwriting risk, particularly in the property and casualty line, on the liability side."[xiii]

Insurers Qua Investors

Property and casualty insurers are also large institutional investors. Accordingly, their investment practices are subject to scrutiny. Insurers and reinsurers were facing damage to their reputations by reason of insuring or investing in companies whose ESG considerations are questionable or perceived to be subpar. Indeed, many trace the origins of ESG to investment strategy – not investing in industries or companies with poor environmental performance. Zurich, for instance, in the past committed to fully de-carbonizing its $200 billion asset portfolio.[xiv]

It committed to using its influence as an investor and insurer to pressure companies to take action on climate change. According to the Forum for Sustainable and Responsible Investment (US SIF), as of 2020, one-third (approximately $17 trillion) of all U.S. assets under management were invested following sustainability principles, with money managers paying closest attention to climate change/carbon emissions, natural resources/agriculture sustainability, and board governance issues. This figure represents a 42 percent increase over 2018.[xv] According to a KPMG survey of 200 U.S. ESG investors, over 60 percent reported a willingness to pay a premium for opportunities aligning with their ESG priorities, and more than half indicated that ESG concerns could be a deal killer.[xvi]

In November 2021, The Hartford announced it would invest $2.5 billion in companies and technologies supporting a transition to renewable energy over the next five years. It stated the investments will come in addition to existing plans to withdraw coal holdings by the year 2023. Hartford also said it signed onto the United Nations Global Compact. The Hartford's CEO Christopher Swift stated, "[w]e view the transition to a greener society as a business imperative."[xvii]

AM Best, in a November 2020 report, emphasized that insurers and reinsurers who ignore ESG in their underwriting and investment decisions confront serious reputational risk. These risks may cause buyers and investors to flee to competitors, affecting the companies' creditworthiness and ratings. By contrast, insurers that invest in and underwrite companies and technologies that will help tackle climate change stand to gain reputationally and with respect to earnings.[xviii]

Insurers Qua Underwriters

Some insurers moved away from underwriting risks that deal with fossil fuels. Zurich, for instance, committed to terminating its relationship with companies that generate more than 30 percent of revenue from mining or generate more than 30 percent of their electricity from thermal coal, oil sands, and oil shale, extract more than 20 million tons of thermal coal or continue to invest in coal mining and infrastructure.[xix] For those that exceed the thresholds, Zurich stated it would engage in a dialogue on transition plans, but if companies fail to demonstrate meaningful improvement, it will cease to underwrite or invest in them. Aviva stated it will stop insuring companies generating more than 5 percent of revenues from thermal coal or unconventional fossil fuels by the end of 2021.[xx]

Aviva added that it would make exceptions for companies that are serious about their transition out of high-carbon fuels and have already "committed to clear science-based targets aligned to the Paris Agreement target of limiting temperature rises to 1.5 degrees." Even oil companies appeared to jump on the ESG bandwagon. BP's Chief Executive, Bernard Looney, stated in February 2020 that it was BPs "new ambition to become a net zero company by 2050 or sooner, and to help the world to get to net zero."[xxi]

Changes in underwriting have taken place. The analysis of risks expanded from traditional components, such as the types of operation or geographical characteristics, to qualitative analyses in relation to ESG criteria. This sometimes included examination of employee rights and audits of supplier companies, as set out in the proposed Supply Chain Acts in Germany and the EU. Policyholders who actively address sustainability issues sometimes benefit from this change in the underwriting process with respect to pricing, policy terms, program structuring, and lower deductibles. It is clear that most insurers have embedded ESG into their risk models, particularly in property, casualty, and cyber lines.[xxii]

Insurers began taking into account the consequences of disclosure requirements imposed on companies. Increased use of artificial intelligence and scoring systems have been formulated and deployed as part of an integrated underwriting process. Underwriting applications and questionnaires have been updated and early dialog regarding ESG risks has been incorporated into the underwriting process.

Insurers Qua Claims Handlers

Finally, insofar as ESG impacts claims types and claims frequency and severity, insurers are impacted appreciably on the claims side. As discussed in part two of this commentary, policyholders and insurers must consider the impacted of risk profiles and claims resulting from ESG and ESG regulation.

Unquestionably, insurers have to be cognizant of the ESG practices and risks of policyholders as ESG issues impact claims and loss activities. ESG issues are rife for litigation and claims. The commentary does not specifically address climate change insofar as it may account for an increase in the frequency or severity of weather-related claims.

D. The Impact of ESG on Policyholders

As discussed above and in Part 2 of this white paper, corporate policyholders have fully felt the impact of ESG in all aspects of their businesses. Corporate risk managers have had to address the impact of ESG on their companies' risk profiles in providing input into company strategies and activities, in purchasing insurance, in connection with their insurance coverage profiles, in the context of their self-insurance and insurance policies, and in responding to insurer information requests in connection with placing insurance.

E. The "All-of-Government" Approach of The Biden Administration

The ESG movement began long before the Biden Administration. ESG became a central component of most policies and departments under the Biden Administration; however, the Biden Administration substantially increased the pace and focus on ESG in the U.S. On May 20, 2021, President Biden signed an Executive Order on climate-related financial risk.

The order directed federal agencies to analyze and mitigate the risks that climate change presents to homeowners, consumers, businesses and workers, and the U.S. financial system. A fact sheet distributed during a White House briefing indicated that the Executive Order will:

- **Develop a whole-of-government approach to mitigating climate-related financial risk.** The order directs the White House national climate advisor and the director of the National Economic Council to develop and identify, within 120 days, public and private financing needed to realize economywide net-zero emissions by 2050, while also advancing economic opportunity, worker empowerment and environmental mitigation, particularly in disadvantaged communities and communities of color.
- **Encourage financial regulators to assess climate-related financial risk.** The order urges the secretary of the Department of the Treasury to work with Financial Stability Oversight Council (FSOC) members to assess climate-related financial risk as it pertains to the stability of the federal government and of the U.S. financial system within a 180-day period. The order also requests a report on plans of member agencies to improve climate-related disclosures and other sources of data and to incorporate climate-related financial risk into regulatory and supervisory practices.
- **Bolster the resilience of life savings and pensions.** The order directs the secretary of the Department of Labor to consider suspending, revising, or rescinding any rules from the prior administration that would have barred investment firms from considering environmental, social, or governance (ESG) factors, including climate-related risks, in investment decisions involving workers' pensions. The order also requests a report on other potential measures to protect the life savings and pensions of U.S. workers and families from climate risk and an assessment of how the Federal Retirement Thrift Investment Board will incorporate ESG risk factors.
- **Modernize federal lending, underwriting, and procurement.** The order requests recommendations for how federal financial management and reporting can incorporate climate-related financial risk, in particular in federal lending programs. The order also directs consideration of new required disclosures of greenhouse gas emissions and climate-related financial risks for federal suppliers and seeks to minimize such risks in federal procurements.
- **Reduce the impact of climate change on the federal budget.** The order mandates fiscally responsible action to respond to the risk of increased costs and lost revenue resulting from climate change. It also directs the federal government to develop and publish annual assessments of climate-related fiscal risk exposure. [xxiii]

Whatever one's view on the constitutionality, propriety, or impact of the Department of Government Efficiency and Productivity (DOGE) created by an Executive Order of President Trump, it has exposed the large amount of federal spending and breadth and depth of activity devoted to ESG, much of which was not readily apparent to U.S. public. It also demonstrates that ESG will be targeted by the second Trump Administration for spending cuts.

