STATE OF TENNESSEE

Office of the Attorney General

JONATHAN SKRMETTI
ATTORNEY GENERAL AND REPORTER

P.O. BOX 20207, NASHVILLE, TN 37202
TELEPHONE (615)741-3491
FACSIMILE (615)741-2009

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Jamie Dimon
Chairman and Chief Executive Officer
JPMorgan Chase & Co.
383 Madison Avenue
New York, NY 10179

Brian T. Moynihan
Chair and Chief Executive Officer
Bank of America Corporation
100 North Tryon Street
Charlotte, NC 28255

Jane Fraser
Chief Executive Officer
Citigroup Inc.
388 Greenwich Street
New York, NY 10013

David S. Solomon
Chairman and Chief Executive Officer
Goldman Sachs Group, Inc.
200 West Street
New York, NY 10282

James P. Gorman
Chairman and Chief Executive Officer
Morgan Stanley
1585 Broadway
New York, NY 10036

Charles W. Scharf
Chief Executive Officer
Wells Fargo & Company
420 Montgomery Street
San Francisco, CA 94104

Dear Chief Executives:

We, the chief legal officers of our respective states, write about a potential disconnect between how you encourage your shareholders to vote on climate-related shareholder resolutions and how you, or the proxy advisors you hire, vote in the course of your asset management function. As fiduciaries, your votes for other companies should not conflict with the votes you recommend for your own company. Therefore, before supporting ESG proposals at other companies, you must be confident that none of the extensive reasons you submitted for opposing ESG proposals at your own company will apply. In the event of any disparities this proxy season, please be assured that we will closely examine your reasoning.

In the most recent proxy season, your shareholders considered one or more resolutions related to climate change, such as requesting reports on how to cut absolute carbon emissions by 2030[1] or adopting a policy to phase out the financing of fossil fuel projects.[2] Each of your boards unanimously opposed these proposals. The opposition was grounded in two related themes: that management needs the discretion to manage risk on a case-by-case basis and that the climate goals these proposals sought to impose are not feasible given the state of technology and public policy.

You opposed these proposals based on several broad principles that would apply equally to many other companies. In your view, the proposals for absolute greenhouse gas reductions were unwise because the business manages risk in a way that "is client-specific, deal-specific, and subject to governance review," all of which considered "portfolio-level credit, operational, reputational, and other risks, including climate risk."[3] Such a proposal unnecessarily micromanages firm operations because "management is best positioned to decide the details of the Firm's climate initiatives, including the optimal format of targets, as an important part of conducting our day-to-day business," especially since company management rejected absolute reduction targets "for important strategic and practical reasons."[4] Further, setting a date certain now would not "take into account changing geopolitical realities that will likely impact future oil and gas demand and timing of related fossil fuel production."[5]

Your boards also pointed out that "[a] timebound commitment to phase out fossil fuels, without ensuring continued access to energy, could lead to a disorderly transition that fails to accommodate critical energy security considerations and the workers and communities that could be harmed."[6] Doing so would be "to the detriment of . . . the real economy."[7] This is in part because achieving climate goals depends on "technological advancements, the evolution of consumer behavior and demand, and the need for thoughtful climate policies — as well as the potential impact of legal and regulatory obligations and the challenge of balancing our commitment to short-term targets with the need to facilitate energy security."[8] A timebound phase out would also deprive your companies "of the flexibility to consider the diverse nature, businesses and regulatory circumstances of our oil and gas clients," and the

[1] *See*, *e.g.*, Bank of American 2023 Proxy Statement ("BAC Proxy") at 98, available at https://investor.bankofamerica.com/2023-proxy-statement.
[2] *See*, *e.g.*, Goldman Sachs Group Inc., Proxy Statement 2023 Annual Meeting of Shareholders ("Goldman Proxy") at 88, available at https://www.goldmansachs.com/investor-relations/financials/proxy-statements/2023/2023-proxy-statement-pdf.pdf.
[3] BAC Proxy at 101.
[4] JPMorgan Chase & Co. Annual Meeting of Shareholders Proxy Statement 2023 ("JPM Proxy"), at 105–06, available at https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/proxy-statement2023.pdf.
[5] Morgan Stanley Notice of 2023 Annual Meeting and Proxy Statement ("MS Proxy"), at 102, available at https://www.morganstanley.com/content/dam/msdotcom/en/about-us-2022ams/2023_Proxy_Statement.pdf.
[6] Citigroup Inc. 2023 Notice of Annual Meeting and Proxy Statement at 129, available at https://www.citigroup.com/rcs/citigpa/storage/public/Citi-2023-proxy-statement.pdf.
[7] MS Proxy at 100.
[8] JPM Proxy at 99; *see also id*. at 92 ("We believe that adoption of an inflexible policy to phase out financing of new fossil fuel exploration and development would not be prudent at a time when analysts project that the availability of alternatives to fossil fuels will not be sufficient to meet increases in energy demand over the medium term."); MS Proxy at 100 ("Morgan Stanley recognizes the need to balance the urgency for action on climate with the realities of the current social, economic and geopolitical landscape . . . . We will need to balance, at times, competing priorities between energy security, economic development, and climate risk across both the short and long term.").

