March 30, 2023

Dear Asset Manager:

We, the undersigned attorneys general, are the chief legal officers of our respective states. Among other duties, we enforce our states' civil laws against unfair and deceptive acts and practices and state and federal civil laws prohibiting agreements to restrain competition. Truthful representations to consumers and fair competition are fundamental pillars of our economic prosperity. We are writing this open letter to asset manager industry participants to raise our concerns about the ongoing agreements between asset managers to use Americans' savings to push political goals during the upcoming proxy season.

Your companies are some of the largest asset managers in the United States, collectively controlling trillions of dollars of investments. Many individuals and organizations count on you to provide sound investment products and advice. The top three asset managers alone cast about a quarter of votes at S&P 500 companies' shareholder meetings.[1] You are therefore not only bound to follow the general laws discussed above but also have extensive responsibilities under both federal and state laws governing securities. Broadly, those laws require you to act as a fiduciary, in the best interests of your clients and exercising due care and loyalty. Simply put, you are not the same as political or social activists and you should not be allowing the vast savings entrusted to you to be commandeered by activists to advance non-financial goals.

Many asset managers, however, have made commitments that cast doubt on their adherence to fiduciary requirements, representations to consumers about their services, and compliance with antitrust laws. As explained further below, asset managers have committed to use client assets to change portfolio company behavior so that it aligns with the Environmental, Social, and Governance (ESG) goal of achieving net zero by 2050. This specific, political commitment changes the terms of the products offered, as well as engagements with individual companies. These changes may be especially apparent in the 2023 proxy season that presents several resolutions related to net zero and social issues. This letter lays out our concerns with this course of

[1] Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 724 (2019).

DEPARTMENT OF JUSTICE
215 North Sanders
PO Box 201401
Helena, MT 59620-1401
(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

conduct and highlights several legal issues presented by upcoming proposals in this proxy season.

I. Asset Managers Have Extensive Legal Duties Under Federal and State Law

Without attempting to comprehensively list all the overlapping legal regimes you must comply with, your overarching role as investment advisers under federal law is to act as a fiduciary to your clients, exercising "a duty of care and a duty of loyalty."[2] "[T]he duty of care requires an investment adviser to provide investment advice in the best interest of its client, based on the client's objectives," and the duty of loyalty requires an adviser to "eliminate or make full and fair disclosure of all conflicts of interest which might incline [her]—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict."[3] To put it simply, you "cannot place [your] own interests" or those of other clients "ahead of the interests of [your] client."[4] These duties are important to "mitigate" the risk of advisers "tak[ing] actions that increase their well-being at the expense of investors, thereby imposing agency costs on investors."[5] In addition, you have a duty to comply with state laws prohibiting unfair or deceptive trade practices, as well as securities laws that prohibit investment advisers from engaging in fraudulent or misleading practices and self-dealing.[6]

II. Asset Managers Appear To Be Disregarding Their Legal Duties

Despite the extensive duties that you owe to your clients under federal and state law, many of you have committed to take actions inconsistent with your clients' financial interests. We outline several of these apparent inconsistencies below.

Many in your industry have joined the Net Zero Asset Managers Initiative ("NZAM"), which, among other things, directs members to "accelerate the transition towards global net zero emissions and for asset managers to play our part to help deliver the goals of the Paris Agreement."[7] Members commit to "[i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is

---

[2] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669, 33,669 (2019); *see SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); 15 U.S.C. § 80b-6; 17 C.F.R. § 240.10b-5.
[3] 84 Fed. Reg. at 33,671; *see id.* at 33,670 (noting such disclosure reflects "Congressional intent" (citing *Capital Gains Research*, 375 U.S. at 191-92)).
[4] *Id.* at 33,671.
[5] *Id.* at 33,679.
[6] *E.g.*, Utah Code §§ 61-1-1, 61-1-2; Tex. Bus. & Com. Code Ann. § 17.46; Tex. Gov't Code Ann. § 4008.101.
[7] Net Zero Asset Managers ("NZAM"), Commitment ("NZAM Commitment").

consistent with [their] ambition for all assets under management to achieve net zero emissions by 2050 or sooner."[8] Far from being optional, NZAM describes this requirement as core to the initiative and one that is "comprehensively implemented" to prevent allegations of greenwashing.[9] Perhaps most shockingly, NZAM members have committed to "challenge" and "seek to overcome" the "constraints [they] face," which in context appears to include "legal duties to clients" and "applicable law" to achieve net zero by 2050.[10] These are not the words of a dedicated fiduciary and these commitments color any votes taken on these issues.

Many of you also participate in Climate Action 100+, which exerts coordinated pressure to seek "commitments from boards and senior management" to "reduce greenhouse gas emissions across the value chain" consistent with the Paris Agreement and achieving net zero by 2050."[11] Members of Climate Action 100+ commit to forcing portfolio companies to "align[] political lobbying with the Paris Agreement," without allowance for whether such an alignment would be in the financial best interests of the company.[12] Potential unlawful coordination appears throughout Climate Action 100+'s documents. Despite boilerplate disclaimers, initiative members clearly speak for the group as they commit to communicate "a central message" to companies: "[I]naction by companies following engagement may result in investors taking further action."[13] None of this is financially defensible. Instead, it is a transparent attempt to push policies through the financial system that cannot be achieved at the ballot box.

