

THE ESG DEBATE HEATS UP: STATE AGS INVESTIGATING ASSET MANAGER INVOLVEMENT IN ESG INITIATIVES AND RELATED PROXY VOTING

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By: Lance C. Dial, Anna E. L'Hommedieu

Over the past two weeks, multiple state attorneys general have sent civil investigative demands (CIDs) or subpoenas to asset managers regarding their involvement in the environmental, social, and governance (ESG) initiatives Climate Action 100+ (CA100+) and Net Zero Asset Managers Initiative (NZAMI). The requests are similar, generally requesting communications the asset manager sent or received with respect to its engagements with CA100+ focus companies in connection with the asset manager's membership in CA100+, Ceres, or NZAMI. The requests also seek information about how the asset manager cast proxy votes in connection with shareholder proposals relating to greenhouse gas emissions at certain banks, insurance companies, or energy and utility companies.

These CIDs and subpoenas represent an escalation from the [30 March 2023 open letter](#) from 21 attorneys general to 53 top asset managers raising concerns about how asset managers were voting proxies on certain key ESG issues (the AG Letter). The AG Letter specifically raised questions with respect to the alignment between membership in NZAMI and CA100+ with asset manager fiduciary obligations. The AG Letter also laid out specific concerns regarding how asset managers vote proxies with respect to their holdings in banks, insurance companies, or energy and utility companies.

The recent subpoena requests appear to build on the statements and analysis set forth in the AG letter, as presaged in the AG Letter's conclusion:

We will continue to evaluate activity in this area in line with our ongoing investigations into potential unlawful coordination and other violations that may stem from the commitments you and others have made as part of Climate Action 100+, Net Zero Asset Managers Initiative, or the like.

Asset managers who receive these subpoenas should carefully consider whether and how to respond. As an initial consideration, asset managers should think about jurisdictional questions, especially where they have no place of business or clients in a state issuing the demand. That said, a jurisdictional objection could raise more concerns than it resolves and may be more costly to pursue than providing a response.

In crafting responses to these demands and subpoenas, asset managers should be clear, open, and truthful in their responses. They should also bear in mind the legal discussion in the AG Letter that raises and dismisses several asset manager defenses as “unavailing.” Specifically, the AG Letter notes that the fact that shareholder

proposals may be non-binding does not reflect the persuasive power of asset manager voting, and that asset managers should not be deferring to proxy advisers on these matters. In addition, the subpoenas suggest that various attorneys general are concerned that asset managers inappropriately colluded with one another in violation of applicable state unfair business practice laws. This could raise other issues such as antitrust violations.

These CIDs and subpoenas come at a time when the US Securities and Exchange Commission is already focused on ESG investment strategies in asset manager examinations and investigations. We expect this trend to continue, with more asset managers receiving CIDs and/or subpoenas regarding these issues, opening a new front in the ESG debate.

KEY CONTACTS



LANCE C. DIAL
PARTNER

BOSTON
+1.617.261.3241
LANCE.DIAL@KLGATES.COM



ANNA E. L'HOMMEDIEU
ASSOCIATE

BOSTON
+1.617.951.9144
ANNA.LHOMMEDIEU@KLGATES.COM

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