ability to tailor business operations based on "changing market conditions, and quickly evolving climate technology."[9]

The board of JPMorgan Chase noted that "[m]anagement is best positioned to make decisions on which types of economic activity to finance, as an important part of day-to-day operations of our core business in the interests of our shareholders."[10] Morgan Stanley believes that "current geopolitical realities" have made it so "that the demand for fossil fuel production may not decline as quickly and steadily as previously thought."[11] Goldman Sachs highlighted the importance of the "continued supply of affordable, reliable energy," implicitly noting that pursuit of climate objectives is contrary to that.[12] Wells Fargo stated that "[o]il and gas remain important energy sources; economic forecasts and net-zero scenarios suggest these fossil fuels will remain an important part of the energy mix for decades to come. Recent geopolitical events underscore the need to address energy security and avoid unintended impacts on vulnerable communities."[13]

We understand that some public pensions and foreign governments pressure you to engage in activism regarding your companies' investments. Last September, Brad Lander, the New York City Comptroller, wrote to Larry Fink demanding that BlackRock "demonstrate a plan to use its position as the world's largest asset manager . . . to move its portfolio companies to their businesses in line with a net zero economy."[14] Mr. Lander threatened to pull business from BlackRock[15] and other asset managers if BlackRock failed to heed specific demands, including "[p]rovid[ing] a detailed approach to keeping fossil fuel reserves in the ground and phasing out high-emitting assets."[16] Japan's $1.7 trillion Government Pension Investment Fund is a signatory to the United Nations Principles for Responsible Investing and intends to implement "ESG issues through external asset managers it employs."[17] Similarly, Norway's $1.4 trillion Norges Bank Investment Management is committed to net zero for all its investments.[18]

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[9] MS Proxy at 102.

[10] JPM Proxy at 92; *see also id*. at 93 ("As a diversified financial institution, JPMorgan Chase conducts many business activities, and it is management's responsibility to determine whether and how to provide financing to specific sectors, companies and projects. These decisions are important to the Firm's day-to-day operations and require complex business judgments, taking into account, among other factors, risk considerations . . . . [W]e believe the Firm's management is best positioned to make these decisions, with the oversight of the Board of Directors."); MS Proxy at 100 ("Morgan Stanley believes that we need to have the flexibility to assist our clients and adopting an overly restrictive policy would limit our ability to meet our clients' needs."); *id*. at 103 ("The Board also believes management should have the ability to weigh the complex variables that are needed in the course of Morgan Stanley's business—rather than adopt a prescriptive, 'one size fits all' approach—and have the flexibility to adjust over time . . . .").

[11] MS Proxy at 100.

[12] Goldman Proxy at 89.

[13] Wells Fargo & Company 2023 Notice of Annual Meeting and Proxy Statement at 114, available at https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2023-proxy-statement.pdf.

[14] Ltr. from Lander to Fink, Sept. 21, 2022, available at https://comptroller.nyc.gov/wp-content/uploads/2022/09/Letter-to-BlackRock-CEO-Larry-Fink.pdf.

[15] Id. at 8 ("we will be prudently reassessing our business relationships with all of our asset managers, including BlackRock, through the lens of our climate responsibilities.").

[16] Id. at 5.

[17] https://www.gpif.go.jp/en/investment/pdf/signatory_UN_PRI_en.pdf#page=3

[18] https://www.nbim.no/en/the-fund/responsible-investment/2025-climate-action-plan/

We are also cognizant of the influence proxy advisors exert on companies. Even if you refrain from overt activism, turning the decision-making over to others could be nearly as invidious. The two leading proxy advisory services, Glass Lewis and Institutional Shareholder Services, have both committed to base their recommendations on whether a company is implementing net zero emissions goals and related climate commitments. For companies that are on the Climate Action 100+ Focus Group list, ISS has announced that it will "generally vote against" relevant directors if the company does not implement "[a]ppropriate [greenhouse gas] emissions reduction targets" that must "increase over time."[19] Likewise, Glass Lewis bases its recommendations in part on whether a proposal is "providing robust disclosure concerning [the company's] climate strategies."[20] Given that activist pressure groups deliberately leverage disclosure requirements to force substantive change,[21] these policies appear to be in tension with the reasoning you laid out in opposition to parallel resolutions at your own companies.

