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Republican AGs Target 53 Large Asset Managers' ESG Practices

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On March 30, 2023, 21 Republican Attorneys General (AGs) **wrote a letter** addressed to over 50 U.S. asset managers citing "concerns about the ongoing agreements between asset managers to use Americans' savings to push political goals during the upcoming proxy season." The AGs state their intent to "enforce [their] states' civil laws against unfair and deceptive acts and practices and state and federal civil laws prohibiting agreements to restrain competition."

The 21-page letter raises various concerns, including perceived action taken by asset managers that allegedly is inconsistent with their client's financial interests. It highlights the obligations assumed by members of the Net Zero Asset Managers Initiative (NZAM) and Climate Action 100+ in relation to issuer engagement on issues of climate change and decarbonization. We have **written previously** about NZAM, in particular regarding Vanguard's decision to withdraw from membership of the initiative. This decision **led to pushback** against the asset manager from investors claiming Vanguard had violated its fiduciary duty in withdrawing. Other ESG-related industry collaborations have faced similar challenges, including the Glasgow Financial Alliance for Net Zero, which eliminated as a membership requirement committing to the UN-supported Race to Zero campaign after several large financial institutions **threatened to withdraw** their support over concerns of an ESG backlash and potential antitrust implications. Recently, three major insurance companies **exited** the Net-Zero Insurance Alliance with Munich Re citing "material antitrust risks" as its reason for withdrawing. And we just **recently reported** on the latest benchmarking tool introduced by Climate Action 100+, but noted that it has been **subject to inquiry** by Republican members of the House Judiciary Committee regarding antitrust compliance.

The letter also raises greenwashing concerns, stating that some asset managers have committed all assets under management to “certain environmental goals” without labelling or advertising all funds as “ESG funds.” According to the letter, “your non-ESG funds do not disclose to investors that their investments will be used to further ESG goals, including pressuring companies to reduce emissions in economically destructive ways.” Relatedly, the letter adds, “[i]nvestors looking for low cost, passive indexing investments may be unwittingly funding ... ESG activism. Any misrepresentations regarding the funds [asset managers] are offering is legally troubling.” Further, the letter asserts that asset managers have “not adequately explained to investors the downsides and risks of the funds you do market as ESG funds – even as you charge much higher fees for these funds.” According to the letter, “many of your environmental assumptions appear to be dubious, making it perhaps unsurprising that ESG funds perform poorly.”

Taking The Temperature: The Attorney General’s letter is part and parcel of the ongoing partisan debate among government officials across the United States, an area we report on frequently. Republican Attorneys General in particular have been quite active, recently writing, for example, to two proxy advisory firms, Institutional Shareholders Services and Glass Lewis, over their updated voting guidelines. That earlier letter 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.” The more recent Attorney General letter likewise takes aim at proxy advisory firms, stating that Institutional Shareholder Services “has effectively joined the efforts of Climate Action 100+ by committing to use its climate benchmark in board votes. For example, ISS’s 2023 benchmark policy states it will recommend “generally vot[ing] against” directors at companies “on the current Climate Action 100+ Focus List” that have not adopted “medium-term [greenhouse gas (GHG)] reduction targets or Net-Zero-by-2050 GHG reduction targets.”

The letter’s focus on potential greenwashing in the asset management industry also strikes at an issue that is the focus of significant attention globally, including for example, from regulators in the EU and Australia, climate activists and shareholders. The EU’s Sustainable Finance Disclosure Regulation (SFDR) is particularly relevant to greenwashing challenges in the asset management area, but that disclosure regime likewise has been the subject of significant criticism due to perceived uncertainty about how to apply its sustainability classification system. That uncertainty has, among other things, resulted in a number of large asset managers announcing downgrades of ESG funds totaling tens of billions of dollars from Article 9 – the highest sustainability classification under the SFDR – to the broader, and less restrictive, Article 8.