The assumptions behind your commitments have also been shown to be false. Your commitments were made on the "expectation that governments will follow through on their own commitments to ensure the objectives of the Paris Agreement are met,"[14] as well as on many other assumptions about science, financial impacts, and public policy. As is commonly known (and as at least one of you has acknowledged), "[g]overnments are not implementing policies to require net zero."[15] In fact, none of the world's biggest emitters—China, the United States, the European Union, and India—are on track to meet Paris Agreement goals.[16] A recent United Nations report confirms the gap between countries' carbon commitments and actual policies and an even greater gap between the theoretical commitments and what would be

[8] *Id.*
[9] NZAM, FAQ.
[10] NZAM Commitment, *supra* note 7.
[11] Climate Action 100+, The Three Asks.
[12] Climate Action 100+, 2021 Year in Review, at 8; *see also infra* notes 74–75.
[13] Climate Action 100+, Engagement Process.
[14] NZAM Commitment, *supra* note 7.
[15] Arizona Attorney General Mark Brnovich et al., Letter from 19 State Attorneys General to Laurence D. Fink, at 4 (Aug. 4, 2022).
[16] Max Bearak & Nadja Popovich, The World is Falling Short of Its Climate Goals. Four Big Emitters Show Why, N.Y. Times (Nov. 8, 2022).

required to fully realize the energy transition you assume will take place.[17] Full implementation of all nations' updated pledges would result in a global greenhouse gas emissions level 15.9% *above* the 2010 level in 2030, while the 1.5°C target requires global carbon emissions to *decrease* by 45% in 2030.[18] Many of you appear to have actual knowledge that this assumption is false because the climate organization many of you have joined issued a "Call to Action" for governments to "follow through on their commitments to the Paris Agreement objectives."[19]

Given these facts, we have significant concerns with how many of you advertise your products and how you are engaging with individual companies. *First*, given that many of you have committed "all assets under management" to certain environmental goals, your failure to label or advertise all your funds as ESG funds suggests a breach of your duties of care and loyalty. As far as we can tell, your non-ESG funds do not disclose to investors that their investments will be used to further ESG goals, including pressuring companies to reduce emissions in economically destructive ways. Relatedly, many of you have seemingly failed to disclose that your funds marketed as "passive" funds are being used to actively influence company behavior. Indeed, pressuring companies to reach zero commitment is one of the most radical active investment strategies imaginable. The organizations you have joined describe the goal as "transforming the economy" and the financial system at a cost of over $100 trillion.[20] Investors looking for low cost, passive indexing investments may be unwittingly funding your ESG activism. Any misrepresentations regarding the funds you are offering is legally troubling.

Second, many of you have not adequately explained to investors the downsides and risks of the funds you *do* market as ESG funds—even as you charge much higher fees for these funds. As noted above, many of your environmental assumptions appear to be dubious, making it perhaps unsurprising that ESG funds perform poorly.[21] At the same time, by one estimate, ESG funds "have 43% higher fees than widely popular

[17] U.N. Environment Programme, Emissions Gap Report 2022: The Closing Window — Climate Crisis Calls for Rapid Transformation of Societies (Oct. 27, 2022).
[18] U.N. Framework Convention on Climate Change, Nationally Determined Contributions Under the Paris Agreement, ¶ 13, U.N. Doc. FCCC/Pa/CMA/2021/8/Rev.1 (Oct. 25, 2021).
[19] Glasgow Financial Alliance for Net Zero ("GFANZ"), Call to Action ("GFANZ Call to Action").
[20] GFANZ, Amount of Finance Committed to Achieving 1.5°C Now at Scale Needed to Deliver the Transition (Nov. 3, 2021).
[21] *See*, *e.g.*, Sanjai Bhagat, An Inconvenient Truth About ESG Investing, Harv. Bus. Rev. (Mar. 31, 2022) ("ESG funds certainly perform poorly in financial terms."); Sally Hickey, Large Cap ESG Funds Perform Worse Than Non-Sustainable Counterparts, FT Adviser (Jul 13, 2022) ("[T]he higher a fund's ESG rating, ranked based on Morningstar's sustainability ratings, the worse its returns over the year to June 22.").

standard ETFs."[22] Tariq Fancy, BlackRock's former Chief Investment Officer for Sustainable Investing, noted that ESG investing "provided the opportunity for . . . a bump in what were otherwise plummeting fees as competition had grown in recent years."[23] These higher fees are charged even though the makeup of many ESG funds are "closely aligned" with generic S&P 500 funds.[24] Thus, two possibilities exist: many asset managers are charging higher fees for a nearly-identical product, or they are charging higher fees for a product that carries lower returns or, at minimum, is based on unstudied and unreasonable assumptions. Either way, the disclosures around these offerings raise significant legal questions.[25]

Third, engagements with companies raise more questions about whether asset managers have complied with their fiduciary duties, particularly the duty of loyalty to disclose all conflicts of interest. These engagements often come in connection with voting decisions about company directors and shareholder proposals, and with the start of the 2023 proxy season, this remains an item of particular concern, as discussed further below.[26] Rather than being based on a rational financial calculus regarding potential changes to government policy, such actions force companies to comply with rules that governments will likely not institute. Companies are already required to disclose "impacts related to climate change" that "have a material effect on a [company's] business and operations."[27] Only extraneous motives could explain efforts by asset managers to require companies to disclose non-material risks associated with climate change. Such engagement will, in many cases, destroy value and make companies and their investors worse off.

---

[22] Michael Wursthorn, Tidal Wave of ESG Funds Brings Profit to Wall Street, Wall St. J. (Mar. 16, 2021).
[23] Tariq Fancy, The Secret Diary of a 'Sustainable Investor,'The Secret Diary of a 'Sustainable Investor' — Part 1, Medium (Aug. 2021); *see also id*. ("Since ESG products generally carry higher fees than non-ESG products, [sustainable investing] represents a highly profitable and fast-growing business line for BlackRock and other financial institutions.").
[24] Akshat Rathi et al., How Blackrock Made ESG the Hottest Ticket on Wall Street, Bloomberg (Jan. 18, 2022) ("ESGU's fees are lower than industry averages for sustainable funds but are still five times higher than an S&P 500 tracker that trades under the ticker IVV – a popular BlackRock fund whose makeup and expected performance are closely aligned with those of ESGU.").
[25] *See generally* Uniform Prudent Investor Act § 5 cmt. (1994) ("No form of so-called 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause.").
[26] *See, e.g.*, Travelers Cos., Inc., Letter from Yafit Cohn to SEC ("Travelers As You Sow Letter") (Jan. 17, 2023); Press Release, As You Sow, As You Sow Files Resolutions With 5 Largest U.S. Banks Seeking Transition Planning to Meet Net-Zero Targets (Jan. 24, 2023); Dan Romito, The Top 15 Anticipated ESG-Related Considerations That Will Influence Strategy in 2023, Harv. L. Sch. F. Corp. Governance, (Dec. 31, 2022).
[27] SEC, Commission Guidance Regarding Disclosure Related to Climate Change (17 CFR Parts 211, 231 and 241; Release Nos. 33-9106; 34-61469; FR-82) ("SEC Guidance"), at 6 (Feb. 2, 2010).

