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WOULDA, COULDA, SHOULDA: HOW VIRGINIA'S EVER-
CHANGING POLITICS CREATES (MISSED) OPPORTUNITIES
FOR MAJOR POLICY DECISIONS

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“Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes.”

Benjamin Franklin, November 13, 1789¹

ABSTRACT

Benjamin Franklin may have been discussing the new United States Constitution when he penned this note to his friend, French scientist Jean-Baptiste Le Roy, but he could easily have been referring to politics in Virginia. Virginia House of Delegates members and members of the Congressional House of Representatives serve two-year terms.² Members of the Virginia Senate serve four-year terms.³ United States Senators serve six-year terms. And the Governor, Lieutenant Governor and Attorney General all serve four-year terms with only the Governor constitutionally limited to a single four-year term.⁴ With all of these terms being staggered across the various offices, the result is that every single year in the Commonwealth of Virginia, there is a consequential election which could shift the balance of power between and within the executive and legislative branches. Death, taxes and Virginia elections—nothing in this world is more certain.

But with the certainty of constant elections also comes constant change. Every January, the Virginia General Assembly convenes to debate and pass the Commonwealth’s laws.⁵ The frequency of state elections can result in whiplash policy changes from year to year as the two dominant political parties trade majority rule.⁶ Only once in the past ten years has one party managed to control the Governor’s office and both chambers of the General Assembly when the Democrats accomplished this short-lived feat in 2019.⁷ The Democrats quickly proceeded to pass a number of initiatives they had long favored, including: criminal justice reform, the decriminalization of marijuana, the creation of the Cannabis Control Authority, expansion of

¹ Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), in THE WRITINGS OF BENJAMIN FRANKLIN, Vol X, 1789-1790, 69 (Albert Smyth ed., 1907).

² VA. CODE § 24.2-215 (1993).

³ VA. CODE § 24.2-214 (1993).

⁴ VA. CONST. art. V, §§ 1, 13, 15.

⁵ VA. CONST. art. IV, § 6.

⁶ See generally Thomas R. Dye, *Party and Policy in the States*, 46 J. POL. 1097 (1984).

⁷ Scott Calvert & Jon Kamp, *Election Results 2019: Democrats Take Control of Virginia Legislature*, WALL ST. J. (Nov. 6 2019), <https://www.wsj.com/articles/election-results-2019-democrats-take-control-of-virginia-senate-11573008587>.

rights for LGBTQIA+, and the Clean Economy Act, among others.⁸ But the rapid advancement of so many initiatives in such a short period of time led to significant pushback against the party; in 2021, Republicans regained control of the House of Delegates and swept all three statewide offices for Governor, Lieutenant Governor and Attorney General.⁹ The Democrats retained control of the Senate, setting up another electoral showdown for control of the General Assembly in the November 2023 elections.¹⁰

This article will discuss some of the policy initiatives introduced during the 2023 legislative session in advance of the fall elections. It will examine what happened with some key initiatives such as campaign finance reform, ratepayer reform and the establishment of a cannabis retail market. It will then analyze what should have happened in these areas and look to the 2024 session for what new initiatives we can expect to see introduced.

I. INTEGRITY & TRANSPARENCY: CAMPAIGN FINANCE REFORM & RATEPAYER ADVOCACY

Virginia is a verifiable wild west when it comes to campaign finance laws—being that there are next to none. Candidates are free to accept any amount from any entity, corporate or individual, for (nearly) any purpose so long as they report it and pause fundraising for the forty-five or sixty days of legislative session.¹¹ Special sessions—the uncalendared, indefinite, discretionary sessions whereby the Governor recalls the legislature to complete their duties after *sine die*—are excluded from this temporary fundraising moratorium, even though recipients of contributions are actively considering the passage of legislation or budgetary measures.¹²

In 2023, a year in which the entire legislature is up for re-election and where nearly every seat is contested, there were fifteen bills introduced on

⁸ Ned Oliver et al., *Democrats Have Controlled Virginia Government For Two Years. Here's What They've Done.*, VA. MERCURY (Mar. 3, 2021), <https://www.virginiamercury.com/2021/03/03/democrats-controlled-virginia-government-for-two-years-heres-what-they-did/>.

⁹ Ben Finley, *Virginia GOP Completes Sweep of Elections With House Win*, ASSOCIATED PRESS (Dec. 3 2021), <https://apnews.com/article/elections-election-recounts-virginia-election-2020-house-elections-798250c29353edc04bb3be95dbd589e5>.

¹⁰ Meagan Flynn, *Republicans End Democratic Control of Virginia House of Delegates*, WASH. POST (Nov. 3, 2021), https://www.washingtonpost.com/local/virginia-politics/virginia-house/2021/11/02/44bbab6c-36b4-11ec-91dc-551d44733e2d_story.html.

¹¹ VA. CODE § 24.2-954 (2006).

¹² *Id.* (the final day of the scheduled legislative session, which lasts either 45 days in odd years or 60 days in even years).

campaign finance reform.¹³ In 2022, there were twenty-two.¹⁴ In 2021, a gubernatorial election year, there were eleven bills.¹⁵ The Joint Subcommittee to Study Comprehensive Campaign Finance Reform, established to “examine the costs of campaigning in the Commonwealth, the effectiveness of the Commonwealth's present disclosure laws and their enforcement, [and] the constitutional options available to regulate campaign finances,” has not met since 2021, and its authority expired in January 2023.¹⁶ Its required report has not yet been published and likely never will be.¹⁷

Ironically, the main voice of campaign finance reform as it relates to state-regulated utilities, Senator Chap Petersen (D-Fairfax), lost his June 20th primary in a shocking upset that saw \$1,274,733 raised—the 12th most expensive Virginia Senate primary of all time.¹⁸

Political contributions buy trust and time. By that measure, the most trustworthy and time-consuming entities in Virginia are Michael D. Bills (Founder of advocacy organization, Clean Virginia) and Dominion Energy (Virginia’s largest regulated electric utility) (“Dominion”).¹⁹ The top two donors alone contributed \$23,952,866 between 2022 and October 2023.²⁰

To illustrate the looming magnitude of the November 2023 elections, at the time this article was first written in August 2023, the 3rd and 4th highest contributors, respectively, were Clean Virginia Fund and Sonjia Smith, wife

¹³ 2023 Session - Elections, LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?231+sbj+024> (last visited Oct. 11, 2023).

¹⁴ 2022 Session – Elections, LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?221+sbj+024> (last visited Nov. 30, 2023).

¹⁵ Across Sessions, LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?000+sbj+024+SB017520201> (last visited Oct. 11, 2023); Across Sessions, LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?000+sbj+024+SB111820211> (last visited Oct. 11, 2023).

¹⁶ H.D.J. Res. 526, 2021 Gen. Assemb., Spec. Sess. I (Va. 2021); *Joint Subcommittee to Study Comprehensive Campaign Finance Reform*, INTERIM STUD. & COMM’N LISTINGS, <https://studies.virginiageneralassembly.gov/studies/556> (last visited Sept. 28, 2023).

¹⁷ See *Overdue Documents*, REPORTS TO THE GENERAL ASSEMBLY, <https://rga.lis.virginia.gov/Overdue/1.11.2023/25104> (last visited Sept. 28, 2023).

