UNIVERSITY of HOUSTON

The Law and Ethics of Advised Emissions

Tracy Hester

Texas Environmental Superconference
State Bar of Texas
August 2, 2024

Lawyers in the Climate Spotlight

- Expanded attention to private sector's role in emissions reductions.
- Emergence of concept of "climate conscious lawyering"
- Bar actions to emphasize climate competence
  - ABA Resolutions
  - Guidance from Law Society of UK and Wales
  - National Bars Coalition at COP26, COP27, COP28, and COP29

2023 CLIMATE SCORECARD

Climate Score	Vault 100 Law Firms
A	Cooley Foley Hoag Schulte Roth & Zabel Sheppard Mullin Richter & Hampton Wilson Sonsini
B	Boies Schiller Flexner Cadwalader, Wickersham & Taft Fenwick & West Fish & Richardson Gunderson Dettmer Stough Villeneuve Franklin & Hachigian Irell & Manella Mintz, Levin, Cohn, Ferris, Glovsky and Popeo Proskauer Rose Seyfarth Shaw
C	Ballard Spahr Bryan Cave Leighton Paisner Davis Wright Tremaine Fox Rothschild Jenner & Block Katten Muchin Rosenman Kilpatrick Townsend & Stockton Kramer Levin Naftalis & Frankel
D	Alston & Bird ArentFox Schiff Baker McKenzie Blank Rome Cahill Gordon & Rendell Cleary Gottlieb Steen & Hamilton Cozen O'Connor Cravath, Swaine & Moore Debevoise & Plimpton Dechert Dentons DLA Piper Duane Morris Faegre Drinker Biddle & Reath Foley & Lardner Fried, Frank, Harris, Shriver & Jacobson Haynes & Boone Locke Lord McDermott Will & Emery Morgan, Lewis & Bockius Morrison & Foerster Nixon Peabody Paul Hastings Perkins Coie Pillsbury Winthrop Shaw Pittman Polsinelli Quinn Emanuel Urquhart & Sullivan Reed Smith Ropes & Gray Troutman Pepper Hamilton Sanders Weil, Gotshal & Manges Williams & Connolly Willkie Farr & Gallagher Wilmerhale Winston & Strawn
F	Akin Gump Strauss Hauer & Feld Allen & Overy Arnold & Porter Kaye Scholer Baker & Hostetler Baker Botts Clifford Chance Covington & Burling Crowell & Moring Davis Polk & Wardwell Freshfields Bruckhaus Deringer Gibson, Dunn & Crutcher Goodwin Procter Linklaters Mayer Brown McGuireWoods Milbank Munger, Tolles, & Olson Norton Rose Fulbright O'Melveny & Meyers Orrick, Herrington & Sutcliffe Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling Sidley Austin Simpson Thacher & Bartlett

Highlights of the Climate Change Guidance for Solicitors

Regulatory guidance covering all entities and individuals regulated by the Solicitors Regulation Authority (SRA). All solicitors in England and Wales who are regulated by the SRA must be a member of the law society.

- Part A: Guidance for law firms - sets out guidance on how to manage their organisation in a manner which is consistent with the transition to net zero.
    - Establishes regulatory impact for firms on greenwashing:
        - "As with any other public statements made by you and your organisation (and, as appropriate, your clients), communications must be accurate and not misleading (paragraph 8.8 of the SRA Code of Conduct for Individuals)…You should be aware of this in relation to any claims you or your organisation makes, and to be alert to the issue if such claims are made by your clients (see section 3.6 below)."
    - Discusses 'advised emissions' also known as 'Scope X', 'Scope 4' etc. and the impact it has on firms who have committed to pursue the 1.5C PA Goal