Political climate goals are at the heart of your ESG commitments, as the initiatives you have joined describe themselves as playing a "critical role" to "mobile[ze] capital" and "protect[] nature."[28] Your co-members in these initiatives are some of the most radical ESG activists, who routinely try to change company behavior through shareholder resolutions.[29] These activists have little ownership stake in public companies, yet the assets clients have entrusted to you provide these activists with leverage. Public documents indicate that some large government clients asked their asset managers to join these political ESG initiatives,[30] potentially compromising their fiduciary duty to pursue financial return for other clients. To our knowledge, asset managers have not disclosed that their ESG commitments were made at the request of clients who may have a political agenda. Votes cast in support of activist members and certain government clients, in line with your political ESG commitments, present multiple conflicts of interest and are unlikely to be justifiable on financial grounds.

We also have concerns that horizontal agreements related to voting and engagement through organizations such as Climate Action 100+ and NZAM unreasonably restrain and harm competition. As noted above, NZAM members commit to "[i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050 or sooner."[31] An agreement to limit the types of asset stewardship services offered by asset managers across "all assets under management" will have adverse effects on competition. And there appear to be less restrictive means that accomplish most of the goals related to disclosure while also providing significantly less exclusion of competition in asset-manager services offered in our states.

Finally, we have similar concerns about certain asset managers' approach to social issues and how they engage companies on such issues. For instance, many of you have imposed racial and gender-based quotas for company board members.[32] And many of you have pledged to support so-called racial equity audits and similar company actions. One especially problematic trend has been shareholder proposals that insurance companies base their underwriting decisions on race rather than actuarially justified risk.[33] These proposals claim in part that insurance companies charge higher premiums "in minority communities versus whiter communities" and urge companies to "identify and close potential gaps" to alleviate any disparate impact.[34] In other words, activist shareholders request that companies report "racial impacts of [the

---

[28] GFANZ Call to Action, *supra* note 19.
[29] Climate Action 100+, InvestorsInvestor Signatories ("Climate Action 100+ Investor Signatories").
[30] Climate Action 100+, How We Work.
[31] NZAM Commitment, *supra* note 7.
[32] *E.g.*, State Street, Guidance on Diversity Disclosures and Practices, at 2–3 (Jan. 2022).
[33] *See, e.g.*, Travelers Cos., Inc., 2022 Proxy Statement (DEF 14A), at 79 (Apr. 8, 2022).
[34] *Id.*

company's] policies, practices, products and services" and request that they (illegally) alter their underwriting criteria or pricing to achieve different outcomes based on race.[35] Yet similar proposals continue to appear in 2023, as discussed below.[36]

III. Asset Managers' Fiduciary Duties In The 2023 Proxy Season

The 2023 proxy season will present multiple occasions on which asset managers will have to choose between their legal duties to focus on financial return, and the policy goals of ESG activists.

A. Banking

Banks are facing multiple proposals in 2023 from climate-initiative activists affiliated with organizations many asset managers have joined. These include Climate Action 100+ "engagement service providers" As You Sow, Seventh Generation Interfaith, and Shareholder Association for Research & Education. They also include Climate Action 100+ affiliated asset managers Arjuna Capital, New York City Comptroller, New York State Comptroller, and Trillium Asset Management. Resolutions (implicitly or explicitly) backed by horizontal asset-manager organizations that do not on their face evidence value to the underlying shareholders are particularly troubling.

Specifically, climate change resolutions have been filed for at least ten North American banks.[37] Some of these proposals require banks to explain the "specific measures and policies" required to align their financing "with [their] 2030 sectoral greenhouse gas emissions reduction targets" tied to net zero by 2050 and quantify resulting emissions reductions.[38] The proposals further note that "targets alone are insufficient" and instead seeks "banks' concrete transition strategies to credibly achieve their disclosed emission reduction targets."[39] As an example, one proposal specifically criticizes a bank for "increas[ing] its fossil fuel funding above 2019 levels."[40] These resolutions are a transparent attempt to use large banks to cut off funding to

---

[35] *See* Travelers Cos., Inc., Letter from Yafit Cohn to SEC ("Travelers Trillium Letter") (Jan. 17, 2023).
[36] *See, e.g.*, *id.*
[37] These are Bank of America, Bank of New York Mellon Corporation, Citigroup, Goldman Sachs, JP Morgan, Morgan Stanley, Royal Bank of Canada, Scotiabank, TD Bank, and Wells Fargo. *See* Ceres, Engagement Tracker.
[38] As You Sow, Goldman Sachs Group Inc: Report on Climate Transition Planning ("As You Sow Goldman Sachs Report") (Nov. 18, 2022); *see also* As You Sow, JPMorgan Chase & Co: Report on Climate Transition Planning (Dec. 2, 2022); As You Sow, Morgan Stanley: Report on Climate Transition Planning (Dec. 9, 2022); As You Sow, Wells Fargo & Co: Report on Climate Transition Planning ("As You Sow Wells Fargo Report") (Nov. 17, 2022).
[39] As You Sow Goldman Sachs Report, *supra* note 38.
[40] As You Sow Wells Fargo Report, *supra* note. 38.

business in our states that may be out of step with environmental activists' net zero goals.

As another example, a bank is facing a proposal by Trillium Asset Management to limit high-carbon financing and by the New York State Comptroller to establish "2030 absolute greenhouse gas emissions reduction targets for … energy sector lending and underwriting."[41] In a similar vein, the New York City Comptroller has submitted proposals for two major banks to establish targets limiting "both lending and underwriting for … oil and gas and power generation."[42] The Sierra Club has sponsored proposals specifically calling for four major banks to cut off lending, *i.e.* to "phase out financing of new fossil fuel exploration and development."[43] Banks are currently subject to an investigation by nineteen Attorneys General regarding their existing coordinated net zero commitments through Net Zero Banking Alliance (NZBA), yet your fellow Climate Action 100+ members believe they should double down.[44]

Finally, at least one bank made a commitment to Climate Action 100+ member Arjuna Capital in return for withdrawal of a shareholder proposal for the bank to set near- and long- term GHG reduction targets aligned with the Paris Agreement and address emissions associated with the company's lending, investment, and underwriting for its highest-emitting sectors.[45] Using the threat of Climate Action 100+ action to obtain a commitment from a bank not to lend to certain sectors is just as problematic as voting on such a proposal.