F. A Deeper Dive Into Environmental Considerations

The extent of activity of the federal government with respect to environmental considerations is illustrated by the actions of the Federal Department of Insurance, the Security Exchange Commission, and the Federal Trade Commission.

The Federal Insurance Office of the U.S. Department of the Treasury (FIO) issued a Request for Information (RFI) following the May 20, 2021, Executive Order on Climate-Related Financial Risk that solicits "public input on FIO's future work relating to the insurance sector and climate-related financial risks." FIO expressed the intent for its climate-related work to respond to the Executive Orders and the Treasury Department's broader climate work, including working with Treasury's Climate Hub. Public comments were due on November 15, 2021.

FIO indicated that it intended *initially* to focus on three climate-related priorities. The first is insurance supervision and regulation, which encompasses assessing climate-related issues or gaps in the supervision and regulation of insurers, including their potential impacts on U.S. financial stability. This will include monitoring the integration of climate-related financial risks into insurance supervisory practices and regulatory frameworks, as well as assessing whether sufficient data, methodologies, and tools exist to manage the solvency of insurers and to protect them against the long-term risk of climate change. FIO states it "will consult with individual state insurance regulators and the NAIC" during its assessment of such supervisory practices and resources. Generally speaking, state regulators have been fairly effective in ensuring the solvency of insurers facing a variety of risks, including environmental liabilities, for the past 30 years.

The second stated priority concerned insurance markets and mitigation/resilience. This involves assessing the potential for major disruptions of private insurance coverage in U.S. markets that are particularly vulnerable to climate change impacts and facilitating mitigation and resilience for disasters.

The final stated initial priority concerns insurance sector engagement. FIO planned to increase its engagement on climate-related issues and take a leadership role in analyzing how the insurance sector may help mitigate climate-related risks. FIO appears ready to address the insurance sector's transition of its operational activities attributable to greenhouse gas (GHG) emissions. It also stated its intent to look into the underwriting activities, investment holdings, and business operations to influence policyholders and markets to support or interpose a low-emissions economy. In some respects, it may be that the FIO will seek to have insurers serve as private regulators (similar to private attorneys general).

Throughout 2023 and 2024, the FIO continued its efforts to collect insurance data to better understand the impacts of climate-related financial risks on the insurance sector. In March 2024, the FIO announced a collaboration with the National Association of Insurance Commissioners (NAIC) and with state insurance regulators. Under this collaboration, the NIAC would be collecting data on the zip code level from the largest homeowner's insurers to be used for a nationwide assessment of climate-related financial risks to consumers in the United States. The data collection was anticipated to be completed and provided by the NAIC to the FIO by September 2024.[xxiv]

The Federal Insurance Office (FIO) was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The FIO is part of the U.S. Department of the Treasury and is headed by a director who is appointed by the secretary of the Treasury. The office provides expertise on insurance matters to the Treasury Department and other federal agencies and engages in international discussions relating to insurance. However, it is not a regulatory agency, and its authorities do not displace the time-tested, robust state insurance regulatory regime. The FIO is charged with monitoring all aspects of the insurance sector, including identifying activities within the sector that could potentially contribute to a systemic crisis in the broader financial system, the extent to which under-served communities have access to affordable insurance products, and the sector's regulation.

The FIO is authorized to receive and collect data and information on the insurance industry and can enter into information-sharing agreements with state regulators. The FIO can also require an insurer or its affiliate to submit data to the office where it determines the information is not available from any public or regulatory sources.

Traditionally, the regulation of the insurance business has been left to the states. The McCarran-Ferguson Act of 1945[xxv] reaffirmed the rights of states to tax and regulate the business of insurance within their respective borders, absent specific congressional intent to the contrary, and generally excepts insurers from federal anti-trust laws. However, since the terrorist attacks of September 11, 2001, and increasing with the financial crisis of 2008, insurers have been subject to increasing federal legislation and regulation.

Many expressed concerns about the FIO expanding its role and perhaps even displacing the state regulation of the business of insurance. These concerns have been allayed somewhat, as the perception is that the second Trump Administration is not likely to expand the role or activities of the FIO.

In the spring of 2022, the SEC proposed a rule regarding climate-related disclosures for investors. "The Enhancement and Standardization of Climate-Related Disclosures for Investors" proposal would have required publicly traded companies and other companies with at least $700 million worth of shares in the hands of public investors to make climate-related disclosures. The proposed rule would have required senior management at these companies to disclose their organization's greenhouse gas emissions (Scope 1) in 2023, greenhouse gas emissions related to the energy and electricity they purchase (Scope 2) in 2023, and greenhouse gas emissions across their upstream and downstream value chain (Scope 3) in 2024 where these emissions are material.

Scope 3 upstream activities include purchased goods and services, capital goods, waste generated from operations, and employee business travel and commuting. Scope 3 downstream activities are the transportation and distribution of products, a third party's use of those products, and its investments. These disclosure requirements, if they became law, could have proven to be expensive, unworkable, and draconian – particularly Scope 3 disclosures involving greenhouse gas emissions of a business's customers, suppliers, vendors, and others. Although the proposal provided a safe harbor for inaccurate statements provided by third parties, it applies only where the statements are affirmed to be reasonable.

On March 6, 2024, the Securities and Exchange Commission adopted final rules to require registrants to disclose certain climate-related information in registration statements and annual reports.[xxvi] In response to thousands of public comments the rule did not contain Scope 3 disclosure requirements. Specifically, the final rule, set to go into effect on May 28, 2024, would require disclosure of:

- Climate-related risks that have had or are reasonably likely to have a material impact on the registrant's business strategy, results of operations, or financial condition;
- The actual and potential material impacts of any identified climate-related risks on the registrant's strategy, business model, and outlook;
- If, as part of its strategy, a registrant has undertaken activities to mitigate or adapt to a material climate-related risk, a quantitative and qualitative description of material expenditures incurred and material impacts on financial estimates and assumptions that directly result from such mitigation or adaptation activities;