PROFESSIONAL SERVICE PROVIDERS

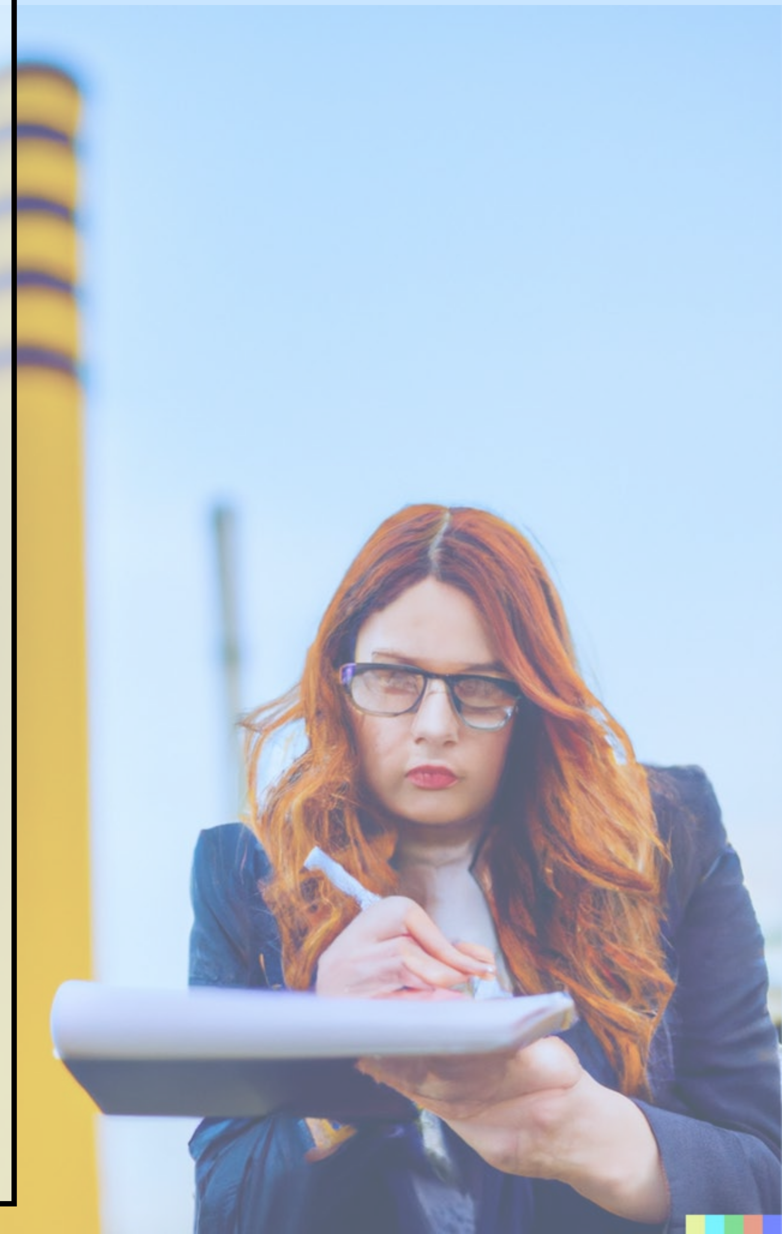
CONSULTATION ON DRAFT GUIDING PRINCIPLES FOR SERVICED EMISSIONS

DRAFT WORKING PAPER

What’s Next – Advised Emissions

Growing scrutiny over how lawyers’ advice facilitates clients’ GHG emissions

- Analogy: finance sector climate disclosures and ESG investment metrics
- Clients doing Scope 3 emissions may ask for their law firms’ emissions
- Law firm identity and brand concerns may lead to more calls for red-lining of particular client sectors and companies
- Choices on developing future practice expertise and recruiting



Parallels – Enabled Emissions in Other Sectors

- Banks and Lending Institutions
- Capital markets and portfolio managers
- Publicly traded corporations – statements on emissions goals and impacts
- Consultants and Management Advisors
- Advertisers
- Insurance – enabled emissions

Calculating Enabled Emissions from Lending or Investments

Common Carbon Footprinting and Exposure Metrics

Metric	Supporting Information	
Weighted Average Carbon Intensity	*Description*	Portfolio's exposure to carbon-intensive companies, expressed in tons CO_2e / \$M revenue. *Metric recommended by the Task Force.*
	Formula	$\sum_{n}^{i}\left(\frac{\text{current value of investment}_i}{\text{current portfolio value}} * \frac{\text{issuer's Scope 1 and Scope 2 GHG emissions}_i}{\text{issuer's \$M revenue}_i}\right)$
	Methodology	Unlike the next three metrics, Scope 1 and Scope 2 GHG emissions are allocated based on portfolio weights (the current value of the investment relative to the current portfolio value), rather than the equity ownership approach (as described under methodology for Total Carbon Emissions). Gross values should be used.
	Key Points + / -	+ Metric can be more easily applied across asset classes since it does not rely on equity ownership approach. + The calculation of this metric is fairly simple and easy to communicate to investors. + Metric allows for portfolio decomposition and attribution analysis. – Metric is sensitive to outliers. – Using revenue (instead of physical or other metrics) to normalize the data tends to favor companies with higher pricing levels relative to their peers.