In addition to the climate proposals noted above, other proposals seek to fully align banks with one political party.[46] One proposal complains that a bank donated to political campaigns of candidates who have sponsored pro-life legislation—undoubtedly all Republicans.[47] Voting for this transparently political proposal, or others like it, would demonstrate plainly that you are more concerned about political goals than maximizing financial returns for investors.

---

[41] Ceres, Limit High Carbon Financing (BAC, 2023 Resolution); *see also* Ceres, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKCewAAHReport on GHG Emissions Targets (BAC, 2023 Resolution).
[42] These are Goldman Sachs and JP Morgan. *See* Ceres, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKJQ2AAPReport on GHG Emissions Targets (GS, 2023 Resolution); Ceres, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKJQ7AAPReport on GHG Emissions Targets (JPM, 2023 Resolution).
[43] *E.g.*, Ceres, Limit High Carbon Financing (WFC, 2023 Resolution).
[44] *See* Press Release, Missouri Attorney General Leads 19 State Coalition in Launching Investigation into Six Major Banks Over ESG Investing (Oct. 19, 2022).
[45] *See* Ceres, Report on GHG Emissions Targets (BK, 2023 Resolution).
[46] As You Sow, JPMorgan Chase & Co: Disclosure of Incongruent Lobbying Activity (Dec. 2, 2022).
[47] *Id.*

In addition, voting for proposals that direct a bank's lending behavior may expose asset managers having exercised control over a bank. Indeed, a United States Senate report warned that net zero agreements or a coordination of voting through proxy advisors could lead to "a finding of concerted or other associated effort that could be deemed 'control' by an 'association' or 'similar organization.'"[48] Many of the proposals noted above are from As You Sow, a Climate Action 100+ "Engagement Service Provider,"[49] and many Climate Action 100+ members (including some of you) likely will vote for it, which may demonstrate coordination through the group. Such a finding could take place even without coordination if the asset manager is of sufficient size.[50]

B. Insurance

Several insurers also face climate proposals that push for unlawful alterations of underwriting activities in order to achieve the ESG goal of aligning insurance underwriting with net zero by 2050.[51]

A Climate Action 100+ member appears to be attempting to control the operation of insurance companies. According to one company, As You Sow "acknowledged that … they had in fact specifically aimed to restrict and circumscribe" the insurer's products and services.[52] Specifically, As You Sow pressed for specific actions including:

- "[C]harg[ing] higher premiums for cars that run on conventional fuels";
- Using client relationships to "disincentivize the emissions of oil and gas clients"; and
- "Terminating clients based on their activities—namely, their failure to transition their GHG emissions activity."[53]

---

[48] *See* Minority Staff of the S. Comm. on Banking, Housing & Urban Affairs, The New Emperors: Responding to the Growing Influence of the Big Three Asset Managers ("The New Emperors"), at 15 (Dec. 2022).
[49] Climate Action 100+ Investor Signatories, *supra* note 29.
[50] *See* The New Emperors. As the report observes, in order to avoid such a designation, BlackRock has sought assurances from federal regulators, and promised not to "take any action to control the" regulated company under certain federal laws. *Id.* at 15; *see* Federal Reserve, Ltr. from Federal Reserve to BlackRockLetter from Mark E. Van Der Weide to BlackRock, at 3 (Dec. 3, 2020).
[51] *See, e.g.* As You Sow, Berkshire Hathaway Inc: Disclose and Reduce GHG Emissions From Underwriting, Insuring, and Investment Activities Aligned with Net Zero (Nov. 15, 2022); As You Sow, Chubb Ltd: Disclose and Reduce GHG Emissions From Underwriting, Insuring, and Investment Activities Aligned With Net Zero (Dec. 7, 2022); As You Sow, Travelers Companies Inc: Disclose and Reduce GHG Emissions From Underwriting, Insuring, and Investment Activities Aligned With Net Zero (Dec. 9, 2022); *see also* Chubb Ltd., Ltr. from Edward Best to SECLetter from Edward Best to SEC; Travelers As You Sow Letter, *supra* note 26.
[52] *See* Travelers As You Sow Letter, *supra* note 26, at 9–10.
[53] *Id.*

As You Sow "conceded" that its proposed actions "could subject the Company to litigation and regulatory scrutiny beyond the obvious impact to the Company's business," but continued to push for its proposal.[54]

Voting for such proposals could not only expose insurers to liability, but also expose you to liability for violating fiduciary duties by exposing companies to liability in order to support the ESG goals of your fellow climate initiative members.

In addition, state regulations presume that "control" of an insurer exists when a person has at least 10% of the voting shares.[55] Coordinated efforts (such as through proxy advisors or coalitions) may result in sufficient consolidation of shares well beyond the 10% mark, leading to a presumption that colluding asset managers are "controlling" an insurer and thus can be regulated as an insurer.[56]

One of your fellow ESG initiative members is also asking an insurer to discriminate on the basis of race in providing insurance,[57] which would likely violate the laws in many if not all of our states.[58] Voting for proposals that encourage companies to engage in prohibited race discrimination could violate fiduciary duties, as the proposals would unnecessarily expose an insurer to liability and also reduce the insurer's returns, as insurance premiums would be set based on race rather than purely on risk.

C. Net Zero Compliance at Utility, Energy, and Other Companies

Your fellow climate initiative activists are pushing climate change resolutions on many other companies as well to force those companies to comply with the ESG net zero goals you have committed to achieve.