- 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;
- 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;
- Any processes the registrant has for identifying, assessing, and managing material climate-related risks and, if the registrant is managing those risks, whether and how any such processes are integrated into the registrant's overall risk management system or processes;
- Information about a registrant's climate-related targets or goals, if any, that have materially affected or are reasonably likely to materially affect the registrant's business, results of operations, or financial condition. Disclosures would include material expenditures and material impacts on financial estimates and assumptions as a direct result of the target or goal or actions taken to make progress toward meeting such target or goal;
- For large accelerated filers (LAFs) and accelerated filers (AFs) that are not otherwise exempted, information about material Scope 1 emissions and/or Scope 2 emissions;
- For those required to disclose Scope 1 and/or Scope 2 emissions, an assurance report at the limited assurance level, which, for an LAF, following an additional transition period, will be at the reasonable assurance level;
- The capitalized costs, expenditures expensed, charges, and losses incurred as a result of severe weather events and other natural conditions, such as hurricanes, tornadoes, flooding, drought, wildfires, extreme temperatures, and sea level rise, subject to applicable one percent and de minimis disclosure thresholds, disclosed in a note to the financial statements;
- The capitalized costs, expenditures expensed, and losses related to carbon offsets and renewable energy credits or certificates (RECs), if used as a material component of a registrant's plans to achieve its disclosed climate-related targets or goals, disclosed in a note to the financial statements; and
- If the estimates and assumptions a registrant uses to produce the financial statements were materially impacted by risks and uncertainties associated with severe weather events and other natural conditions or any disclosed climate-related targets or transition plans, a qualitative description of how the development of such estimates and assumptions was impacted, disclosed in a note to the financial statements. [xxvii]

Several lawsuits were instituted challenging the rule. The SEC issued an order staying its climate rule, effective April 4, 2024.[xxviii]

Given the divergent policies of the second Trump Administration, it is possible that the SEC's climate disclosure rule may not go into effect. Nonetheless, there are other sources of disclosure. For example, the Federal Acquisition Regulatory Council (FAR) requires federal buyers to purchase sustainable products and services "to the maximum extent practicable." With the exception of national security acquisitions and contracts for services performed and supplies delivered outside of the United States, federal buyers will only be able to forgo the rule's requirements upon written justification that sustainable products or services are not practicable. The rule also introduces an omnibus contract clause for communicating requirements for sustainability to government contractors. The federal government spends over $700 billion on products and services annually. Many commentators believe that the Trump Administration will repeal or roll back this rule as well.

Other sources of ESG disclosures include the Federal Trade Commission's (FTC) Green Guides, first published in 1992, the Green Guides which are aimed at preventing unfair or deceptive environmental marketing claims, applying to "claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals."[xxix] The Green Guides have been the subject of some attention since December 2022, when the FTC announced it was seeking public comment on updates and changes to the guides based on increasing consumer interest in environmentally friendly products.

In the fall of 2023, the SEC finalized amendments to what has been called its "Names Rule." The Names Rule requires funds whose names suggest a focus on particular investments, industries, or geographical regions to invest at least 80 percent of their fund assets in the type of investment, industry, or geographic region suggested by the fund name. The amendments, first proposed in 2022, expand the rule such that it now extends to any fund name with terms suggesting environmental or social characteristics such as "growth," "value," "sustainable," or "socially responsible."

President Trump's first term produced significant deregulation, which President Biden countered by imposing a record number of regulations. A variety of ESG-focused rules promulgated by the U.S. Department of Labor, the U.S. Securities Exchange Commission (SEC), the U.S. Environmental Protection Agency, and other agencies will likely be revised or eliminated. Green investment strategies may also be impacted.

The Trump administration likely will reverse the Biden Administration's 2022 final rule that allows (but does not require) employee retirement plan advisers to consider ESG factors in their investment choices. The SEC's final rule on climate disclosure, titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors," will likely be repealed or substantially scaled back by the incoming Trump Administration.

G. U.S. Supreme Court Decisions Directly Impacting the "E" of "ESG"

Recent decisions of the U.S. Supreme Court also have limited ESG and administrative agency authority more generally. First, the court employed the "major issues doctrine" to strike down ESG and DEI initiatives.

On June 30, 2022, the U.S. Supreme Court issued its decision in *West Virginia v. Environmental Protection Agency*.[xxx] In this case, the Supreme Court addressed the Clean Power Plan, a rule promulgated by the EPA to address carbon dioxide emissions from existing coal and natural gas-fired power plants. The Clean Power Plan set forth three important measures:

> (1) "heat rate improvements," which were practices that power plants could use to burn coal more cleanly;
>
> (2) a shift in electricity production from coal-fired power plants to natural gas-fired power plants; and
>
> (3) a shift from coal and gas plants to more renewable energy production, such as wind and solar power.

The EPA also set forth "final emission guidelines for states to follow in developing plans" to regulate existing power plants. At issue was whether the EPA had the authority to regulate these emissions via the "best system of emission" identified in the Clean Power Plan. The Supreme Court found that the EPA, which purported to derive its authority from Section 111(d) of the Clean Air Act, did not have the broad authority to do so.

The case resulted in a 6-3 ruling from the Supreme Court, with the majority opinion written by Chief Justice Roberts. The Court began by addressing threshold issues of justiciability. The majority held the State petitioners had standing as they were injured because the EPA rule would require them to more stringently regulate power plant emissions within their borders. As to mootness, the Court rejected the government's argument that the case is moot based upon its representation that the EPA does not intend to enforce the Clean Power Plan prior to promulgating a new Section 111(d) rule.

The Court stated that "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." The Court noted that the government did not suggest that, if this litigation was resolved in its favor, it would not reimpose emissions limits predicated on generation shifting. Although this aspect of the ruling is hardly groundbreaking, it will support the standing of states to challenge future agency action.

The Court reversed the D.C. Circuit Court of Appeal's ruling that had struck down the Trump administration's Affordable Clean Energy rule, which had repealed the Obama-era Clean Power Plan and replaced it with more limited regulations of carbon dioxide emissions from existing power plants. The Supreme Court's ruling, instead, restricted the EPA's "power to regulate greenhouse gas emissions from power plants, finding that the Obama Administration exceeded its authority under the Clean Air Act by allowing states to issue regulations aimed at increasing the use of cleaner sources of electricity generation."

The majority determined that the EPA exceeded the congressionally mandated authority by using the Clean Power Plan to give states the option to promulgate regulations that would encourage "generation shifting" or moving away from power sources like coal to cleaner ones, like natural gas or renewables. According to Chief Justice Roberts:

> Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day," But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

Chief Justice Roberts stated the government – under the major questions doctrine – could not point to "clear congressional authorization" for its manner of regulations but instead pointed to the EPA's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction ... adequately demonstrated." According to the majority, "[s]uch a vague statutory" was "not close to the sort of clear authorization required" by the Court's precedent.

In her dissent, Justice Kagan stated Section 111 of the Clean Air Act did, in fact, broadly authorize the EPA to devise the "best system of emission reduction" for power plants and that the parties did not dispute that the "best system" was generation shifting. Accordingly, Justice Kagan's dissent viewed the majority's decision as depriving the agency of "the power needed – and the power granted – to curb greenhouse gases." Justice Kagan added that a key reason Congress makes broad delegations like Section 111 was so an agency could respond appropriately and commensurately to new and big problems. She accused the majority of substituting its own policymaking ideas for those of Congress and stated that the majority's decision was "really an advisory opinion on the proper scope of the new rule EPA is considering," as the Biden Administration stated it would not revive the 2015 Clean Power Plan.

