Consumers' Research
established 1929

Defeating the ESG Attack on the American Free Enterprise System

An Overview of the Corporate Proxy System for Oversight & Litigation Efforts

Defeating the ESG Attack on the American Free Enterprise System

An Overview of the Corporate Proxy System for Oversight & Litigation Efforts

INTRODUCTION

The American free enterprise system is under attack from within. With the "Environmental, Social, and Governance" (ESG) movement, progressive politics has become a primary subject of corporate governance. For example, in just the last two years, some of the largest asset managers in the world have leveraged Americans' savings to coerce corporations to adopt critical race theory, boycott states with Republican governments, fund employees' abortions, and divest from investment in drilling for oil and natural gas, among a wide range of other left-wing causes. This is a far cry from capitalism as America has long known it. And importantly it harms consumers by limiting output and raising prices, affecting both the return on their retirement savings and the cost of goods they purchase.

How did it happen? In short, by ideological capture and a market distorted by government capital. Progressives have increasingly captured the corporate bureaucracies that dominate American capital markets. And asset managers are responding to a little noticed market feature: the largest concentrations of capital are government pension and sovereign wealth funds. Asset managers can win these funds' business by catering to their politics. Combine these facts, and the result is that governments and their progressive allies in academic, nonprofit, and corporate bureaucracies can regulate their public policy objectives through capital markets even more effectively than they could through legislation. The outcome is a new "market" norm in favor of progressive politics that has been engineered by activists.

Stopping this hijacking of the free enterprise system will require understanding precisely how it works. The ESG movement works by co-opting the foundational assumption of the free enterprise system—that the market will invest Americans' savings productively. This assumption lies at the heart of our system. Indeed, Adam Smith himself described the investment of "what the frugal man saves" in "productive hands" as a hallmark of capitalism.[1] Deeper still, the fiduciary principle that one entrusted with another's property must manage it in their best interests is as old as Western Civilization.[2] But the ESG movement co-opts that principle by controlling the levers of the market in order to engineer its outcomes.

In the original conception of the market, this should not happen. Ideally, savers would self-police and ensure their own money is put to good use. But at least since the advent of the modern capital market, most Americans invest their savings only indirectly—by and large, their money is entrusted to a series of intermediary financial institutions to invest. As a result, the ability of regular Americans to

1 ADAM SMITH, THE WEALTH OF NATIONS 338 (1776).

2 *See Matthew* 25:14–30; Luke 19:11–27; *see* also Stephen Bainbridge, *The Parable of the Talents*, UCLA L. & ECON. RSCH., Working Paper No. 16-10 (2016).

police how their money is invested is circumscribed. This is the separation of ownership and control that the ESG movement exploits. And publicly traded intermediaries—asset managers, banks, and insurers—can themselves be coerced through the same activist pressure, creating a feedback loop that activists can exploit for even greater influence.

The battlefield is the corporate "proxy" system. This is the system of mediating institutions that determine how Americans' savings are invested and how the companies receiving those investments allocate capital. Standing between Americans' savings and the productive investment of those savings in businesses is a vast intermediating system of money managers. Many Americans reasonably delegate the management of their savings to others, like banks, financial planners, and employer 401(k) managers. And with many small or private funds, the system works as it should: managers invest Americans' savings for their benefit in productive enterprises. But with the ESG movement, that kind of money management is increasingly the exception, not the rule. At some of the biggest and most important institutions in the American economy, the system has turned on itself. Instead of investing Americans' savings for productive enterprise, large money managers and their advisers increasingly use Americans' savings perversely to advance left-wing political and social engineering.

Ironically, the attack on the free enterprise system makes a target out of one of the system's most successful achievements. More Americans than ever are invested in business corporations through American capital markets. From mom-and-pop savers and union pensioners to employees in 401(k) plans, since the beginning of the 21st century over half of all Americans are invested in publicly traded corporations.[3]

3 Kim Parker & Richard Fry, *More than half of U.S. house-holds have some investment in the stock market*, PEW RSCH. CENTER (Mar. 25, 2020) https://tinyurl.com/yp48c7f8.

This level of widespread investment in the stock market—and, as a result, rising financial wealth for everyday Americans—was arguably the main triumph of modern capitalism in America. The ESG movement's critical insight was that by controlling the market institutions that manage capital, this level of wealth can be used as leverage over corporate America.

This commandeering of America's capital market system didn't happen overnight. It began as a series of fads emerging out of academia and Wall Street in the 1980s and 1990s, under monikers like "corporate social responsibility" and "socially responsible investment." In general, these early activists were thought of as "gadflies"—annoying, perhaps, but unserious and relatively unharmful groups that had nothing better to do than bother the moral consciences of companies and their real shareholders. But over time, these movements gained strength. The composition of corporate leadership, workforces, and government regulators became more politically progressive and friendly to their causes. Politicians began to see corporations as vehicles to achieve social change they could not achieve at the ballot box. As they grew in strength, these movements moved into a new and historically effective phase with the advent of the ESG movement.[4]

For the vast majority of American public companies, alignment with ESG causes, like the campaign for "net zero" emissions, bears no facial resemblance to economic reality. Some ESG advocates justify their policies as managing so-called "transition risk," or the risk that governments in the future will force the companies to adopt, at steeper costs, the very policies that the ESG movement advocates for today. But ESG policies are uniformly the policies of left-wing political movements: their issues are climate change, racial "equity," abortion, and many others. The fact that

4 *See* Neb. Dep't of Just., *The Endgame of ESG*, OFF. OF THE ATT'Y GEN. 9–11 (Dec. 6, 2022) https://tinyurl.com/4vfe97wz

many ESG proposals would only make economic sense in a world in which the political left seized political power strongly enough to impose deeply unpopular policies on the public only betrays the movement's political origins. A more honest assessment of ESG proposals reveals they are demands that corporations accommodate a particular political agenda. These accommodations, like winding down profitable lines of business in oil and gas, are usually costly. But even if ESG policies were not costly—even if they had financial benefit—their benefits would only be incidental to alignment with a political program that was evidently assembled without regard for the best interests of American savers. There is no escaping the ESG movement's deep conflict with fiduciary principles.

Still, the movement to divert Americans' savings to ESG-motivated causes presents a challenge for federal and state legal officers and policymakers. ESG, as a theory, is an apparent violation of fiduciary duty in broad daylight. But in practice, it is not often obvious where law enforcement or policy change would begin. The system of money management that underlies modern financial markets is highly complex. The proxy system has many dark corners and shadows in which derelict or nefarious managers can hide. For most Americans, there are three or more intermediaries between their savings and their ultimate say in corporate governance. Each intermediary has different duties to the other. These duties are enforced by various laws and agencies. And the ESG movement perverts each set of duties in different ways. For example, a retail investor frustrated by his asset manager's support for the takeover of a company by left-wing activists may move his money to another manager (if his savings account allows him the flexibility to do so). But the ostensibly less-political manager—likely a smaller asset manager who may charge higher fees—is more likely to, for cost reasons, rely on the guidance of outside proxy advisers. The outside proxy adviser market is a duopoly dominated by firms which often take even more aggressively left-wing political stances than asset managers. The new asset manager will disclaim responsibility for the proxy adviser's decisions. The investor is out of options. The proxy adviser may, in turn, point to the positions of large asset managers, the media, and well-credentialed left-wing NGOs and academic departments that can—as if by magic—conjure up nice-looking studies showing that whatever left-wing project his money was wasted on was *actually* in his own best interests. It is a problem that the investor lacks adequate choice in the market, but the entire structure of the market is against him, too.

Oversight and enforcement action against ESG would be easier if there were a singular Enron-type fraud or Madoff-type conspiracy to which ESG-inspired violations of fiduciary duty could be traced. But the ESG movement is different. The ESG movement is a network of institutions operating under the cover of a pretense—the pretense of fashionably elite progressive politics and so-called charitable causes. The channels by which they bring about financial pressure are often indirect. They win, not by forcing transparent decisions by accountable individuals in the open, but by stacking the decks of corporate governance so that their causes become the path of least resistance. They win by changing what is considered "normal" in the market.

Often, these changes are driven by asset managers catering to blue-state pensions and sovereign wealth funds. Here is an example of how it works. Activist left-wing state governments like New York and California leverage their considerable assets to drive an ESG agenda. For example, CalPERS, CalSTRS, and the New York State Common Retirement Fund coordinate with climate activists and asset managers to set energy policy at U.S. companies, and the New York City Comptroller who manages the New York City Pension Funds demands that its asset managers use not just New York's funds, but also other clients' funds to "keep fossil fuel reserves in the ground."[5] These initiatives have no financial rationale or connection to productively investing Americans' savings. Yet asset managers are financially incentivized to push them to retain pension fund clients and earn higher management fees from ESG products. And these financial incentives for ESG activism push on the open door of a financial sector and corporate America that is far too accommodating of a progressive therapeutic culture that works to achieve ESG agenda items from the inside.[6]

While enforcing corporate compliance with the left-wing political and social movements *du jour* might be considered "normal" on Wall Street today, it is not in the rest of America. At bottom, no amount of bureaucracy can entirely obscure the plain violation of fiduciary principles that the ESG movement represents. This reality throws into sharp relief the purpose of the proxy system with its current misuse. The proxy system derives its name from the legal fact that money managers ultimately possess their powers to act "by proxy." They act *on behalf* of the Americans whose savings they manage in trust. The entire "proxy system" exists to replicate, in modern form, the traditional stockholder meeting, where Americans with real skin in the game once held businesses accountable for how they invested their money—and built the American free enterprise system.[7]

For many years, the state's enforcement of the duty to invest Americans' savings productively served the merely supplemental task of reinforcing a norm that the financial sector writ large already shared. But today, the combination of ideological capture of a concentrated financial sector and the influence of government capital is waging an unprecedented assault on this basic assumption of the free enterprise system. Consequently, defeating that assault will require revitalizing fiduciary and other legal principles to ensure that the law protects savers from the conflicts of interest present in modern asset management.

* * * *

The first step for effective oversight and enforcement action against ESG requires breaking the proxy system down into its component parts. ESG may be a violation of fiduciary duty hiding in plain sight, but effective law enforcement requires it to be specified and put into context. As Justice Frankfurter once remarked:

> [T]o say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[8]

Once the players in the ESG movement and their methods of operation have been identified, they may be measured for their compliance with the law. While the ESG movement in capital markets may be novel, the tools of law enforcement against it are traditional. What is needed is a clear explanation of the ESG movement in the proxy system, the applicable laws that govern it, and the potential application of those laws by reasoned analogy to established precedent.

Part I identifies the relevant market actors in the ESG movement, the roles they perform in advancing ESG causes, and the methods by which they exert influence

---

5 *See Year in Review: A Progress Update*, CLIMATE ACTION 100+ at 8 (2022), https://tinyurl.com/3c6kfrtb; Sept. 21, 2022 Letter from Brad Lander to Laurence D. Fink at 5 (Sept. 21, 2022) https://tinyurl.com/yvhb77na.

6 Darel Paul, *The Puzzle of Woke Capital*, AM. AFF. J. (Fall 2022), https://tinyurl.com/yckruyrd.

7 *See* Business Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990) ("The goal of federal proxy regulation was … to enable proxy voters to control the corporation as effective-ly as they might have by attending a shareholder meeting.").

8 SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943).

on their ultimate targets—business corporations. The **Case Study** then demonstrates, via real-world example, how the Players interact and drive change at target corporations. **Part II** explains the applicable laws governing the players' conduct and suggests relevant facts for the enforcement of those laws.

PART I. MAPPING THE PROXY SYSTEM

The proxy system is highly complex, and almost no singular description would be comprehensive.[9] However, it is possible to map some of the most significant vectors of ESG's influence. **Subpart A** identifies the market actors ("Players") that are most relevant to ESG's influence. **Subpart B** identifies the methods by which the Players leverage their influence to achieve substantive changes in corporate governance.