With respect to utility companies, As You Sow has filed proposals for multiple utilities to require "short and long-term targets aligned with the Paris Agreement's

---

[54] *Id.*
[55] Notably, in at least some states, this threshold is lower than for other types of businesses. *Compare, e.g.*, Fla. Stat. § 624.10(3) ("Control [under the Insurance Code] is presumed to exist if a person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing 10 percent or more of the voting securities of another person."), *withid.* § 607.0901 (20% interest presumed to have control).
[56] *See supra* notes 48–50 and accompanying text; *see also* Motion to Intervene and Protest, at 14, *In re Vanguard Grp., Inc.*, No. EC19-57-001 (Fed. Energy Regulatory Comm'n Nov. 28, 2022) (motion by over a dozen attorneys general raising concerns about whether a "group effort" by asset managers who joined NZAM may result in those managers collectively exceeding percentage ownership markers related to the Federal Power Act).
[57] *See* Travelers Trillium Letter, *supra* note 35.
[58] *Id.* at 10–12 n.7.

1.5°C goal requiring Net Zero emissions by 2050 for the full range of its Scope 3 value chain GHG emissions."[59] It is highly doubtful that requiring utility companies to adopt Scope 3 emissions targets, when those are not required by applicable federal or state law, is in the interests of shareholders.

With respect to energy companies, Follow This has introduced proposals requiring large energy producers to align their Scope 3 emissions with Paris targets.[60] These resolutions seek to coerce medium-term Scope 3 emission reductions by these companies. As with the resolutions targeting utility companies, it is highly doubtful these resolutions are in the interests of shareholders.

Some proposals push for greater "transparency" from energy producers about how those producers are reducing emissions, without any explanation of why this transparency would benefit the company or its shareholders.[61] Other proposals attempt to force companies to "achieve deforestation-free commodity supply chains by 2025,"[62] while warning those companies that "[f]inancial institutions with nearly $9 trillion in assets under management have committed to eliminating agricultural commodity-driven deforestation from their portfolios by 2025."[63] In other words, activists have forced banks to create ESG mandates, and now try to convince non-banks that they must go along with those mandates or risk losing funding from the banks.

In a different vein, As You Sow is also pushing three companies to stop using Vanguard as the default plan for their employee 401(k) accounts, claiming that Vanguard funds "invest significantly in fossil fuel companies."[64] As You Sow has brought three resolutions targeting Vanguard specifically without any resolutions related to the other members of the "Big Three." Perhaps it has something to do with the fact that Vanguard withdrew from the Net Zero Asset Managers Initiative in early

[59] Ceres, Adopt GHG Reduction Targets (AEE, 2023 Resolution).
[60] Follow This, Follow This Resolutions 2023.
[61] *See, e.g.*, As You Sow, ExxonMobil Corp: Report Impact of Asset Transfers on Disclosed Greenhouse Gas Emissions (Dec. 7, 2022); As You Sow, Chevron Corp: Impact of Asset Transfers on Emissions Disclosure (Dec. 7, 2022).
[62] *See, e.g.*, As You Sow, Papa John's International Inc: Eliminate Deforestation From Company Supply Chains ("As You Sow Papa John's Proposal") (Nov. 2, 2022); As You Sow, Pilgrims Pride Corp: Eliminate Deforestation From Company Supply Chains ("As You Sow Pilgrims Pride Proposal") (Dec. 5, 2022).
[63] As You Sow Papa John's Proposal, *supra* note 62; As You Sow Pilgrims Pride Proposal, *supra* note 62.
[64] As You Sow, Comcast Corp: Report on Assessing Systemic Climate Risk From Retirement Plan Options (Dec. 21, 2022); As You Sow, Netflix Inc: Report on Assessing Systemic Climate Risk From Retirement Plan Options (Dec. 22, 2022); As You Sow, Amazon.com Inc: Report on Assessing Systemic Climate Risk From Retirement Plan Options (Dec. 15, 2022).

December 2022—the same month that all three resolutions were filed.[65]Asset managers voting for the exclusion of one of their competitors has clear antitrust implications.

Once again, votes for these proposals are votes to promote political ESG purposes, not the maximization of returns for investors as demanded by fiduciary duties. As noted above, companies already must disclose "impacts related to climate change" that "have a material effect on a [company's] business and operations."[66] As for these additional disclosures, investors will not get better returns if energy companies disclose potentially damaging information, food sellers switch to more expensive but activist-approved supply chains, or other companies pick a different provider for their employee 401(k) plans. But activists will be pleased if those proposals pass and will be able to use those proposals as leverage to pressure other companies to do the same.

D. Abortion and Political Spending

According to one activist group, more abortion-related proposals are on proxy ballots this year than on all other previous years *combined*.[67] These proposals include: (1) "political spending misalignment" and (2) "risk mitigation."[68]

1. "Political Spending Misalignment"

Like the proposal described above, these proposals seek to force companies to explain donations to candidates of only one party. Another variation of these proposals attempts to force companies to (1) obtain reports from third-party organizations before donating to those organizations, and (2) publicly file those reports from the third-party organization.[69] Like the other proposals noted above, the explanatory notes are focused on denying donations to Republicans, with the proposals worrying that donated funds could end up being given to "attacks on voting rights, efforts to deny climate change, and efforts to impose extreme restrictions on abortion."[70]

At least two lobbying proposals are sponsored by Climate Action 100+ members, which include government agencies. Seventh Generation Interfaith sponsored a proposal asking a large bank to align its lobbying with commitment to achieve Net Zero

---

[65] Ross Kerber & Noor Zainab Hussain, Vanguard Quits Net Zero Climate Effort, Citing Need for Independence, Reuters (Dec. 7, 2022).
[66] SEC Guidance, *supra* note 27, at 6.
[67] *See* Press Release, Rhia Ventures, Press: Shareholders File Numerous Proposals Addressing Access to Reproductive Health Care for 2023 Proxy BallotsShareholder Proposals Address Reproductive & Maternal Health Benefits (Jan. 24, 2023).
[68] *Id.*
[69] *See, e.g.*, SEC, Ltr. From SEC to Eli LillyLetter from Rule 14a-8 Review Team to Eli Lilly (Mar. 6, 2023).
[70] *Id.*

by 2050.[71] Similarly the Vermont Pension Investment Commission sponsored a resolution requiring an energy company to align its lobbying and political activities with a commitment to achieve net zero.[72] It is troubling that members of a horizontal organization of asset managers that includes many government actors would be trying to limit political speech, particularly when there does not appear to be a shareholder financial basis for the limitation.