¹⁸ Chap Petersen, *Let’s Finally Pass Campaign Finance Reform in 2020*, WASH. POST (June 21, 2019), https://www.washingtonpost.com/opinions/local-opinions/lets-finally-pass-campaign-finance-reform-in-2020/2019/06/21/5568ba7a-91d6-11e9-aadb-74e6b2b46f6a_story.html; *2023 Democratic Primary*, ELECTIONS.VIRGINIA.GOV, <https://enr.elections.virginia.gov/results/public/FAIRFAXCOUNTY/elections/2023DEMPRI> (last visited Oct. 10, 2023); *Top 15 Most Expensive Legislative Primaries*, VA. PUB. ACCESS PROJECT, <https://www.vpap.org/visuals/visual/most-expensive-primaries-2023/> (last visited Sept. 28, 2023).

¹⁹ *Top Donors*, VA. PUB. ACCESS PROJECT, <https://www.vpap.org/money/top-donors/> (last visited Oct. 1, 2023); see *Who We Are*, CLEAN VA., <https://www.cleanvirginia.org/michael-bills/> (last visited on Oct. 8, 2023); see also, Josh Hanger, *Dominion is Abusing its Monopoly. Time for a New Model*, VA. MERCURY (Dec. 3, 2021), <https://www.virginiamercury.com/2021/12/03/dominion-is-abusing-its-monopoly-time-for-a-new-model/>.

²⁰ *Top Donors*, *supra* note 19.

of Mr. Bills and well-regarded philanthropist and community activist.²¹ Their combined total was just over \$8,000,000.²² As of October 2023, Ms. Smith has now fallen to 10th place, overtaken by the Spirit of Virginia PAC, the Republican State Leadership Committee PAC, Urban One Inc., the Republican Commonwealth Leadership PAC, and the House and Senate Democratic Caucuses, bringing the top ten spenders to a combined \$68,780,051.²³

When discussing campaign finance reform, the conversation is not complete without discussing Virginia's independent system for utility oversight: the State Corporation Commission ("SCC"). The SCC's Public Utility Regulation division is tasked with numerous critical, complicated, and often overlooked duties that, in short, ensure fair rates for the electric customer and fair return on equity for the utility.²⁴ Over the years however, the legislature has passed several bills that gutted the authority of the SCC through an art of complex legalese that all but green-lit any request from the utility.²⁵ Not to mention, the regulatory body and all of its responsibilities are left to just one sitting Commissioner due to political squabbling.²⁶

This environment—loose campaign finance laws plus a feeble regulatory authority—creates a situation in which legislative outcomes are often binary decisions between top donors, indivisible from campaign investment, and are thus rather predictable. Per House Joint Resolution No. 526 that created the

²¹ *Id.* See *Legal Aid Justice Center Receives \$10 Million from Sonjia Smith*, PHILANTHROPY NEWS DIG. (Nov. 17, 2021), <https://philanthropynewsdigest.org/news/legal-aid-justice-center-receives-10-million-from-sonjia-smith>.

²² *Top Donors*, *supra* note 19.

²³ See *Top Donors 2022-2023*, THE VA. PUB. ACCESS PROJECT, <https://www.vpap.org/money/top-donors/> (last visited Dec. 1, 2023) (updated through 2023, the current combined total of top spenders exceeds the October 2023 total detailed above) (Urban One has devoted 96% of its 2022-2023 fundraising total just to "Richmond Wins, Vote Yes," its PAC to sway Richmond voters to approve its casino referendum for a second time. Another \$4 million contribution comes from Churchill Downs Inc. While much of this article focuses on campaign finance reform in contributions to candidates, it's important to remember that there are no limits on spending regarding referenda either), see REPUBLICAN STATE LEADERSHIP COMM., <https://www.rslc.gop/what-we-do> (last visited Dec. 1, 2023) (the Spirit of Virginia PAC is Governor Youngkin's fundraising arm, and the Republican State Leadership Committee is a Washington, D.C.-based organization "whose mission is to recruit, train, and elect Republicans to multiple down-ballot, state-level offices").

²⁴ See VA. CONST. art. IX, § 2.

²⁵ See Gregory S. Schneider, *The Giant Company that Could: How Dominion Turned Scorn into a Big Payday*, WASH. POST (Mar. 9, 2018), https://www.washingtonpost.com/local/virginia-politics/2018/02/28/14773b9e-1730-11e8-8b08-027a6ccb38eb_story.html?tid=lk_inline_manual_4; see Sarah Vogelsong, *Dominion Earned \$278 Million More Than Permitted in 2018, Regulators Find*, Va. Mercury (Aug. 29, 2019), <https://www.virginiamercury.com/blog-va/dominion-earned-278-million-more-than-permitted-in-2018-regulators-find/> (a famous example of these acrobatics is the 2018 Grid Transformation & Security Act, which delayed Dominion's 2019 triennial review and thus any rebates to customers, during which time the SCC calculated that the utility over-earned \$356,000,000 in 2018 alone).

²⁶ See Kate Andrews, *SCC Judge's Resignation Will Leave 2 of 3 Seats Empty*, VA. BUS. (Nov. 18, 2022), <https://www.virginiabusiness.com/article/scc-judges-resignation-will-leave-2-of-3-seats-empty/>.

Joint Subcommittee to Study Comprehensive Campaign Finance Reform: “Pressures exerted by expensive campaigns make larger contributions and their donors more important; and these pressures test the integrity of the candidates who ask for money and the donors who respond.”²⁷ A question of integrity is not one that can be left unanswered.

Enter: Governor Glenn Youngkin (R). While on the campaign trail in 2021, just two months before the election, reporters got a tip that Dominion Energy, which typically balances contributions fairly equally between the parties, donated \$250,000 to the Democrat-leaning, D.C.-based Accountability Virginia PAC.²⁸ This PAC then funded an attack ad against Youngkin attempting to turn rural voters against the Republican candidate, alleging that he planned to restrict Virginians’ second amendment rights.²⁹ While time has since softened his ire, once he was inaugurated in January 2022, Governor Youngkin took aim squarely at Dominion like no Governor before.³⁰

A. What Should Have Happened:

Knowing that the financial bloodbath of election season would begin as soon as the gavel fell *sine die* on February 25th, the 2023 regular session was the time to enact limits on campaign contributions.³¹ Also, considering that much of the Governor’s rhetoric leading up to the session centered around lowering the cost of living—particularly lowering electric bills—a bipartisan effort to rein in both campaign contributions and electric utility rates seemed within reach.³² Tackle campaign finance reform, and reinvigorate utility oversight to bring down the cost of electricity.

²⁷ H.D.J. Res. 526, 2021 Gen. Assemb., Spec. Sess. I (Va. 2021).

²⁸ See *Browse Receipts*, FED. ELECTION COMM’N, https://www.fec.gov/data/receipts/?committee_id=C00783746&two_year_transaction_period=2022&cycle=2022&line_number=F3X-11C&data_type=processed (last visited Sept. 30, 2023).

²⁹ Patrick Wilson, *Dominion Energy Gave \$200K to Secretive PAC*, RICH. TIMES DISPATCH (Oct. 17, 2021), https://richmond.com/news/state-and-regional/dominion-energy-gave-200k-to-secretive-pac-attacking-youngkin-from-the-right/article_b694b095-fa0c-5966-ba06-5c49663a4a46.html.

³⁰ Ben Paviour & Michael Pope, *Republican Glenn Youngkin is Sworn in as the Governor of Virginia*, NPR (Jan. 15, 2022), <https://www.npr.org/2022/01/15/1073180200/youngkin-sears-inauguration-republicans-gop-virginia>; George Packer, *How Virginia Took on Dominion Energy*, THE ATLANTIC (June 15, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/plutocrat-vs-monopoly/674319/>.