A. THE PLAYERS

The Players are the market actors relevant to ESG's influence. They are the originators and vectors of most ESG influence in the market today. Players act primarily by creating what SEC Commissioner Hester Peirce has called "pressure points that activists—or stakeholders as some prefer to call them—can use to strong-arm uncooperative funds into instituting policies more conducive to the activists' agendas or punish funds that fail to fall in line."[10]

The Players can be categorized into three groups. **Activists** use their rights as shareholders to put ESG items on the agendas of target corporations and funds. **Coordinators** establish and maintain networks that connect activists with financial market actors and help to coordinate activists' initiatives. **Principals** are the institutions that exercise direct or delegated control over the investment and proxy voting rights of securities.

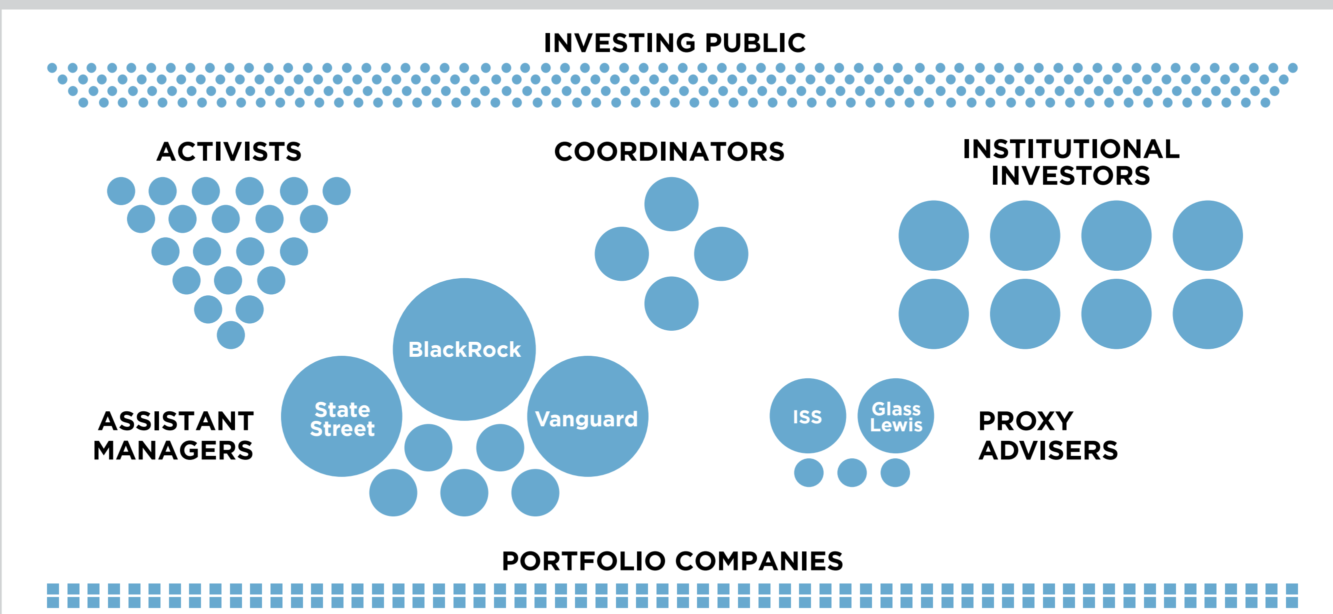
Appendix A provides a sample list of oversight and investigatory inquiries for policymakers and officials. Appendix B provides a partial list of ESG Activists.

Figure 1, below, maps the Players in the context of the proxy system below. Each section will update the figure to map out each Player's role in the system.

9 More comprehensive resources include the SEC's 2010 Concept Release on the proxy system. *Concept Release on the U.S. Proxy System*, Release No. 34-62495 (2010).

10 Hester Peirce, Commissioner, SEC, Statement on Envi-ronmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies (May 25, 2022), https://tinyurl.com/mr45w5jx.

FIGURE 1. PLAYERS IN THE PROXY SYSTEM

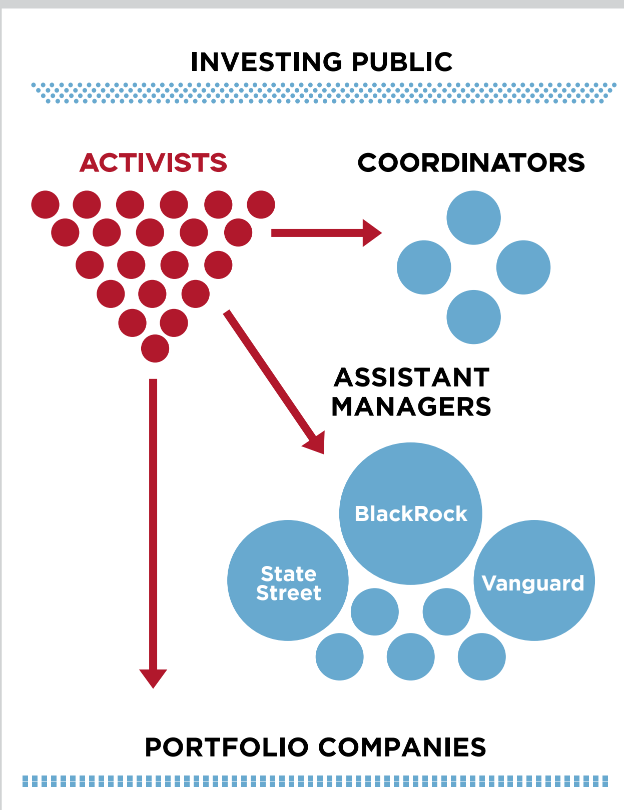


1. Activists

Activists are shareholding entities that use their rights as shareholders to put ESG-friendly items on the agendas of target corporations and funds. Under state corporate law and federal securities laws, shareholders of publicly traded companies have a right to put forward certain items for a shareholder vote. If a shareholder owns at least a few thousand dollars in shares, he can propose a resolution for the company to adopt, known as a "shareholder proposal."[11] If a majority of shareholders vote in favor of the proposal, then the shareholders "adopt" the proposal as a recommendation to the company. A company is practically obligated to comply with an adopted shareholder proposal because shareholders can vote against directors who do not implement an adopted proposal at the next meeting on director elections. In fact, the two proxy advisers who control 97 percent of the market and advise shareholders on whether to reelect company directors state that "clear action is warranted when [shareholder] proposals receive support from a majority of votes cast."[12] And a director's "responsiveness" to such proposals is a "fundamental principle" in these proxy advisers recommendations on director elections.[13] Since shareholders possess these rights by law, companies will often meet, or "engage" with shareholders in order to head off more fundamental changes in corporate governance by agreeing to settlements that partially adopt the shareholder's proposal.

11 *See* 17 C.F.R. § 240.14a-8 (2022) (hereinafter "Rule 14a-8").

FIGURE 2. ACTIVISTS IN THE PROXY SYSTEM



Activists exercise these rights to promote ESG agenda items at companies. A model Activist is Trillium Asset Management. Trillium is a small investment fund that aims to "activate our clients' capital to advance humankind towards a global sustainable economy."[14] In 2021, Trillium sponsored 21 shareholder proposals and led 666 engagements with companies.[15] Trillium noted that over 300 of these "engagements"—meetings with companies it invested in—involved pushing companies to increase the racial, ethnic, and sexual orientation diversity of their boards and senior corporate leadership. Among its proposals, in 2022 Trillium supported a proposal that called for the pharmaceutical company Johnson & Johnson to undertake a so-called "racial equity audit." Trillium asked investors questions like "[i]s risk oversight of J&J's racial impacts sufficient given current board structure and all white named executive officers" and "[h]as J&J examined the impact of its political activities on racial

12 *See* David F. Larcker & James R. Copland, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Firm* (2018), ROCK CTR. FOR CORP. GOVERNANCE, Working Paper No. 18-27 (2018) https://tinyurl.com/mrhyf-wpm; Glass Lewis, *2023 Policy Guidelines*, GLASS, LEWIS & CO. at 18 (2022), https://tinyurl.com/353u4y6e; *see* Institutional S'holder Servs., *United States Proxy Voting Guidelines 2022*, ISS Governance at 17 (Dec. 13, 2022), https://tinyurl.com/mrcrrx4t ("Directors should respond to investor input, such as that expressed through . . . significant support for shareholder proposals (whether binding or non-binding).").

13 Institutional S'holder Servs., *supra* note 12, at 9; *see* Glass Lewis, *supra* note 12, at 19.

14 Trillium Asset Mgmt., *2021 Impact Report*, TRILLIUM INV. At 5, https://tinyurl.com/mhhjym6x.

15 *Id.* at 19.

equity?"[16] At Johnson & Johnson's annual meeting, 63 percent of shareholders voted in favor of the proposal. As a result, Johnson & Johnson's management has been forced to decide if it wishes to comply with the proposal's request of a racial equity audit. This is but one example of the change that Activists can drive at companies.

Activists generally include nonprofits, social-purpose investment funds, labor union and governmental pension funds, trusts and family offices, and religious organizations. Below are a few prominent examples.

- *Nonprofit organizations.* Nonprofit organizations make up the largest share of Activists. They generally raise money from large and institutional donors, including family foundations, to fund their shareholdings and activities. The principal method of influence pursued by nonprofits is the submission of shareholder proposals on ESG subjects. For example, the nonprofit As You Sow, "the nation's non-profit leader in shareholder advocacy," runs campaigns through shareholder proposals on environmental and social issues, and in 2022 submitted shareholder proposals for 79 companies.[17] In addition to submitting shareholder proposals, other nonprofits coordinate campaigns across Activists. For example, Ceres, a climate-activist nonprofit which also functions as a coordinator, *see* p. 10 *infra*, operates an investor network to supplement its initiatives.
- *Social-purpose investment funds.* A significant contribution to activism comes from social-purpose or "impact" investment funds, which, in general, are managed on risk-return strategies, but use their assets as leverage for advancing ESG issues. Social-purpose investment funds advance ESG issues through an all-of-the-above approach that includes submitting shareholder proposals, conducting engagement with companies, and sponsoring investor and industry network Coordinators. Trillium Asset Management is a typical example. Other notables include Arjuna Capital and Green Century Capital Management.
- *Governmental pensions and investment offices.* Most of the largest asset owners in the world are public funds.[18] In fact, 19 of the top 20 asset owners are either public pension funds or sovereign wealth funds, and they hold over 92 percent of the collective wealth of the top 100 asset owners.[19] These funds carry immense weight, accounting for over 25 percent of global assets under management.[20] Using this massive market power, governmental funds make shareholder proposals and increase the leverage of other Activists. They may even delegate their engagement with portfolio companies to allied Activists. For example, in 2022, the California State Teachers' Retirement System (CalSTRS) sponsored three proposals. Other notable state investment funds include the New York State Common Retirement Fund, and Philadelphia Public Employees Retirement System. Sovereign wealth funds active on ESG issues include Norway's $1.3 trillion fund Norges Bank Investment Management, which has a net-zero carbon emissions target for its portfolio companies.[21]
- *Labor union pension funds.* The

16 Susan Baker, Director of Shareholder Advocacy, Trillium Asset Mgmt., *Racial Equity Audits: A Critical Tool for Shareholders*, TRILLIUM INV. At 3 (Apr. 13, 2021), https://tinyurl.com/y4kmd8uk.

17 *About Us*, AS YOU SOW, https://tinyurl.com/37p7n9kc.

18 *See* Thinking Ahead Group 2.0, *The Asset Owner 100: The Most Influential Capital on the Planet*, THINKING AHEAD INST. (Nov. 2022), https://tinyurl.com/4wbapz3d.

19 *Id.* at 23, 26.

20 *Sovereign Wealth Fund and Public Pension Assets Reach Record $33 Trillion for 2021*, SOVEREIGN WEALTH FUND INST.(Jan. 1, 2022), https://tinyurl.com/3mdf2y2w. Total global assets under management is $126 trillion. See Pooneh Baghai et al., *The Great Reset: North American Asset Management in 2022*, MCKINSEY & CO. (Oct. 2022), https://tinyurl.com/mrxd7vyc.