Publicly Traded Corporations

- SEC proposed rule on ESG disclosure obligations
  - Attorneys and law firms as part of client's Scope 3 disclosures
  - Role of in-house counsel

- Final Rule drops the Scope 3 requirements, but similar obligations under California disclosure statutes

B

Facilitated Emissions

INTERNAL ONLY
March 23, 2021

☆ *Want to join this letter?* USE THIS LINK ☆

Open Letter on Climate Action at McKinsey

We, the undersigned, are ready for McKinsey to fully embrace its purpose "to help create positive, enduring change in the world" through climate action. The climate crisis is the defining issue of our generation. Our positive impact in other realms will mean nothing if we do not act as our clients alter the earth irrevocably. Our values mandate that we "help our clients make distinctive, lasting, and substantial improvements in their performance," a call that encourages us to look at our clients' most significant impacts to society as well as that impact's sustainability. Such a calling can only be accomplished by helping our clients shift to a more sustainable trajectory that preserves our planet, our clients' businesses, and our shared legacy.[1]

We must be honest that there is significant risk to McKinsey and our values from pursuing the current course. Our inaction on (or perhaps assistance with) client emissions poses serious risk to our reputation, our client relationships, and our ability to "to build a great firm that attracts, develops, excites, and retains exceptional people." Our clients, firm members, and prospective hires all want to believe that we act on principle, and we need to cultivate their trust.

Why do we serve high-emissions companies? Because that is where the emissions are.