³¹ See Jimmy Cloutier, *Virginia General Assembly Adjourns for 2023 After Passing Modest Campaign Finance Reform*, OPEN SECRETS (Feb. 28, 2023), <https://www.opensecrets.org/news/2023/02/virginia-general-assembly-adjourns-for-2023-after-passing-modest-campaign-finance-reform/>.

³² See Jackie DeFusco, *Youngkin Plan Would Revisit Clean Energy Goals in Virginia*, ABC8NEWS (Oct. 3, 2022), <https://www.wric.com/news/politics/capitol-connection/youngkin-energy-plan-would-revisit-clean-energy-goals-in-virginia/> (“The plan that was adopted in 2020 by the previous administration establishes inflexible rules with rigid deadlines that are unattainable under current technical capabilities and places an unbounded and ultimately unknowable cost on Virginia ratepayers,” Youngkin said.”).

B. What Did Happen:

Despite a slew of retirements and primary losses from senior legislators long-beloved by Dominion who controlled the outcome of energy policy for decades, if there was any year to pass a limit on contributions from corporations or public utilities, it certainly was *not* 2023. Redistricting, retirements, and Virginia's notorious political swing made it too risky for incumbents to limit themselves financially.³³

Like clockwork, all efforts to enact dollar limits, prohibit contributions from public utilities, and eliminate special session fundraising died a bipartisan death, and that was *if* the bills even got a committee hearing. However, something remarkable did happen.

Without a single "No" vote in either chamber, Delegate Lee Ware (R-Powhatan) and Senator (now Congresswoman) Jennifer McClellan (D-Richmond) passed H.B. 1604 and S.B. 1321, respectively.³⁴ At just one page (a rarity for energy legislation), the bill allows the SCC to determine "in its sole discretion" that if the utilities' proposed base rates will produce either revenue in excess of, or a loss below, the authorized rate of return, the SCC has the authority to raise or lower the base rate to result in a "just and reasonable" calculation.³⁵ This bill was a big win that signaled times are changing, but lightning struck twice.

Arguably one of the most significant ratepayer reform bills ever to pass the General Assembly, House Majority Leader Terry Kilgore (R-Scott) and Senator Dick Saslaw (D-Fairfax) came together to enact H.B. 1770 and S.B. 1265, which made several monumental changes to the oversight of Virginia's public utilities.³⁶ In summary, the bill accomplishes nine goals:

1. Allows Dominion to utilize fuel securitization procedures.
 - Because of the volatility of prices from fossil-fuel derived energy, the new law allows Dominion to "pre-purchase" stocks of fuels like natural gas to avoid sudden and

³³ See Graham Moomaw, *How Redistricting Reform is Launching the Virginia General Assembly into a New Era*, VA. MERCURY (May 16, 2023), <https://www.virginiamercury.com/2023/05/16/how-redistricting-reform-is-launching-the-virginia-general-assembly-into-a-new-era/>.

³⁴ Madison Hirneisen, *General Assembly Passes 'Affordable Energy Act'*, Ctr. Square (Feb. 21, 2023), https://www.thecentersquare.com/virginia/article_ef07e12c-b231-11ed-888c-33c10babec9a.html;SB1321VirginiaElectricUtilityRegulationAct,LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?231+sum+SB1321> (last visited Oct 3, 2023).

³⁵ VA. CODE § 56-581 (2023).

³⁶ See Dawnthea M. Price Lisco & Connor Scribner, *The General Assembly's Adjourned. Now What?*, VPM (Feb. 27, 2023), <https://www.vpm.org/live-updates/live-blog-ish-2023-peoples-agenda-general-assembly#the-general-assemblys-adjourned-now-what>.

unpredictable price increases.³⁷

2. Changes base rate review from every three years to every two years.
 - This provision supports Del. Ware and Former-Sen. McClellan's bill by making more frequent the SCC's oversight of base rates, the charge of generating and distributing energy to a customer.³⁸
3. Eliminates tying Dominion's allowable return on equity to that of its peer group.
 - The SCC determines Dominion's allowable return on equity by analyzing that of similar utilities in the region, including Florida, Georgia, Texas, Tennessee, West Virginia, Kentucky, and North Carolina. The new law eliminates the peer group analysis and increases Dominion's profit rate from 9.35% to 9.7% until the next biennial review.³⁹
4. Allows for two or more rate adjustment clauses (RACs) to be rolled into the base rate.
 - RACs are one of three components of an electric bill and are used to fund specific projects or programs, most notably for example, Virginia's participation in the Regional Greenhouse Gas Initiative. Several of these projects last for years but are not re-reviewed by the SCC on a set periodic basis, despite often becoming a long-term line item on a customer's monthly bill. Rolling RACs into the base rate, reviewed now biannually, is purported to help lower monthly bills.⁴⁰

³⁷ See VA. CODE § 56-249.6:1 (2023); Charlie Paullin, *General Assembly Deal Sets Dominion Profits for Two Years While Overhauling Regulatory System*, VA. MERCURY (Feb. 25, 2023), <https://www.viriniamercury.com/2023/02/25/general-assembly-deal-sets-dominion-profits-for-two-years-while-overhauling-regulatory-system/>.

³⁸ See VA. CODE § 56-585.8 (2023).

³⁹ See VA. CODE § 56-585.1 (A)(2)(b) (2023); H.B. 1770, 2023 Gen. Assemb., Reg. Sess. (Va. 2023).

⁴⁰ See VA. CODE § 56-585.1 (A)(7)(b) (2023).

5. Eliminates Dominion's prescribed profit range.
 - When determining over-earnings and under-earnings around the allowed return on equity (9.7%), there is a prescribed range of 0.7 percentage points in either direction. Earn less than that, increase the base rate; earn more than that, and return some to customers. The new law eliminates that set range, instead leaving under or overearnings to the discretion of the SCC.⁴¹
6. Limits the amount that Dominion may recover following severe storm recovery efforts and grid upgrades associated.
 - Critics argue that Dominion uses its ability to recover costs from storm recovery and grid upgrades to decrease its excess earnings so it does not have to issue customer refunds. The new law states that those costs cannot exceed the amount needed to over-earn in that year.⁴²
7. Lowers the amount of excess earnings Dominion keeps.
 - When Dominion does over-earn, the utility is authorized to keep 30% of those excess earnings, while the rest is returned to customers. The new law lowers that allowance to 15%.⁴³
8. Authorizes the SCC to raise or reduce base rates as necessary.
 - This provision mimics Del. Ware and Former-Sen. McClellan's rate reform bill, allowing the SCC to set new base rates as necessary during review.⁴⁴
9. Mandates that the SCC address reliability in its annual report to the General Assembly.
 - This is a top talking point when it comes to Virginia's clean energy transition, as fears over decarbonization and

⁴¹ *See id.* at § 56-585.1 (A)(8)(a).

⁴² *See id.* at § 56-585.1 (A)(8).

⁴³ *See id.* at § 56-585.1 (A)(9)(b).