21 Kari Lundgren & Stephen Treloar, *Norway Wealth Fund Sets Net-Zero Target for Portfolio Firms,* BLOOMBERG (Sept. 20, 2022), https://tinyurl.com/ye7t-jar6.

investment offices of large labor unions both make shareholder proposals and use assets under management to support other Activists. Labor unions generally manage the pensions they secure via collective bargaining with employers. Many unions' internal investment offices tasked with managing union pension plans use plans assets to advance ESG. For example, in 2022 the Service Employees International Union submitted 20 proposals, covering political donations and racial equity audits. Other notables include the American Federation of State, County, and Municipal Employees (AFSCME) and American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

- *Religious organizations.* Some religious organizations will use their assets to conduct ESG activism. For example, prominent shareholder proponents include a variety of orders, including the Sisters of St. Francis Philadelphia and School of Sisters of Notre Dame, St. Louis, and denominations including the Unitarian Universalists, Presbyterian Church (USA), and Episcopal Church. Others include nonprofits, which, though not themselves religious organizations, may coordinate the work of other religious organizations. Notable nonprofits include Mercy Investments and the Interfaith Center on Corporate Responsibility.

2. Coordinators

Coordinators establish and maintain networks that connect activists with industry and help to coordinate activists' initiatives. They coordinate the activities of Activists by hosting meetings of Activists and Activists with industry, publishing reports, and awarding favorable ratings and scores accepted by the activist community. Coordinators are also often connected to political organizations and expand Activists' influence with industry by coordinating Activist issue campaigns with political advocacy.

- Climate Action 100+ (CA100+) is a network that coordinates the investment strategies of 700 investors with over $68 trillion in assets "to ensure the world's largest corporate greenhouse gas emitters take necessary action on climate change."[22] Notable investor signatories to the network include asset managers like BlackRock, Goldman Sachs Asset Management, J.P. Morgan Asset Management, and State Street Global Advisors, as well as major asset owners like CalPERS, CalSTRS, the New York State Common Retirement Fund and Teachers' Retirement Fund, the Washington State Investment Board, the Harvard University Endowment, and the Minnesota State Board of Investment.[23]

  Climate Action 100+ investors, which are coordinated by five regional investment networks and overseen by a global Steering Committee, "commit to engaging with at least one of 166 focus companies . . . to seek commitments on the initiative's key asks," which includes "[taking] action to reduce greenhouse gas emissions across the value chain."[24] Climate Action 100+ appoints a lead investor or investors for each focus company. While Climate Action 100+ offers disclaimers that it "does not facilitate or require collective decision-making,"[25] investors who sign on to Climate Action 100+ are required to "disclose through a bi-annual survey their engagement plans and priorities over the coming 12 months to ensure strong and concerted action."[26] If investors engage with companies on

22 About, CLIMATE ACTION 100+, https://tinyurl.com/4uaybvhp.

23 *Who is Involved, Investors*, CLIMATE ACTION 100+, https://tinyurl.com/nhk4x-rjv.

24 *Approach, How We Work,* CLIMATE ACTION 100+,https://tinyurl.com/4s-fk5p44.

25 *Id.*

26 *Approach, Engagement Process,* CLIMATE ACTION 100+, https://tinyurl.com/ycy9xvuu.

an individual basis, they "are required to share information with the engagement working group and the coordinating investor network" and "liaise with relevant network staff and/or lead investors to ensure engagement priorities and ambition are aligned with the goals of the initiative, as well as with the overall collaborative approach (as appropriate in each sector)."[27]

- Ceres is a nonprofit that operates networks of investors, companies, and policymakers to align emissions with net-zero. The Ceres Investor Network includes more than 220 institutional investors managing more than $60 trillion in assets. Members include BlackRock, Franklin Templeton, and State Street Global Advisors.[28] Ceres tracks share-holder proposals submitted by its members for other members and arranges meetings between its members. The Ceres Company Network works directly with business com-panies, including Apple, Ford, PepsiCo, and The Walt Disney Corporation to advocate for emissions reductions.[29]
- The Net Zero Asset Managers Initiative (NZAMI) is a network of asset managers committed to using their investment management to support the goal of net-zero global greenhouse emissions by 2050 or sooner. Notable signatories include BlackRock, State Street Global Advisors, J.P. Morgan Asset Management, T. Rowe Price Group, UBS As-set Management, and Federated Hermes Limited. Signatories 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."[30] The network sets its own policy positions, which it "expects" signatories to also adopt, including a position in support of "fossil fuel phase out" that refuses to finance or support the construction of new coal power plants.[31]
- The Glasgow Financial Alliance for Net Zero (GFANZ) coordinates the practices of signatory banks, insurance companies, and investors to align with net-zero emissions targets. One of its affiliated sector-specific alliances, the Net-Zero Banking Alliance (NZBA), is convened by the United Nations and focuses on the efforts of banking-sector financial institutions. Notable members include Bank of America, Citi, JPMorgan Chase, the Goldman Sachs Group, Inc., and Wells Fargo & Co. Members commit to align their lending and investment portfolios with efforts to reduce emissions to net zero by 2050 or sooner.
- *Law firms.* Many large law firms are counsel to Coordinators, Principals, and business companies that attend the events and conferences hosted by Coordinators. Law firms may also provide legal opinions to Coordinators and participating Principals concerning the legality of coordinating activities.[32]

3. Principals

The Principals are institutions that exercise direct or delegated control over the investment and proxy voting rights of securities. They include asset managers, who exercise direct control, and proxy advisers, who exercise delegated or indirect control.

27 *Id.*

28 *Ceres Investor Network*, CERES, https://tinyurl.com/2p9fwuba.

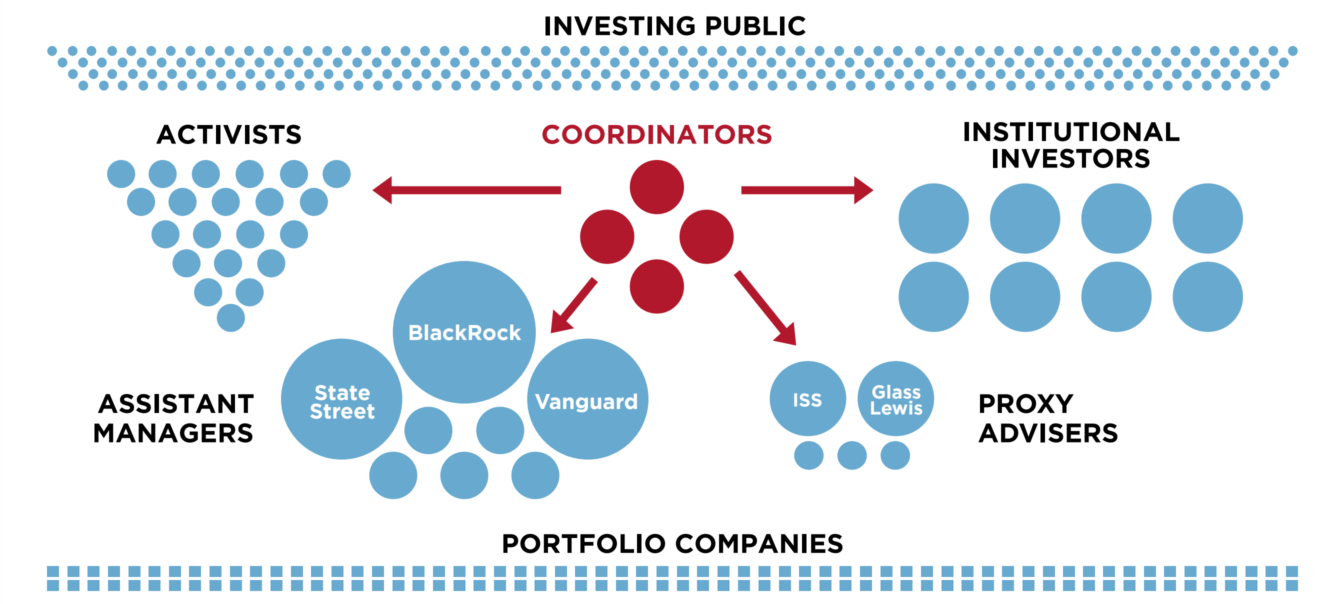
29 *Ceres Company Network*, CERES, https://tinyurl.com/2yy45vuc.

30 *Commitment*, THE NET ZERO ASSET MANAGERS INITIATIVE, https://tinyurl.com/ymnc3ypd.

31 *Network Partners' expectation of signatories with regard to fossil fuel investment policy*, NET ZERO ASSET MANAGERS INI-TIATIVE at 2 (Nov. 1, 2021), https://tinyurl.com/y6pskef7.

32 *See* Letter from Senators Tom Cotton, Michael S. Lee, Charles E. Grassley, Marsha Blackburn, & Marco Rubio to law firms, Nov. 3, 2022, https://tinyurl.com/yckzmjj7.

FIGURE 3. COORDINATORS IN THE PROXY SYSTEM



i. Large Asset Managers

Asset managers exercise direct control over the investment and voting rights of investor assets. They gain this control over the management of securities through contractual arrangements with clients and by selling retail investment products. Asset managers' clients include institutional investors—institutions that themselves manage pools of capital, usually from a concentrated source of capital like an employer 401(k) plan or pension fund of a company, government, or labor union—and other managers like family offices. Asset managers also bring funds under their management by selling investment products, like exchange-traded funds (ETFs), to retail investors. Asset managers are generally compensated through fee arrangements as a percent of assets managed.

Asset managers exercise control over investor assets by choosing how to invest them and exercise the control rights concurrent to their investments. Control rights are highly concentrated in the "Big Three" asset managers, BlackRock, Vanguard, and State Street Global Advisors, which together manage over $20 trillion in assets and cast an average of 25 percent of the votes at S&P 500 companies.[33]

Large asset managers generally exercise control by committing to follow certain voting guidelines, which state the criteria by which the manager will exercise control rights such as proxy votes. Notable examples include:

- BlackRock's 2021 voting guidelines exhorted that "boards should aspire to 30% diversity of membership and encourage companies to have at least two directors on their board who identify as female and at least one who identifies as a member of an underrepresented group."[34]
- State Street Global Advisors' 2022 voting guidelines suggest the manager will vote against reelecting the director that is the chair of a company's

33 *See* Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 736 (2019); Shaun Bisman & Felipe Cambeiro, *Big Three Institutional Investor Updates*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 13, 2022), https://tinyurl.com/mss9c7ac.

34 BlackRock Invest. Stewardship, *Proxy voting guidelines for U.S. securities*, BLACKROCK (Jan. 2021).

compensation committee if the company does not disclose its Equal Employment Opportunity (EEO-1) reports.[35]

- Consistent with these guidelines, State Street Global Advisors and BlackRock both voted in favor of racial equity and civil rights audit proposals in the 2022 proxy season.[36]
- Larry Fink's 2022 Letter to CEOs stated that BlackRock is "asking companies to set short-, medium-, and long-term targets for greenhouse gas reductions."[37] Similarly, BlackRock's 2023 voting guidelines "look[s] to companies to disclose short-, medium-, and long-term targets . . . for Scope 1 and 2 greenhouse gas emissions (GHG) reductions."[38]
  - In accordance with this policy, BlackRock has repeatedly voted against board directors based on lack of GHG reduction targets. For instance, BlackRock voted against the re-election of the board chair at TransDigm, a U.S. aviation manufacturer, for failure to "to adopt quantitative greenhouse gas emissions goals."[39] As another example, BlackRock voted against the longest serving director up for re-election at Woodside Petroleum "to hold the company accountable for inadequate progress on scope 3 target setting."[40]

Asset managers generally execute on their voting guidelines through in-house investment stewardship teams.[41] Stewardship teams make decisions for how the asset manager will cast its proxy votes and conduct engagements with target companies by meeting with relevant company management to express the manager's views on issues. Stewardship teams may decide, as the examples above show, that the manager will vote against re-electing directors at companies that fail to sufficiently comply with their voting guidelines. For an example of engagement, through Q3 of 2022, BlackRock conducted 2,839 total engagements with companies.[42]

35 *Proxy Voting and Engagement Guidelines*, STATE ST. GLOB. ADVISORS at 5 (Mar. 2022), https://tinyurl.com/2np2zhb5

36 *See, e.g., Vote Bulletin–Johnson & Johnson*, STATE ST. GLOB. ADVISORS (Apr. 28, 2022), https://tinyurl.com/2xzfce48; *Spotlight: Racial Equity and Civil Rights Audits*, KIRKLAND & ELLIS at 6 (Jun. 2022), https://tinyurl.com/bddjrr9b.