As noted above, voting for these political proposals would prioritize political goals over financial interests, which could violate fiduciary duties and would also raise Hatch Act concerns.

2. "Risk Mitigation"

Finally, proposals seek to force companies to issue reports "detailing any known and potential risks and costs to the company caused by enacted or proposed state policies severely restricting reproductive rights."[73] The proposals also encourage companies to consider "related political contribution policies" and "public policy advocacy."[74] The proposed report would not include any analysis of risks and costs created by enacted or proposed state policies advocating *for* "reproductive rights."

Given the polarization of this issue, these proposals raise similar concerns and liability risks to the political contribution proposals. The supposed financial impacts of these proposals are especially flimsy, with the proponents weakly offering that the company "may find it more difficult to recruit employees to … states which have outlawed abortion."[75] Clearly, in context, these proposals are attempts to force companies to (1) spend time and money creating reports containing anything as minor as a "potential risk[]" from a "proposed state polic[y]," which can then be used by abortion rights advocates, and (2) announce "related political contribution policies" to restrict donations to pro-life (Republican) political candidates. Voting for these proposals prioritizes political goals over the financial interests of the company's shareholders and raises Hatch Act concerns.

3. Race and Gender Quotas

As in other years, many proposals push for "diversity, equity, and inclusion" initiatives designed to incorporate race or gender quotas into board or employee composition. One activist group lists 25 "Diversity and Gender Equality" proposals it filed

---

[71] Ceres, Report on Lobbying in Line with Net Zero GHG Target (WFC, 2023 Resolution).
[72] Ceres, Report on Lobbying in Line with Net Zero GHG target (DVN, 2023 Resolution).
[73] *See, e.g.*, Rhia Ventures, Coca-Cola Reproductive Resolution.
[74] *Id.*
[75] *Id.*

for this proxy year alone, and already, 11 of the recipient companies have "reached agreement" with the activist group on the issue.[76] The remaining holdouts must defend proposals seeking to require their companies "to report to shareholders on the effectiveness of the Company's diversity, equity, and inclusion efforts."[77] Although the reports supposedly are for the purpose of "understand[ing] how well [the company is] hiring, promoting, and retaining the best possible employees," the requested reports make no mention of qualitative performance by employees, instead seeking "*quantitative* metrics … including data by gender, race, and ethnicity"[78] – in other words, quotas.

As discussed further below, the supposed evidence behind these proposals is inconclusive at best.[79] Without such evidence, requiring companies to pay for expensive reports merely to satisfy the whims of activists is not in line with the fiduciary duty to act in the sole interest of shareholders.

IV. Asset Managers Lack Valid Defenses

Several defenses have been raised by ESG proponents when confronted with the issues raised above. Those defenses are unavailing, as discussed below.

A. Shareholder Proposals Are Not Merely "Precatory"

Although one proxy advisor recently has defended its recommended votes by arguing that shareholder proposals are merely "precatory" and "not binding," that is not the case in practice.[80] Every proposal carries the implied threat to directors that their failure to respond to that proposal in the desired fashion will result in a coordinated effort to have those directors removed.[81] Two proxy advisors, Institutional Shareholder Services (ISS) and Glass Lewis, control nearly the entire proxy advisor

---

[76] As You Sow, ResolutionsCurrent Resolutions. To find the proposals, filter by "Diversity and Gender Equity" and "2023."
[77] *See id.*
[78] *See, e.g.*, As You Sow, Berkshire Hathaway Inc: Greater Disclosure of Material Corporate Diversity, Equity, and Inclusion (Nov. 14, 2022) (emphasis added).
[79] *See infra* notes 107–111 and accompanying text.
[80] Glass Lewis, Ltr. from Glass Lewis to State AGsLetter from Kevin Cameron to State Attorneys General ("Glass Lewis State Attorneys General Letter"), at 6 (Jan. 31, 2023). This explanation begs the question of why companies would pay proxy advisors hundreds of millions of dollars a year to get advice on "precatory," non-binding proposals. *See, e.g.*, Press Release, Inst'l S'holder Servs., Deutsche Börse Acquires Leading Governance, ESG Data and Analytics Provider ISS (Nov. 17, 2020) (stating that ISS's 2020 revenue was expected to be more than $280 million).
[81] *See* Inst'l S'holder Servs., 2022 U.S. Voting Guidelines2022 U.S. Proxy Voting Guidelines ("ISS 2022 Proxy Voting Guidelines"), at 13; Glass Lewis, 2022 Policy Guidelines, at 19.

market.[82] ISS's U.S. guidelines vow to advocate for votes against members or entire boards "as appropriate" if the board fails to act on a successful shareholder proposal.[83] Glass Lewis goes even further and warns that even if a shareholder proposal fails, Glass Lewis nevertheless may advise its clients to vote against directors who do not "demonstrate some initial level of responsiveness" to a failed shareholder proposal that scraped together as little as *20% of the vote* – never mind the fact that up to 80% of shareholders disagreed with the proposal.[84] These advisors' recommendations on director votes carry tremendous sway, giving their threats real teeth.

Moreover, ISS has effectively joined the efforts of Climate Action 100+ by committing to use its climate benchmark in board votes.[85] For example, ISS's 2023 benchmark policy states it will recommend "generally vot[ing] against" directors at companies "on the current Climate Action 100+ Focus List" that have not adopted "medium-term [greenhouse gas (GHG)] reduction targets or Net-Zero-by-2050 GHG reduction targets."[86] They also state that ISS will use the Climate Action 100+ Focus Group list as a proxy for "significant [greenhouse gas] emitters."[87] It is unsurprising that ISS would adopt these policies given that NZAM members commit "[a]cross all assets under management" to "[e]ngage with actors key to the investment system including credit rating agencies, auditors, stock exchanges, proxy advisers, investment consultants, and data and service providers to ensure that products and services available to investors are consistent with the aim of achieving global net zero emissions by 2050 or sooner."[88] Given the horizontal agreements between asset managers that underlie Climate Action 100+ and NZAM, any asset manager using that benchmark in engagement or supporting that benchmark in votes should know that their efforts could lead to changes in control of target companies.