⁴⁴ VA. CODE § 56-581(C) (2023).

reliability are causing legislators to pump the brakes until more data is available. This provision requires the SCC to include data on fossil-fuel plant retirements as it impacts reliability in its annual report to the General Assembly.⁴⁵

Even just one of those provisions is a significant departure from Virginia's current regulation of its electric utilities, but all nine signal that times are changing and financial influence over legislators is weakening. Much of that change can be attributed to the passage of the Virginia Clean Economy Act in 2020, which mandated that Virginia's electric utilities retire all fossil-fuel generating plants and transition to a 100% carbon-free electric grid by 2045.⁴⁶

This landmark legislation sheds an unprecedented and very public light on the inner-workings of the SCC, Virginia's utilities, and the legislature. This light has since illuminated a new platform for politicians who either push for greater transparency and oversight as the Commonwealth pursues decarbonization, while others argue for dismantling the clean economy altogether and pursue an "all of the above" energy mix instead. Time will tell if in 2024 that light will finally shine in the direction of the big money donors still holding the puppet strings.

II. CANNABIS: ONE STEP FORWARD, TEN STEPS BACK

In November 2019, Virginia Democrats swept the legislature and secured an unprecedented majority.⁴⁷ For the first time in twenty-one years, Democrats controlled the Executive Mansion and both chambers of the General Assembly.⁴⁸

Capitalizing on their trifecta, Democrats passed several progressive measures addressing issues such as criminal justice reform, economic insecurity, LGBTQIA+ rights, clean energy, and cannabis. In 2020, the Democratic majority voted to decriminalize simple possession of non-medical marijuana, up to one ounce.⁴⁹ Possession of less than one ounce is

⁴⁵ VA. CODE § 56-585.1(F) (2023)

⁴⁶ H.B. 1526, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

⁴⁷ Ryan W. Miller, *Virginia is Officially Blue: Democrats Regain Control of Legislature, Clearing Way for Liberal Policies*, USA TODAY (Nov. 6, 2019), <https://www.usatoday.com/story/news/nation/2019/11/06/virginia-election-results-democrats-win-power-liberal-policies/4163840002/>.

⁴⁸ Ella Nilsen, *Democrats Just Pulled Off a Huge Win, Taking Control of Virginia's State Legislature*, VOX NEWS (Nov. 5, 2019), <https://www.vox.com/policy-and-politics/2019/11/5/20944109/virginia-elections-legislature-results-democrats>.

⁴⁹ H.B. 972, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

subject to a \$25 civil penalty.⁵⁰ Additionally, employers and educational institutions cannot require an applicant to disclose their records relating to an arrest, criminal charge, or conviction for a violation of the now-repealed section of the Virginia Code, which had previously made possession of *any* amount of marijuana illegal.⁵¹

Legislators were called into special session twice in 2020 to handle the raging COVID-19 pandemic, but also to address increasing unrest in the state following the murders of George Floyd and Breonna Taylor.⁵² The Democratic majority faced serious public pressure to address racial tensions and enact emergency legislation that supported equality, progress, and justice, especially as the pandemic exacerbated already growing divides.⁵³

When the 2021 legislative session began, then-House Majority Leader Charniele Herring (D-Alexandria) and Senator Adam Ebbin (D-Alexandria) passed a whopping 283-page bill that would create a legalized, recreational adult-use marijuana market starting January 1, 2024.⁵⁴

The legislation contained provisions for the creation of the Cannabis Control Authority (“CCA”); a detailed licensing structure for cultivation, processing, wholesaling, testing, and retail sale of marijuana; a social equity qualification for marijuana licensees; tax allocations; protections for unions and employees; programs aimed at reinvestment in disadvantaged communities; legalization of simple possession and home cultivation; requirements for packaging and labeling; incubator programs for minority businesses; zoning authority for localities; limits on how much marijuana can be contained in a package; restrictions on where retail facilities could be located; and other provisions.⁵⁵ However, the bill contained one major caveat: a reenactment clause that required the legislature to come back in

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Kelly Thomasson, *Governor Northam Calls April 11 Special Session for General Assembly to Complete Work on State Budget*, VA. GOV. RALPH S. NORTHAM (Mar. 13, 2018), <https://wayback.archive-it.org/9773/20180513182057/http://governor.virginia.gov/newsroom/newsarticle?articleId=25726>; Laura Vozella, *Northam Calls Legislature Back to Tackle State Budget, Social Justice Issues*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/local/virginia-politics/northam-calls-legislature-back-to-address-budget-upended-by-coronavirus-racial-injustice-issues/2020/07/17/fe832312-c834-11ea-8ffe-372be8d82298_story.html.

⁵³ See Ned Oliver, *Va. House Speaker Promises Action on Police Reform During Upcoming Special Session*, VA. MERCURY (June 11, 2020), <https://www.virginiamercury.com/2020/06/11/va-house-speaker-says-special-session-will-address-police-reform-aggressive-change-is-needed-now/>.

⁵⁴ H.B. 2312, 2021 Gen. Assemb., Spec. Sess. (Va. 2021); S.B. 1406, Gen. Assemb., Spec. Sess. (Va. 2021).

⁵⁵ H.B. 2312, 2021 Gen. Assemb., Spec. Sess. (Va. 2021); S.B. 1406, Gen. Assemb., Spec. Sess. (Va. 2021).

2022 and pass the bill again.⁵⁶

Since Democrats expected to hold the majority in 2022, this reenactment clause was meant to convince the moderate legislators that such an astoundingly large program would be created in an efficient, methodical, and unhurried manner. Voting yes for the Cannabis Control Act in 2021 would have given the CCA adequate time to enact regulations, permit licensed cultivators to begin establishing supply, allow licensed retailers to get their local permits in place, and test products before they hit the shelf, all before retail sale would have begun in 2024.

The elections in November 2021 saw Republicans take back the House of Delegates and the Executive Branch.⁵⁷ During the 2022 legislative session that followed, nearly every cannabis bill, including the reenactment of the Cannabis Control Act, was either rejected or never received a hearing.⁵⁸

Because of the failure to reenact the Cannabis Control Act, Virginians are caught in a web of confusion and nonenforcement. For example, Virginians currently are allowed to possess up to an ounce of marijuana and grow four plants for their own use, but they cannot purchase seeds or immature plants, let alone buy the finished product they are legally allowed to possess.⁵⁹ This vacuum has caused increased calls to poison control centers for accidental ingestion of THC products by children; proliferation of unregulated derivatives like Delta-8, Delta-10, and THC-A; pop-up shops selling illegal products; increased crime; and untested, out-of-state, highly potent products sold by unlicensed retailers.⁶⁰ All of these occurrences have since been used by politicians to either support or oppose any further progress towards

⁵⁶ H.B. 2312, 2021 Gen. Assemb., Spec. Sess. (Va. 2021); S.B. 1406, Gen. Assemb., Spec. Sess. (Va. 2021).

⁵⁷ Graham Moomaw & Ned Oliver, *Youngkin Wins Major Upset as GOP Roars Back in Virginia*, VA. MERCURY (Nov. 3, 2021), <https://www.virginiamercury.com/2021/11/03/youngkin-wins-stunning-upset-as-gop-roars-back-in-virginia/>.

⁵⁸ See Katie Shepherd, *Weed Sales Legal in Md., but not Va. Youngkin's 'Not Interested' in Change.*, WASH. POST (Jul. 15, 2023), <https://www.washingtonpost.com/dc-md-va/2023/07/15/youngkin-virginia-cannabis-sales/>.

⁵⁹ H.B. 2312, 2021 Gen. Assemb., Spec. Sess. (Va. 2021); S.B. 1406, 2021 Gen. Assemb., Spec. Sess. (Va. 2021).

