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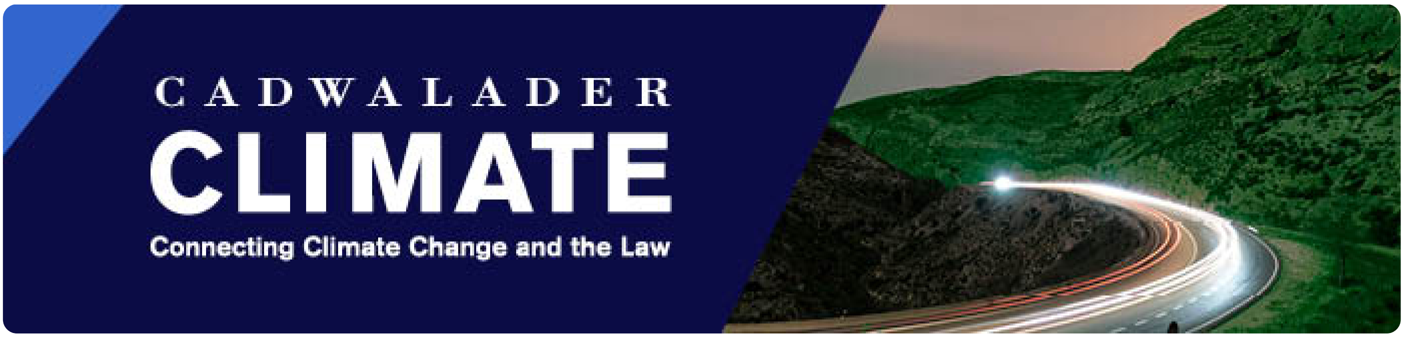

State Legislative Developments: Oklahoma and West Virginia

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On March 21, 2023 the Oklahoma House of Representatives passed **House Bill 2547**, which claims to be "designed to continue protections of state pension funds from strategies that would be harmful to the state's energy industry." The bill was introduced by Rep. Terry O'Donnell (R-Catoosa). On March 28, 2023, the Governor of West Virginia, James Justice, signed into law **House Bill 2862**, which prohibits state investment boards within West Virginia from casting their proxy votes "for the purpose of furthering non-pecuniary interests."

Oklahoma House Bill 2547 follows on from **legislation** co-authored by O'Donnell in 2021 and signed by the Governor in May 2022 that is **similar** to legislation passed or proposed elsewhere requiring state treasurers to maintain lists of financial institutions that "boycott energy companies," and to divest assets from such investment managers that "continue to boycott energy companies" after notice from the Treasurer and an opportunity to respond. The new bill addresses proxy voting by investment managers. If enacted, it would mandate that "all shares held directly or indirectly by or on behalf of a governmental entity and/or the participants and their beneficiaries shall be voted solely in the pecuniary interest of plan participants and their beneficiaries," government pension funds could not "rely on any voting decision guidance" from any blacklisted financial institution, and, "unless no economically practical alternative is available, a governmental entity may not grant proxy voting authority to any person who is not a part of the governmental entity, unless that person has a practice of, and in writing commits to, following guidelines that match the governmental entity's obligation to act solely upon pecuniary factors." The term "pecuniary interest" is not defined in the bill.

In a **statement** from the Governor announcing that he was joining an alliance of Republican governors opposing the Biden Administration's **ESG policies**, Oklahoma Treasurer Todd Russ was quoted as stating that “[t]hese harmful policies that are regulating the use of ESG in the financial arena are ultimately hurting Oklahoma businesses and our taxpayer” and that “I am glad to have the support of the Governor as I direct these investments of Oklahoma taxpayer dollars toward financial institutions that support Oklahoma industries and values.”

Like the Oklahoma bill, West Virginia House Bill 2862 is focused on voting of proxies by investment managers of public pension fund assets. The bill would require the board to directly vote shares, or to instruct investment managers to vote shares (based on a written commitment from the manager to abide by the statute), consistent with a “duty to ensure that all shareholder votes are cast solely in the pecuniary interests of the beneficiaries, based on a consideration of only pecuniary factors.” The proscription extends to recommendations of proxy advisory firms, which must “commit, in writing, to make all shareholder voting recommendations to the board or the board’s fiduciary according to the” foregoing standard of care. The bill also requires investment managers to provide advance notice “of any shareholder vote concerning non-pecuniary interests and to provide the board with a reasonable opportunity to instruct the fiduciary, in writing, how the vote must be cast.”

“Pecuniary factor” is defined as a factor that “has a direct and material effect on the financial risk or financial return to beneficiaries based on appropriate investment horizons consistent with an investment pool’s objectives and funding policy.” It goes on to state that “[e]nvironmental, social, corporate governance, or other similarly oriented considerations are not pecuniary factors, unless a prudent investor would determine that such a consideration directly and materially affects the financial risk or financial return to beneficiaries based on appropriate investment horizons consistent with an investment pool’s objectives and funding policy.”

Taking the Temperature: By focusing on proxy voting, the Oklahoma and West Virginia bills take aim at an issue receiving increasing attention from an ESG perspective. We have reported on similar proposed legislation in Kansas and other jurisdictions. Likewise, in January 2023, 21 Republican state attorneys general wrote to proxy advisory firms Institutional Shareholder Services and Glass Lewis claiming 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.” And in December 2022, the Minority Staff of the U.S. Senate Committee on Banking, Housing and Urban Affairs issued a report regarding the influence of the “liberal views” toward ESG of the “Big Three” asset managers, Blackrock, State Street, and Vanguard. The report asserted that, contrary to what it deems appropriate for passive investment strategies such as index funds, asset managers that are members of the Net Zero Asset Managers initiative commit to engage with portfolio companies toward a goal of achieving net zero emissions by 2050. At the same time, at the end of last year several major asset managers including Blackrock and Vanguard announced plans to expand programs providing investors with greater say over how their shares are voted, some of which announced similar plans for some individual index fund shareholders.