



September 17, 2025

Submitted Electronically Via: <https://www.regulations.gov>

Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Request for Information on State Laws Having Significant Adverse Effects on the National Economy or Significant Adverse Effects on Interstate Commerce

To Whom It May Concern:

The American Securities Association (ASA)¹ submits these comments in response to the request for information (RFI) put out by the Department of Justice (DOJ) and National Economic Council (NEC) regarding state laws that may negatively impact the national economy or have adverse impacts on interstate commerce. The ASA appreciates the Administration focusing on state and federal regulations that impede productivity and economic growth.

I. General.

The U.S. constitutional system of federalism divides authority between the federal government and the states. The federal government's role is limited to what is explicitly outlined in the Constitution, with all other power delegated to states. This system was intentional as the Founders were mindful of consolidating too much power in the executive because they were in the midst of fighting for their independence from a tyrant king. This system has served the United States well since then because it allows states to be "laboratories of democracy" that can regulate commerce within their borders as their people see fit.

Recently, state politicians have begun to use state laws to set *federal* policy. They are using their legal system to change the behavior of commercial actors and citizens in all 50 states. States attempting to set national standards through their own legislature or regulatory agencies has become an increasing trend in recent years. This is highly problematic because it presupposes that all Americans want what the citizens of a single state want and that presumption is baseless and simply untrue.

¹ ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.





The ASA agrees with the DOJ's statement that these efforts "undermine...federalism by projecting the regulatory preferences of a few States into all States."²

As the DOJ and NEC review public comments and examine actions that potentially violate the Constitution or federal law, it is critical for the Administration to also consider ways state – or even local – governments may violate federal law and impact interstate commerce through other types of directives. Proactively addressing these issues through legal action may be necessary to safeguard the integrity of federal standards and protect market activity across America.

II. Municipal Finance Market.

One example that concerns ASA is that some state and local governments are disqualifying certain financial institutions from participating in public finance transactions because they lack an *acceptable* environmental, social, and governance (ESG) 'score'.³ ESG scores are a black box that consider several disparate and potentially illegal factors, including things such as diversity, equity, and inclusion (DEI) when scoring hiring practices and board of director composition. The problem is that some states and municipalities have now begun using these opaque, unaccountable, and conflicted ESG scores to force a political change in corporate behavior that cannot be achieved at the ballot box.⁴

Growing evidence shows that the prioritization of ESG factors largely benefits the "Wall Street-ESG Industrial Complex" rather than working Americans.⁵ This self-serving group is made up of activist investors, proxy advisory firms, ESG "ratings" businesses, Wall Street banks, "impact-driven" asset managers, and activists⁶ who use their influence over capital and the assets they manage to advocate for ideological, and in many cases, illegal changes in corporate behavior at the expense of America's savers, retirees, and working families.

ESG was devised to force political, cultural, and social change that cannot be achieved through the democratic process. It purposefully subordinates the interests of American investors – and taxpayers in the case of the municipal bond market – to the radical priorities of fringe politicians and the ideologically aligned rating agencies who support them.

² <https://www.justice.gov/opa/pr/justice-department-and-national-economic-council-partner-identify-state-laws-out-state>

³ California Health and Safety Code § 38532 (SB 253); California Health and Safety Code § 38533 (SB 261). The laws authorize CARB to develop regulations governing the operational aspects, including vendor roles (such as ESG data aggregators, verifiers, or risk rating providers). www.treasurer.ca.gov/cdiac (CDIAC - *California Public Fund Investment Primer*, - "SOCIAL RESPONSIBILITY" AND THE INVESTMENT OF PUBLIC FUNDS, pg. 222. www.treasurer.ca.gov/cdiac/invest/primer.pdf)

⁴ For Example: "Santa Clara Valley Water District shall not do business with banks who do not have an ESG ranking at or better than the "Average/Medium" category by at least one of the professional ESG research companies such as Sustainalytics or other equivalent rankings published by other ESG research firms." Valleywater.org (Executive Limitations, Financial Management, Policy No. EL-4, 4.7.7).

⁵ See e.g. House Financial Services Committee 2024 staff report on the failure of ESG https://financialservices.house.gov/uploadedfiles/hfsc_esg_working_group_staff_report.pdf

⁶ <https://www.americansecurities.org/post/asa-sends-letter-ahead-of-house-financial-services-esg-hearing>





Remarkably, the use of the “S” in ESG ratings continues despite court rulings that point to the use of such factors when making hiring decisions as illegal.⁷ As Justin Danhoff, a senior policy advisor at the Department of Labor, said of ESG in a speech at the OECD earlier this month, “ESG, at its core, looks a lot like a Marxist march through corporate culture,” and “the United States is no longer going to support these policies, even tacitly.”⁸

Yet, despite mounting evidence that non-economic ESG metrics do not contribute to improved corporate performance or investor return,⁹ the ESG Industrial Complex continues to blindly support, rely upon, and profit from their use. America’s working families deserve better.

It is imperative to the American public that this Department demand clear answers to some basic questions below that directly address the integrity, accountability, and market impact of ESG.