October 27, 2021 | Commentary

By Bob Sternfels

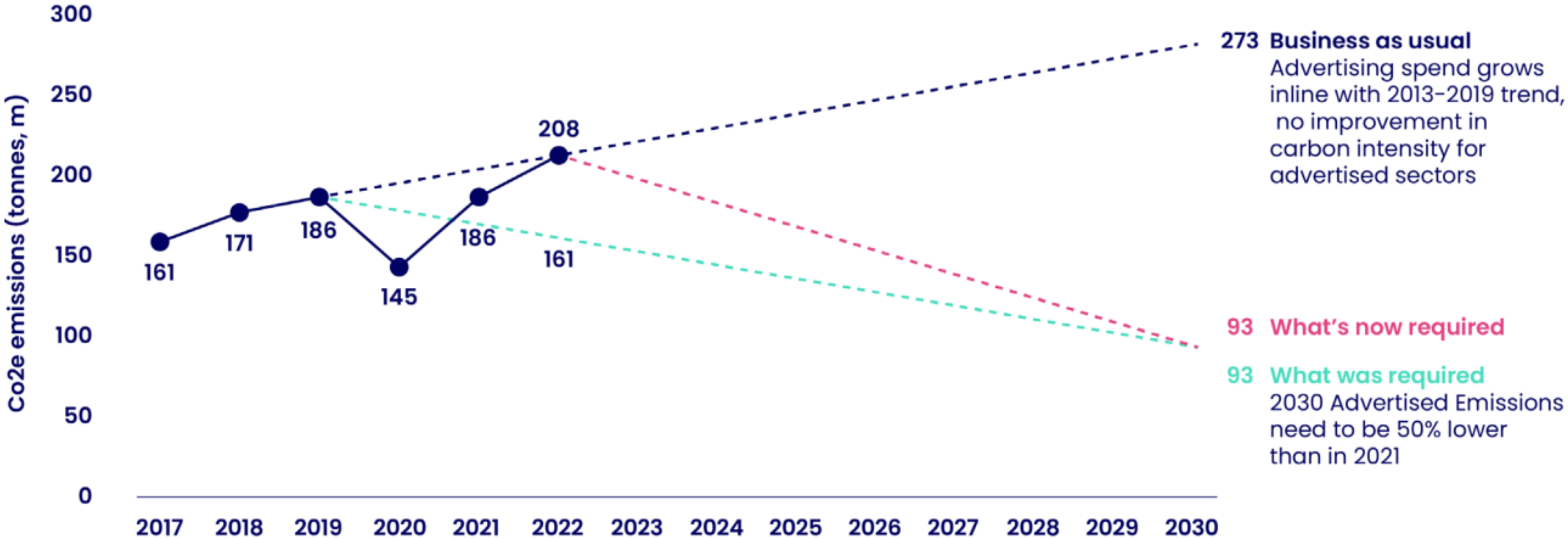
Share Print Save

With the COP26 climate change conference on the horizon, should McKinsey be working with companies whose operations add considerable amounts of greenhouse gases to the atmosphere? That's a fair question. And to give away the punchline up front—our answer is yes.

What are Advertised Emissions?

Figure 3

Advertised Emissions are back on BAU trajectory, above pre-pandemic levels



Source: Magic Numbers calculation based on data from WARC, Exiobase, ARC, ONS, BEIS, Ricardo, Greenpeace, WWF and DVLA

Figure 5

FORMULAS TO CALCULATE INSURANCE-ASSOCIATED EMISSIONS

Insurance-associated emissions = $\sum_i$ **Attribution factor**$_i$ **x** **Emissions**$_i$ (with i = insured)

Share of the emission to be associated with the re/insurer
(see methodologies in Chapters 5.2 and 5.3)

GHG accounting for two segments

Commercial lines

Personal motor lines

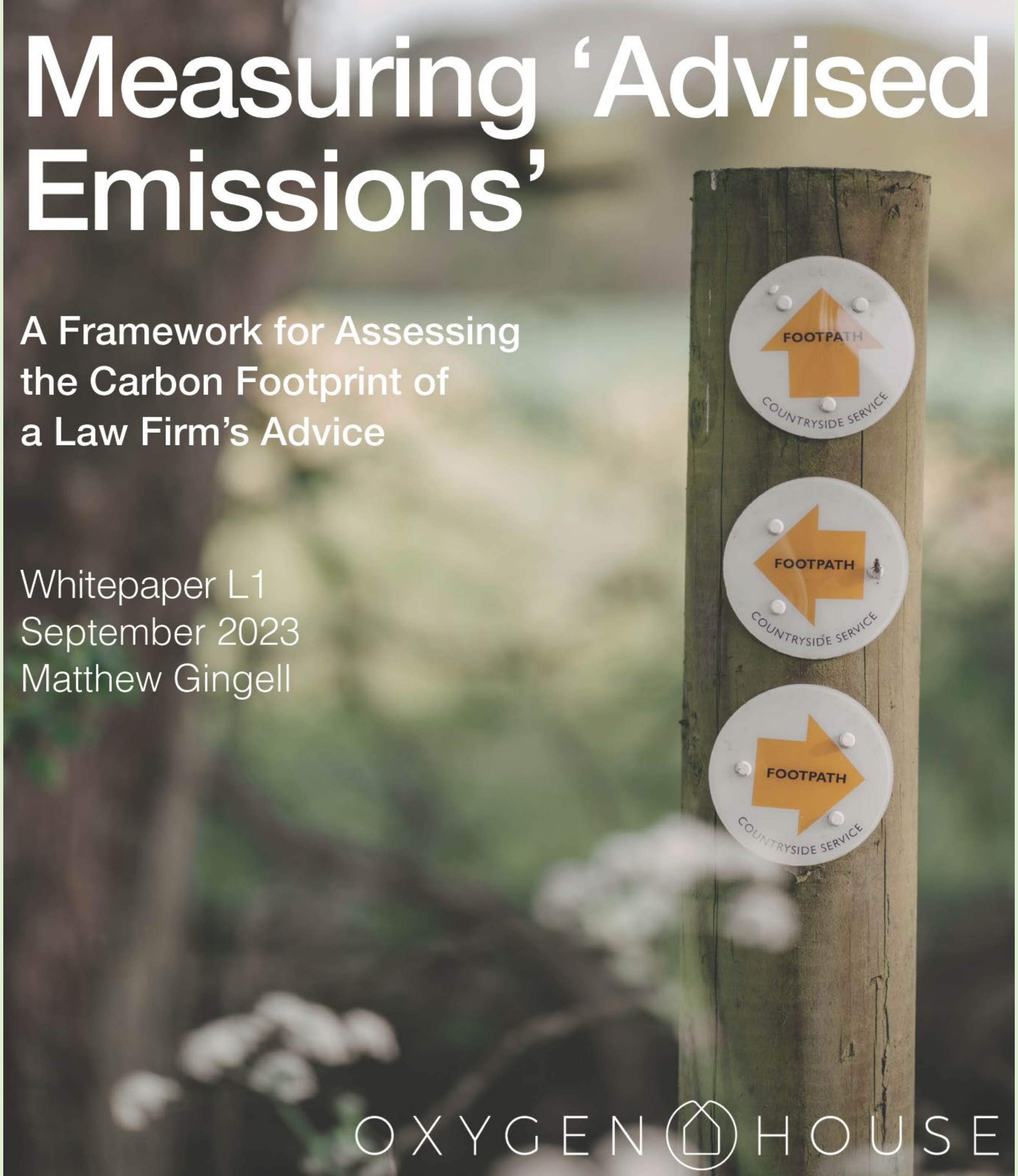
$$\textit{Attribution factor}_i = \frac{\textit{Re/Insurance premium}_i}{\textit{Customer revenue}_i}$$