There was a general consensus this decision would hinder, delay, complicate, or otherwise impact the Biden Administration's climate goals. Commentators vary considerably on both the legal correctness of the decision and their assessment of the impact of the decision. According to this CNN report:

> The Supreme Court's decision on Thursday dealt a major blow to climate action by handcuffing the Environmental Protection Agency's ability to regulate planet-warming emissions from the country's power plants, just as scientists warn the world is running out of time to get the climate crisis under control.
>
> It is a major loss for not only the Biden administration's climate goals, but it also calls into question the future of federal-level climate action and puts even more pressure on Congress to act to reduce emissions.
>
> Experts tell CNN the decision could set the U.S. back years on its path to rein in the climate crisis and its deadly, costly impacts.
>
> The opinion makes it "more difficult to achieve larger-scale emissions reductions," Andres Restrepo, senior attorney for the Sierra Club's Environmental Law Program, told CNN. "To avoid the worst impacts of climate change we need to do a lot more and move a lot faster. That's why today's ruling is such a setback." [xxxi]

Fox News offered a different view:

> For some time, the Environmental Protection Agency has wanted to destroy the American coal industry and has issued regulations with that end in mind. Today, the Supreme Court said it cannot do that without a clear grant of authority from Congress. This ruling not only stops environmental zealots in the EPA, but it should also stop major power grabs by bureaucrats at other agencies. It's a landmark ruling against the agencies that have become like a fourth branch of government.
>
> In the June 30 ruling in *West Virginia v. EPA*, the Court was concerned with an Obama-era regulation called the Clean Power Plan. The EPA felt it had a duty to reduce greenhouse gas emissions and drew up rules that would force states to do so. In the process, the agency decided the "best system of emissions reduction" was one that the coal industry could not survive under. Regulators relied on a little-used provision of the Clean Air Act that had only ever been used to make emission reduction systems operate more cleanly, not to eliminate them. The Court said they couldn't do this. [xxxii]

It will take a while to know the true impact of the Supreme Court's decision. However, the impact likely will not be as limiting for regulators as some fear and others hope. The Supreme Court recognized that the EPA does have the power to regulate greenhouse gas emissions, and the ruling does not prevent the EPA from regulating outright power plant greenhouse gas emissions under Section 111(d) or under the Clean Air Act. The EPA could look to other sources of authority and rely more on traditional tools, such as those used to regulate other air pollutants, but at a minimum, it will be required to exercise greater care in regulating greenhouse gas emissions. Of course, the limitations will apply regardless of whether the administration is Democrat or Republican.

The decision may potentially give states a greater role to play with respect to clean energy requirements, which likely will play out differently in red and blue states. Principles of federal law preemption must be considered. Also, many states tether their air quality standards to federal standards by specifically incorporating references to parts of Section 111 into their own statutes and regulations. Others choose to implement the EPA's determinations as a baseline or guide for minimum air quality standards. As such, the Supreme Court's decision will directly impact state law.

The Supreme Court's reliance upon "the major questions doctrine" is significant. In his concurrence, Justice Gorsuch described the doctrine as a tool to ensure that the government does "not inadvertently cross constitutional lines." The major questions doctrine has previously been used to guard against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Both liberal and conservative justices have relied upon the major question doctrine in the past.

The related "non-delegation" doctrine prevents Congress from intentionally giving away its own power. Application of the major questions doctrine often results in requiring Congress – the people's elected representatives – to weigh in legislatively to solve more contemporary problems or issues. In the majority's decision in *West Virginia v. EPA*, the doctrine was used to prevent the EPA's authority from being based upon "vague" statutory grants and require the EPA to point to clear congressional authorization.

The decision – particularly its reliance upon "the major questions doctrine" – likely has implications beyond the EPA and greenhouse gas emissions. It signals the view of the current majority of justices that the "administrative state" may be out of control and that it may be sympathetic to efforts to limit the broad and growing power of unelected government bureaucrats in federal administrative agencies. Stated differently, rather than treating such assertions of power as standard statutory interpretations, as to which judges are highly deferential to agency actions, courts may approach extraordinary, novel actions of administrative agencies with far-reaching consequences with a greater degree of skepticism. As Justice Roberts stated:

> [i]f Congress wishes to effect a sweeping overhaul of the nation's economic activity, it must now do so explicitly—with 'clear congressional authorization' Agencies may not, on their own initiative, transform a statutory scheme used for one thing to perform some other ambitious work, even if the law's language makes their statutory interpretation 'colorable.

The decision may have implications beyond the context of ESG as well. Another important takeaway from the Supreme Court's decision is a lesson learned by most Presidential administrations: namely, in a democracy, courts and judicial challenges can delay and derail an administration's policies no matter the number of resources or the amount of political capital devoted to them. The bigger and more sweeping the policy, the more subject to challenge the policy may be.

On May 25, 2023, the U.S. Supreme Court issued a ruling in *Sackett v. Environmental Protection Agency,*[xxxiii] narrowing the federal government's authority to regulate bodies of water and effectively upending a Biden Administration rule that had recently gone into effect. The EPA classified the wetlands on the Sacketts' property as "waters of the United States" because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake. The EPA ordered the Sacketts to restore the site, threatening penalties of over $40,000 per day.

The Supreme Court ruled that the federal government's definition of the term "waters of the United States" must be restricted to a water source with a "continuous surface connection" to major bodies of water. The decision was unanimous on the merits, but the court split 5-4 on determining how the federal government should go about defining water sources. According to the majority opinion authored by Justice Alito, understanding the Clean Water Act to apply to wetlands that are distinguishable from otherwise covered waters of the United States would substantially broaden the statute to define navigable waters as waters of the United States and adjacent wetlands.

On December 30, 2022, the EPA and the U.S. Army Corps of Engineers announced that they had approved a water of the United States regulation to be implemented in March 2023. After announcing this, EPA Administrator Michael Regan stated that the rule "safeguards our nation's waters." The rule opened the door for the federal government to regulate wetlands, lakes, ponds, streams, and "relatively permanent" waterways, largely mimicking a pre-2015 environmental rule set during the Obama Administration, which implemented the changes to curb water pollution.

The regulation was the broadest interpretation to date of which water sources require protection under the Clean Water Act. Industry groups and some lawmakers criticized the regulation as an example of federal overreach. In April, a federal judge granted a request from 24 states and several trade groups to pause the implementation of the regulation. The Supreme Court's decision was hailed for protecting farmers, ranchers, and landowners from overreach under the Clean Water Act.

The foregoing decisions are consistent with the trend of decisions of the Court – including the Court's decision in *Department of Education v. Brown,*[xxxiv] striking down the Biden Administration's effort to forgive student loan debt – insisting that administrative agency actions, particularly major actions, be grounded in specific legislative authority to act.