⁶⁰ Alex Littlehales, *Virginia Poison Center Saw More than 200% Increase in Edible-Related Calls*, 13NEWS NOW (Jan. 19, 2023), <https://www.13newsnow.com/article/news/local/virginia-poison-center-more-than-200-increase-edible-related-calls/291-f1d78642-3b6b-4ab3-b93f-273c3d3077c7>; Graham Moomaw, *Virginia Hemp Panel Suggests Tougher Rules on Unregulated THC Products*, VA. MERCURY (Dec. 2, 2022), <https://www.virginiamercury.com/2022/12/02/virginia-hemp-panel-suggests-tougher-rules-on-unregulated-thc-products/>; Susan Cameron, *Cannabis-Related Stores are Popping Up Across Virginia Amid Confusion over the State's Marijuana Laws*, CARDINAL NEWS (Sept. 6, 2023), <https://cardinalnews.org/2023/09/06/cannabis-related-stores-are-popping-up-across-virginia-amid-confusion-over-the-states-marijuana-laws/>; Karina Elwood, *Inside the 'Wild, Wild West' of Virginia's Marijuana Market*, WASH. POST (Aug. 26, 2022), <https://www.washingtonpost.com/dc-md-va/2022/08/26/virginia-marijuana-gray-market/>.

legalization.

A. What Should Have Happened:

In 2022, legislators should have foreseen that adjourning with absolutely no regulatory structure and no enforcement mechanisms would certainly push consumers towards the black market. Including provisions in the initial legislation that prioritized public and consumer safety would have quelled some fears from the right, while the Democrats could have hedged their bets against losing their majority, a possibility that appears to have been dismissed.

In 2023, legislators should have sought to codify some authority within the CCA and the Virginia Department for Agriculture & Consumer Services ("VDACS") to start taking the steps to rein in illegal sales by enacting a licensure scheme and enforcement provisions. Virginia would have seen tax revenue in the millions, and the state would be on the path today to approving regulations governing the cultivation, processing, and sale of safe and tested marijuana products.⁶¹

B. What Did Happen:

Hindsight, of course, is 20/20. At the time, the reenactment clause on the Cannabis Control Act in 2021 was a necessary step to get the bill across the finish line. Even then, Democrats only controlled the Senate by one vote.⁶² The provisions of the Cannabis Control Act that created a preference in the licensure process for those who were or had a family member who was convicted of a marijuana-related violation of the Virginia Code (see Va. Code § 18.2-248.1, § 18.2-250.1; see also § 18.2-265.3(A) as it relates to marijuana) did not resonate with many legislators.⁶³ The inclusion of unionization and prevailing wage language ruffled some feathers as well.⁶⁴ After all, whether there is an adult-use market in Virginia or not, banking for marijuana businesses remains at an impasse because of the federal

⁶¹ JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION, KEY CONSIDERATIONS FOR MARIJUANA Legalization v, 39 (2020).

⁶² *Party Control of Virginia State Government*, BALLOTEDIA, https://ballotpedia.org/Party_control_of_Virginia_state_government (last visited Oct. 1, 2023); *SB 1406 Marijuana: Legalization of Simple Possession, etc.; Established, Report*, LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=sb888> (last visited Sept. 17, 2023) (showing on final vote on the bill, Sen. Petersen (D) voted against Governor Northam's recommendation, forcing then-Lieutenant Governor Justin Fairfax (D) to cast the tie breaking vote).

⁶³ See Agustin Rodriguez & Christina Sava, *Virginia Cannabis Control Act: A Tale of Two Legislatures*, TROUTMAN PEPPER (June 21, 2022), <https://www.regulatoryoversight.com/2022/06/virginia-cannabis-control-act-a-tale-of-two-legislatures/> (showing that a number of provisions in the bill required ratification by the 2022 General Assembly but were not ratified in 2022); see VA. CODE ANN. § 4.1 (2021).

⁶⁴ See Ben Paviour, *Virginia Marijuana Bill Adds Protections for Workers and Unions*, VPM (Mar. 30, 2021), <https://www.vpm.org/news/2xxx-xx-30/virginia-marijuana-bill-adds-protections-for-workers-and-unions>.

government's refusal to address the SAFE Banking Act.⁶⁵

An attempt in 2023 by Delegate Michael Webert (R-Fauquier) to create a safe, well-regulated adult-use market that would crack down on illegal products, empower both the CCA and VDACS to enforce their regulations, and open Virginia's legal cannabis market to Virginia-based small businesses failed.⁶⁶

Senator Emmett Hanger (R-Augusta) and House Majority Leader Terry Kilgore (R-Scott) introduced bills that originally aimed to establish a registration process for the sale of regulated hemp products, as well as codify packaging, labeling, and testing requirements for those products.⁶⁷ As passed, the bill capped the amount of THC that may be present in a hemp product to 0.3%, not to exceed 2 milligrams of THC per package, and prohibited the sale of products containing any synthetic derivative of THC, such as Delta-8.⁶⁸ The bill was passed on party lines in the Senate but passed overwhelmingly in the House with a bipartisan vote of 78-14.⁶⁹

Governor Youngkin felt it did not go far enough. His administration sent down a recommendation that was accepted overwhelmingly in the Senate but proved more controversial in the House, finally passing by a vote of 52-41.⁷⁰ The final bill that went into effect on July 1, 2023, includes the following provisions:

1. Hemp products can contain no more than 0.3% THC concentration *and either* (i) no less than 25 units of CBD per 1 unit of THC per package; or (ii) 2 milligrams of total THC per package.
 - Total THC includes all derivatives of THC, including Delta-8, Delta-9, Delta-10, etc.
 - Retailers cannot sell or offer for sale any substance intended for human consumption, orally or by inhalation,

⁶⁵ See Olivia Wathne, *Can Marijuana Dispensaries Use Traditional Banks*, FINDLAW, <https://www.findlaw.com/cannabis-law/starting-a-cannabis-business/can-marijuana-dispensaries-use-traditional-banks-.html> (last visited Oct. 12, 2023).

⁶⁶ *HB 1750 Cannabis Control; Establishes Framework for Creation of Retail Marijuana Market*, LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?231+sum+HB1750> (last visited Sep. 25, 2023).

⁶⁷ S.B. 903, 2023 Gen. Assemb., Reg. Sess. (Va. 2023); H.B. 2294, 2023 Gen. Assemb., Reg. Sess. (Va. 2023).

⁶⁸ VA. CODE ANN. § 3.2-5145.1 (2023); VA. CODE ANN. § 59-198 (69) (2023) (banning the sale of synthetic derivatives).

⁶⁹ *SB 903 Industrial Hemp; Regulated Hemp Products, etc.*, LIS, <https://lis.virginia.gov/cgi-bin/legp604.exe?231+vot+HV2370+SB0903> (last visited Oct. 5, 2023).

