



## Fox Rothschild Podcast

### ESG Essentials: What You Need to Know Now

#### Episode 18: The Reshaping of ESG & DEI

*Featuring David Colvin and Karen Davis of Fox Rothschild*

**David:** Welcome back, everybody, to another episode of "ESG Essentials: What You Need to Know Now," a podcast brought to you by your friends at Fox Rothschild. I'm your co-host, David Colvin, Co-Chair of Fox's ESG Practice Group. And as many of you know and have heard me say many times on this podcast, the podcast covers core ESG concepts and explores important issues for businesses, both public and private, that are concerned with developing and deploying an ESG profile, or responding to increased scrutiny from regulators, investors and consumers --and potentially government agencies-- regarding their perceived environmental and social impact. And of course, they're also interested in minimizing the reputational risk that can arise and often be associated with ESG.

In today's episode, which comes after our fall hiatus, we'll be talking about some recent developments, both at the state and federal level related to ESG. And for today's conversation, I'm very pleased to welcome back to the podcast not only my partner but my co-host of the podcast and Co-Chair of the firm's ESG Practice Group, Karen Davis.

Karen, how are you today?

**Karen:** I'm well, David. How are you?

**David:** I am doing well. I am doing well. So we're going to talk a little bit, just to sort of lay it out there, we're going to talk a little bit about a new piece of legislation that was passed out of the Empire State in New York related to climate change. And then we're going to talk a little bit about some of what's been coming out of Washington with the Trump administration's executive orders. So, if I can, let me start with the New York law and ask you to tell us, and the listeners, about the New York Climate Change Superfund Act, if you will.

**Karen:** Sure, happy to do it. Late last year on December 26, New York enacted a new law by the name of the New York Climate Change Superfund Act. And this law is modeled after the federal Superfund law, which is also known as CERCLA. And it also imposes retroactive strict joint and several liability on responsible parties. And under this new Climate Change Superfund Act in New York, the responsible parties are entities that New York asserts have had an outsized impact on climate change in the state.

And they define that as any entity that during the period of time of January 1, 2000, through December 31, 2018, was engaged in the trade or business of extracting fossil fuel or refining crude

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oil and is responsible for more than one billion tons of covered greenhouse gas emissions. So, the law seeks to raise \$75 billion-- which is a lot of money-- from these responsible parties over 25 years.

That would be \$3 billion annually. And then that money will be used to fund what they're calling "climate change adaptive infrastructure projects" in New York. So, it's an interesting law and one that we'll be keeping our eye on.

**David:** For sure. For sure. Let me ask you this, is the law focused on, for example, refining of crude oil that actually occurs in New York? Or is it more broader in the sense that it's seeking to hold companies accountable for their activities outside of New York?

**Karen:** You're getting to the punchline here, David. It is not limited to entities that do that work in the state of New York. And the law has been challenged. There's litigation pending, and that is one of the allegations of the plaintiffs that New York is improperly interfering with the economic interests of other states.

And notably, New York is not the home to the majority of the companies that are targeted by the law. Rather, New York imports 85% of its energy needs from elsewhere. So, the law really has a disproportionate impact on facilities located outside of the state of New York.

**David:** Okay, so what do you think are the next steps for listeners to be aware of as the law is implemented?

**Karen:** The New York Department of Environmental Conservation is charged with promulgating regulations necessary to carry out the law by the end of this year, December 26, 2025. That seems pretty ambitious. We'll see if they're able to meet that timeframe. And if those regulations are issued on time, then these responsible parties would be required to make their first payments under the Act on September 30, 2026.

So, you know, relatively short timeframes for these things to come into effect. We don't know in the litigation, those deadlines might be stayed by the court. We'll just have to wait and see.

**David:** Yeah, and I think that's probably a likely nextstep or outcome just given the expansiveness of the statute in terms of what it's attempting to regulate and to allow the courts to sort out all those questions, before companies are forced to comply.

Should we expect, Karen, to see more activity on the state level regarding climate change initiatives? Particularly when you think about the alleged or real or perceived ESG backlash? I mean, do you anticipate seeing more state action related to climate change when you look at the landscape?