37 Larry Fink, *Larry Fink's 2022 Letter to CEOs*, BLACKROCK (2022), https://tinyurl.com/2p93aavz.

38 BlackRock Inv. Stewardship, *2023 Policies Summary*, BLACKROCK at 3 (2023), https://tinyurl.com/2p8a9kvs.

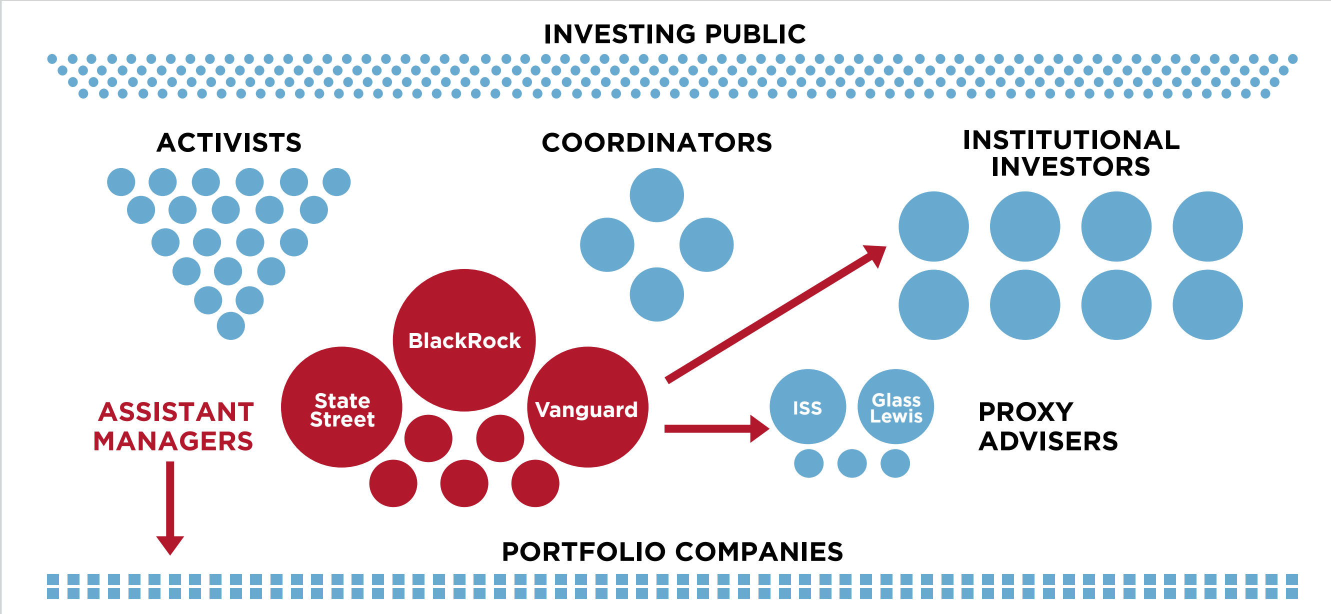
39 BlackRock Inv. Stewardship, *Our Approach to Sustainability*, BLACKROCK at 11 (2020), https://tinyurl.com/468wr6rw.

40 BlackRock Inv. Stewardship, *Vote Bulletin: Woodside Petroleum Ltd.*, BLACKROCK at 2 (2021), https://tinyurl.com/yj6za4hp.

41 See American Accountability Foundation Research Team, *The Little-Known Staffers Enforcing ESG Policy at Ameri-can Public Companies*, AM. ACCOUNTABILITY FOUND. (Aug. 9, 2022), https://tinyurl.com/3dmbtea7.

42 BlackRock Inv. Stewardship, *About Us*, BLACKROCK https://tinyurl.com/33r7s84m.

FIGURE 4. ASSET MANAGERS IN THE PROXY SYSTEM



ii.Proxy Advisers

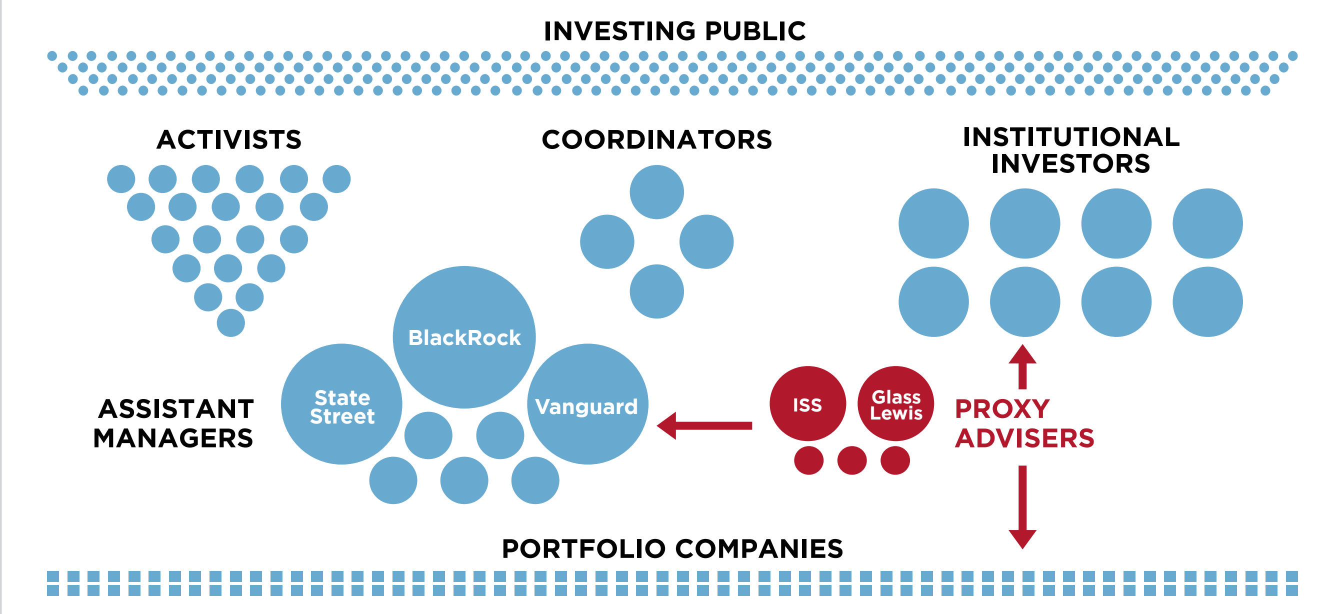
While large asset managers generally conduct proxy research and cast proxy votes in-house, mid-size and smaller asset managers generally find it more economical to employ the services of an outside proxy advisory firm. For instance, the mechanics of tracking proxy cut-off times, man-aging and analyzing proxy materials, and casting votes can require significant resources. These managers frequently hire proxy advisers to provide analysis and proxy voting recommendations and facilitate voting, recordkeeping, reporting, and disclosure requirements.

The proxy advisory services industry is a duopoly, with only two firms, Institutional Share-holder Services (ISS) and Glass Lewis & Co, controlling over 90 percent of the market. In addition to providing non-public, client-specific voting advice, proxy advisers issue public voting guidelines. For example, ISS recommends voting against directors of companies "on the current Climate Action 100+ Focus List" unless the company has issued "[d]etailed disclosure[s] of [its] climate-related risks" and implemented "Net-Zero-by-2050 [green-house gas emissions] reduction targets."[43] In 2021, Glass Lewis recommended voting favor of shareholder proposals recommending "racial equity audits" at least seven companies.[44]

43 Institutional S'holder Servs., *supra* note 12, at 17.

44 Ron S. Berenblat et al., *Racial Equity Audits: A New ESG Initiative*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), https://tinyurl.com/2u7zp-7na.

FIGURE 5. PROXY ADVISERS IN THE PROXY SYSTEM



B. THE METHODS

This section describes the methods by which the Players advance the ESG agenda at target companies.

1. Engagement

Engagement by Players with target compa-nies generally encompasses any activity outside of the formal proxy vote process to encourage companies to adopt Players' goals. Ordinarily, engagement takes the form of meetings between the Players and the target company.

Companies will routinely settle with Activists by adopting policies in exchange for the withdrawal of a shareholder proposal. For example, in 2021, Bank of America announced a net-zero emissions target in exchange for the withdrawal of an As You Sow shareholder proposal.[45]

Large asset managers and proxy advisers conduct engagement with companies outside of the formal proxy process by meeting to discuss man-agers' issues of concern. For example, BlackRock touts thousands of engagements with its portfolio companies every year on issues like climate change. These engagements shape the work of companies' investor relations departments and bring issues to company management that result in influence over companies' agendas.

2. Shareholder Proposals

Shareholder proposals are written recommendations or requirements submitted by a shareholder for consideration by the company's shareholders at the company's annual meeting. Although shareholder proposals are typically non-binding, companies will generally attempt to comply with the recommendation of a proposal that receives a majority vote of shareholders.

For example, in 2022, 54 percent of Apple shareholders voting approved a proposal that recommend Apple conduct a "racial equity audit" that would identify alleged racial issues at the company.[46] Shortly after, Apple committed to conducting the audit. The proposal was sponsored by Trillium

45 2021 Proxy Preview at 9. Stephanie Spear, *Bank of America Announces Net-Zero Financing Goal*, AS YOU SOW (Feb. 11, 2021), https://tinyurl.com/5yj47e98.

46 Kif Leswing, *Shareholders Vote for Apple to Conduct a Civil Rights Audit, Bucking Company's Recommendation,* CNBC (Mar. 4, 2022), https://tinyurl.com/74wjr9fe.

Asset Management, and both BlackRock and State Street Global Advisors voted their shares in favor of the proposal.[47]

3. Coordinator Commitments

Coordinators secure "commitments" by Players and target companies to certain ESG goals. For example, the Net Zero Asset Manager Initiative requires its signatories to 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."[48] Coordinators then use these commitments to "hold accountable" signatories by encouraging them to undertake activities that Coordinators and Activists define as consistent with the commitments. Thus, the Net Zero Asset Managers Initiative explains that "[c]ombined with the reporting components of the commitment, we are ensuring this means real action not just empty statements."[49]

4. Voting Policies

Principals set voting policies that advance ESG issues by exercising proxy votes consistent with ESG goals. For example, a lack of sex diversity on boards was the top reason that BlackRock withheld votes from directors in 2021, accounting for 61 percent of negative votes.[50]

5. Media & Public Relations Campaigns

Activists, Coordinators, and sometimes Principals may launch media and public relations campaigns to influence Principals and target companies. For example, BlackRock has faced numerous protests and media campaigns for allegedly failing to adequately divest from fossil-fuel energy companies.

6. Disclosure

Across the board, nearly every Player uses disclosures of corporate information in order to create pressure points for activism. For example, As You Sow has submitted numerous shareholder proposals recommending that companies disclose their "Scope 3" emissions, or the emissions of companies' suppliers and customers. Climate Action 100+ has adopted a formal position in favor of Scope 3 emissions disclosure, and uses emissions disclosures in order to identify target companies at which the network prioritizes its resources.

