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NYC Comptroller and Pension Funds Advocate for Banks to Establish Interim Absolute GhG Emissions Targets

January 31, 2023

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On January 2, the New York City (NYC) Comptroller, Brad Lander, the NYC Employees' Retirement System, the NYC Teachers' Retirement System, and the NYC Board of Education Retirement System, **announced** that they had submitted shareholder proposals to three U.S. banks and one Canadian bank. The proposals, addressed to **Bank of America**, **Goldman Sachs**, **JPMorgan Chase** and **Royal Bank of Canada**, seek to require the banks to disclose their absolute greenhouse gas (GhG) emissions targets for 2030. Specifically, the Goldman Sachs, JP Morgan Chase, and Royal Bank of Canada proposals call for interim GhG lending and underwriting emissions targets for the oil and gas and power generation sectors. The Bank of America proposal, co-filed with the New York State Common Retirement Fund, similarly calls for interim GhG lending and underwriting emissions targets in the bank's energy sector that align with the Paris Agreement's goal to limit warming to 1.5 degrees Celsius.

The press release adds that "while some other major U.S. and foreign banks have set absolute emissions reduction targets, these four banks have only set targets to reduce the intensity of their emissions" by 2050. The banks are members of the Net-Zero Banking Alliance (NZBA), which **requires** members to publish 2030 and 2050 decarbonization targets within 18 months of joining the alliance, with intermediate targets to be set every five years from 2030 onwards. In November 2022, the NZBA **reported** that over half of its 122 member banks had set intermediate (i.e., 2030) decarbonization targets and that 90% of the member banks due to publish targets by October 2022 had done so.

Taking the Temperature: This development highlights the convergence of several trends. First, we have commented on the potential for increasing shareholder proposal activity in relation to climate change due to a number of factors. These include programs at some of the largest institutional asset managers to provide beneficial owners with greater say over how their shares are voted, recent updates to guidelines by proxy advisory firms ISS and Glass Lewis, the SEC's issuance of Staff Bulletin No 14L, which removed any requirement that there be a causal nexus between a social policy issue and the company's business as a basis for a company to exclude a shareholder proposal, and the SEC's adoption of a universal proxy card, which has the potential to benefit climate-related activist investors seeking to nominate directors to a company's board because the universal proxy permits shareholders to "split their vote."

Second, the shareholder proposals underscore challenges potentially posed by membership in financial industry collaborations such as the NZBA, the Glasgow Financial Alliance for Net Zero (GFANZ), and others. This past fall, some major U.S. banks acknowledged that they were considering withdrawing from GFANZ due to concerns over their ability to satisfy decarbonization commitments and the potential to be subject to litigation or enforcement actions as a result. Shortly thereafter, GFANZ amended its membership rules by dropping its connection to the UN-supported Race to Zero campaign. In December, Vanguard announced that it was withdrawing from the Net Zero Asset Managers Initiative to provide clarity "about the role of index funds and about how we think about material risks, including climate-related risks—and to make clear that Vanguard speaks independently." That same month, Republican members on the House Committee on the Judiciary wrote a letter to the steering committee members of Climate Action 100+, Ceres and CalPERS, requesting documents and seeking information regarding antitrust compliance.

Third, these shareholder proposals reflect that actions by one industry participant are rarely isolated. The funds, which own a combined total of $850 million worth of shares in the four banks, likely are re-evaluating their own portfolios to meet ESG-related commitments. The press release states that the "proposals are a part of the pension funds' overall approach to achieving net zero emissions in their investment portfolio by 2040."

State AGs Challenge Department of Labor Rule on ESG Investing

January 31, 2023

By Timbre Shriver
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Twenty-five Republican state attorneys general, along with two energy companies, have commenced an action against the U.S. Department of Labor (DOL) seeking to "hold unlawful and set aside" rules governing how retirement plan mangers can consider climate change and other ESG factors. The **complaint**, filed last week in the U.S. District Court for the Northern District of Texas, challenges a **2022 rule issued by the DOL** that clarified previous regulations and afforded retirement plan fiduciaries the ability to consider ESG-related factors in their investment decisions and in exercising shareholder rights, consistent with their duties of prudence and loyalty. The complaint alleges that the rule conflicts with the scope of Employee Retirement Income Security Act (ERISA) fiduciary duties, is arbitrary and capricious in violation of the Administrative Procedure Act, and goes beyond the DOL's authority to regulate ERISA fiduciaries to consider nonpecuniary factors in administering plan assets. Among other things, the plaintiffs contend that the rule "will not only loosen the statutory and regulatory restraints on fiduciaries to consider ESG factors, it will allow fiduciaries and investment managers to potentially substitute their own ESG policy preferences under the guise [of] making a risk-return determination about an investment or investment course of action."