On balance, these decisions slowed down the pace of agency-designed environmental regulation as well as any regulation specific to ESG under the Biden Administration, but these decisions did not alter the direction or goals of the Biden Administration or lessen the pressures companies faced from stakeholders to undertake ESG efforts. Certainly, the 2024 election had a more significant impact.

H. U.S. Supreme Court Decisions More Broadly Limiting Power of Administrative Agencies

A trilogy of cases decided by the United States Supreme Court in 2024 limits the power of administrative agencies in a manner that extends well beyond ESG and DEI. The regulatory or administrative state wields enormous power and influence in the United States. These agencies reside in the Executive Branch and are delegated authority by Congress to issue rules, regulations, licenses, and establish rates. Reportedly, there are now over 400 federal departments and agencies.

The number of regulations, the size of the Code of Federal Regulations (which contains all finalized rules and regulations), the scope of regulations, and the costs of compliance with these regulations have all increased significantly over the decades. The Federal Register totaled 61,308 pages in 2017 (which was down from the all-time high of 95,894 pages in 1993) and swelled back up to 86,356 pages in 2020.

In 2021, the Biden Administration promulgated over 3,250 regulations in contrast to 81 laws passed by Congress, meaning agencies accounted for over 97 percent of new laws adopted in the United States. It has been estimated that regulatory compliance and the economic impact of regulation exceed $1.9 trillion annually.

Perhaps more problematic than the number and costs of regulations is the power of agencies to promulgate laws that lack majority support by the general public. Agencies pass regulations that would not withstand media scrutiny, would not garner sufficient public support to survive the legislative process, and could have adverse consequences for the reelection of United States Representatives, Senators, and the President.

Indeed, Chief Justice Roberts' dissent in the *City of Arlington v. FCC*[xxxv] compared administrative agencies to tyranny:

> One of the principal authors of the Constitution famously wrote that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their

> rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government"[xxxvi]

As the Chief Justice aptly noted, "hundreds of federal agencies [are] poking into every nook and cranny of daily life."

Government bureaucrats who run these agencies and promulgate these regulations having the force and effect of law are not elected by voters. Many are not even appointed by the President and confirmed by the Senate. Many believe that bureaucrats are sometimes unaccountable to elected officials and may even frustrate the efforts and agendas of elected officials.

The U.S. Supreme Court decision in *Loper Bright Enters v. Raimondo,*[xxxvii] does not abolish agencies or substantially limit their general rule-making power when properly delegated to them by Congress. However, it provides a meaningful check on agencies by ending court deference to agencies in interpreting ambiguous law. Writing the 6-3 majority opinion, Chief Justice Roberts put an end to the *Chevron* deference sometimes afforded to administrative agencies by courts in interpreting ambiguous law. Justice Roberts set the stage by noting since the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*[xxxviii] the Court sometimes required courts to defer to agency interpretations of the statutes those agencies administer – even when a reviewing court reads the statute differently.

Where *Chevron* applied, a court would first determine whether Congress expressed its intent clearly concerning the question at issue. If so, Congressional intent would be effectuated. Where the statute is silent or ambiguous concerning the subject issue, under *Chevron*, the reviewing court was required to defer the agency's interpretation, provided it was based on a "permissible construction" of the statute.

The reviewing courts in each case applied *Chevron* to resolve challenges to the same agency rule in favor of the government. The National Marine Fisheries Service (NMFS) administers the Magnuson-Stevens Fishery Conservation and Management Act (MSA) pursuant to delegation from the Secretary of Commerce (SEC). Pursuant to this scheme, councils developed fishery management plans, which NMFS approves and promulgates as final regulations.

A plan may require that one or more observers be on board domestic vessels to collect data necessary for the conservation and management of the fishery. The MSA specifies three groups that must cover the costs associated with observers: foreign fishing vessels operating within the exclusive economic zone; vessels participating in certain limited access privilege programs; and vessels within the jurisdiction of the North Pacific Council.

The MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels for the latter two categories. The MSA does not address whether Atlantic herring fishermen may be required to bear costs associated with any observers that a plan may mandate. The NMFS fully funded the observer coverage the New England Fishery Management Council required in its plan for the Atlantic herring fishery. In 2013, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable.

Several years later, the NMFS promulgated a rule approving the amendment. Petitioners are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA, which incorporates the Administrative Procedure Act (APA).[xxxix] They argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. In one case, the district court granted summary judgment to the government.

It concluded that the MSA authorized the Rule but noted that even if these petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under Chevron. A divided panel of the D. C. Circuit affirmed. The majority addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers and deferred to the agency's interpretation as a "'reasonable" construction of the MSA.

In the companion case, petitioners Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC, owners of two vessels that operate in the Atlantic herring fishery, filed a suit challenging the Rule as unauthorized by the MSA. The First Circuit affirmed the ruling of the district court in favor of the government. The First Circuit concluded that the agency's interpretation of its authority to require at-sea monitors who owners of regulated vessels pay for does not exceed the bounds of the permissible. It purported to apply *Chevron* but did not explain which aspects of its analysis were relevant to which of *Chevron*'s two steps. The U.S. Supreme Court granted certiorari in both cases, limited to the question of whether Chevron should be overruled or clarified.

In ending *Chevron* deference, Chief Justice Roberts mainly relied upon the fundamental principle of judicial review to support the Court's decision that interpretation of the law is within the province of the courts–not administrative agencies. He pointed out that the framers of the Constitution envisioned that the final interpretation of the laws would rest within the province of the courts.

The U.S. Supreme Court initially embraced this understanding in *Marbury v. Madison*, one of the first cases law students will study in constitutional law class. In *Marbury*, Chief Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[xl] Precedent teaches that whatever respect an executive branch interpretation was due, a judge is not bound to adopt the construction given by the head of a department.

Next, Chief Justice Roberts turned to the Administrative Procedures Act ("APA") enacted in 1946. He noted the APA serves "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."[xli] According to Chief Justice Roberts, the APA itself addresses the issue before the Court:

> In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." [xlii]

The APA requires courts to hold unlawful and set aside agency actions, findings, and conclusions that are not in accordance with the law. Chief Justice Roberts concluded:

> The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to Marbury: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if 'arbitrary, capricious, [or] an abuse of discretion'); §706(2)(E) (agency fact-finding in formal proceedings to be set aside if 'unsupported by substantial evidence').

The Chief Justice acknowledged that courts may seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," consistent with the APA.[xliii]

According to the Chief Justice, the deference *Chevron* required of courts cannot be squared with the APA. *Chevron* defies the command of the APA that the reviewing court – not the agency whose action it reviews – is to decide all relevant questions of law and interpret statutory provisions. He rejected the arguments offered for deferring to agencies to resolve statutory ambiguities, including that agencies have subject matter expertise regarding the statutes they administer, deferring to agencies promotes the uniform construction of federal law, and resolving statutory ambiguities may involve policymaking best left to political actors, rather than courts.

