

Morgan Lewis

# GLOBAL SPONSOR FORUM

## REGULATORY LANDSCAPE OF NEW ENERGY INVESTMENTS

April 27, 2021



# Speakers



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# ESG and SEC Regulatory Issues

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# ESG INDUSTRY PARTICIPANTS AND ISSUES



## Investors and Clients

Asking for more information about their investments and what issuers are doing to address the risks and issues raised by ESG factors.



## Issuers

Grappling with how to be responsive to client demands and report ESG data when there is (in the United States) a lack of structure and common terminology to measure and describe ESG factors and risks presented by those factors.



## Funds

Taking a wide variety of approaches to ESG investing – some relying on third-party ratings, others using proprietary research to implement investments strategies – both core ESG mandates as well as using ESG factors as a component of their strategies.

# ESG INDUSTRY PARTICIPANTS AND ISSUES



## Industry Groups

Working to establish a prevailing voluntary reporting regime for issuers to follow in order to provide meaningful and comparable data (e.g., [SASB](#), [TCFD](#), [CFA](#)).



## Index Providers

Establishing and using independent ESG ratings and rankings for years – with a lack of precise terminology or standard methods.



## Regulators

Find footing and respond to the developments in this space. With respect to the potential adoption of independent industry group standards, this raises third-party oversight questions.

# ISSUES RELATED TO MANDATORY ISSUER ESG DISCLOSURES



Lack of standard ESG measures, terminology, data, etc.



Different industry types and sizes implicate different ESG metrics and to different degrees – making a one-size-fits-all solution challenging



Regulators don't fully understand all the issues and are having trouble finding direction on oversight



The conversation is becoming politicized (Gensler's pending confirmation will tip the scales)

# ISSUES RELATED TO MANDATORY ISSUER ESG DISCLOSURES

Multiple Commissioner public statements taking different views on how to proceed – reflects tension in the industry

- E.g., **February 24**: Lee – Statement on climate disclosure
- E.g., **March 4**: Peirce and Roisman – joint statement on SEC’s enhanced focus on climate change efforts