Moreover, major asset managers have made clear that they will vote against boards even for "insufficient progress" on ESG issues – let alone refusing to implement voted-for shareholder proposals, which certainly would lead to asset managers targeting boards. For example, BlackRock previously identified "244 companies that were making insufficient progress integrating climate risk into their business models or

---

[82] *See* James K. Glassman & Hester Peirce, How Proxy Advisory Services Became So Powerful, Mercatus Ctr. at George Mason Univ. (June 18, 2014) (finding that ISS and Glass Lewis controlled 97% of the proxy advisor market).
[83] ISS 2022 Proxy Voting Guidelines, *supra* note 84, at 13.
[84] Glass Lewis, https://www.glasslewis.com/wp-content/uploads/2022/11/US-Voting-Guidelines-2023-GL.pdf2023 Policy Guidelines, at 10.
[85] Utah Attorney General Sean D. Reyes et al., Letter from State AGs to Glass Lewis and ISSLetter from 21 State Attorneys General to Institutional Shareholder Services and Glass Lewis ("State Attorneys General Glass Lewis Letter") (Jan. 17, 2023).
[86] ISS 2022 Proxy Voting Guidelines, *supra* note 84, at 17.
[87] *Id.* at 17 n.10.
[88] NZAM Commitment, *supra* note 7.

disclosures" and took voting action against 53 of them.[89] It also placed 191 companies "on watch" for "insufficient progress on climate," and threatened that if "significant progress" was not made, BlackRock might take "voting action against management."[90] In one high-profile episode, BlackRock voted against the re-election of board members for ExxonMobil due to their (perceived) failure to adjust to a "net zero economy."[91] BlackRock also voted against directors for increasing exposure to coal-fired power generation.[92]

B. SEC Staff Letters Are Not Legal Opinions

Many companies seek permission from SEC staff to exclude shareholder proposals. One proxy advisor recently suggested that when SEC staff does not exclude the proposal and says it is unable to conclude the proposal violates state law, others can rely on that response as a legal conclusion.[93]

In fact, as the SEC clearly states on its website, its staff responses to companies are "informal," not approved by the SEC itself, not legally binding, and "do not constitute legal advice."[94] In an analogous context, the FTC recently decried the "problem" of companies choosing to "rely on [nonbinding guidance] as a substitute for their own legal analysis," despite the "agency's clearly stated assertion that informal interpretations are not a legal determination."[95]

C. Climate Change Proposals Are Not Financially Justified

Some investment managers defend investments and votes for environmental purposes based on the assumption that there is an impending "transition to decarbonize the world."[96] BlackRock stated that the net zero transition is "inevitabl[e]" and for that reason, it expects its portfolio companies to have a "plan for operating under a scenario where the Paris Agreement's goal of limiting global warming to less than two

---

[89] BlackRock, Investment Stewardship Annual Report, at 37 (Sept. 2020).
[90] *Id.* at 11.
[91] BlackRock, Vote Bulletin: Exxon Mobil Corporation, at 3 (May 26, 2021) (explaining that BlackRock voted against the board in support of three nominees who "would be better able to help management align the business with a net zero economy"); *see also* State Street, 2021 Proxy Context: Exxon Mobil Corporation (XOM) (May 27, 2021).
[92] BlackRock, Voting Bulletin: Fortum Oyj (Apr. 23, 2020).
[93] Glass Lewis State Attorneys General Letter, *supra* note 83, at 6.
[94] *See* SEC, Requests for No-Action, Interpretive, Exemptive, and Waiver Letters; SEC, Staff Interpretations (cautioning that because responses such as no-action letters "represent the views of staff, they are not legally binding").
[95] Holly Vedova, Fed. Trade Comm'n, Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt (Aug. 26, 2021).
[96] BlackRock, Managing the Net Zero Transition.

degrees is fully realized."[97] The NZAM Commitment—of which BlackRock and State Street are signatories—is crucially premised on the prediction that "governments will follow through on their own commitments to ensure the objectives of the Paris Agreement are met."[98]

As discussed above, these assumptions are speculative and unrealistic.[99] The road to the Paris Agreement's desired temperatures or to global net zero carbon emissions is far from inevitable. The International Energy Agency ("IEA") even describes the pathway as "narrow" and "unprecedented" and admits that the technology to reach net zero by 2050 does not yet exist.[100] Fiduciary duties cannot be fulfilled by relying on aspirational, unrealistic assumptions to guide investments and shareholder votes.

Notably, J.P. Morgan Asset Management voted in favor of a 2022 resolution requiring Costco to disclose its greenhouse gas emissions.[101] However, when JPMorgan Chase received a shareholder proposal in 2020 asking the company to disclose its greenhouse gas emissions, the board opposed the proposal,[102] which narrowly failed.[103]

D. Quotas Are Not Financially Justified

Similarly, in pressuring companies to impose board-diversity quotas, BlackRock and State Street operate under the assumption that race- and gender-based quotas "lead[] to . . . better long-term economic outcomes."[104]

This assertion lacks evidentiary support regarding board behavior. Indeed, a California state court was unable to find academic studies to support the state's contention that there is "a causal connection between women on corporate boards and corporate governance," leading the court to deem California's gender quotas

---

[97] BlackRock, A Framework for Our Clients: How to Invest in the Net Zero Transition.
[98] NZAM Commitment, *supra* note 7.
[99] *See supra* notes 14–19 and accompanying text.
[100] Press Release, Int'l Energy Agency, Pathway to Critical and Formidable Goal of Net-Zero Emissions by 2050 Is Narrow But Brings Huge Benefits, According to IEA Special Report (May 18, 2021) ("[I]n 2050, almost half the reductions come from technologies that are currently only at the demonstration or prototype phase.").
[101] J.P. Morgan Asset Mgmt., Global Equities Voting Summary Report Q122Global Equities Voting Summary Report Q1 2022, at 63.
[102] JPMorgan Chase & Co., 2020 Proxy Statement, at 97–98.
[103] Proxy Monitor, Proxy Monitor. Search "JPMorgan Chase."
[104] BlackRock, Investment StewardshipInvestment Stewardship 2022 Policies Updates Summary, at 3; *see also* Cyrus Taraporevala, CEO's Letter on SSGA 2021 Proxy Voting Agenda, Harv. L. Sch. F. Corp. Governance (Jan. 13, 2021) (post by State Street CEO stating that management teams with a "critical mass of racial, ethnic, and gender diversity are more likely to generate above-average profitability").

unconstitutional.[105] The SEC recently found that "studies of the effects of board diversity are generally inconclusive, and suggest that the effects of even mandated changes remain the subject of reasonable debate."[106]

Blindly promoting the positive effects of diversity quotas for businesses' bottom lines and dogmatically voting against board members on the basis of diversity quotas is inconsistent with fiduciary duties and the prudent investor rule.