He pointed out that Congress expects courts to handle technical statutory questions and that courts have expertise in interpreting the law.[xliv] Justice Thomas concurred, writing separately to underscore his view that *Chevron* deference also violates our Constitution's separation of powers. Justice Gorsuch wrote a separate concurring opinion regarding *stare decisis*.

Justice Kagan dissented and was joined by Justice Sotomayor and Justice Brown-Jackson. According to Justice Kagan, Congress would usually prefer that the responsible agency, not a court, resolve ambiguities:

> Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; court shave no such accountability and no proper basis for making policy.
>
> And of course, Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress' would have 'desired' the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows.

The pendulum has been swinging away from *Chevron* deference for some time. The 2013 dissent of Chief Justice Roberts, joined by Justice Kennedy and Justice Alito, in *City of Arlington* foreshadowed the elimination of *Chevron* deference. Over the past two terms, the nation's high court stepped up its efforts to address agency overreach. As previously discussed, the court has been using the "major issues doctrine" to erode *Chevron* deference. The U.S. Supreme Court itself had not employed *Chevron* deference since 2016, and Chief Justice Roberts thought it made sense to free lower courts from its restraints.

Last year, Congress took a stab at ending *Chevron* deference. Specifically, on June 15, 2023, the House of Representatives passed the Separation of Powers Restoration Act of 2023 (SOPRA). The bill, which was never enacted into law, would have eliminated *Chevron* deference about a year before the U.S. Supreme Court overruled *Chevron*. Though not a basis for the result in *Loper Bright*, SOPRA at least evinced the intent of the current House of Representatives not to continue *Chevron* deference.

The day before deciding *Loper Bright*, the Supreme Court issued its ruling in *Securities and Exchange Commission v. Jarkesy*.[xlv] The decision did not involve *Chevron* deference but rather interposed restrictions on the agencies' ability to adjudicate disputes before their courts. Shortly after the passage of the Dodd-Frank Act, the SEC initiated an enforcement action for civil penalties against investment adviser George Jarkesy, Jr. and his firm, Patriot28, LLC, for alleged violations of the antifraud provisions contained in federal securities laws.

The SEC decided to adjudicate the matter in-house and determined that Jarkesy and Patriot28 violated securities law and levied a civil penalty of $300,000. Jarkesy and Patriot28 petitioned for judicial review. The Fifth Circuit vacated the SEC's order on the ground that adjudicating the matter in-house violated the defendants' Seventh Amendment right to a jury trial. The Supreme Court granted *Certiorari*.

In a 6-3 decision written by Chief Justice Roberts, the Supreme Court affirmed, holding that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial, and the agency must bring proceedings in federal court. The Court held that the "public rights" exception to Article III jurisdiction – which allows Congress to assign certain matters for decision to any agency without a jury (*e.g.*, certain customs and immigration laws) – does not apply because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. In the case *sub judice*, the SEC targeted the same basic conduct as common law fraud, which is a private as opposed to public right.

Justice Sotomayor filed a dissent, joined by Justice Kagan and Justice Brow-Jackson. According to Justice Sotomayor's dissent, "the Constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress."

On the last day of the term, the Supreme Court issued its decision in *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*[xlvi] In this final case of the trilogy increasing the ability of regulated entities and individuals to challenge agency action, the Court held that the default six-year statute of limitations for challenging federal agency actions begins to run when the plaintiff is injured by a final agency action, not when the final agency action is published. The 6-3 decision authored by Justice Coney-Barrett allows decades-old regulations to be challenged.

In this case, Corner Post, a truck stop that opened in 2018, challenged Regulation II of the Federal Reserve Board, which was introduced in 2011. Regulation II capped debit card interchange fees at $0.21 per transaction and 0.05 percent of the transaction's value. The district court dismissed the suit as time-barred, and the Eighth Circuit affirmed, holding that the statute of limitations begins to run when a regulation is published, the rule followed by the majority of U.S. Courts of Appeal. As the Federal Reserve Board published Regulation II in 2011, the lower courts held that the time to challenge the regulation expired in 2017, a year before Corner Post existed and processed its first debit card transaction.

Justice Brown-Jackson dissented along with Justice Sonia Sotomayor and Justice Kagan). Justice Jackson believed that the majority's reasoning was fundamentally flawed and inconsistent with the Court's prior decisions. According to Justice Jackson, the decision "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face" and that litigants could "game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline."

Justice Jackson predicted that this decision, coupled with *Loper Bright*, will "wreak havoc on Government agencies, businesses, and society at large" and lead to a "tsunami of lawsuits" challenging agency regulations. Justice Jackson is likely correct that the number of lawsuits challenging administrative agency regulations will increase significantly, at least in the short term. The Supreme Court recognized that it is the role of courts and not administrative agencies to interpret statutes. In so doing, it has allowed regulated persons and entities to limit agency authority and abuses through litigation. It also interposed a measure of checks and balances on agencies consistent with the type of government envisioned by the framers.

Loper Bright's ending of *Chevron* deference unquestionably is a significant development. The decision will empower regulated entities and provide greater incentive for them to litigate by improving their chances of prevailing where the issue involves regulation in areas in which the agency does not have expressly delegated authority.

There has been some research suggesting that courts have frequently invoked *Chevron* deference and that, in such cases, agencies have prevailed over 77 percent of the time, which is an increase in the agency win rate of more than 23 percent in cases in which *Chevron* deference was applied as compared to cases in which *Chevron* deference was not applied. In addition, regulated entities may experience some upstream advantage by achieving greater influence as part of the rulemaking process insofar as agencies afford greater weight to their comments.

In the wake of *Loper Bright*, doubt may be cast on the validity of some existing agency interpretations and regulations that rely on broad or ambiguous statutory language. However, the Supreme Court majority made clear that its decision does not invalidate prior cases decided under *Chevron*.

Many believe that some of the broader, more far-reaching regulations may be at risk without *Chevron* deference, but many long-settled regulations will survive. Many federal agencies have been preparing for the elimination of *Chevron* deference since the Supreme Court granted review in *Loper Bright*. They had been honing their reasons to support newly promulgated regulations and others they believed to be at risk.

It remains to be seen whether *Loper Bright* will effectuate a sea-level change or merely result in a modest decrease in agency power. Congress retains the ability to delegate authority to federal agencies but must make such intent to delegate clear. Many times, the delegation of authority or the expression of congressional intent to allow agencies to "gap fill" will be expressed and clear. In such instances, *Loper Bright* does nothing to invalidate such delegation. Many cases before *Loper Bright* did not apply *Chevron* deference. Also, in several instances, parties impacted by regulations may not have the funds or time to litigate against agencies with seemingly unlimited resources.

Although *Loper Bright* rejects mandatory deference under *Chevron*, the Court observed that federal courts may still "seek aid" from the executive branch, giving careful attention to what the agencies have to say on interpretive matters, particularly where the agency's construction rests on "factual premises" within its expertise. Some courts may see this language as providing an opening to effectively defer to agency interpretation without expressly applying *Chevron* deference.