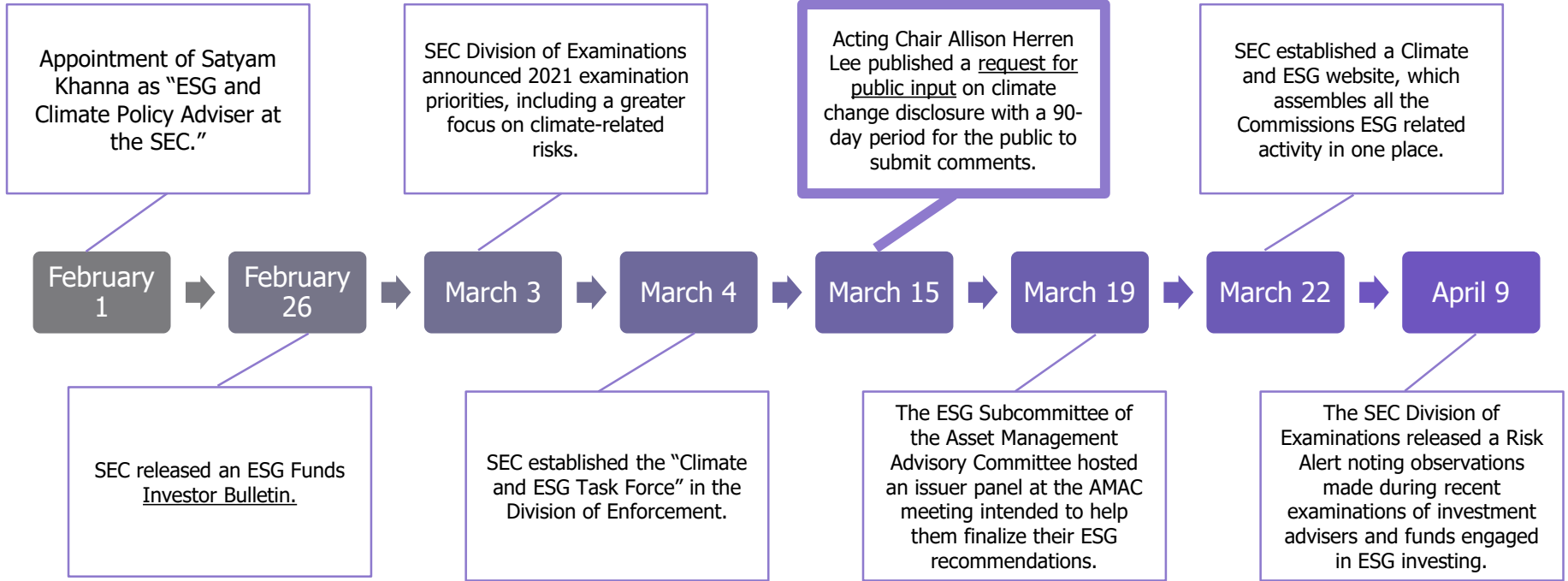
## Competing principles

- Disclosures should be limited to information that is material and useful to investors
- Regulators want a one-size-fits-all requirement that generates accurate, comparable, quantitative data across companies in all industry types and sizes
- Data should be presented with some qualitative context to account for these differences

Requirements should also be flexible enough to accommodate future developments and growth in this area

# Q1 2021 SEC ACTIVITY

Q1: SEC sweep exam related to asset managers' use of ESG considerations in their investment process





# March 15: Acting Chair Allison Herren Lee's Request

- The format of Acting Chair Allison Herren Lee's March 15 request is unique – not an RFI subject to notice and comment under the APA
- Get the sense that Acting Chair Lee is attempting to push the ESG agenda forward quickly while she has the reins.
- The request is climate-focused as opposed to ESG generally; additionally, it is issuer disclosure-focused (as opposed to fund disclosure).
- It seems that the SEC is driving issuer disclosure as they recognize funds can only provide meaningful comparable disclosure about ESG investing if the information they are consuming from issuers is first comparable and standardized.

# April 9 SEC Risk Alert

The Division of Examinations released a Risk Alert noting observations on deficient and effective practices of investment advisers and funds engaged in ESG investing.

## Deficient Practices

- Disclosure issues
- Control issues
- Proxy voting claims vs. policies and practices
- Misleading or baseless marketing claims
- Weak compliance programs
- Compliance personnel

## Effective Practices

- Clear and tailored disclosures
- Effective compliance programs
- Knowledgeable compliance personnel

# Commissioner Peirce's Statements on the Risk Alert

## April 12

ESG is not unique as compared to other investment strategies or approaches and noted that none of the observations included in the Risk Alert are ESG-specific.

Firms are not required to have in place ESG-specific policies and procedures, nor are firms required to designate ESG-specialized compliance personnel.

A firm's compliance personnel should be sufficiently knowledgeable in all aspects of a firm's business in order to oversee an effective compliance program.

## April 14

The concept of a universal standard of ESG metrics would "constrain decision making and impede creative thinking."

Stands in opposition of Acting Director of Corporation Finance John Coates' recent statements that the SEC "can and should" lead the way in developing a standardized global framework for ESG.

# EU/UK Sustainable Finance Disclosure Regulation

Effective March 10, 2021, the EU Sustainable Finance Disclosure Regulation (SFDR) will apply directly to EU managers of private investment funds and EU portfolio managers of segregated accounts.

- Extra-territorial application of SFDR is not wholly clear yet, but the European Commission has confirmed that financial market participants should comply with the obligations set out in the text of SFDR.
- Certain obligations under SFDR apply to all asset managers whether or not they have an express ESG/sustainability focus; additional aspects will then apply to funds with such a focus.
- The United Kingdom has decided not to onshore SFDR, which means that SFDR does not apply under UK law or indeed as part of the UK national private placement regime under the AIFMD.
- The United Kingdom has announced that it is committed to matching the ambition of the EU in ESG and sustainability as part of its own UK Green Finance Action Plan and it is expected that the United Kingdom will, however, produce its own version of SFDR in the course of this year.

