CADWALADER

21 Attorneys General Write to Proxy Advisors ISS and Glass Lewis

January 24, 2023

Regulation

By Jason Halper
Partner and Co-Chair | Global Litigation

On January 17, 21 Republican attorneys general **wrote** to proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis over their recently released U.S. voting guidelines. As we **reported** last week, the updated guidelines include recommendations on a number of climate and social issues, including board oversight of and accountability for environmental and social issues, board diversity, racial equality audits, and disclosure of shareholder proposals. In their letter, the attorneys general claimed that the firms' "climate and diversity, equity, and inclusion priorities" may conflict with the contractual agreements they have with states' investment vehicles, including because these agreements "typically require that [the firms] consider only one goal: the economic value of the investments." By way of example, the letter cites Texas's Employees Retirement System proxy voting policy that requires proxy recommendations to "'consider only those factors that relate to the economic value of [the] investment' and be 'in accordance with the [plan's] economic best interest,' without subordination of the plan's interests 'to unrelated objectives' pertaining to social or environmental policy." The letter goes on to claim that the actions taken by ISS and Glass Lewis "may threaten the economic value of our states' and citizens' investments and pensions — interests that may not be subordinated to your social and environmental belief, or those of your other clients." In support thereof, the attorneys-general cite to the improbability of any of the top greenhouse gas emitters meeting the commitments of the Paris Agreement, and, therefore, "[a] rational company acting in the best interests of its shareholders would not voluntarily incur the massive expense estimated by the [International Energy Agency] pathway [to net zero]."

In response, an ISS spokesperson said that although the "letter reveals a fundamental misunderstanding of market forces at work," they would respond to the questions posed in the letter and continue to work towards its sole agenda of serving its clients.

As we discussed extensively in Cadwalader Climate, Republican lawmakers have opposed ESG-related developments in a variety of ways including **blacklisting from underwriting syndicates financial institutions that supposedly "boycott" energy companies**, **withdrawing funds from asset managers citing policy concerns**, and **launching investigations**. In a panel discussion on decarbonization at the World Economic Forum in Davos, Switzerland, **former Vice President Al Gore spoke** about the need to scale down “anti-climate finance” and in a recent interview, **CEO of BlackRock Laurence Fink stated** that the fund had lost approximately $4 billion in assets in 2022 due to the boycott of ESG (while adding that the firm added $230 billion in investments in the U.S. last year) and is seriously considering the criticisms it has received and working to “address the misconceptions.”

Taking The Temperature: This letter is another development in the politicization of ESG-related policies governing investment decisions and company behavior more broadly. There is skepticism that consideration of climate issues ever run contrary to a fund’s fiduciary or contractual duties of maximizing returns for shareholders given the likely materiality of such issues. It is clear, however, that certain states will continue to use the threat of “potential” breaches of fiduciary and contractual obligations (and corresponding investigatory authority) to exert political pressure over entities who have policies with which they disagree. On the other hand, investment firms and advisors maintain an obligation to consider risks that could undermine stockholder interest, including, for example, and as highlighted by ISS’ response, climate change-driven economic shifts and changing market expectations in relation to social issues that could impact value.