⁷⁰ *Id.*

that contains a synthetic derivative of THC.⁷¹

2. Products containing THC must be:

- Contained in child-resistant packaging;
- Labeled with all ingredients, the serving size, the total percentage and milligrams of THC per serving, and, if it contains THC, that the product cannot be sold to anyone under 21 years old;
- Accompanied by a certificate of analysis from a certified laboratory stating the total THC concentration of the substance that is also available at the retail location;
- Not depicting a human, animal, vehicle, or fruit; and
- Not bearing the trademark, trade name, or famous mark of another product.⁷²

After adjourning in 2023 without a budget, the question of whether any of these provisions would even be enforced remained unanswered. Without the budget, VDACS could not hire the appropriate number of enforcement officers necessary to enforce the law, let alone stand up a new licensure scheme. Fortunately, on September 6, 2023, the legislature passed a budget with \$1,100,000 reserved for VDACS' enforcement of the new law, complete with 15 new positions tasked with registering and inspecting facilities selling hemp products.⁷³

To no one's surprise, there is an additional wrinkle. A group of hemp industry advocates filed suit on September 1, 2023, against the Commonwealth of Virginia, arguing that the law passed by the General Assembly above preempts the authority of the U.S. Constitution and requested a preliminary injunction.⁷⁴ Should the judge indeed grant the injunction, the necessity for both parties to come together and craft a workable solution for hemp and cannabis regulation is more imperative than

⁷¹ S.B. 903, 2023 Gen. Assemb. (Va. 2023) (reconvened); VA. CODE ANN. § 59.1-200(A)(69) (2023) (clarifying the requirements of the originally referenced Act); see Prakash Nagarkatti & Mitzi Nagarkatti, *Cannabis-Derived Products like Delta-8 THC and Delta-10 THC Have Flooded the US Market*, UNIV. OF S.C.: THE CONVERSATION (Apr. 28, 2023), https://sc.edu/uofsc/posts/2023/04/conversation_cannabis_derived_products.php.

⁷² S.B. 903, 2023 Gen. Assemb., Reg. Sess. (Va. 2023) (reconvened).

⁷³ H.B. 6001, 2023 Gen. Assemb., Spec. Sess. I (Va. 2023).

⁷⁴ Northern Virginia Hemp & Agriculture, LLC et. al. v. Commonwealth of Virginia et.al. Case. No. 1:23-cv-01177 (D. Va. 2023).

ever.

The Commonwealth is now less than three months away from January 1, 2024, the original date for full retail sale of marijuana, and legislators have fallen backwards more than they are stepping forward. Legislators' inaction has left millions in potential revenue behind (Maryland consumers spent \$87,430,000 in the state's first month of legal adult-use sales) and allowed black market operators to control the marketplace.⁷⁵ November's elections will dictate the strategy on marijuana legalization: A Democratic-controlled legislature will almost certainly introduce an adult-use bill, and a split legislature will likely offer a more measured approach. Republicans may not want to touch the issue at all. Either way, any bill still has to clear the Governor's desk, and he has made it clear that he is "not interested."⁷⁶

III. ESG: IT'S COMPLICATED

With the fights over campaign finance reform, cannabis and ratepayer reform, scant attention was paid to a growing trend in corporate governance that is slowly finding its way into Virginia and may play a much larger role in the 2024 legislative session. Environmental, Social and Governance ("ESG") has been trending for several years in the corporate sector as institutions and investors wrestle with balancing corporate profits and the desire to achieve greater corporate accountability for companies' stewardship of the environment and their treatment of other citizens.⁷⁷

We can trace the first use of the term ESG back to 2004 when former United Nations Secretary General, Kofi Annan, invited corporate leaders to a discussion on integrating ESG into capital markets.⁷⁸ The idea was that companies that adopted ESG principles would likely return greater value to shareholders, while also increasing trust in the corporations themselves and producing "better outcomes for society."⁷⁹

The purpose of this article is not to provide a detailed discussion of the growth of ESG, for there are many articles that discuss ESG's history and the

⁷⁵ Katie Shepherd, *Over \$87 Million Spent on Cannabis in Maryland's First Month of Adult Sales*, WASH. POST (Aug. 2, 2023), <https://www.washingtonpost.com/dc-md-va/2023/08/02/maryland-july-cannabis-sales/>.

⁷⁶ *Id.*

⁷⁷ See James Surowiecki, *The Hottest Trend in Investing is Mostly a Sham*, WASH. POST (May 26, 2023), <https://www.theatlantic.com/ideas/archive/2023/05/esg-woke-investing-trend-reality/674197/>.

⁷⁸ Jo Paisley, *ESG Explained: What It Is and Why It Matters*, GLOB. ASSOC. OF RISK PRO.'S (June 30, 2023), <https://www.garp.org/risk-intelligence/sustainability-climate/esg-why-it-matters-063023>.

⁷⁹ *Id.*

recent economic growth in ESG related investments, including those cited here. However, a basic understanding of ESG's core principles is important to understanding how those principles underpin today's political discourse, and how they will impact legislation in Virginia's coming legislative sessions.

The environmental component of ESG considers a company's approach to the physical environment and any actions taken that may impact the environment.⁸⁰ Examples include greenhouse gas emissions and their impact on climate change, non-greenhouse gas air pollution, or water and wastewater management.⁸¹ The "social" criteria measures a company's social impact and includes assessments of a company's community engagement, labor practices, commitment to diversity and inclusion, labor practices and local economic contributions.⁸² Governance examines how companies make decisions and their corporate governance structure.⁸³ An evaluation of a company's governance component will assess the company's business ethics, capital allocations and supply chain management, governance structure and engagement, and company policies and external disclosures.⁸⁴

A quick review of nearly any public company's public website will show how these principles have been incorporated into their overall business strategies.⁸⁵ A company's sustainability, for example, may hinge on how well it adheres to these ESG principles. Critics of ESG argue that ESG is more about branding than actually growing corporate profits.⁸⁶ They argue that ESG is simply a distraction from the fundamental role of a company, which is to make as much money as possible while adhering to the basic rules of society.⁸⁷ Other criticisms of ESG discuss the near impossibility of striking an appropriate balance between the three key components in a way that is meaningful to multiple, diverse shareholders.⁸⁸ Yet others argue that ESG is

⁸⁰ Lucy Pérez et al., *Does ESG Really Matter- and Why?*, MCKINSEY QUARTERLY (Aug. 10, 2022), <https://www.mckinsey.com/capabilities/sustainability/our-insights/does-esg-really-matter-and-why>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ ENVIRONMENTAL SOCIAL GOVERNANCE REPORT 70-72 (Apple 2022); CORP. SUSTAINABILITY REP. 14-23 (General Dynamics 2022); Environmental Social Governance Report 70-72 (Apple 2022); Corporate Sustainability Report 14-23 (General Dynamics 2022); *Environmental, Social and Governance, ESG*, <https://www.aholdelhaize.com/investors/esg/> (last visited Oct. 11, 2023); *Environmental, Social and Governance (ESG) Resources*, JOHNSON & JOHNSON, <https://www.jnj.com/esg-resources> (last visited Oct. 11, 2023) (the integration of ESG principals into the core business strategies of each of these industry leaders recognizes the important impact corporations can play in effecting positive community change and an understanding of the potential negative backlash from shareholders when they do not).

⁸⁶ Pérez et al., *supra* note 80.

⁸⁷ *Id.*

⁸⁸ *Id.*

incapable of any meaningful measurement and even when it can be measured it has little impact on overall financial performance.⁸⁹

The growing debate over the importance of ESG has certainly not gone unnoticed by politicians from both sides of the political aisle. Both Republicans and Democrats have staked out positions on ESG, either advocating for broader consideration of ESG factors by corporations (Democrats) or limiting any further expansion of ESG considerations in investment decisions (Republicans). We have seen these opposing views play out in recent legislative and court actions at both the federal and state levels.