## October 2020 DOL's "Financial Factors in Selecting Plan Investments"

- The Trump administration DOL enacted a proposal determining that in making investment decisions, **a plan fiduciary must only consider pecuniary factors** (except in very limited circumstances).
- In particular, the final Rule interprets ERISA's fiduciary duties under Section 404(a)(1) with respect to investment decisions, with a focus on the duty of loyalty. It primarily does so by adding a requirement that investment decisions be based only on "pecuniary factors" except in very limited circumstances.
- In this reframing of a fiduciaries' duties, the proposal also imposes gatekeeping in the form of procedural and documentation requirements around those limited circumstances.
- The Rule does not presumptively consider ESG factors nonpecuniary. The DOL also clarified in announcing the Rule that "ESG factors could be pecuniary in nature and that, in such cases, fiduciaries properly could consider the factors as part of their investment analysis."

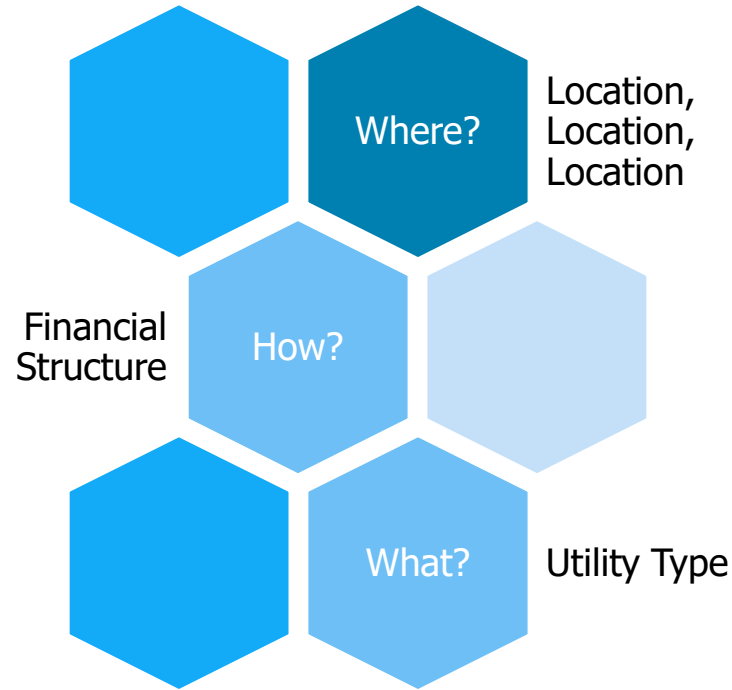
## March 2021 DOL Announces a Nonenforcement Policy Toward New ESG Rules

- In March 2021, EBSA stated that until it releases further guidance, it will not pursue enforcement actions against any plan fiduciary based on a failure to comply with the duty of loyalty and prudence requirements set out in the ESG Rule with respect to an investment.
- This probably signals the end of the DOL's current enforcement effort around ESG usage by ERISA plans and suggests that the Biden DOL may prepare a new set of rulemaking in the areas of ESG.

# Energy Regulation of Electric Investments

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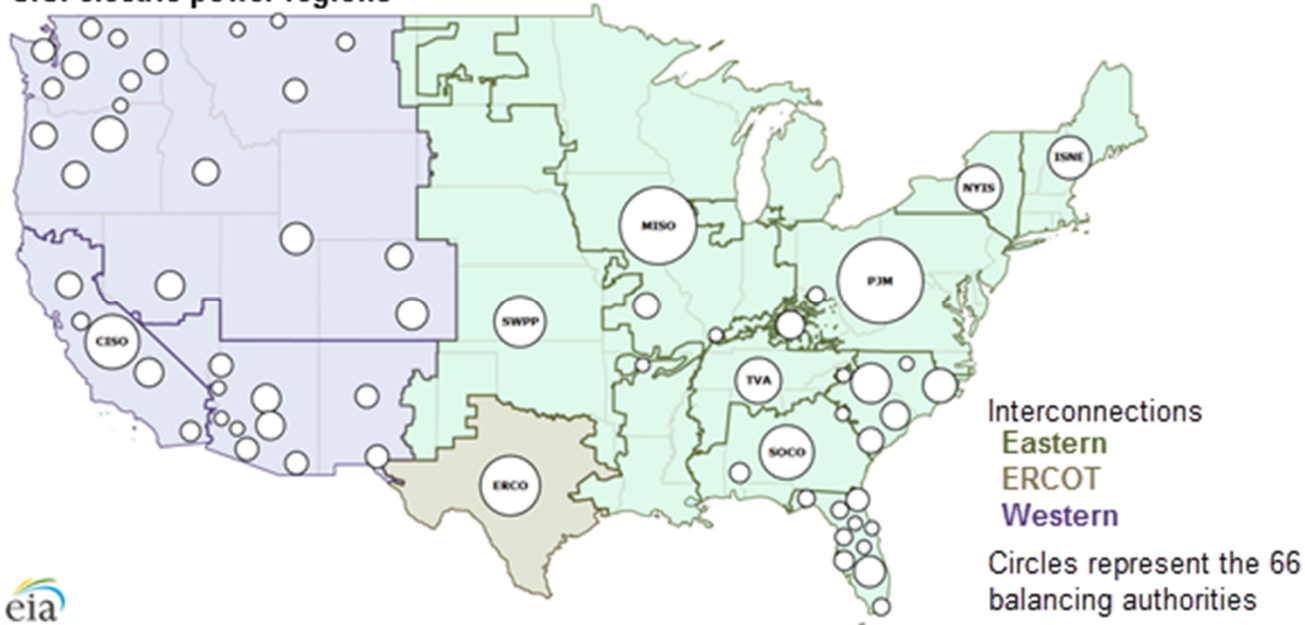
# Regulation as an Energy Investor