The ruling emphasizes the importance of clear and explicit delegation of authority from Congress to agencies. This may lead to more detailed and specific statutory language in future legislation and perhaps require Congress to revisit existing legislation. Ideally, Congress would improve its legislative actions by passing legislation that is shorter and more succinct and that addresses issues with greater precision, leaving less room for agencies to legislate under the guise of rulemaking. There is the potential that Congress could begin inserting broad, *pro forma* delegation language in legislation.

Many commentators have complained that *Loper Bright* reflects the Court's usurpation of power by the judiciary through judicial review at the expense of Congress. Others believe the real shift of power among the three branches of government is Congress's abdication of its legislative function in favor of the executive branch and the assumption of power by administrative agencies unimaginable at the time of the Constitution's drafting. Agencies and the bureaucrats that run them remain vested with broad powers. Many of their activities are not subject to the same sunlight as legislation passed by Congress. Actions and regulations that would not pass muster if subjected to the scrutiny of the legislative process are commonplace in the administrative state.

Also, Congress does not enforce or adjudicate the legislation it passes. Administrative agencies enforce and adjudicate the regulations they promulgate. There are many ways in which agencies can influence the nation's policy agenda and legislation through the White House and through the speeches and activities of agency heads and subheads.

Loper Bright is a significant decision, but agencies will continue to wield enormous power over Americans. The other two decisions also may benefit those challenging agency activities. Many litigates will benefit from litigation in federal court as opposed to in an agency-controlled forum. Many litigates whose challenges would be barred before the entity existed or were injured by regulations promulgated years or decades before will welcome the opportunity to assert claims that would be time-barred if the statute of limitations began to run once a regulation is published.

Loper Bright will impact insurers as businesses and regulated entities in the same manner as other businesses and regulated entities. Regulatory actions impact insurers' underwriting, investment, and claims-handling activities, which may impact losses.

Regulatory enforcement actions are a concern for every corporate policyholder, and policyholder lawyers are reminding their clients to review the regulatory environment for risks related to the business and to ensure their insurance programs proactively provide coverage for the related regulatory risk. Policyholders and insurers are keeping their eyes on civil penalties. Many expect an uptick in securities cases that could impact professional liability and D&O policies and increase defense costs.

The trilogy of cases decided by the Supreme Court in the 2024 term will significantly impact agency power, rulemaking, and adjudicating. However, the extent of the impact will depend, in part, on the actions of agencies, Congress, the President, and the courts. At least in the short term, the level of judicial challenges to agency regulation can be expected to increase.

I. The Non-Delegation Doctrine is Currently Before the Supreme Court

A case currently before the Supreme Court has the potential to further limit the authority of administrative agencies and to invalidate federal statutes. *U.S. Federal Communications Commission v. Consumers' Research* involves the FCC's ability to issue a fee to cover the costs of providing broadband and telecommunication services in rural and low-income areas. This case may present an opportunity for the court to reinvigorate the nondelegation doctrine.

The issues in the case include whether Congress violated the nondelegation doctrine by authorizing the Federal Communications Commission to determine, within the limits set forth in 47 U.S.C. § 254, the amount that providers must contribute to the Universal Service Fund, whether the FCC violated the nondelegation doctrine by using the financial projections of the private company appointed as the fund's administrator in computing universal service contribution rates, whether the combination of Congress's conferral of authority on the FCC and the FCC's delegation of administrative responsibilities to the administrator violates the nondelegation doctrine.

The nondelegation doctrine is rooted in Article I of the Constitution and its grant of legislative authority to Congress. The nondelegation doctrine was last used in a significant way to strike down laws in the 1930s. Since then, courts generally have applied the "intelligible principle" test to uphold exercises of agency discretion, where Congress provided at least some minimal level of guidance as to how that discretion should be exercised. The nondelegation doctrine was raised in a 2019 case, *Gundy v. United States*.[xlvii] In that case, all four conservative justices participating in the case signaled support for strengthening the nondelegation doctrine. With a majority of conservative justices, it is possible that the Court could strengthen the nondelegation doctrine.

The nondelegation doctrine is more sweeping than the "major issues" doctrine as it could be employed where an administrative agency exercises any amount of policy discretion as opposed to where it exercises discretion on major policy issues. Also, the remedy for violating the nondelegation doctrine potentially is broader as well in that a statute granting the policy discretion may be struck down as being unconstitutional, removing the ability of the agency at hand to regulate in that area entirely and potentially affecting more rules than only the challenged rule.

The application of the nondelegation doctrine could rip roar across the country and invalidate many laws, but the Court could shape its ruling much more narrowly. Indeed, the Court may avoid a decision on the non-delegation doctrine altogether by determining the case is moot due to the petitioner's failure to seek preliminary relief before the United States Court of Appeals for the Fifth Circuit. The case will be closely watched.

Read part two of this commentary, where we will explore DEI, the countervailing balance to federal rules and policies provided by state law, the impact of international law and the role of stakeholders in ESG policymaking, and the impact of ESG policy and regulation on risk profiles and claims activity.

[i] *See generally* Seaman, S.M. and Schulze, J.R., *Allocation of Losses in Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2024) at Chapter 19. These commentaries are derived in part from Seaman, S.M. and Schulze, J.R., *Allocation of Losses in Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2024) at Chapter 21, but have been modified significantly and updated to reflect more recent developments.

[ii] *See* Aaron De Smet, et al., *The Great Attrition is making hiring harder. Are you searching the right talent pools?, McKinsey & Company* (July 13, 2022), available at https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/the-great-attrition-is-making-hiring-harder-are-you-searching-the-right-talent-pools?utm_medium=paid.

[iii] *See* David Saric, "What does Gen Z want from an insurance career?" *Insurance News* (June 16, 2023), available at https://www.insurancebusinessmag.com/us/news/breaking-news/what-does-gen-z-want-from-an-insurance-career-449575.aspx.

[iv] *See* Nana Dhingra, "Help your employees find purpose--or watch them leave," *McKinsey & Company* (April 5, 2021), available at https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/help-your-employees-find-purpose-or-watch-them-leave.

[v] *See* "Beyond compliance: Consumers and employees want business to do more on ESG," PWC, available at https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/consumer-and-employee-esg-expectations.html.

[vi] Press Release, Zurich Insurance Group, *Zurich publishes its Sustainability Report 2020* (Mar. 12, 2021).

[vii] Report, Aon plc, *2020 Aon Impact Report* (2021).

[viii] *Lloyd's Withdraws from Net Zero Insurance Alliance, Joining Growing List of Major Players, Insurtech Insights*, https://www.insurtechinsights.com/lloyds-withdraws-from-net-zero-insurance-alliance-joining-growing-list-of-major-players/ (last visited 1/7/2025).