Framed in language of "disclosure," the Players demand that companies adopt GHG reduction targets that align with net zero. For example, Climate Action 100+ advises investors that they "must now go beyond asking companies to disclose against the Net-Zero Company Benchmark," which includes measuring "alignment of company capital expenditures (CapEx) and output with the Paris Agreement goals," to "ensure they take sector-specific actions to achieve global, net zero emissions by 2050."[51]

Similarly, BlackRock asks companies to set GHG reduction targets and has epeatedly voted against board directors who did not.[52] It voted against the board chair of TransDigm for failing "to adopt quantitative greenhouse gas emissions goals" and against ExxonMobil directors for "failure to have clear, long-term greenhouse gas reduction targets."[53] In practice, what the Players demand when asking for climate *disclosures* is climate *action*.

47 KIRKLAND & ELLIS, *supra* note 36.

48 THE NET ZERO ASSET MANAGERS INITIATIVE, *Commitment, supra* note 30.

49 *FAQ*, THE NET ZERO ASSET MANAGERS INITIATIVE, https://tinyurl.com/2p8229u.

50 John Jenkins, *BlackRock's Support for Shareholder Proposals Doubles,* THECORPORATECOUNSEL.NET (July 21, 2021), https://tinyurl.com/yza3b9wj.

51 *Global Investors Driving Business Transition,* CLIMATE AC-TION 100+ at 10 (Oct. 2021), https://tinyurl.com/3mmdbkzt. *2021 Year in Review: A Progress Update,* CLIMATE ACTION 100+ at 9 (Mar. 2022), https://tinyurl.com/yh7zr-j4y.

52 Larry Fink, *Larry Fink's 2022 Letter to CEOs, supra* note 37 ("[W]e are asking companies to set short-, medium-, and long-term targets for greenhouse gas reductions.").

53 BlackRock Inv. Stewardship, *Our Approach to Sustainability*, BLACKROCK at 11 (2020), https://tinyurl.com/468wr6rw.

7. Proxy Contests

Activists, especially social-purpose investment funds, may also engage in more traditional shareholder campaigns to replace corporate directors and gain control over a company, often referred to as "proxy contests." The most prominent example of such a proxy campaign is the green activist fund Engine No. 1's campaign at ExxonMobil, which successfully elected three directors to ExxonMobil's board after a proxy campaign focused on climate and green-energy issues that secured the support of each of the Big Three asset managers. Climate Action 100+ took credit for its work coordinating the "extensive engagement" behind this achievement.[54]

* * * *

CASE STUDY: PHILLIPS 66

It may be instructive to review a case study of how Activists, Coordinators, and Principals operate in order to achieve ESG agenda items. The timeline below shows the methods employed to ultimately influence an American oil and gas company, Phillips 66, to agree to set Scope 3 emissions reduction targets.[55] In other words, by using the levers of the proxy system, ESG advocates were able to box Phillips 66 into committing to a plan to limit the very product it sells.

Timeline

2014, 2015, 2016: The Activists CalSTRS and the Presbyterian Church (U.S.A.) submit share-holder proposals for consideration by Phillips 66's shareholders calling on the company to disclose emissions and set reduction targets.

Late 2017: Climate Action 100+ launches as an organization, which "escalates pressure on the company."[56]

December 2019: The Activist As You Sow submits a shareholder proposal to BlackRock requesting a report on how the company plans to implement stakeholder-friendly governance[57] and issues a press release saying, in part: "Shareholders are demanding that companies exercise leadership on a broader range of environmental, social, and governance issues." The press release specifically chides BlackRock about its allegedly poor voting record on ESG shareholder proposals.

2020: Investor signatories of Climate Action 100+ meet with members of Philipps 66's board of directors.

January 2020: BlackRock joins Climate Action 100+.[58] BlackRock CEO Larry Fink commits to "place sustainability at the center of our investment approach."[59]

March 2020: The Activists Boston Trust Walden and Mercy Investments publicly announce that they agree to withdraw shareholder proposals on BlackRock's proxy statement in exchange for BlackRock's commitment to a "more active voting position" and on the basis of a "slew of new pledges on climate change and sustainability" from Fink's 2020 letter to CEOs.[60]

May 2020: As You Sow (which is also a Climate Action 100+ signatory), submits a share-holder proposal calling on Philipps 66 to report on the health risks of expanding petrochemical in areas "increasingly prone to climate-change induced storms, flooding, and sea level rise."[61]

September 2020: The Climate Action 100+ steering committee, which includes

---

54 *See* Climate Action 100+, 2021 Year in Review: A Progress Update, at 8, https://tinyurl.com/3c6kfrtb.

55 *Phillips 66 increases Ambition of GHG Emissions Reduction Targets*, CLIMATE ACTION 100+ (Jan. 31, 2022), https://tinyurl.com/mryb2e2a.

56 *Id.*

57 Specifically, the proposal requested the implementation of the Business Roundtable's recent "Statement of the Purpose of a Corporation."

58 *BlackRock joins climate action 100+ to ensure largest corporate emitters act on climate crisis,* CLIMATE ACTION 100+ (Jan. 9, 2020), https://tinyurl.com/4nupmbzt.

59 Larry Fink, 2020 Letter to CEOs, *A Fundamental Reshaping of Finance*, BLACKROCK (2020), https://tinyurl.com/u6ttjm2p.

60 Paul Verney, *BlackRock and JP Morgan spared ESG voting proposals following sustainability pushes*, BOSTON TRUST WALDEN CO.: RESPONSIBLE INV. (Mar. 10, 2020), https://tinyurl.com/wrm3fb8h.

61 *Phillips 66: Report on Petrochemical Risks*, AS YOU SOW (2019), https://tinyurl.com/mu4xb8ws.

representatives of the Activists Ceres, CalPERS, and PRI, sends a letter to Phillips 66 requesting that the company commit to disclosures aligned with Climate Action 100+'s net-zero benchmark, and increased transparency of lobbying expenditures.

November 2020: ISS issues its proxy voting guidelines for the 2021 proxy season. In the section describing circumstances in which ISS may recommend a vote against or withhold from one or more directors in an uncontested election, ISS updated its policy to include, as an example of risk oversight failure, "demonstrably poor risk oversight of environmental and social issues, including climate change."[62]

January 2021: BlackRock CEO Larry Fink issues his annual letter to clients, titled "Net-zero: A Fiduciary Approach." In that letter, Fink states: "We expect the issuers we invest in on our clients' behalf to be adequately managing the global transition towards a net zero economy. . . . Where we do not see progress in this area, and in particular where we see a lack of alignment combined with a lack of engagement, we will not only use our vote against management for our index portfolio-held shares, we will also flag these holdings for potential exit in our discretionary active portfolios."

January 2021: State Street Global Advisors sends its annual letter on its proxy voting agenda, stating: "As a signatory to Climate Action 100+, we look forward to sharing our experience and insights on climate stewardship with other members. In 2021 we will focus on specific companies especially vulnerable to the transition risks of climate change. Further, we will continue our ongoing engagement with companies in other sectors that, while not as carbon intensive, also face risks such as the physical impacts of climate change."

62 *ISS Publishes 2021 Voting Policy Updates*, WILSON, SONSINI, GOODRICH & ROSATI (Nov. 13, 2020) https://tinyurl.com/bdeknp66.

May 2021: Phillips 66 shareholders vote in favor of proposal from the Follow This calling for Scope 1, Scope 2, and Scope 3 reduction and targets and a CalSTRS and Presbyterian Church (U.S.A.) proposal calling for the company to produce a climate lobbying report.[63] Phillips 66 pledges to implement the proposals.

Figure 6 displays the vote counts. The vote demonstrates the immense influence of the Big Three asset managers and the proxy adviser duopoly. In order to approve the proposal, a majority of shares "present" at the meeting—that is, voting in person or by proxy—needed to vote in favor of the proposal. BlackRock, State Street Global Advisors, and Vanguard alone made up one-third of the shares present at the meeting.

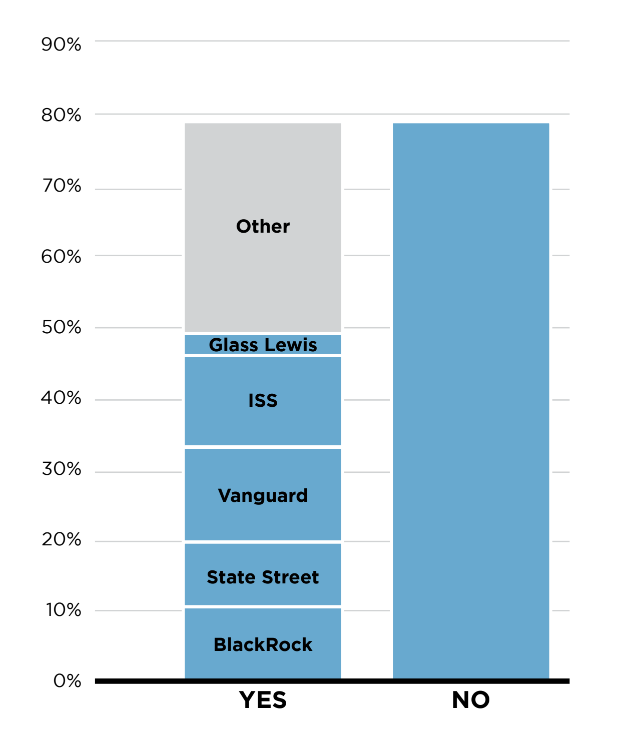
As a result of the Big Three's voting bloc, all the Activist needed to win was just over 16 percent of the remaining shares present. And true to form, the proxy duopoly likely controlled the remaining shares needed to put them over the top. Though estimates vary, one conservative estimate suggests that ISS alone influences up to 13 percent of shareholders' votes at the median public company, while Glass Lewis influences three percent.[64] Using these estimates, ISS and Glass Lewis alone would have carried the rest of the votes needed to adopt the Activist's proposal.[65] And this is without considering the votes of smaller asset managers than the Big Three that were also significant shareholders of Phillips 66. While some of these other asset managers would have been among the votes influenced by ISS and Glass Lewis, others may have voted in favor of the proposal using a different proxy adviser, or without using a proxy adviser at all.

63 Phillips 66, Submission of Matters to a Vote of Security Holders (Form 8-K) (May 12, 2021), https://tinyurl.com/4caxsr8x.

64 Stephen Choi, Jill E. Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 590 EMORY L.J. 870, 900 (2010).

65 Phillips 66, *supra* note63.

FIGURE 6. BLOCK VOTING IN PHILLIPS 66 GREENHOUS-GAS EMISSIONS DISCLOSURE PROPOSAL



After shareholders adopted the resolution, Climate Action 100+ claimed victory:

> Following the 2021 annual meeting votes and further investor engagement around emissions reduction targets, later that year Phillips 66 became the first U.S. refiner and second U.S. oil company to set a Scope 3 emissions target, pledging a 15 percent reduction in emissions by 2030. . . . Investors will continue to engage closely with Phillips 66 to deliver on their commitments and set more ambitious targets for dealing with Scope 3 emissions, as well as increased alignment with the Climate Action 100+ Net-Zero Company Benchmark. [66]

PART II. APPLICABLE LAW & RELEVANT FACTS

A. ACTIONABLE PREDICATES

A range of ESG-motivated actions may become the factual predicates for legal action and changes in policy. While the ESG agenda is ill-defined and ever-expanding, the following patterns of action are becoming well established. Additional ESG predicates may emerge over time. Large corporations appear especially vulnerable to Player demands to take sides in contested political elections, which may become more consequential in the future. In general, ESG predicates place political, racial, and progressive cultural issues (including climate change) on corporate agendas.

- *Climate-change commitments.* Players may commit or pressure business companies to commit to climate-change reduction efforts. While some environmental policies may be material to investment decisions, the commitments urged by Activists are generally not. For example, a widespread shareholder proposal campaign urges investment funds and business companies to align all of their own business activities, and even *their customers'* activities, with so-called "net-zero" emissions in order to "comply" with the Paris Agreement.[67]
- *"Racial equity" or other social-issue "audits."* Players may pressure business companies to undertake internal, third-party audits on various progressive social issues, including

66 CLIMATE ACTION 100+, *supra* note 55.

67 These commitments are often referred to as "Scope 3" commitments because they extend beyond emissions from the company's activities (Scope 1 and Scope 2) to extend to the company's suppliers and customers (Scope 3). *See, e.g., What are scope 1, 2 and 3 carbon emissions?*, NAT'L GRID, https://tinyurl.com/ys2cpdf4; *see also* BlackRock Inv. Stewardship, *2022 climate-related shareholder proposals more prescriptive than 2021*, BLACKROCK (May 2022), https://tinyurl.com/4rwcc255 (noting an increase in shareholder proposals on scope 3 emissions in 2022).