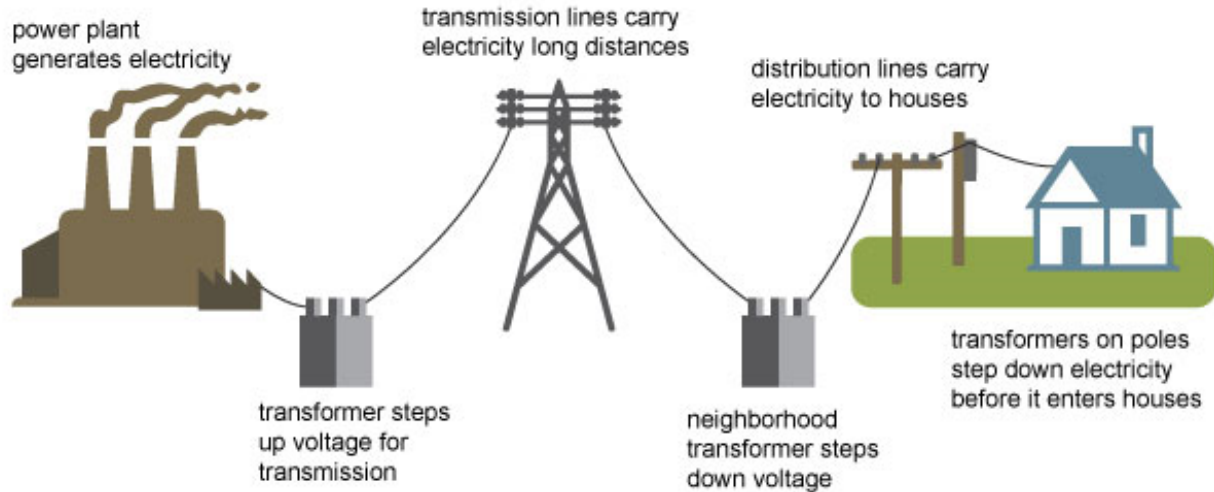
# Federal and State Energy Regulation in the United States