**Karen:** I do. The Trump administration has made it clear that they intend to roll back various initiatives under the Biden administration related to climate change. And I think that certain states will try to fill that void by state-level activity, whether it's new laws or regulations or other initiatives. Vermont already has a law very similar to the New York Climate Superfund law. And other states,



including California, Massachusetts and New Jersey, have proposed similar legislation. So we'll see if any of those move forward.

But I think we should anticipate not just climate, but other environmental initiatives on the state level in response to what is happening at the federal level. And, our firm, Fox Rothschild, does have a web page that is following the various Trump administration initiatives and executive orders, including from an environmental perspective. And there's a lot of good content and summaries available at that web page. And listeners may find it useful. It just, you know, consolidates a lot of information in one place.

I encourage listeners to check it out.

**David:** That's an excellent plug. An excellent plug.

Why don't we switch gears? And we can talk a little bit about the Trump administration executive orders.

**Karen:** So, my turn to ask you questions, turn the tables on you.

**David:** Exactly.

**Karen:** I know there has been a flurry of executive action in the last month on the part of the Trump administration. And can you tell us, are there any executive orders that stand out to you more than the others?

**David:** Sure. Unless you've been living under a rock, as we've all seen there really has been an unprecedented amount of executive action in the first month of the Trump administration. Which includes the issuance of executive orders that address immigration and border security, tariffs, federal employment, education issues, pausing enforcement of the Foreign Corrupt Practices Act-- which I know Karen, you put an alert out on that-- as well as issues related to gender ideology and diversity, equity and inclusion.

And it's that last topic, DEI, that I want to focus on today. In particular, the executive order entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." And before I get into the executive order, I do want to remind our listeners that we don't take political positions on these issues and we try our best to adhere to a "just the facts" approach when talking about these issues. Because we understand and respect that people may have different viewpoints. So, with the "just the facts" mantra in mind what is the new DEI policy of the United States government? And according to the executive order, "It is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence and hard work." And so, in furtherance of that policy, the Trump administration ordered the termination of "all discriminatory and illegal preferences, mandates, policies, programs," et cetera. All federal agencies were ordered to enforce all federal civil rights laws and to "combat illegal private sector DEI preferences, mandates and policies." End quote.



Now, and in terms of implementation of the policy that I just went through, the Department of Labor was ordered to: one, cease promoting diversity. Two, to cease requiring federal contractors and subcontractors to meet affirmative action requirements, which have been in place and required for the better part of the last 50 years. And three, to cease allowing federal contractors to engage in workforce balancing based upon race, color, sex, religion or national origin.

So that's the policy. And I'm happy to answer any other questions you have about it, Karen.

**Karen:** How do you see this new federal policy affecting companies that contract with the federal government?

**David:** Yeah, I think it's going to affect companies that contract with the federal government in a lot of ways.

I think for purposes of today's discussion, and just trying to focus perhaps, on maybe the most salient ways that it will impact those companies, I basically see three issues. First, I think any company that contracts with the federal government by way as being a general contractor or subcontractor-- or even the recipient of a grant from the federal government-- I think all those companies really need to examine any DEI policies that they may have in place and to ensure that policy complies with the civil rights laws of the country and the executive order as announced by the government back in January. So that's issue number one. And to the extent they need assistance with that, they should seek legal counsel to determine whether or not any policies they may have in place pertaining to DEI comply with the federal civil rights laws.

Perhaps more specific or granular in terms of how this order may affect and will affect contractors who work with the federal government is that all federal contracts and grants will now contain a provision that requires the contractor or grant recipient to acknowledge and agree that its compliance with antidiscrimination laws is actually material to the government's payment decisions under that contract or grant. And they're also required to certify, as part of the contract to the federal government, that the company doesn't operate any DEI programs that violate federal antidiscrimination laws.

So, in other words, essentially, the government is putting to its contractors, you know, but for the company's agreement to comply with federal antidiscrimination laws and to represent that it doesn't utilize DEI programs that might violate those laws, the federal government wouldn't be entering in to that particular contract. And that certification, if breached or determined to be untrue-- and this is the real where the rubber meets the road-- that could give rise to civil liability under the False Claims Act, which carries with it some significant statutory penalties and treble damages. And it could even result in potential criminal liability.