Notably, despite its many votes against other companies on racial equity grounds, in 2021, State Street itself received a shareholder proposal requesting a comprehensive racial equity audit.[107] State Street management unanimously opposed the proposal, and the proposal failed.[108]

E. Deference to Proxy Advisors Is Unjustified

Some asset managers believe that deferring to proxy advisors on these issues will avoid liability for votes. This is incorrect for multiple reasons.

First, a fiduciary cannot simply rely on the advice of a third party. The fiduciary must continue to exercise its fiduciary duties in deciding whether the third party's advice should be followed. If evidence emerges that the third party is giving biased advice, the fiduciary must take that into consideration. Here, the undersigned as attorneys general have highlighted, ISS and Glass Lewis appear to have engaged in conflicts of interest, failed to focus on financial return in vote recommendations, committed to use Climate Action 100+ benchmarks, and promoted and relied upon false and misleading statements.[109] In response to these concerns, both companies failed to describe a financial basis for requiring companies to align with net zero aspirations.[110]

Second, the policies that ISS and Glass Lewis advertise as their "benchmark" policies have a clear political bent that is not solely in the interest of generating shareholder value, even just comparing them with other policies that those two companies

[105] *See Crest v. Padilla*, No. 19STCV27561 (Cal. Super. Ct. May 13, 2022), *available at* https://s.wsj.net/public/resources/documents/Crest-et-al-v-Padilla-05-13-2022.pdf.
[106] SEC, Order Approving Proposed Rule ChangesOrder Approving Proposed Rule Changes to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service (Release No. 34-92590) (Aug. 6, 2021).
[107] State Street, STT-2021-Proxy-Statement2021 Proxy Statement.
[108] *Id.*; *see also* Press Release, Majority Action & SEIU, State Street AGM Statement -— 5/19/21Shareholders Issue Strong Rebuke to State Street for Racial Justice Failures at Annual Meeting, With Over One Third Supporting Resolution In Support of Racial Equity Audit (May 20, 2021).
[109] State Attorneys General Glass Lewis Letter, *supra* note 88.
[110] Glass Lewis State Attorneys General Letter, *supra* note 83; Inst'l S'Holder Servs., Letter from ISS to State AGsLetter from Institutional Shareholder Services to State Attorneys General (Jan. 31, 2023).

offer. For example, ISS recently released its Global Board-Aligned International Proxy Voting Guidelines.[111] ISS explained that "[o]n environmental or social matters, the Global Board-Aligned Policy will generally result in recommendations that are in line with those of a company's board, with recommendations in support of shareholder proposals limited to circumstances where it is considered that greater disclosure will directly enhance or protect shareholder value and is reflective of a clearly established reporting standard in the market."[112] Similarly, Glass Lewis has a "Governance-Focused Policy," which it claims "are ideal for investors who want to promote effective governance mechanisms on boards without taking strong positions on other types of issues."[113] Whether these policies are in fact free of political bias, they are certainly presented as being less political than the "benchmark" policies. Given these alternative options, asset managers cannot simply rely on the fact that they followed ISS or Glass Lewis's "benchmark" policies to show they were acting to further shareholders' interests.

In light of this information, following ISS and Glass Lewis's proxy recommendations will not shield asset managers from liability – and in fact, may expose them to liability.

V. Conclusion

We will continue to evaluate activity in this area in line with our ongoing investigations into potential unlawful coordination and other violations that may stem from the commitments you and others have made as part of Climate Action 100+, Net Zero Asset Managers Initiative, or the like.

Sincerely,

Austin Knudsen
ATTORNEY GENERAL
OF MONTANA

Jeff Landry
ATTORNEY GENERAL
OF LOUISIANA

Sean Reyes
ATTORNEY GENERAL
OF UTAH

---

[111] Inst'l S'holder Servs., Global Board-Aligned Proxy Voting Guidelines: 2023 Policy Recommendations (Mar. 15, 2023).
[112] Press Release, Inst'l S'holder Servs., ISS Launches Global Board-Aligned Voting Policy (Mar. 16, 2023).
[113] Glass Lewis, Glass Lewis Proxy Voting Policies.

Steve Marshall
ATTORNEY GENERAL OF ALABAMA

Tim Griffin
ATTORNEY GENERAL OF ARKANSAS

Christopher M. Carr
ATTORNEY GENERAL OF GEORGIA

Raúl Labrador
ATTORNEY GENERAL OF IDAHO

Theodore E. Rokita
ATTORNEY GENERAL OF INDIANA

Brenna Bird
ATTORNEY GENERAL OF IOWA

Kris Kobach
ATTORNEY GENERAL OF KANSAS

Daniel Cameron
ATTORNEY GENERAL OF KENTUCKY

Lynn Fitch
ATTORNEY GENERAL OF MISSISSIPPI

Andrew Bailey
ATTORNEY GENERAL OF MISSOURI

JOHN M. FORMELLA
ATTORNEY GENERAL OF NEW HAMPSHIRE

Dave Yost
ATTORNEY GENERAL OF OHIO

Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA

Jonathan Skrmetti
ATTORNEY GENERAL OF TENNESSEE

Ken Paxton
ATTORNEY GENERAL OF TEXAS

Jason Miyares
ATTORNEY GENERAL OF VIRGINIA

Patrick Morrisey
ATTORNEY GENERAL OF WEST VIRGINIA

Bridget Hill
ATTORNEY GENERAL OF WYOMING