"racial equity."[68] For example, after 40.5 percent of JPMorgan Chase & Co. shareholders supported a racial equity audit proposal submitted by the Activist SOC Investment Group,[69] JPMorgan Chase undertook a racial equity audit. The audit revealed that JPMorgan Chase had contributed $18.2 billion toward racial minorities assets under its "Racial Equity Commitment" program.[70] An analogous racial equity audit conduct by Starbucks recommended pay incentives for board diversity and doubling down on racial quotas in hiring.[71]

- *Abortion promotion.* Players may pressure business companies to take public positions on abortion laws and expend material corporate resources to provide their employees with paid-for abortions and travel costs to evade state laws. For example, numerous companies, including AT&T and Citigroup, have committed to pay for employees' abortion-related coverage.[72]
- *Charitable contributions.* Players may take or pressure business companies to make contributions to ESG-affiliated groups. These contributions may take the form of business policies, "initiatives," or direct financial donations. For example, large corporations donated millions to the group Black Lives Matter, which has faced scrutiny for self-dealing.[73] By one measure, after 2020, America's 50 biggest public companies collectively committed $49.5 billion to addressing racial issues.[74]
- *Political elections and campaigns.* Players may make or exert pressure on business companies to make material changes in their business policies based in part by the political motivations of corporate officers. Examples abound. 79 major corporations—including American Express, Nike, and Walgreens, among others—at least temporarily halted their political donations to Republicans after the Capitol protests in January 2021.[75] Large corporations also increasingly take public stances on elections and "voting rights."[76] In 2021, after the state of Georgia enacted a voting process reform law, numerous large corporations, including BlackRock, announced their public opposition to the law and, in some cases, threatened to relocate economic activity away from the state.[77]

B. ESTABLISHING FACTS

After establishing a potentially actionable ESG predicate, oversight and litigation efforts may be able to develop facts that support legal or policy actions. However, the relevant facts will differ by theory of liability and applicable law. The discussion below provides a brief summary of several theories of liability. Appendix A provides sample inquiries overseers and litigants could assert. The answers to these inquiries would help to establish material facts.

1. Conflicts of Interest

Conflicts of interest are relevant throughout corporate, trust, and securities law. Investigations could establish facts that

68 *See, e.g.,* Vivek Ramaswamy, *Our Letter to Apple*, STRIVE ASSET MGMT. (Sept. 19, 2022), https://tinyurl.com/43bzmb7h (collecting examples of racial equity audit proposals adopted and implemented); Ellen McGirt, *Former Attorney General Loretta Lynch says DEI audits are critical to racial progress—and they'll be on the rise in 2023*, FORTUNE (Jan. 6, 2023), https://tinyurl.com/yf2u749a.

69 JPMorgan Chase & Co., Current Report (Form 8-K) (May, 18, 2021).

70 *2022 Racial Equity Commitment Audit Report*, JP MORGAN CHASE & CO., https://tinyurl.com/yckkye9h.

71 Covington & Burling, *A Report to Starbucks, On the Progress of its Efforts to Promote Civil Rights, Equity, Diversi-ty, and Inclusion*, STARBUCKS (Mar. 31, 2021), https://tinyurl.com/2p8u6wyu.

72 Lauren Hodges, *Corporate America reckons with its role in reproductive rights, NPR (July* 25, 2022), https://tinyurl.com/3yw7bbzf.

73 See Brad Dress, *Black Lives Matter exec accused of stealing $10M in lawsuit,* THE HILL (Sept. 5, 2022), https://thehill.com/regulation/court-battles/3629589-black-lives-matter-exec-accused-of-stealing-10m-in-lawsuit/; Andrew Kerr, Major *corporate donors silent on Black Lives Matter's alleged self-dealing,* WASH. EXAMINER (June 3, 2022), https://tinyurl.com/mshstw7t.

74 Tracy Jan et al., *Corporate America's $50 billion promise*, WASH. POST (Aug. 23, 2021), https://tinyurl.com/2p8wxtm6.

75 Kate Gibson, *Most, but not all, corporations kept their post-January 6 PAC pledges*, CBS NEWS (Jan. 5, 2022), https://tinyurl.com/4xazxe6r .

76 David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Other Abstain*, N.Y. TIMES (Apr. 14, 2021), https://tinyurl.com/mr2r9rkt.

77 *Id.*

support claims that relevant Players are not independent from conflicts of interest and therefore are exposed to liability.

Several federal statutes prevent Players from acting with conflicts of interest. Under the Investment Advisers Act and the Employee Retirement Income Security Act (ERISA),[78] many Players are fiduciaries and owe their clients a duty of loyalty.[79] This means Players must perform all their duties—whether its investing clients' funds or advising clients' on proxy voting—with one end in mind: their clients' interests.[80] Some of these statutes require Players to act "solely" in their clients' interest[81] while others require them to seek their clients' "best interests."[82] Either way, both standards limit or outright prohibit conflicts of interests.[83] Conflicts of interests arise when Players put their own interests (or anyone else's) ahead of their clients' interests.[84] Under the Investment Advisers Act, this rule extends to any "interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."[85] And under ERISA, this rule applies to any interest other than "providing (financial) benefits" to clients and "defraying reasonable expenses."[86]

These rules present a plethora of problems for Players. While asset managers and proxy advisers must act for their clients' financial best interests, they often have conflicting mandates from their clients. Some major asset owners demand their assets be managed for climate goals. For example, the Comptroller of the City of New York publicly wrote to BlackRock CEO Larry Fink demanding he help NYC pension funds achieve their net zero goals, including by "[providing] a detailed approach to keeping fossil fuel reserves in the ground."[87] On the other hand, 19 state attorneys general have raised concerns that BlackRock is violating the duty of loyalty to invest their state's pensions to earn a financial return.[88]

Asset managers like BlackRock have their own financial incentives for how they handle these client demands. They can charge fees for ESG funds "that are often more than 40 percent higher than fees for traditional comparable funds."[89] They also separately sell ESG analysis services, like BlackRock's Aladdin. To increase their assets under management, they market themselves as a climate leader to millennials, who are posed to inherit around $68 trillion.[90]

Proxy advisers like ISS and Glass Lewis have the same incentives. They also sell products analyzing ESG investments, like ISS ESG solutions and Glass Lewis's ESG Climate Solutions.[91] The value of these products depends on companies continued commitment to environmental and social goals—a matter that ISS and Glass Lewis deal with directly in their proxy advisory services when they advise investors on how to vote on thousands of ESG-focused shareholder proposals. This gives ISS and Glass Lewis a financial motive

78 The Investment Advisers Act generally applies to all large asset managers and proxy advisers. *See* 15 U.S.C. § 80b-2(11). ERISA is limited to asset managers who invest pri-vate retirement, pension, and insurance plans. *See* 29 U.S.C. §§ 1002(21)(A), 1003(a).

79 *See* 29 U.S.C. §§ 1103(c)(1), 1104(a)(1); Commission Inter-pretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669, 33669 (July 12, 2019) (here-inafter the "2019 Interpretative Release").

80 *See* 29 U.S.C. §§ 1103(c)(1), 1104(a)(1); 2019 Interpretative Release, 84 Fed. Reg. at 33671.

81 *See* 29 U.S.C. § 1104(a)(1).

82 2019 Interpretative Release, 84 Fed. Reg. at 33671.

83 *See id.* ("Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest . . . ."); *see also* 29 U.S.C. § 1104(a)(1) (utilizing the "sole interest" standard); Max M. Schanzen-bach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 400–02 (2020) (explaining that conflicts of interests are prohibited under the sole interest standard).

84 *See* 2019 Interpretative Release, 84 Fed. Reg. at 33675; Restatement (Third) of Trusts §78(2) (2007).

85 *See* 2019 Interpretative Release, supra note 82.

86 29 U.S.C. §§ 1103(c)(1), 1104(a)(1)(A). See Fifth Third Bancorp v. Dudenhoef-fer, 573 U.S. 409, 420-21 (2014) (explaining that in ERISA, "the term 'benefits' . . . must be understood to refer to the sort of financial benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries.").

87 Letter from Brad Lander to Laurence D. Fink, *supra* note 5 at 4, 5.

88 Letter from Mark Brnovich, Arizona Attorney General, et al. to Laurence D. Fink (Aug. 4, 2022), https://tinyurl.com/2s3mmu2z.

89 Andrew A. King & Kenneth P. Pucker, *ESG and Alpha: Sales or Substance?*, INST. INV.: OPINION (Feb. 25, 2022), https://tinyurl.com/yc3h86ey.

90 Nicole Casperson, *ESG is One of 3 Top Ways to Attract Millennials,* ESG CLARITY (Apr. 15, 2021), https://tinyurl.com/mrxrfk46.

91 *See* Institutional S'hldr Servs., ISS ESG, ISS GOVERNANCE, https://tinyurl.com/ytmrretv; *ESG Climate Solutions*, GLASS, LEWIS & CO., https://tinyurl.com/mr2c6fcf.

to use their proxy advisory services to promote their ESG-related services.

Even more, ISS and Glass Lewis provide the same proxy voting advice to clients with divergent interests, suggesting that they are only serving the best interests of some of their clients. For example, several of ISS and Glass Lewis' clients have committed to pressure "proxy advisers . . . to ensure that [their] products and services . . . are consistent with the aim of achieving global net zero emissions by 2050 or sooner."[92] But other clients, like state pension funds, have hired ISS and Glass Lewis to help them increase the value of their employees' retirement savings. In fact, 21 state attorneys general wrote ISS and Glass Lewis a letter questioning these proxy advisers' commitment to their financial goals.[93]

Sample questions to players related to conflicts of interest are included in Appendix A.

2. Control and Collusion

In corporate and securities laws, actors that are determined to have control over business companies are subject to additional legal duties. Players may fall under these duties by aggregating their shares and other tools of influencing shareholders together for coordinated actions that, combined, may constitute control.

A shareholder or group of shareholders may be found to exercise control over a company even if they own far less than a majority of the company's shares.[94] A group of shareholders may be found to control a company if "they, as a practical matter, are no differently situated than if they had majority voting control" over a particular transaction.[95] At the average shareholder meeting, where only 80 percent of shares outstanding are present, any combination of shareholdings over 40 percent will be sufficient to win a majority vote.[96] Not only the group's share ownership, but "broader indicia of effective control" play a role too, including whether the group utilizes "pressure tactics" or has "the ability to exercise outsized influence in the board room or on committees."[97]

If a shareholder is determined to exercise control over a company, then the shareholder is subject to fiduciary duties *to the company*.[98] This would subject a Player to numerous duties, many of which ESG Predicates may violate.

Another duty concurrent to control is enhanced filing requirements with the SEC. Under Section 13(d) of the Securities and Exchange Act, an investor must file certain information with the SEC when it acquires a position of at least five percent or more in any class of equity securities of a public company.[99] On a Schedule 13D, firms must disclose how they are working to change or influence control of the company.[100] The Big Three asset managers, however, often rely on an exception to this requirement meant for passive investors and file an abbreviated Schedule 13G form.[101] This deprives investors and lawmakers of valuable information of how the asset managers are exerting control over management of portfolio companies. Moreover, the asset managers are legally required to file the more informative 13D disclosure if they have a control purpose or intent with respect to a portfolio company. If an asset manager (1) develops ESG policies, (2) meets with

92 Net Zero Asset Managers Initiative, *Commitment, supra* note 30.

93 Letter from Sean D. Reyes, Utah Attorney General, et al. to Gary Retelny & Kevin Cameron (Jan. 17, 2023), https://tinyurl.com/5y3tfa7u.