- Why do ratings firms continue to promote and ‘score’ companies based upon highly subjective ESG criteria that are heavily influenced by special interest groups and, in some cases, conflict with federal and Constitutional law?¹⁰
- Why are state and local governments relying upon politically partisan ratings to eliminate firms from participating in competitive bid public finance offerings?
- Why are ESG metrics put ahead of the best interests of American citizens and shareholders by the companies, states, and municipalities that use them?
- Do American voters understand that using ESG scores to artificially reduce bidders in public finance transactions will inevitably lead to an increase in borrowing costs?
- Do shareholders know that some of the companies they own are still using ESG-related factors to choose their workforce, suppliers, and vendors?

Despite the Administration’s plan to end discriminatory hiring by American businesses,¹¹ ESG ratings firms have refused to reconsider their approach to using race-based hiring as a factor in their ratings.¹²

The third-party rating agencies that construct ‘ESG scores’ have a vested financial interest in keeping the ESG agenda alive by any means possible. There is absolutely no transparency into how these agencies develop their ESG scores or, more importantly, which special interest groups and political organizations influence their decisions.¹³ Yet, despite this lack of transparency and its potential illegality, states and municipalities are now impacting the pricing of bonds and loans

⁷ <https://www.connkavanaugh.com/blog-authors/kathleen-r-otoole/supreme-court-decision-may-impact-your-companys-diversity-equity-and-inclusion-initiatives/>; <https://www.mccarter.com/insights/supreme-court-invalidates-race-based-affirmative-action-in-higher-education-admissions-what-does-that-mean-for-private-employers/>

⁸ <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/erisa/ebsa-addresses-trump-administration-pension-investing-priorities-at-oecd-event>

⁹ <https://www.chicagobooth.edu/review/do-diverse-leadership-teams-produce-better-performance>

¹⁰ <https://www.sustainalytics.com/esg-ratings>

¹¹ E.O. 14173 (January 21, 2025).

¹² <https://www.sustainalytics.com/esg-research/resource/investors-esg-blog/dei-rollbacks-impact-on-esg-risk-ratings-broader-implications-investors>

¹³ <https://corpgov.law.harvard.edu/2018/08/07/ratings-that-dont-rate-the-subjective-world-of-esg-ratings-agencies/>





in national public finance markets by using conflicted ESG scores to limit which underwriters can participate in their transactions.

If a state or local government can disqualify an underwriter from a public finance transaction based on an ESG score from an unregulated third party, then this presents risks to taxpayers, investors, and financial institutions that participate every day in the national municipal bond and loan markets. At some point, disqualifications will lead to an increase in the cost of financing and that could pose a danger to financial stability, the cost-effectiveness of public infrastructure financing beyond that state, and a state's indebtedness that could require a federal bailout.

We implore the Department to look into this practice and the risks that the continued use of ESG scores in the U.S. financial markets poses to investors, taxpayers, and American society. Specifically, the Department should examine whether it's legal for states and municipalities to use politically motivated 'ESG scores' as a pretext to exclude underwriters seeking to participate in public finance transactions whose loans and bonds are traded in a national market. Many believe this practice violates federal law¹⁴ and the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

III. Worker Classification Rules.

The ASA also continues to be troubled by state efforts to re-classify individuals that choose to be independent contractors as employees. California enacted such a law in 2019, and New Jersey is the latest state to propose this reclassification significantly narrowing the exemptions found in the ill-conceived California law.

More than half a million people in the United States work as independent contractors in the financial services industry, and new laws threaten to change the arrangements American companies have with their nationwide worker base. States are changing worker reclassification laws without regard to their impact on interstate commerce. Congress has chosen not to reclassify millions of independent contractors as employees, but its decision should not be a basis for states to set cross-border standards.¹⁵

IV. Climate Change Regulation.

Another recent development lies with states adopting laws that ostensibly only apply to business activities conducted within a particular state. In reality, many of these laws affect out-of-state businesses and interstate commerce.

¹⁴ Title VII of the Civil Rights Act of 1964.

¹⁵ *Students for Fair Admissions, Inc. v. Harvard (SFFA)*





A prime example of this is the emission and climate change disclosure laws adopted by California in 2023.¹⁶ Collectively these laws affect every U.S.-based business, wherever it is located, that happens to generate revenue in California above a certain threshold.

Similar to the issue described above in the municipal market, California based its climate policies upon the standards of unregulated, conflicted third-party organizations. In this case, California adopted the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and the Greenhouse Gas Protocol.

These foreign-dominated organizations have little respect for and understanding of U.S. law. Their goal is to impose a European-supranational style of regulation on the rest of the world. States importing foreign rules and applying them to U.S. companies is not only harmful to the national economy, but it also undermines American sovereignty and the due process rights of American companies.

California's climate laws conflict with the Constitution's commerce clause. By seeking to regulate certain disclosure within their borders, these state laws interfere with the nationwide uniform disclosure standards for public companies set forth by the national securities regulator, the U.S. Securities Exchange Commission.

If these state laws are permitted to take effect, then this will set a troubling precedent that allows states to adopt fifty sets of new disclosure rules that will apply to every public company doing business within their borders. Injecting this type of friction into public company compliance will dramatically increase the cost of doing business across state lines.

V. Conclusion.

ASA commends the DOJ and NEC for making this request and we look forward to working with the Administration to best address these issues.

Sincerely,

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¹⁶ Senate Bill 253 (Climate Corporate Data Accountability Act); Senate Bill 261 (Climate-Related Financial Risk Act); Assembly Bill 1305 (Voluntary Carbon Market Disclosures Act)