U.S. electric power regions



# Transmission (Federal, Mostly) vs. Distribution (State)

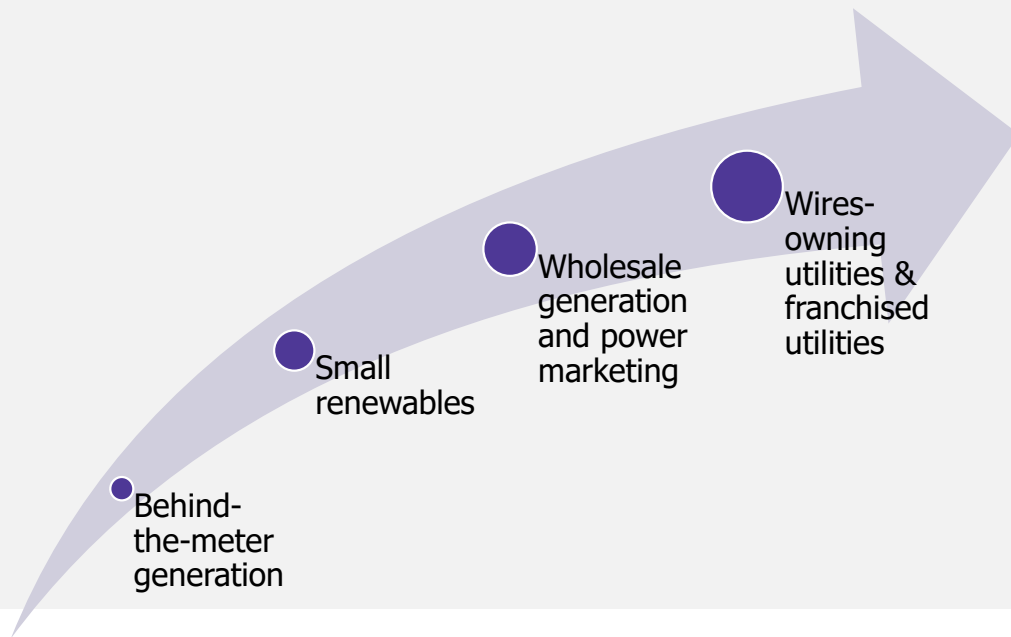
## Electricity generation, transmission, and distribution



Source: Adapted from National Energy Education Development Project (public domain)

# Regulation as an Energy Investor: Type of Entities

- Level of regulation depends heavily on the type of utilities involved



## Regulation as an Energy Investor: Manner of Investment

10%+ Voting  
Equity Investment

"Passive" Investment  
(Limited Partners, Class A  
Members, etc.)