94 *See, e.g.*, In re Cysive, Inc. S'holders Litig., 836 A.2d 531 (Del. Ch. 2003) (finding control for 35 percent shareowner).

95 *In re* PNB Holding Co. S'holders Litig., No. 28-N, 2006 WL 2403999 at *9 (Del. Ch. Aug. 18, 2006).

96 Voigt v. Metcalf, 2020 WL 614999 at *18 (Del. Ch. 2020).

97 Voigt, 2020 WL 614999 at *9.

98 *See* Quadrant Structured Prods. Co. Ltd. v. Vertin, 102 A.3d 155, 183–84 (Del. Ch. 2014).

99 15 U.S.C. § 78m(d)(1).

100 17 C.F.R. § 240.13d-1.

101 MINORITY STAFF OF THE S. COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 117 CONG., THE NEW EMPERORS: RESPONDING TO THE GROWING INFLUENCE OF THE BIG THREE ASSET MANAGERS 1-2 (Dec. 2022), https://tinyurl.com/5yvv89rv.

companies to discuss how they are not following such policies, and (3) then votes against directors because the company's ESG practices do not match the asset manager's policies, the asset manager may have done more than simply engage with the company, and instead attempted to exercise control.[102] If the Big Three are found to be exercising control of portfolio companies, there may be other regulatory obligations related to the ability to resell securities or liability for the company's violations of the Exchange Act.

With respect to the Big Three's influence on banks, there is the possibility that they are exercising a "controlling influence" under the Bank Holding Company Act of 1956.[103] This would subject the firms to significant capital and liquidity requirements. If the asset managers are acting in concert with each other through their commitments to the Net Zero Asset Managers Initiative, for example, their shares could be attributed to each other for purpose of the Bank Holding Company Act.

The Big Three's control over public utility companies is also limited by Section 203 of the Federal Power Act (FPA). This law prevents holding companies from acquiring more than ten million dollars in shares of a utility company without authorization from the Federal Energy Regulatory Commission (FERC).[104] And FERC verifies that a holding companies' acquisition of a utility company's shares is "consistent with the public interest."[105]

Notably, Vanguard has implied that its commitment to use its influence over utilities to achieve climate goals was not consistent with the public interest. Specifically, thirteen state attorney generals protested Vanguard's influence over utility companies and intervened in a FERC proceeding.[106] Instead of defending its stance on climate issues, Vanguard immediately withdrew from the Net Zero Asset Managers Initiative and explained that it wanted to "make clear that Vanguard speaks independently on matters of importance to our investors."[107] Players acting together to control corporations for ESG purposes may have effects beyond corporate and securities laws. The coordinated actions of Players may also establish violations of federal antitrust law prohibitions on collusion.[108] The Sherman Antitrust Act prohibits certain "group boycotts" or "concerted refusals by traders to deal with other traders.[109] Specifically, boycotts that have "an adverse effect on competition" are not allowed.[110] And agreements "among firms that ordinarily compete with one another at the same level of the market" that "almost always tend to restrict competition and decrease output" are considered *"per se violations"* of the Sherman Act.[111]

These antitrust laws also pose serious problems for Players who appear to be boycotting fossil fuels. For example, 301 asset managers who control $59 trillion in the market and otherwise compete with one another have joined the Net Zero Asset Managers Initiative.[112] Among other things, these asset managers are expected to adopt a "robust and science-based" fossil fuel phaseout policy. A model policy offered by the Science Based Targets initiative requires asset managers to "immediately ceas[e]" providing "financial or other support" to "coal companies that are building new coal infrastructure or investing in new or

102 Mark T. Uyeda, Commissioner, SEC, Remarks at the 2022 Cato Summit on Financial Regulation (Nov. 17, 2022), https://tinyurl.com/4tk6yecy.

103 *Id.* at 2.

104 *See* 16 U.S.C. § 824b(a)(2).

105 18 C.F.R. § 2.26 (2023).

106 Brittany Bernstein, *Vanguard Pulls Out of Net Zero Cli-mate Effort to Make Clear It 'Speaks Independently*,' YAHOO NEWS (Dec. 7, 2022), https://tinyurl.com/4azfxj7h.

107 *Id.*

108 *See generally Group Boycotts,* FED. TRADE COMM'N, https://tinyurl.com/4d-c7f7de.

109 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

110 Tunica Web Advert. v. Tunica Casino Operators Ass'n, Inc., 496 F.3d 403, 412 (5th Cir. 2007).

111 *Id.*

112 *See* THE NET ZERO ASSET MANAGERS INITIATIVE, https://tinyurl.com/ycyatzbs.

additional thermal coal expansion, mining, production, utilization (i.e., combustion), retrofitting, or acquiring of coal assets."[113] Similarly, Climate Action 100+'s members jointly "engage" electric utilities to phaseout out gas and coal by 2040, assigning a retirement date to each coal or gas unit.[114]

In other words, the Net Zero Asset Manager's Initiative and Climate Action 100+ members are jointly boycotting an entire sector of the power industry. Because their agreements are directly aimed at decreasing coal and gas production and eliminating competition against "clean power generation," they may be violating the Sherman Act.[115]

Beyond the anticompetitive effects on the energy sector, the alignment of major asset managers on their investment strategies and engagement policies reduces consumer choice in the asset management industry.

Sample inquiries to players related to control and collusion are included in Appendix A.

3. Unreasonable Management & Corporate Waste

Players and business companies are subject to duties of care. Under state corporate law, directors and officers breach their fiduciary duty to shareholders by committing "corporate waste," or expending assets for no rational purpose. Similar duties apply to investment funds. For example, the adopting release for Rule 206(4)-6 under the Advisers Act, the "proxy voting rule," provides that "[u]nder the Advisers Act . . . an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting."

As SEC Commissioner Mark Uyeda has described:

> Even if an adviser's proxy voting policies and procedures are disclosed to clients, it is unclear whether an adviser to a fund that seeks to track the performance of an index is acting in accordance with its fiduciary duties when it uses fund assets to pursue non-financial goals.[116]

Investigations into Players and business companies could establish that directors and officers violate their duties of care by engaging in ESG transactions.

Sample inquires to players related to unreasonable management and corporate waste are included in Appendix A.

113 *Network Partners' expectation of signatories with regard to fossil fuel investment policy,* THE NET ZERO ASSET MANAGERS INITIATIVE (Dec. 2021), https://tinyurl.com/y6pskef7.

114 Laura Hillis et al., *2020 Progress Report*, CLIMATE ACTION 100+ at 21, 44 (2020), https://tinyurl.com/32txkwwz.

115 *See e.g.*, F.T.C. v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 432–35 (1990).

116 Mark T. Uyeda, Commissioner, SEC, *ESG: Everything Everywhere All At Once* (Jan. 27, 2023) https://tinyurl.com/yty83s8v.

APPENDIX A—SAMPLE INQUIRIES

I. QUESTIONS TO ASSET MANAGERS

A. Conflicts of Interest

1. Identify all environmental or social activist groups of which you have been a member between 2017 to present, including Ceres, Climate Action 100+, the Net Zero Asset Managers Initiative (NZAMI), and the Glasgow Financial Alliance for Net Zero (GFANZ). For each such group, also provide the dates of your membership and identify all senior executives and board members in your company that were involved in your decision to join.
2. For each group listed in response to question 1, identify all commitments that were formally or informally requested of you, or which you offered or agreed to, relating in any way to that group. This includes but is not limited to commitments such as implementing "a stewardship and engagement strategy, with a clear escalation and voting policy, to achieve net zero emissions by 2050 or sooner." It also includes all commitments related to all portfolio companies. Also describe in detail your actions related to each such commitment.
3. Describe in detail your communications with activists and your clients from 2017 to present related to joining Climate Action 100+, Ceres, NZAMI, and GFANZ, where such communications preceded or were contemporaneous with you joining the organization referenced in the communications.
4. Describe in detail your communications with members of Climate Action 100+, Ceres, NZAMI, and GFANZ, relating to the subject matter of each initiative with respect to any portfolio company where you engaged or voted on a proposal at the company.
5. Describe in detail how the environmentally and socially aimed actions you have taken with respect to investments and exercises of shareholder rights have financially benefited your clients. Specifically, what financial benefits do your clients receive when you pressure companies to reduce or disclose greenhouse gas emissions or adopt gender and board diversity quotas? Provide copies of all studies you have performed analyzing any financial benefits to your clients, including all studies that have found harms or no benefits.
6. In addition to asset management services, do you perform any services related to ESG analysis? If so, how does the success of ESG-focused companies and growth of ESG investing financially affect your ESG analysis services? How do you square this financial incentive with your fiduciary duty of loyalty to your clients?
7. Do you serve any domestic or foreign clients whose investment policies include environmental goals such as achieving net zero, and social goals, including, but not limited to, government pension funds and sovereign wealth funds? Do you also serve clients whose investment policies require that investments be made in the sole financial interest of the client's beneficiaries? Describe in detail all steps you have taken from 2020 to present to comply with the wishes of your ESG clients when furthering ESG and climate goals in your company engagement and proxy voting, while maximizing financial return for your non-ESG.
8. Identify how you have voted on all shareholder proposals relating to emissions reductions by a company, financial institution, or insurance company, racial equity audits, use of race in insurance underwriting, and lobbying in line with the Paris

Agreement. Describe in detail why such votes were solely in the financial interest of your shareholders. Also, provide all communications you received from any client or member of Climate Action 100+, NZAMI, Ceres, or GFANZ regarding such votes.

9. Identify the amount of assets under management you have at present from China Investment Corporation (CIC), Safe Investment Company (SAFEIC), National Social Security Fund (NSSF), and Ping An, and also describe in detail whether of the foregoing entities or their affiliates have currently or previously placed any personnel with you.

B. Control and Collusion

10. For the companies where you own sufficient shares to qualify to file a Schedule 13D form but have not filed a form in one or more years from 2020 to present and where you engaged with such companies or voted on shareholder proposals regarding setting emissions reduction targets, how, if at all, have you informed investors and lawmakers of your efforts to change or influence the control of the company?

11. List every [U.S.] utility company in which you own more than ten million dollars in shares. Identify every instance in which you have ever used your financial stake to pressure a utility company to reduce its carbon emissions, set emissions targets, phaseout fossil fuels, or comply with environmental or social goals.

12. Have you ever worked with other asset managers to pressure com-panies to comply with environmental and social goals of activist groups like Ceres, Climate Action 100+, NZAMI, or GFANZ? Have you ever agreed with other asset managers to take any adverse action, such as negative board votes, against companies that do not align with the goals of any social or activist group?[117] If the answer to the foregoing questions is anything other than an unequivocal no, then describe in detail each such instance.

13. Do you agree that one or more agreements or commitments between you and other asset manager(s) such as Climate Action 100+'s goal of phasing out fossil fuel are aimed at reducing competition against clean energy?[118] If you disagree, describe in detail why neither the intent nor effect of such actions is to reduce competition against clean energy.

14. Provide copies of all analyses reviewed or relied upon by you that relate to whether your involvement in organizations including Ceres, Climate Action 100+, NZAMI, and GFANZ establishes control under federal or state law or violates any applicable federal or state antitrust laws.

15. Provide any notes or materials related to meetings with [Climate Action 100+ and Target Companies] from 2020 to present on the topic of emissions reductions.

C. Unreasonable Management and Corporate Waste

16. Describe in detail how you prudently concluded that [Business Company] conducting an [ESG Transaction] report would increase the value of the company's shares. Also describe in detail how doing so would increase the value of the portfolio(s) you manage which hold the Company.

---

117 *Network Partners' expectation of signatories with regard to fossil fuel investment policy*, NET ZERO ASSET MANAGERS INITIATIVE, https://www.netzeroassetmanagers.org/media/2021/12/NZAM-Network-Partners-Fossil-Fuel-Position.pdf.