$$\textit{(Industry) Attribution factor} = \frac{\textit{Insurance industry's total premium from the motor line of business}}{}$$

Measuring ‘Advised Emissions’

A Framework for Assessing the Carbon Footprint of a Law Firm’s Advice

Whitepaper L1
September 2023
Matthew Gingell



OXYGEN HOUSE

Initial Approaches to Calculating Attorney Advised Emissions

$$A^e = E^C \times A^f \times T^f$$

$$A^f = \frac{F^b}{O_\rho}$$

Where:

A^e : Advised Emissions
A^f : Attribution Factor
E^C : Emissions of Client
T^f : Transition Factor
F^b : Fees Billed to Client/yr
O_ρ : Opex of Client (or client division)/yr.

Att: Gingell/Oxygen House

2021		
	Emissions of Client	**Attributed to MDY**
	(i) Scope 1&2 Operational Emissions - 1065 tonnes CO_2e	12.78 tonnes CO_2e
	(ii) Scope 3 financed emissions of which: a) Scope 1&2 = 225,000 tonnes CO_2e b) Scope 3 = 612,000 tonnes CO_2e	 a) 2,700 tonnes CO_2e b) 7,344 tonnes CO_2e
Fees Billed to Client	USD 820,357	
Opex of Client	USD 68,080,301	
Transition Factor	?	
Attribution Factor	0.012	
ADVISED EMISSIONS		**10,057 tonnes CO_2e (without using any transition factor)**

The initial challenge: finding law services economic data

2023 Am Law 100 Rank (FY:2022)	2022 Am Law 100 Rank (FY:2021)	Firm Name	Gross Revenue in 2022	Change from 2021
1	1	Kirkland & Ellis	$6,514,300,000	8%
2	2	Latham & Watkins	$5,321,007,000	-3%
3	3	DLA Piper	$3,685,205,000	6%
4	4	Baker McKenzie	$3,300,189,000	6%
5	5	Skadden, Arps, Slate, Meagher & Flom	$3,020,869,000	0%
6	7	Sidley Austin	$2,922,634,000	5%
7	6	White & Case	$2,828,000,000	-1%
8	10	Morgan, Lewis & Bockius	$2,745,251,000	7%
9	11	Gibson, Dunn & Crutcher	$2,736,637,000	10%
10	8	Ropes & Gray	$2,718,173,000	2%

DLA PIPER INTERNATIONAL

Sustainability Report 2022/2023

Impact Summary Report

The impact of our advice

Advised emissions

WHY THIS MATTERS TO US

We're committed to understanding how our client advice impacts sustainability objectives. We are starting with the impact of our advice on the goals of the Paris Agreement, otherwise known as advised emissions.

