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State Legislative Developments: Florida Goes One Way – Arizona, Indiana, North Dakota and Wyoming Go The Other

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On February 13, 2023, Florida Governor Ron DeSantis (R) **announced** his support for what his office described as "comprehensive legislation to protect Floridians from the woke environmental, social, and corporate governance (ESG) movement that continues to proliferate throughout the financial sector." Among other things, the **bill (HB 3)** would prohibit (1) fund managers working with state and local governments from considering ESG factors when making investment decisions; (2) state and local governments from using ESG factors when issuing bonds; and (3) "all state and local entities, including direct support organizations, from considering, giving preference to, or requesting information about ESG as part of the procurement and contracting process." The bill requires consideration of "only pecuniary factors," which are defined as those factors "expected to have a material effect on the risk or returns of an investment based on appropriate investment horizons consistent with applicable investment objectives and funding policy." Expressly excluded as permissible is "the consideration or furtherance of any social, political, or ideological interests."

On the same day, in an act that that reverses the practice of the prior administration, Arizona Attorney General Kris Mayes (D) **announced** that "Arizona would stop participating in investigations into major American banks and other financial institutions over ESG practices related to investing." Mayes explained "[c]orporations increasingly realize that investing in sustainability is both good for our country, our environment, and public health and good for their bottom lines."

Earlier this month, the Indiana Chamber of Commerce expressed a similar sentiment when it **announced** its opposition to a bill (HB 1008) that would prohibit public pension funds from investing in "funds or companies with policies of limiting investment based upon," among other things, "failure to meet or commit to environmental standards" or "work in the fossil fuels" industry. The Chamber described the bill as "anti-free market," indicating that it failed to take into account the "best interests of state pensioners." In support of its position, the Chamber cited a report from the Legislative Services Agency that estimated the bill would reduce returns for pensioners by nearly $7 billion over the next ten years.

In a similar vein, on February 1, 2023 the North Dakota House of Representatives **rejected** an "anti-ESG" bill by a 90-3 vote. The bill, **HB 1347**, would have required the state treasurer to prepare, publicly post, and maintain a list of financial institutions that, without a business purpose, are "engaged in a boycott of energy companies." A "boycott of energy companies" was defined as "without a reasonable business purpose, refusal to deal with a company, termination of business activities with a company, or another action intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company" engages in various activities in the fossil fuel industry or does business with such companies. The rejected bill was similar to laws that were enacted in various other states, including **Kentucky**, Texas and West Virginia.

Continuing the trend, on February 22, the Appropriations Committee of Wyoming's House of Representatives voted 7-0 to recommend that the House not pass two similar "anti-ESG" bills. One bill **(SF01721)**, like the bill opposed by Indiana's Chamber of Commerce, would have required managers of state funds to consider only "financial" factors, a term defined explicitly to exclude consideration of "social, political or ideological interests," including various environmental concerns. The other bill **(SF0159)** would deny government contracts to companies that "engage in economic boycotts," a term broadly defined to include "taking any commercial action that is intended to penalize, inflict economic harm on, limit commercial relations with or change or limit the activities of a company" based on the company's failure to satisfy defined environmental or other policy-based criteria.

Taking the Temperature: As we have discussed previously, the debate over the extent to which financial institutions may appropriately consider facts that fall under the rubric of "ESG" contains a deeply partisan element, and the developments in Florida, Arizona and elsewhere highlight that divide. The Florida bill, which is likely to become law given the Republican supermajorities in the state House of Representatives and Senate, is just another step in a series of moves by state Republican officials opposed to the consideration of ESG factors in investment decisions and upset over perceived insufficient support of the fossil fuels industry. On the other side of the ledger, Mayes's announcement in Arizona puts her in line with seventeen Democratic state attorneys general who wrote a letter late last year in support of investment managers being able to appropriately consider climate-related issues in making investment decisions.

Although the partisan nature of the ESG debate is likely to persist, the developments in Indiana, North Dakota, and Wyoming are noteworthy for their divergence from the overall tendencies of state Republican and Democratic officials toward ESG. The Indiana Chamber of Commerce, while technically a nonpartisan organization, wields considerable political influence in a state where Republicans control the governorship and both chambers of the legislature. Indeed the Chamber of Commerce's political action committee boasts that nearly 90% of the candidates it endorsed since 1990 won

their races. The Chamber's strong disapproval of the Indiana legislation therefore is noteworthy given its otherwise traditional support of Republican candidates. Likewise, the Legislative Assembly in North Dakota is also controlled by Republicans, who by a 90-3 vote nonetheless rejected the type of financial institution blacklist bill that has become law in other Republican-controlled states; and Wyoming's House Appropriations Committee voted unanimously against two "anti-ESG" bills despite being comprised of six Republicans, including the chair, and just one Democrat. In our view, corporations and financial institutions will benefit from the depoliticization of ESG so that they can freely determine the underlying factors and criteria that are material to (for a board) governance and management of the company or (for an asset manager) investment decisions and analysis.