Minor Voting Equity  
Investors

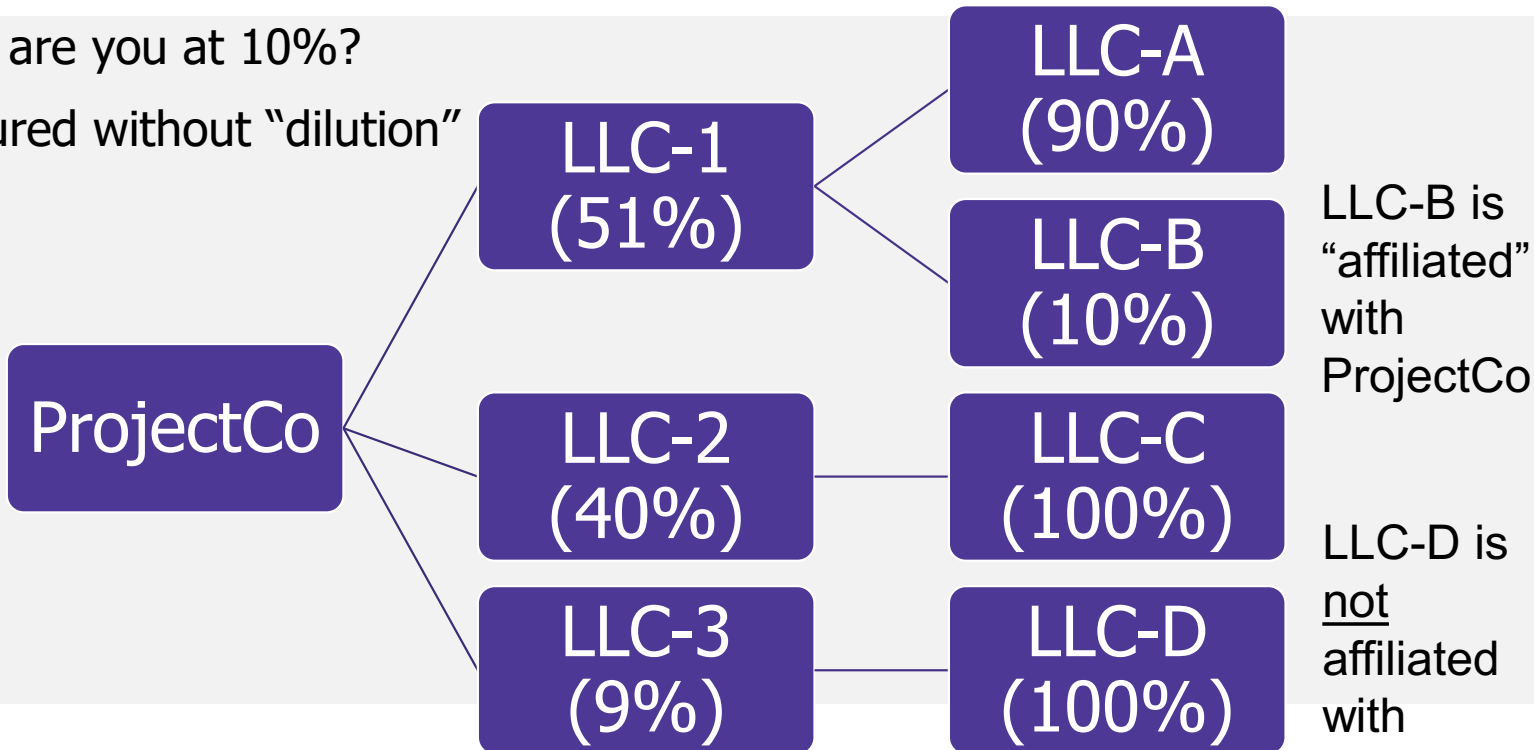
Debt Holders



# 10% or Greater Equity Investment

- When are you at 10%?

= Measured without "dilution"



# Understanding Regulatory Burdens (Federal)

- 10% or greater voting equity = risks of significant regulation, depending on type of assets in portfolio
  - Federal Power Act, Public Utility Holding Company Act of 2005
  - Disclosure, ongoing reporting of additional acquisitions, FERC approvals for M&A
- Sub-10% equity = generally not regulated or disclosed, but 10% threshold would need to be watched carefully (aggregated enterprise-wide)
- 10% or greater equity, but “passive” = disclosure, but generally not regulated
  - Case law-driven legal analysis required
- Debt = generally not regulated or disclosed
- Note: Various exceptions exist and structures can be developed to minimize regulation, generally dependent on hierarchy discussed above
- Caution: Always check the state rules before investing

# Attorney Biographies

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# Gerald Kehoe



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Gerald J. Kehoe focuses on private investment capital formation and investment product structuring. He advises fund sponsors managing vehicles investing in energy, infrastructure, renewables, buyouts, and other strategies. Jerry also advises sponsors and global institutional investors on structuring and implementing co-investments, direct investing pools, master feeder partnerships, and other complex investment structures.

Jerry advises US and international sponsors in fund launches, raising substantial commitments for investments in power and energy generation and transmission assets, real estate, solar and wind projects, patent royalty strategies, leveraged buyouts, clean technology, and other infrastructure assets. Commitments are sourced from institutional US and international investors, including sovereign wealth funds, US and global pension plans, insurance companies, endowments, family offices, and foundations.

Since 2009, *Chambers USA: America's Leading Lawyers for Business* has recognized Jerry for his work. He is active in international business associations and committees promoting the development of commercial law and trade, and he maintains an active pro bono practice.

He was previously a partner in the investment management practice of an international law firm, where he spent four years as the managing partner of its London office.



# Daniel Losk



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Daniel A. Losk advises sponsors and investment managers of real asset-related private equity funds on fund formation matters and structuring and implementing co-investment transactions. He also counsels insurance companies, global pension funds, and other institutional investors in connection with consortia, joint venture, and platform investment transactions. Daniel's diverse transactional experience has also included advising clients on matters involving mergers and acquisitions, project finance, and general corporate transactions.

Daniel has experience working on Latin American transactions and is fluent in Spanish.

Before joining Morgan Lewis, Daniel was an associate in the energy and project finance practice of an international law firm in Boston, and in the project finance and infrastructure practice of another international law firm in New York City.

Prior to attending law school, Daniel worked at a strategy consulting firm, advising domestic beverage and food companies on their international market expansion into Latin America and Europe.