WHAT WE AIM TO ACHIEVE

We aim to develop a robust, evidence-led methodology for assessing how our client advice contributes to the goals of the Paris Agreement. We do not believe this can be done solely on a high-level, principles-based approach or by evaluating the transition plans of our clients – we need to understand how our advice impacts global greenhouse gas emissions.

In parallel with developing our own methodology, we are seeking to shape industry best practice to ensure that standards for our sector in this area are robust, based on verifiable data and are grounded in impact on climate action metrics.

ARE WE ON TRACK?

The legal sector is at the very beginning of the advised emissions journey. This is a complex topic for which there is no blueprint; we'll need to – and are determined to – take a pioneering role.

WHAT WE'VE BEEN WORKING ON IN THE LAST YEAR

We have engaged with an expert third party partner to help us develop a methodology for advised emissions, and are developing a model for how this methodology will be integrated into our client and matter onboarding framework.

Along with seven other law firms with offices in the UK we founded the Legal Charter 1.5, which seeks, amongst other objectives, to galvanise the legal sector's role in achieving the Paris goals. We actively shaped the principles of the Charter related to Advised Emissions and are an active member of their Advised Emissions Working Group.

PRINCIPLE 2 – ADVISED EMISSIONS

Quantitative Methodology

A work in progress, this working group is focusing on researching a methodology to measure the advised emissions when onboarding clients. Please check back for updates.

In addition to looking at methodologies that we could potentially adapt, such as GFANZ, this group is talking to academics about commissioning a piece of research.

Methodology to include considerations such as:

- Scenario modelling to help estimate emissions for particular sectors (assumptions)
- Type and source of emissions relating to advice
- Length of advice
- Location of advice
- Environmental impact assessment of advice
- KPIs
- Approach to data conversion
- Tools to introduce methodology e.g. client engagement

Get Involved

Risks of Promoting Reductions in Advised Emissions

- **Politicization** of legal services standards
  - Conflicts over DEI initiatives
  - Allocation of state governmental purchasing power
- **Liability for inaccurate or potentially misleading statements**

United States Senate
WASHINGTON, DC 20510

November 3, 2022

Kenneth J. Markowitz
Akin Gump Strauss Hauer & Feld
Robert S. Strauss Tower
2001 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Markowitz,

We are writing about your firm's Environmental, Social, and Governance (ESG) practice. Although businesses would certainly be wise to lawyer up before undertaking ESG initiatives, your firm has a duty to fully inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes.

During a recent Senate Judiciary Committee hearing, FTC Commissioner Lina Khan and Assistant Attorney General of the Antitrust Division Jonathan Kanter were asked to share their thoughts about ESG collusion. Commissioner Khan emphasized that there is no ESG exemption to antitrust laws. Regarding ESG group initiatives, she added, "Certainly, those types of cooperation or agreements, in as much as they can affect competition, are always relevant to" the FTC. Assistant AG Kanter emphasized his own agreement with "the sentiment that collusion is anticompetitive, and I also agree with the underlying sentiment that when firms have substantial power and they use that power to achieve anticompetitive ends, that should be actionable under the antitrust laws."