118 Laura Hillis et al., *2020 Progress Report*, CLIMATE ACTION 100+ at 21, 44 (2020), https://tinyurl.com/32txkwwz.

17. Describe in detail how you concluded that [Business Company] management's statement of opposition to the preparation of the requested [ESG Predicate] report [e.g., management said a proposal would "be of little value for our shareholders, associates, and other stakeholders and, therefore, would be an unnecessary distraction and redirection of resources"[119]] was incorrect and why you voted for such report over management's negative recommendation.
18. Describe in detail all times from 2017 to present when you have engaged with a financial institutions or insurance company or voted on a pro-posal that was intended to encourage the financial institution or insurance company to incorporate race or sex into its underwriting or lending decisions. Explain how such exercises of shareholder rights are in the financial interests of the financial institution or insurance company's shareholders.

II. QUESTIONS TO PROXY ADVISERS

1. Have you ever based your voting recommendations, in whole or in part, on the social and environmental goals of groups that seek to achieve net zero by 2050, including Ceres, Climate Action 100+, Net Zero Asset Managers Initiative (NZAMI), or Glasgow Financial Alliance for Net Zero (GFANZ) at any time from 2017 to present? If yes, describe and detail all such instances. Are the standards and goals of these activist groups reflected in your proxy voting policies?
2. Describe in detail how your voting recommendations that align with ESG goals have proven to financially benefit investors? How have they increased the financial value of the underlying companies? What financial benefits, if any, do your clients receive when your recommendations pressure companies to set emissions reduction targets, reduce greenhouse gas emissions, or enforce gender and board diversity quotas?
3. In addition to proxy advisory services, do you sell consulting or other services elated to ESG to companies for whom you make shareholder proposal or board recommendations? If so, how does the success of ESG-focused companies and ESG investing financially affect your ESG analysis services? How do you square this financial incentive with your fiduciary duty of loyalty to all of your clients?
4. Do you provide services to clients that prioritize environmental and social causes and are willing to make financial sacrifices to support these causes? Have any of these clients attempted to "engage" with you on aligning your services with various ESG goals? Do you provide services to clients whose only aim in utilizing your services is to increase the return on their investments? How do you serve the best interests of both your ESG-focused clients and your exclusively financially focused clients when supporting ESG goals?
5. Provide any notes or materials related to meetings with [Climate Action 100+ and Target Companies] from 2020 to present on the topic of emissions reductions.
6. With respect to your proxy voting guidelines, describe in detail any contact that any of your directors or officers had with any [Activist(s)] or [Coordinator(s)] from 2017 to present related to ESG goals. With whom outside of your company do you communicate in developing the guidelines? Describe in detail the nature of those discussions?

119 Walmart Inc., 2022 Proxy Statement (Form DEF 14A) (June 1, 2022).

7. Identify all recommendations that you have made related to the diversity of board membership from 2017 to present. Provide copies of all analyses that you performed or reviewed related to board diversity and financial performance of companies. Describe in detail how your recommendations related to board diversity were based on improving the value of shares in portfolio companies.
8. With respect to your engagement strategy, provide any contact any director or officer of the Fund had with any [Activist(s)] or [Coordinator(s)]. With whom did you communicate with in developing the strategy? Did you invite any [Activist(s)] or [Coordinator(s)] to any engagement meetings or other activities. What was the nature of those discussions?
9. Identify how you have recommended shareholders vote on all shareholder proposals relating to emissions reductions, racial equity audits, use of race in insurance underwriting, and lobbying in line with the Paris Agreement. Describe in detail why such recommendations were solely in the financial interest of your shareholders. Also, provide all communications you received from any client or member of Climate Action 100+, NZAMI, Ceres, or GFANZ regarding such proposals.
10. Explain how [Business Company] conducting an [ESG Transaction] report would increase the value of the company's shares. Explain how doing so would increase the value of the portfolio(s) you manage which hold the Company.
11. Explain how you concluded that [Business Company] management's statement of opposition that preparation of the requested [ESG Predicate] report [e.g., management said a proposal would "be of little value for our shareholders, associates, and other stakeholders and, therefore, would be an unnecessary distraction and redirection of resources"[120]] was errant.

III. QUESTIONS TO BUSINESS COMPANIES

1. Have you been on the receiving end of any "engagements" by Activists, Coordinators, or anyone acting on behalf of a Coordinator with respect to ESG topics at your company? Coordinators include such organizations as Ceres, Climate Action 100+, Net Zero Asset Managers Initiative (NZAMI), Net-Zero Banking Alliance (NZBA), and Glasgow Financial Alliance for Net Zero (GFANZ). Where you have any notes or communications relating to those engagements, including any threats or potential witnesses who recall the content of those engagements, please identify such engagements, including the date, persons involved, and topics discussed.
2. Explain how your donation to or commitment to a [ESG Transaction] initiative increased the value of your shares. Provide any requests for communications and efforts that asset managers and proxy advisers made to you.

IV. QUESTIONS TO ACTIVISTS

1. Provide any contact made with [Coordinator(s) or Asset Manager(s)] related to [ESG Transaction or vote]. Provide all responses made by [Coordinator(s) or Asset Manager(s)] relating to how anyone would vote their shares in relation to [ESG Transaction or vote].
2. Provide all communications with Asset Managers, Clients of Asset Managers, and Coordinators related to [ESG transaction or vote].

120 *Id.*

V. QUESTIONS TO COORDINATORS

1. Provide a list of all Asset Managers and Proxy Advisors that have been or are formal or informal members of your organization from 2017 to present.
2. Provide all documents relating to any contact made with [Activist(s) or Asset Manager(s)] related to [ESG Transaction or vote].
3. Provide any representations made by [Activist(s) or Asset Manager(s)] indicating how certain parties would vote their shares in relation to the Transaction.
4. Provide all analyses reviewed or relied upon by you that establishes that entities' involvement in [Coordinator] did not establish control under federal or state law or violate any applicable federal or state antitrust law.

APPENDIX B—ESG ACTIVISTS

PRIVATE ESG INVESTMENT FUNDS[121]

ASSET MANAGER	CHARTER JURISDICTION	PRINCIPAL PLACE OF BUSINESS	STATES FILING SECURITIES NOTICES IN	# OF SHAREHOLDER. PROPOSALS VOTED ON 2012-2022	TOTAL AUM	AUM POTENTIALLY SUBJECT TO REGULATION: INDIVIDUALS (INCLUDING 401(K PLANS)	PENSION PLANS	STATE OR MUNICPAL GOVERNMENT ENTITIES	CHARITABLE ORGANIZATIONS	CORPORA-TIONS	OTHER REGULATED INVESTMENT VEHICLES*	SOVEREIGN WEALTH FUNDS AND FOREIGN OFFICIAL INSTITUTIONS
Adasina Social Capital	California	California	California, Colorado, Texas	N/A	$44.0 Million	$20.0 Million	X	X	$12.0 Million	X	X	X
Amundi Asset Management	Delaware	Massachusetts	All 50 states and District of Columbia	1	$100.9 Billion	X	$4.4 Billion	$5.1 Billion	$560.5 Million	X	$51.8 Billion	X
Arjuna Capital	Delaware	North Carolina	California, Massachusetts, New Mexico, New York, North Carolina, Texas, Washington	54	$403.4 Million	$29.7 Million	$3.9 Million	X	$16.3 Million	$0.1 Million	X	X
Azzad Asset Management	Delaware	Virginia	Alabama, California, District of Columbia, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Virginia, West Virginia	4	$1.3 Billion	$89.7 Million	$8.2 Million	X	$41.9 Million	X	$381.0 Million	X
Baldwin Brothers	Delaware	Massachusetts	Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, Washington	3	$1.6 Billion	$58.3 Million	X	X	$106.0 Million	$182.2 Million	$0,2 Million	X
BNP Paribas Asset Management	New York	New York	New York	5	$53.0 Billion	X	$3.4 Billion	$55.6 Million	$172.1 Million	$150.1 Million	$2.8 Billion	$29.3 Billion
Boston Common Asset Management	Delaware	Massachusetts	California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, Wisconsin	12	$5.9 Billion	$0.70 Million	$59.3 Million	$308.1 Million	$806.3 Million	$196.7 Million	$2.13 Billion	X
Boston Trust Walden	Massachusetts	Massachusetts	None	32	$4.3 Billion	X	X	$117.9 Million	X	X	$3.5 Billion	$250.2 Million
Calvert Research and Management	Massachusetts	District of Columbia	District of Columbia, Maryland, Massachusetts	5	$40.4 Billion	$238.8 Million	$263.4 Million	X	X	$365.4 Million	$38.9 Billion	X

121 Click on each asset manager to view their SEC investment adviser registration. Data is sourced from each manager’s most recent Form ADV. Shareholder proposal numbers are those voted on by Fortune 250 companies between 2012 and 2022, see Proxy Monitor, https://tinyurl.com/9zr8bnb5.

Change Finance	Colorado	Texas	California, Virginia		$115.5 Million	X	X	X	X	X	$115.5 Million	X
Christian Brothers Financial Services	Illinois	Illinois	California, Illinois, Nebraska, New York	4	$10.9 Billion	X	X	X	$510.7 Million	X	$9.2 Billion	X
Clean Yield Asset Management	Vermont	Vermont	California, Maryland, Massachusetts, New Hampshire, New York, Texas, Vermont	12	$517.8 Million	$53.9 Million	X	X	$34.6 Million	X	X	X
Domini Impact Investments	Massachusetts	New York	Massachusetts, New York	34	$3.0 Billion	X	X	X	X	X	$3.0 Billion	X
Engine No. 1*	Delaware	California	California	0*	$557.0 Million	X	X	X	X	X	$281.7 Million	X
First Affirmative Financial Network	Colorado	Colorado	Arizona, California, Colorado, Connecticut, District of Columbia Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin	9	$915.8 Million	$511.0 Million	$4.0 Million	X	$26.5 Million	$1.1 Million	X	X
Green Century Capital Management	Massachusetts	Massachusetts	Colorado	28	$998.3 Million	X	X	X	X	X	$998.3 Million	X
Harrington Investments	California	California	California	20	$297.7 Million	$19.2 Million	X	X	$43.7 Million	$12.0 Million	X	X
Hermes Investment Management	United Kingdom	United Kingdom	None	4	$40.6 Billion	X	$8.6 Billion	$865.1 Million	$251.7 Million	$33.6 Million	$13.9 Billion	$323.4 Million
Impax Asset Management	United Kingdom	United Kingdom	None	8	$2.4 Billion	X	X	X	X	X	X	X
Loring, Wolcott & Coolidge	Massachusetts	Massachusetts	Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, Washington	3	$12.6 Billion	X	$9.7 Million	X	$483.9 Million	$292.8 Million	X	X
Miller/Howard Investments	Delaware	New York	All 50 states and District of Columbia	6	$3.0 Billion	$444.1 Million	$14.2 Million	$8.7 Million	X	$175.7 Million	$373.3 Million	X
Newground Social Investment	Washington	Washington	Washington	17	$128.0 Million	$42 Million	X	X	$4 Million	X	X	X
Nia Impact Capital	Delaware	California	California, Colorado, Delaware, District of Columbia, Florida, Illinois, Maine, Massachusetts, Montana, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Washington	3	$417.3 Million	$18.5 Million	X	X	$135.5 Million	$38.9 Million	$64.9 Million	X

NorthStar Asset Management	Massachusetts	Massachusetts	California, District of Columbia, Massachusetts, New Hampshire, New York, Texas, Virginia, Washington	56	$792.2 Million	$20.1 Million	X	X	$101.7 Million	$5.1 Million	X	X
Trillium Asset Management	Delaware	Massachusetts	Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming	56	$5.7 Billion	$1.6 Billion	$32.3 Million	X	$882.3 Million	$204.5 Million	$1.7 Billion	X
Zevin Asset Management	Massachusetts	Massachusetts	California, Colorado, Connecticut, Florida, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Pennsylvania, Texas, Vermont, Washington	27	$783.0 Million	$29.6 Million	$5.0 Million	X	$295.7 Million	X	X	X