# Miranda Lindl O'Connell



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Miranda Lindl O'Connell represents fund of funds, private foundations, social entrepreneurs, pension plans and other institutional investors in private investment fund transactions. Miranda counsels clients regarding the investment in and secondary sale of interests in private investment funds of a variety of structures including private equity funds, co-investment funds, venture funds, captive funds, separate accounts and other customized private finance options. She advises social entrepreneurs, private foundations, and charities on a range of social impact investments including program-related investments, mission-related investments, and innovative investment vehicles and structures including social impact funds and debt and equity investments. Miranda currently serves as deputy office managing partner of the firm's San Francisco office.

Miranda also counsels clients in the structuring, formation, and governance of US domestic and international private investment funds. She represents clients in the formation of funds of funds, funds sponsored by 501(c)(3) entities, corporate governance funds, venture funds, real estate funds, co-investment funds, and private equity funds.

The American Bar Association presented Miranda with its Outstanding Volunteer in Public Service Award for her work at the Homeless Advocacy Project.

While in law school, Miranda served as an extern for Judge John T. Noonan of the US Court of Appeals for the Ninth Circuit. Prior to law school, she worked as the race director for the San Francisco Marathon.

# J. Daniel Skees



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J. Daniel Skees represents electric utilities before the Federal Energy Regulatory Commission (FERC) and other agencies on rate, regulatory, and transaction matters. He handles rate and tariff proceedings, electric utility and holding company transactions, utility financing, electric markets and trading issues, reliability standards development and compliance, including cybersecurity requirements, administrative litigation, and transmission development. In handling appeals of FERC decisions, Dan has successfully represented clients before both the US Court of Appeals for the District of Columbia Circuit and the US Court of Appeals for the Fifth Circuit.

Dan's representation of companies investing in or developing electric generation include various renewable and carbon-neutral resources, as well as transmission assets are a major focus of his practice. This includes advising them regarding the regulatory concerns triggered by those investments, including the initial transaction, interconnection, and ongoing compliance issues related to market-based rate tariffs, EWG and QF certifications, and public utility holding company compliance. As part of this practice, Dan works with utility investors, including banks, insurance companies, investment funds, private equity firms, and a wide variety of institutional investors to structure their transactions and equity ownership to minimize regulatory compliance concerns and obligations. This includes a significant focus on renewable resources, energy storage resources, and distributed generation used to meet decarbonization and electrification goals.

Where prior FERC authorization is necessary for an acquisition or merger, Dan advises applicants on seeking a receiving such authorizations under Section 203 of the Federal Power Act. Recent examples include FERC authorizations granted in *Hog Creek Wind Project, LLC*, 173 FERC ¶ 62,111 (2020) (portfolio of large renewable energy projects in multiple markets); *Griffith Energy LLC*, 171 FERC ¶ 62,023 (2020) (large natural gas generator); *Public Service Co. of Colorado*, 169 FERC ¶ 61,175 (2019) (acquisition of an existing generating facility by an incumbent vertically-integrated utility) and *NGV Emerald Acquisition Co., LLC*, 167 FERC ¶ 62,125 (2019) (acquisition of a fleet of existing renewable merchant generation projects).

Dan's advising on investments in electric assets also includes issues related to hydroelectric facility relicensing and license transfers under Part I of the Federal Power Act.

The mandatory electric reliability standards under Section 215 of the Federal Power Act are another primary focus area. Dan advises clients regarding compliance with reliability standards, and helps them participate in the development of new standards. Dan's counsel in the reliability area includes the unique compliance concerns presented by the Critical Infrastructure Protection (CIP) reliability standards. Working with business and technical leads within companies, he assists electric utilities in designing their CIP compliance programs and defending those efforts when necessary. The process includes proceedings on reliability compliance before FERC, the North American Electric Reliability Corporation (NERC), and regional entities charged with enforcing compliance. As part of these efforts, Dan advises utilities on the development of controls for the protection of their supply chain against cyber risks, including mitigating the risks of problematic suppliers of equipment, components, and subcomponents through contracts and security controls. Dan is routinely quoted in leading industry news publications on utility cybersecurity issues, including *Utility Dive*, *S&P Global Platts*, *Power Magazine*, *E&E News*, *Law360*, and *Inside Cybersecurity*.

As part of his federal regulatory practice, Dan also regularly advises and counsels foreign diplomatic missions and officers on certain aspects of US law, including compliance with directives from the Office of Foreign Missions of the US Department of State.

# THANK YOU

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