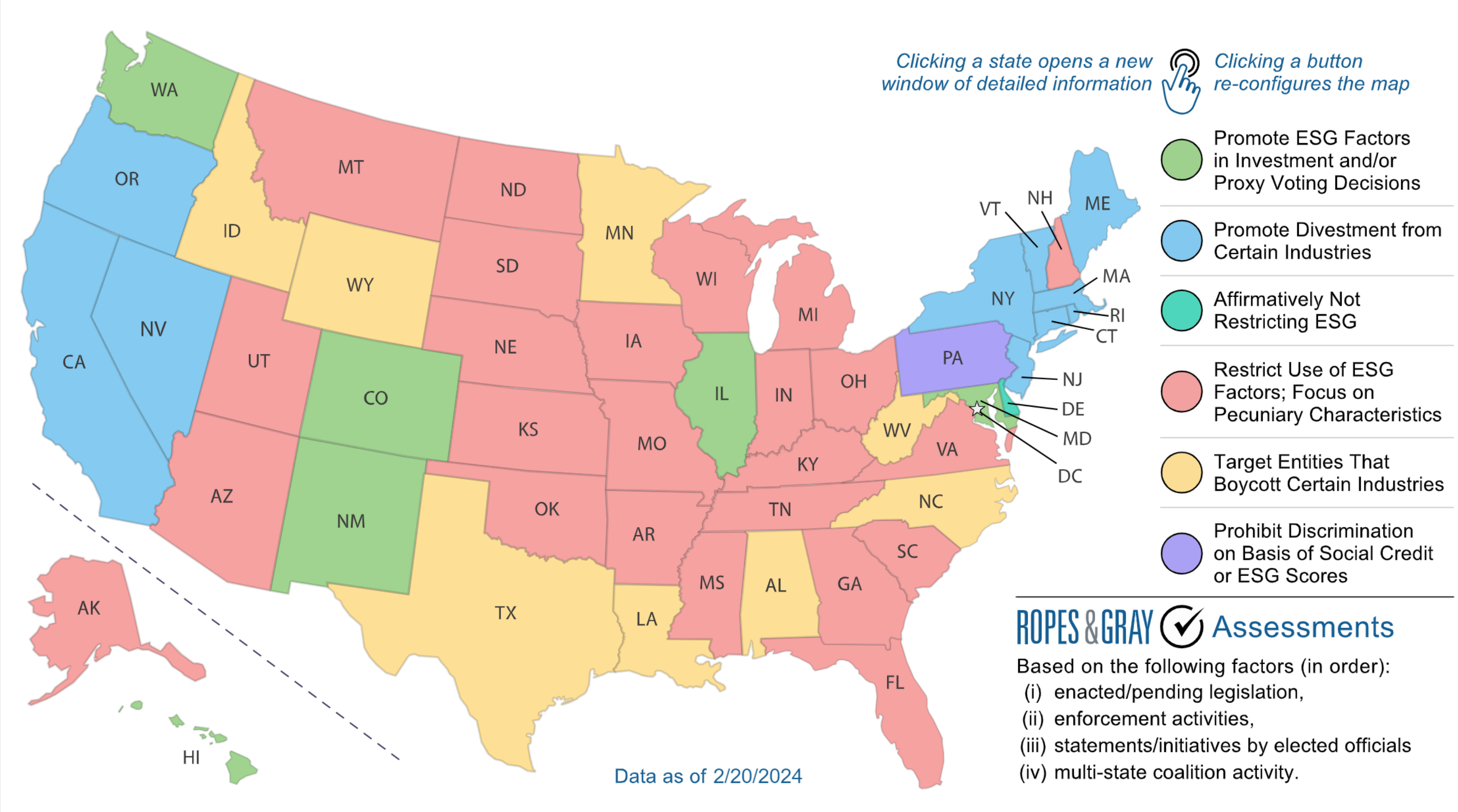
The ESG movement attempts to weaponize corporations to reshape society in ways that Americans would never endorse at the ballot box. Of particular concern is the collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad. Over the coming months and years, Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice. To the extent that your firm continues to advise clients regarding participation in ESG initiatives, both you and those clients should take care to preserve relevant documents in anticipation of those investigations.