So, the fact that the government is effectively asking the companies with whom it contracts to recognize that the government's making a decision to pay them through an appropriation is conditioned upon that company agreeing that's a material piece and that they're certifying that they're not operating a DEI policy that would otherwise conflict with the antidiscrimination laws of



the country. That could easily give rise to a myriad of lawsuits under the False Claims Act to the extent that companies either say something untrue, inadvertent as it may be, or think that their policies and procedures are consonant with the antidiscrimination laws of the country and somebody else decides that they're not.

And then the third way I see this affecting contractors that do business with the federal government is even if those contractors can comply with the representation and certification I just described, they may also do business with states. And those states may have requirements that require companies to engage in affirmative action or to implement certain DEI policies. And so then they're in conflict, right? Because you can't satisfy both. So companies that may be on sort of both the federal and state level, in terms of contracting, are going to need to evaluate and think through how they can make the certifications required to the federal government while also maintaining any business relationships that they have with states that have DEI and affirmative action requirements.

**Karen:** That's a pretty broad reach. And do you see it spilling over at all to companies that are not federal contractors or subcontractors?

**David:** I do, and you don't have to take my word for it. It says it right in the executive order. So, as part of the order, the Attorney General is required to submit within, I think, 120 days of when the order was issued, the Attorney General has to submit a report to the White House that identifies a whole lot of factors-- I'm going to run through a few of them-- including a report that identifies illegal discrimination and preferences and key sectors of concern in various federal agencies. A report that will identify the "most egregious and discriminatory DEI practitioners," in each sector of concern.

The Attorney General will be recommending specific measures aimed at deterring DEI programs. The Attorney General will be reporting and identifying potential civil compliance investigations of up to nine publicly traded companies, large nonprofits, state and local bar associations, if you can believe it, as well as potential federal litigation opportunities to enforce federal civil rights laws. And so, I think the upshot here for listeners is that while many private companies that don't do business with the federal government will likely be unaffected by this order, many private companies will be affected because they may fall into one of the points I just made note of in terms of the report that the Attorney General is going to prepare. And they should be reviewing their policies to address potential risks that will arise out of this order.

**Karen:** Well it sounds like we definitely have to keep our eyes out for that report from the Attorney General. That'll be an interesting one to see.

**David:** For sure.

**Karen:** And so what do you think is next?

**David:** So, what's next? Until April of '25, all federal contractors may continue to comply with the regulatory scheme that existed prior to the issuance of this particular executive order. So, there's essentially a safe harbor that exists until April of 2025.



As I mentioned before, I think all companies that do business with the federal government should be using that safe harbor time to review and audit any DEI policies that they have in place and identify any practices that might not align with the stated federal policy. And that again, that's the federal-stated policy is not to consider race, color, sex, religion, sexual preference or national origin in ways that would violate federal civil rights laws. And in terms of what else is next? Two legal challenges have already been filed. That probably comes as no surprise to many of our listeners. Those challenges are based principally on constitutional arguments that, one, the executive order violates separation of powers. So it directs the termination of funding for government DEI programs in violation of the Spending Clause. And effectively, some would argue, usurps the spending power that lies exclusively with Congress. So that's one basis of challenge.

Another basis of challenge is that the order violates due process. And then a third is that it violates the First Amendment. I think we can safely anticipate additional legal challenges will be filed. I think we should safely hope and anticipate that the government will issue further guidance in terms of what it means to be in a legal DEI policy. And I think companies in terms of next step should really just be monitoring the status of the litigation, of the guidance that comes out of the federal agencies and, as always, should seek legal guidance from experienced counsel to address all of these issues.

**Karen:** Sounds good. These certainly are interesting times and a lot going on on the federal government.

**David:** Without question without question. But I, you know, the flurry of activity coming out of the federal government and the reaction to it is certainly giving us a lot to work on. And so we will have more podcasts coming out, Karen. You and I will be doing a number of these in the coming weeks to keep our listeners fully apprised of these developments and providing them, hopefully, with some useful guidance in terms of how to address and react to it.

So, I look forward to our next conversation. And I'll talk to you soon.

**Karen:** Okay, sounds good. Thank you.

**David:** All right. Thanks to all our listeners. We look forward to the next opportunity.