A. President Biden's ESG Rule and Republican Backlash

On January 20, 2021, President Joseph Biden issued Executive Order 13990 (“E.O. 13990”) titled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”⁹⁰ Section 2 of E.O. 13990 directed federal agencies to review all existing regulations, orders and guidance documents promulgated during President Donald Trump’s administration that may be inconsistent with the policy expressed in E.O. 13990.⁹¹

On December 1, 2022, the Department of Labor (DOL) issued a final rule clarifying the responsibilities of fiduciaries under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”).⁹² The amended guidance eliminated a previous rule issued during President Trump’s administration that required fiduciaries under ERISA to “select investments and investment courses of action based solely on consideration of “pecuniary factors.”⁹³ Under the new rule, which came to be known as the “ESG Rule,” fiduciaries could once again consider any factors that the fiduciary believed were relevant to a particular investment’s risk and potential rate of return, including ESG factors.⁹⁴ The ESG Rule reaffirmed a fiduciary’s responsibility to prioritize the financial benefits owed to plan participants, while allowing for consideration of all factors that may impact a financial product’s return. The ESG Rule did not require that fiduciaries consider ESG factors, it only allowed them to take ESG factors into account if they were potentially relevant to a product’s market risk or rate of return. The previous

⁸⁹ *Id.*

⁹⁰ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁹¹ *Id.*

⁹² Prudence and Loyalty in Selecting Plan Investing and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022).

⁹³ *Id.* (citing Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (Nov. 13, 2020)).

⁹⁴ *See id.*

rule precluded such non-pecuniary considerations.⁹⁵

In today's supercharged political atmosphere, no action by any president will stand for long without a challenge from political opponents. On January 3, 2023, Congress passed House Joint Resolution 30 (H.J. Res. 30) disapproving the rule submitted by DOL and ruling that the rule shall have no force or effect.⁹⁶ Only one Democratic member in the House and two Democratic Senators voted in favor of the resolution.⁹⁷ President Biden issued the first veto of his administration when he vetoed the resolution on March 20, 2023, keeping the rule in place—for now.⁹⁸

B. ESG Fight Coming to Virginia

The actions taken by Congress and the President mark only one chapter in the fight over ESG policies. Lawsuits challenging the use of ESG ratings have been launched across the country and Virginia has stepped into the fray. Both Virginia's Governor and Attorney General have taken sides in the fight over ESG expansion. In August 2022, Virginia Attorney General Jason Miyares announced that his office was joining a group of eighteen other attorneys general in support of Missouri's investigation into the ESG ratings conducted by Morningstar Inc., and Morningstar's subsidiary, Sustainalytics, alleging that the companies' investment ratings violate Virginia's consumer protection laws.⁹⁹ The investigation further alleges that the companies' ESG ratings contain an anti-Israel bias.¹⁰⁰ Additionally, Miyares announced in January 2023 that his office was joining the lawsuit brought by 24 other Republican-led states against DOL's ESG Rule.¹⁰¹ The plaintiffs seek to block implementation of the rule, alleging that it threatens the retirement savings of millions of Americans and was issued in violation of the Administrative Procedures Act.¹⁰² Should the lawsuit succeed, the result

⁹⁵ *Id.*

⁹⁶ H.R.J. Res. 30, 118th Cong. (2023).

⁹⁷ *Roll Call 124 | Bill Number: H. J. Res. 30*, HOUSE.GOV (2023), <https://clerk.house.gov/Votes/2023124>; *Roll Call Vote 118th Congress - 1st Session*, U.S. S. (2023), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1181/vote_118_1_00035.htm (only Representative Jared Golden of Maine, Senator Jon Tester of Montana and Senator Joseph Manchin of West Virginia voted in favor of the resolution).

⁹⁸ *Message to the House of Representatives — President's Veto of H.J. Res 30*, WHITE HOUSE (Mar. 20, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/20/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-30/>.

⁹⁹ *Virginia Attorney General Miyares Joins Investigation into ESG Ratings Company Morningstar and its Subsidiary Sustainalytics*, VA. OFF. OF THE ATT'Y GEN. (Aug. 17, 2022), <https://www.oag.state.va.us/media-center/news-releases/2428-august-17-2022-virginia-attorney-general-miyares-joins-investigation-into-esg-ratings-company-morningstar-and-its-subsidiary-sustainalytics>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Utah v. Walsh*, No. 2:23-cv-00016 (N.D. Tex. filed Jan. 26, 2023) (at the time of this article, the lawsuit was still pending leaving the fate of the ESG Rule yet to be decided).

would be a return to the Trump-era rule where fiduciaries could only consider pecuniary factors in making investment decisions.

Florida Governor, Ron DeSantis, announced on March 16, 2023 an alliance of nineteen Republican Governors unified in their fight against the ESG Rule and ESG influences in general.¹⁰³ Members of the alliance pledged to use their respective states' resources to stop the spread of ESG.¹⁰⁴ Just one week after DeSantis' announcement of the alliance, he gained another ally in Virginia Governor Glenn Youngkin.¹⁰⁵ With Virginia's Governor and Attorney General now firmly in support of the latest anti-ESG efforts, the Commonwealth will likely see this battle play out in the 2024 legislative session.

C. *What to expect in 2024*

The current makeup of Virginia's General Assembly has Republicans controlling the House of Delegates and Democrats in control of the Senate.¹⁰⁶ However, the rash of retirements and recent election defeats will result in a drastic change to the two chambers following the November 2023 elections. As enjoyable as the practice of trying to pick the winners of any election may be, one may have slightly better luck picking the winner of next year's Super Bowl or World Series. The results of the last few elections are evidence of the transitory nature of majority rule in the General Assembly. Between 2015 and 2021, Democrats in the House of Delegates went from having only thirty-three members (out of 100), to gaining the majority and the speakership, to returning to being the minority party.¹⁰⁷ And in one tightly contested race, a name had to be drawn out of a hat to determine a winner.¹⁰⁸ The constant

¹⁰³ *Press Release, Governor Ron DeSantis, Joint Governors' Policy Statement, ESG*, (Mar. 16, 2023), <https://www.flgov.com/wp-content/uploads/2023/03/Joint-Governors-Policy-Statement-on-ESG-3.16.2023.pdf>.

¹⁰⁴ *Id.*

¹⁰⁵ John McGowan, *Virginia Governor Youngkin Joins DeSantis' Anti-ESG Alliance*, FORBES (Mar. 23, 2023), <https://www.forbes.com/sites/jonmcgowan/2023/03/23/virginia-governor-youngkin-joins-desantis-anti-esg-alliance/?sh=2a30c5fd44aa>.

¹⁰⁶ *Virginia General Assembly Guide*, JAMES MADISON UNIV., https://www.jmu.edu/civic/virginia_general_assembly_guide.shtml (last visited Oct. 6, 2023).

¹⁰⁷ *Election Results: November 3, 2015*, VA. PUB. ACCESS PROJECT (Nov. 3, 2015), <https://www.vpap.org/electionresults/20151103/house/>; *2019 Virginia House of Delegates Election Results*, VA. PUB. ACCESS PROJECT, <https://www.vpap.org/electionresults/20191105/house/> (last visited Sept. 29, 2023); Daniella Cheslow, *Delegate Eileen Filler-Corn is Virginia's First Female, Jewish House Speaker*, NPR (Jan. 9, 2020) <https://www.npr.org/local/305/2020/01/09/794861242/delegate-eileen-filler-corn-is-virginia-s-first-female-jewish-house-speaker> (Democrats lost 7 seats in the 2021 elections reducing their membership in the House to 48 seats. Because of their four year terms, Senators were not on the ballot in 2021).