Taking the Temperature: At least in part, the DOL's rule reflects a view, frequently articulated by large institutional asset managers and others, that climate change and other ESG factors can be material to the companies in which they invest and therefore are properly considered as part of the investment process. While this legal challenge highlights the politicized nature of climate-related financial issues in the U.S., one interesting question it raises is whether, if the plaintiffs in this suit ultimately prevail on the theories articulated, the New York City pension funds that sent the shareholder proposals, discussed in another post today, could be argued to have violated their fiduciary duties in doing so, given the climate-related focus of the shareholder proposals. After all, a central premise of the lawsuit is that the DOL's rule "contravenes ERISA's clear command that fiduciaries act with the sole motive of promoting the financial interests of plan participants and their beneficiaries." Viewed from another perspective, however, these shareholder proposals simply reflect a request for greater disclosure on what the shareholders likely consider an issue material to investment risk, which would seem to fit squarely within the permissible considerations for an ERISA fiduciary, even under the construction afforded by the plaintiffs in the state attorneys general suit. Whatever the outcome, as we have discussed, we expect climate-focused litigation to increase in prevalence and variety for the foreseeable future.

Climate Activist Sends Shareholder Proposals to Multiple U.S. Banks

January 31, 2023

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Environmental advocacy group As You Sow has sent climate-focused shareholder resolutions to five major U.S. banks. The **resolutions** request that the banks disclose their climate transition plans for meeting financed emissions reduction targets, "including the specific measures and policies to be implemented, reductions to be achieved by such measures and policies, and timelines for implementation and associated emission reductions." The institutions targeted are: **Bank of America**, **Goldman Sachs**, **JPMorgan Chase**, **Morgan Stanley**, and **Wells Fargo**. According to As You Sow, the "banking sector has a critical role to play in addressing the climate crisis and aligning financing activities with the Paris Agreement's net zero by 2050 goal" and that by "operationalizing and translating net-zero commitments into clearly disclosed and actionable strategies, each bank can assure investors and the public that they have a path forward to meet their 2030 goals."

Taking The Temperature: Climate-related shareholder activity has become a feature of the corporate governance landscape, as we discuss in another post today. As You Sow states that it has made comparable shareholder proposals at various insurance companies asking them to measure and disclose their net-zero targets in their underwriting and investing activities. Earlier this month, we reported on a shareholder resolution sent to Glencore PLC, a multinational commodity trading and mining company, seeking details of the "specific plan" for Glencore "to align thermal coal production with emissions reductions commitments." Companies and their boards can prepare by proactively assessing enterprise risks and opportunities associated with climate transition and the accuracy and thoroughness of related disclosure.

United Kingdom Competition Authority Announces Support for Climate Change Agreements Among Competitors

January 31, 2023

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In a recent **speech** to the Scottish Competition Forum, Sarah Cardell, newly installed Chief Executive of the UK's Competition Markets Authority (CMA), laid out her vision for analyzing agreements among competitors that foster climate change goals. Simultaneously, the CMA issued **Draft Guidance on Horizontal Agreements** that more formally sets out the CMA's policy in this area.

This announcement is a forceful declaration that competition enforcers have an important policy role to play in facilitating the world economy's move toward a more sustainable future. According to Ms. Cardell, "[t]here can be few, if any, bigger challenges facing our economy and our society than climate change. That's why, in our new strategy, we have prioritised action to accelerate the UK's transition to a net zero economy. Now, some might question whether environmental sustainability is an appropriate priority for a competition authority. I respectfully disagree."

The announcement reportedly comes after intense lobbying of the CMA by the financial sector, particularly efforts led by the net zero alliance known as the Glasgow Financial Alliance for Net Zero.

Ms. Cardell identified three ways in which the CMA may support competitor collaborations aimed at positive climate change:

- Ensuring that sustainable markets develop in competitive ways;
- Helping educate consumers to make choices that are more sustainable; and
- Ensuring that competition law is not itself a barrier to agreements that promote positive climate change initiatives, such as net zero targets.

Taking the Temperature: The CMA's announcement is a bold competition policy initiative that sets the UK apart from other competition authorities as a leader in the climate arena. By contrast, several months ago the EU launched a well-publicized dawn raid against a number of European fashion houses as part of an investigation into whether collective agreements on sustainable fabrics violated EU competition law. Similarly, antitrust chiefs at the U.S. Federal Trade Commission and Department of Justice have warned that an illegal agreement among competitors will not be saved merely because the subject of the agreement is climate change. It remains to be seen whether the UK will set the international policy agenda on competition and climate change or whether it will be an outlier.