Sincerely,

Tom Cotton
Tom Cotton
United States Senator

Michael S. Lee
Michael S. Lee
United States Senator

ROPES & GRAY


Clicking a state opens a new window of detailed information
Clicking a button re-configures the map
WA
OR
CA
NV
ID
MT
WY
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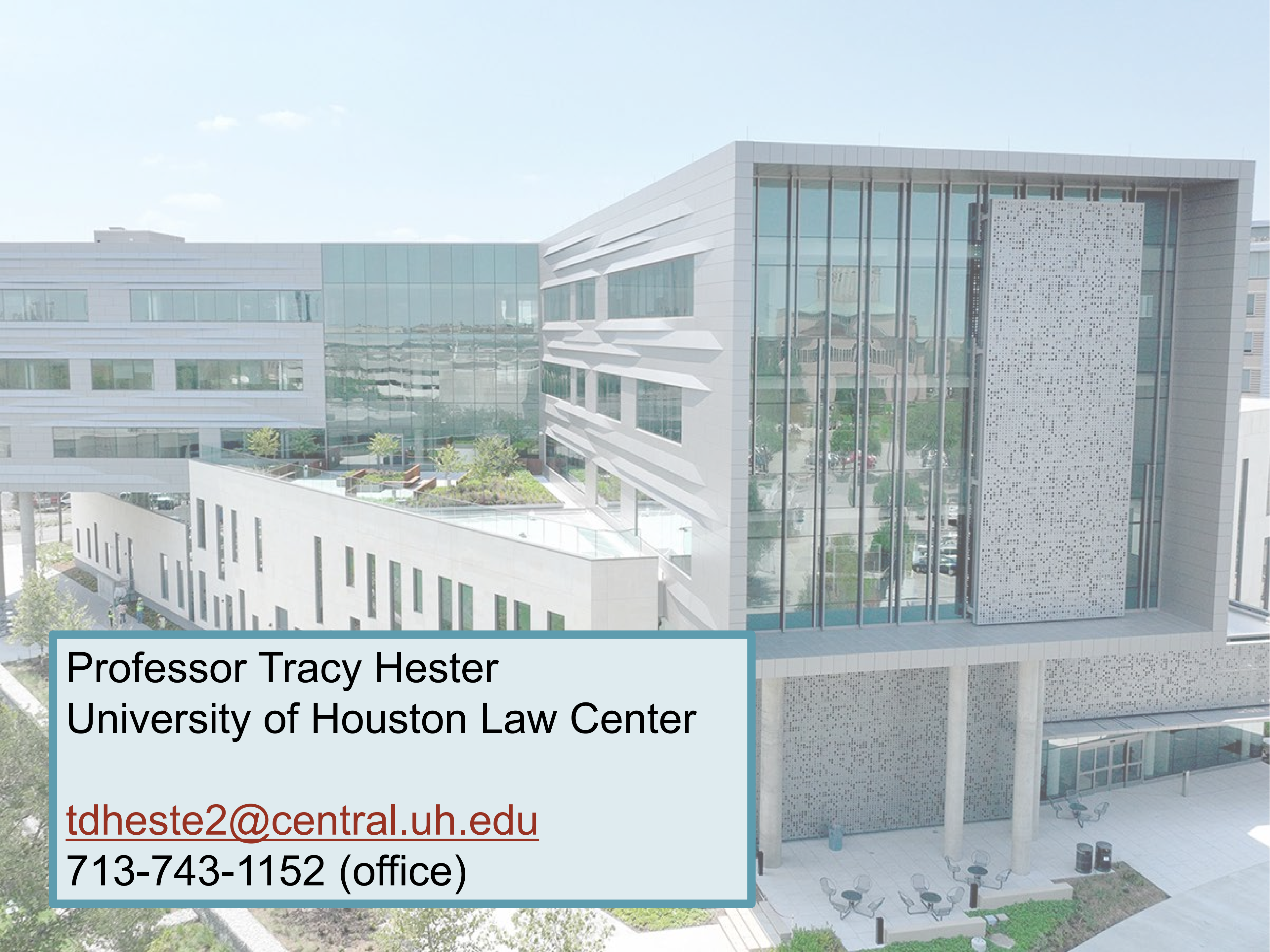
HI
Data as of 2/20/2024
Promote ESG Factors in Investment and/or Proxy Voting Decisions
Promote Divestment from Certain Industries
Affirmatively Not Restricting ESG
Restrict Use of ESG Factors; Focus on Pecuniary Characteristics
Target Entities That Boycott Certain Industries
Prohibit Discrimination on Basis of Social Credit or ESG Scores
ROPES & GRAY Assessments
Based on the following factors (in order):
(i) enacted/pending legislation,
(ii) enforcement activities,
(iii) statements/initiatives by elected officials
(iv) multi-state coalition activity.

Attorney Ethics and Advised Emissions

- Iago's Paradox – we advise, and don't control
- *Duty of Confidentiality* – Model Rules 1.6, 1.18
- *Duty of Competence* – Rule 1.1 (remember climate conscious lawyering initiatives)
- *Duty of Loyalty* –
  - Transparency
  - Screens and walls
  - Retainers and scope



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