¹⁰⁸ Laura Vozzella, *A Rare, Random Drawing Helped Republicans Win a Tied Virginia Election but It May Not End There*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/local/virginia-politics/repUBLICAN-yancey-picked-in-random-lottery-declared-winner-of-pivotal-va-house-race/2018/01/04/9c9caa5a-f0a1-11e7-b390-a36dc3fa2842_story.html.

fluctuations in control have led to constant campaigning and partisan attacks as each party seeks to keep its base fired up in hopes of reclaiming the majority. With elections occurring every year in Virginia, Yogi Berra was right—"it ain't over til it's over."

The constant shifts in control make it difficult to predict what issues will dominate in the 2024 legislature, but with both the Governor and the Attorney General taking strong anti-ESG positions and joining multi-state alliances, the odds are great that we can expect to see legislative attempts to limit ESG expansion in 2024.

Several states have already passed anti-ESG legislation.¹⁰⁹ Florida's House Bill 3 (H.B. 3), however, may become the model for anti-ESG legislation going forward.¹¹⁰ While H.B. 3 follows similar anti-ESG practices of other states in requiring that fiduciaries only consider pecuniary factors when investing, the law goes even further to explicitly restrict "the consideration of the furtherance of any social, political, or ideological interests," and limits the investment decisions of local governments, the chief financial officer, and trust funds.¹¹¹ The law also bans the issuance of ESG bonds in the state.¹¹²

Virginia will look to follow this legislative trend in 2024. The 2023 session provided a preview of what is to come. Senate Bill 1437 (S.B. 1437) introduced by Senator Ryan McDougle (R-Hanover) sought to restrict the Virginia Retirement System (VRS) from investing in ESG funds.¹¹³ The bill reads, in part:

Except as otherwise provided in a state investment policy and unless the Board can demonstrate that a social investment would provide a superior rate of return compared to a similar investment that is not a social investment and has a similar time horizon and risk, neither the Board nor any external fiduciary utilized by the Board may invest or make recommendations regarding state funds for the purpose of social investment. For purposes of this section, 'social investment' means an investment that is based on environmental, socially responsible, and governance criteria in the investment, commitment, voting of shares, or engagement with portfolio companies with public funds for a purpose of obtaining

¹⁰⁹ Leah Malone et. al., *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, SIMPSON THACHER & BARTLETT LLP, https://www.stblaw.com/docs/default-source/publications/esg_battlegroundsalert.pdf (last updated Sept. 2023).

¹¹⁰ Leah Malone & Emily B. Holland, *Florida Passes Farthest-Reaching Anti-ESG Law to Date*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (May 27, 2023), <https://corpgov.law.harvard.edu/2023/05/27/florida-passes-farthest-reaching-anti-esg-law-to-date/#2>.

¹¹¹ H.R. 2023-3, 2023 Legis. Sess., at 1-11 (Fl. 2023); see Malone & Holland, *supra* note 109.

¹¹² Malone & Holland, *supra* note 109.

¹¹³ S. 1437, 2023 Gen. Assemb., Reg. Sess. (Va. 2023).

an effect other than a maximized return for the Retirement System.¹¹⁴

While the bill did not require VRS to use only “pecuniary factors” in its investment decisions, or ban ESG investing as explicitly as Florida’s H.B. 3, the intent is the same. The requirement that authorization for ESG investment be included in any state investment policy ensures that such authorization will not be coming soon. State investment policy is established by the Governor and implemented by the State Treasurer.¹¹⁵ With Governor Youngkin’s new alliance with other anti-ESG governors, it is highly unlikely that any state policy would authorize ESG investing. And while the amendment seeks to be less restrictive than Florida’s, it is not clear from the language how the VRS Board would demonstrate a superior rate of return for an ESG investment over a similar investment, and whether such analysis may consider non-pecuniary factors.

Senate Bill 1437 did not make it out of committee this year, but one can imagine that it will come back in a revised form in light of the Governor’s and Attorney General’s recent anti-ESG positions.¹¹⁶ We can probably expect a revised bill to contain language restricting VRS to relying solely on “pecuniary factors” in making investment decisions.

Any changes to how VRS operates, however, must occur through legislation as the Governor is limited in steps he can take to effect change in VRS’ investment policy. It is true that the Governor is the Commonwealth’s chief budget officer, but VRS is an independent state agency whose board is only partially appointed by the Governor.¹¹⁷ Five members of the VRS Board are appointed by the Governor, while the remaining four members are appointed by the Joint Rules Committee of the General Assembly.¹¹⁸ Members have to be confirmed by a majority vote of members in both houses and have staggered five-year terms.¹¹⁹ The Governor cannot simply remove members of the Board and replace them with more sympathetic appointees.

The Governor does, however, have executive authority over state procurement, the Department of the Treasury and the Department of Planning and Budget. He may attempt by executive order to limit any discretion state agencies have in making ESG-based decisions. This year the Governor will

¹¹⁴ *Id.*

¹¹⁵ VA. CODE § 2.2-103(B) (“the Governor shall be the chief planning and budget officer of the Commonwealth.”); *see also*, VA. CODE § 2.2-1800 (establishing the Department of the Treasury under the supervision of the State Treasurer).

¹¹⁶ S. 1437, 2023 Gen. Assemb., Reg. Sess. (Va.2023) (died in chamber).

¹¹⁷ *See* VA. CODE § 51.1-124.1 (2022) (establishing the Virginia Retirement System as an independent agency of the Commonwealth).

¹¹⁸ VA. CODE § 51.1-124.20 (2022).

¹¹⁹ *Id.*

introduce the only two-year budget of his administration.¹²⁰ He may seek to include language in the budget further restricting the ability of state agencies to consider ESG factors in any investing decisions. Ultimately, how successful the Governor will be in achieving any of his anti-ESG initiatives will depend heavily on the outcome of this fall's tightly contested General Assembly elections. Any action accomplished through executive action alone could simply be reversed by the next Governor if so inclined.

The Attorney General's decision to join several anti-ESG lawsuits, the introduction of Senate Bill 1437, and Governor Youngkin's alliance with Governor DeSantis staked Virginia's position firmly against ESG expansion. Unless the Governor's party claims control of both houses in November, he will need to find a suitable compromise with Democrats if he wishes to further any legislative objectives in this area. He may seek temporary achievements through executive action, but such actions will only last through his term.

CONCLUSION

The 2024 legislative session is shaping up to be one of the most intriguing sessions in recent years. The recent retirements and electoral defeats of many longtime legislators will change the leadership landscape of the legislature. But regardless of which party controls the General Assembly, do not expect to see a retail market in cannabis come to fruition as the Governor has already made his opposition clear. Bipartisan disdain for campaign contribution limits will continue as neither party wants to give up any fundraising advantage to the other, and Dominion will likely continue to see its influence challenged as new players like Clean Virginia enter the legislative fray and newer legislators swear off Dominion contributions.

The fight to limit the expansion of ESG considerations will garner greater attention as lawsuits continue and additional legislation is introduced. It is very unlikely that Virginia will attempt to implement restrictions as severe as Florida's due to differences in regulatory structures, but these differences will not keep Governor Youngkin from attempting to uphold the pledge he made in joining DeSantis' anti-ESG alliance: to use every available state resource to curb ESG expansion. Perhaps the Governor is also a fan of Yogi Berra.

¹²⁰ VA. CODE § 2.2-1508 (2009).

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