[ix] *Id.*

[x] Simon Jessop, *JPMorgan becomes latest U.S. lender to quit Net-Zero Banking Alliance*, Reuters (Jan. 7, 2025, 12:23 PM CST), https://www.reuters.com/business/environment/jpmorgan-says-leave-net-zero-banking-alliance-2025-01-07/ (last visited 1/7/2025); Charlie King, *Why Are Banking Giants Citi, etc Quitting Net Zero Alliance?*, Sustainability Magazine (published Jan., 6, 2025) (updated Jan. 8, 2025)

[xi] Press Release, Office of Attorney General of Texas, *Following Attorney General Ken Paxton's Urging, All U.S. Based Major Banks Withdraw from Anti-Oil and Gas Net-Zero Banking Alliance*, (Jan. 7, 2025), https://www.oag.state.tx.us/news/releases/following-attorney-general-ken-paxtons-urging-all-us-based-major-banks-withdraw-anti-oil-and-gas-net (last visited 1/9/2025).

[xii] Isla Binnie, *Texas schools fund pulls $8.5 billion from BlackRock over ESG investing*, Reuters (March 19, 2024, 4:23 PM CDT), https://www.reuters.com/sustainability/sustainable-finance-reporting/texas-schools-fund-pulls-85-billion-blackrock-over-esg-policies-2024-03-19/ (last visited 1/7/2025).

[xiii] Ross, H., *Climate risks for insurers: Why the industry needs to act now to address climate risk on both sides of the balance sheet*, S&P Global (Aug. 27, 2021).

[xiv] *Climate Change Report 2021*, Zurich Insurance Group (2021).
[xv] Report, US SIF, *Report on US Sustainable and Impact Investing Trends 2020* (2020).
[xvi] *See* "Most U.S. investors want a dedicated ESG due diligence product that can analyze risks and opportunities," KPGM (July 27, 2023), available at https://info.kpmg.us/news-perspectives/industry-insights-research/kpmg-esg-due-diligence-survey-2023.html.
[xvii] The Hartford To Invest $2.5B In Climate Initiatives Law 360 (Nov. 15, 2021); Eli Flesh, *The Hartford To Invest $2.5B In Climate Initiatives*, Law 360 (Nov. 12, 2021, 6:07 PM EST), https://www.law360.com/articles/1439765/the-hartford-to-invest-2-5b-in-climate-initiatives.
[xviii] Report, AM Best Information Services, *Insurers and Reinsurers - Ignoring ESG Factors Poses Reputational Risk* (2020).
[xix] Dalton, R., "Zurich cuts ties with over 90 companies over green issues," *Insurance Insider* (Mar. 12, 2021).
[xx] Report, Aviva, *Taking Climate Action: Sustainability* (2021).
[xxi] Press Release, bp p.l.c., BP sets ambition for net zero by 2050, *fundamentally changing organisation to deliver* (Feb. 12, 2020).
[xxii] "How ESG Data is Reshaping Insurance Underwriting" *InsureTech* (Feb 4, 2025), available at https://insurtechdigital.com/sustainability/the-role-of-esg-data-in-modern-insurance-underwriting.
[xxiii] Press Release, *White House, FACT SHEET: President Biden Directs Agencies to Analyze and Mitigate the Risk Climate Change Poses to Homeowners and Consumers, Businesses and Workers, and the Financial System and Federal Government Itself* (May 20, 2021).
[xxiv] *See* Press Release, FIO, *U.S. Department of the Treasury and State Insurance Regulators Launch Coordinated Effort on Homeowners Insurance Data Collection to Assess the Effects of Climate Risk on U.S. Insurance Markets*, (Mar. 8, 2024), https://home.treasury.gov/news/press-releases/jy2162 (last visited 1/15/2025).
[xxv] 15 U.S. Code § 6701.
[xxvi] Press Release 2024-31, SEC, *SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors,* (Mar. 6, 2024), https://www.sec.gov/newsroom/press-releases/2024-31 (last visited 1/13/2025).
[xxvii] *Id.*
[xxviii] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors; Delay of Effective Date, 89 Fed. Reg. 25,804 (Mar. 28, 2024) (to be codified at 17 C.F.R. 210, 229, 230, 232, 239, and 249). Currently, the effective date of the Final Rules, (published at 89 Fed. Reg. 21,668 (Mar. 28, 2024)), is delayed indefinitely pending the judicial review of cases consolidated in the Eighth Circuit Court of Appeals. See The Enhancement and Standardization of Climate-Related Disclosures for Investors; Delay of Effective Date, 89 Fed. Reg. 25,804 (citing *Nat. Res. Def. Council, Inc. v. SEC*, No. 24-707 (2d Cir. filed Mar. 12, 2024); *Liberty Energy Inc. v. SEC*, No. 24-60109 (5th Cir. filed Mar. 6, 2024); *Louisiana v. SEC*, No. 24-60109 (5th Cir. filed Mar. 7, 2024); Tex. All. of Energy Producers v. SEC, No. 24-60109 (5th Cir. filed Mar. 11, 2024); *Chamber of Commerce of U.S. of Am. v. SEC*, No. 24-60109 (5th Cir. filed Mar. 14, 2024); *Ohio Bureau of Workers' Comp. v. SEC*, No. 24-3220 (6th Cir. filed Mar. 13, 2024); *Iowa v. SEC*, No. 24-1522 (8th Cir. filed Mar. 12, 2024); *West Virginia v. SEC*, No.

24-10679 (11th Cir. filed Mar. 6, 2024); and *Sierra Club v. SEC*, No. 24-1067 (D.C. Cir. filed Mar. 13, 2024).

[xxix] 16 C.F.R. § 260.1(c).

[xxx] 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

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[xxxiv] 600 U.S. 551, 143 S. Ct. 2343, 216 L. Ed. 2d 1116 (2023)

[xxxv] 569 U.S. 290 (2013)

[xxxvi] *City of Arlington v. FCC*, 569 U.S. 290, 312-313.

[xxxvii] 603 U.S. 369 (2024)

[xxxviii] 467 U. S. 837 (1984)

[xxxix] 5 U. S. C. §551 *et seq*

[xl] 1 Cranch 137.

[xli] *United States v. Morton Salt Co.*, 338 U.S. at 632.

[xlii] 5 U. S. C. §706. *Id. at Loper Bright Enters. v. Raimondo*, Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882, at *32-33 (June 28, 2024).

[xliii] *Skidmore v. Swift & Co.*, 323 U.S. at 134, 140.]. *Id.* at *Loper Bright Enters*, 2024 U.S. LEXIS 2882, at *47.

[xliv] *Id.* at *Loper Bright.*, 2024 U.S. LEXIS 2882, at *113-14 (Kagan, J., dissenting) (citing *Smiley v. Citibank* (South Dakota), N. A., 517 U. S. 735, 740-741, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996))

[xlv] 2024 U.S. LEXIS 2847, 2024 WL 3187811.

[xlvi] 603 U.S. 799, 144 S. Ct. 2440, 219 L. Ed. 2d 1139, 2024 U.S. LEXIS 2885 (2024).

[xlvii] 139 S. Ct. 2116 (2019).