Conflicts from the demands of activist government clients may persuade you to take the opposite voting position for other companies than you have taken with your own company. When you act as an asset manager on behalf of our state pensions, and many other clients, the money is not your own. In that role, you owe your clients various fiduciary duties, including loyalty and care. These duties require you to act *solely* in the *financial* interest of your clients, to the exclusion of other motivations and interests.[22] "The trustee, in other words, is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Acting with mixed motives triggers an irrebuttable presumption of wrongdoing, full stop."[23] Thus, in managing the investments of a trust, "the trustee's decisions ordinarily must not be motivated by a purpose of advancing or expressing the trustee's personal views concerning social or political issues or causes," except as expressly authorized by the terms of the trust or consent of the beneficiaries, or in certain charitable contexts.[24]

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[19] ISS, United States Proxy Voting Guidelines, at 17 n.10, https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf. ISS defines the Climate Action 100+ focus group list as "significant GHG emitters." Id. at 16 n.10.

[20] Glass Lewis, 2022 Policy Guidelines for ESG Initiatives, at 28, https://www.glasslewis.com/wp-content/uploads/2021/11/ESG-Initiatives-Voting-Guidelines-GL-2022.pdf.

[21] CA100+, Press Release, Climate Action 100+'s 2030 Vision, PRI in Person (Dec. 9, 2022) (explaining Phase 2 of CA100+ initiative is to force companies to implement targets they set in context of disclosure), available at https://www.climateaction100.org/news/climate-action-100s-2030-vision-pri-in-person.

[22] *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096-98 (D.D.C. 1971) (holding that trustees breached their fiduciary duty to coal miner beneficiaries to maximize income by holding an inordinate proportion of the trust's assets in cash in non-interest-bearing checking accounts to benefit a union-controlled bank rather than investing the funds, even in government bonds, to generate returns for the beneficiaries); *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419-21 (2014) (holding that although they are not required to diversify, fiduciaries of ERISA-governed ESOP plan are not entitled to a generalized presumption of prudence; regardless of nonpecuniary goals, such as employee ownership of employer stock, ERISA's reference to "benefits" refers to "*financial* benefits" (emphasis in original)); *Rippey v. Denver U.S. Nat. Bank*, 273 F. Supp. 718, 734 (D. Colo. 1967) (holding that trustee's failure to seek the best price for stock in newspaper company, and decision instead to sell to permit non-beneficiary partial owner to maintain control, violated trustee's duty to get the "best price obtainable" for trust beneficiaries).

[23] Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381, 400-401 (2020) (citations and quotations omitted).

[24] Restatement (Third) of Trusts, § 90, cmt. c; *see also* Uniform Prudent Investor Act § 5 cmt. (1994) ("No form of so-called 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the

Given these duties under which you operate, we assume you and your proxies will vote in other companies consistent with the reasoning you articulated when rejecting similar proposals at your own company. If your votes are instead exercised in favor of proscriptive environmental targets that presume the "energy transition" will happen, consistent with commitments you have made to various climate groups,[25] you implicitly concede to a conflict of interest in your asset management arm that threatens your fiduciary duties. You must act solely to maximize returns for your clients. We cannot conceive of a rationale that would justify opposing proscriptive environmental requirements for your own companies but insisting that the same requirements enhance shareholder value at other firms.

In the event that you vote for other companies to have less of a focus on financial return than your own, whether you act directly or through a proxy advisor, be assured that our respective offices will certainly take notice. Such contradiction will raise serious questions, and we will use the full measure of our investigative authority to seek answers.

Sincerely,

Jonathan Skrmetti
Tennessee Attorney General and Reporter

Alan Marshall
Alabama Attorney General

Tim Griffin
Arkansas Attorney General

interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause."); Richard A. Posner & John H. Langbein, *Social Investing and the Law of Trusts*, 79 Mich. L. Rev. 72, 96 (1980) ("It remains to consider whether social investing is contrary to trust law and its statutory counterparts. We conclude that it is . . . .").

[25] For example, you each are founding members of the Net-Zero Banking Alliance. As such, you have committed to "align [your] business strategy to be consistent with and contribute to . . . the Paris Climate Agreement" without regard to whether doing so is financially beneficial to your shareholders or clients. These agreements also raise substantial antitrust concerns that, though not unfamiliar to us, fall outside the scope of this letter.

Ashley Moody
Florida Attorney General

Christopher M. Carr
Georgia Attorney General

Raúl R. Labrador
Idaho Attorney General

Todd Rokita
Indiana Attorney General

Brenna Bird
Iowa Attorney General

Kris W. Kobach
Kansas Attorney General

Daniel Cameron
Kentucky Attorney General

Jeff Landry
Louisiana Attorney General

Lynn Fitch
Mississippi Attorney General

Andrew Bailey
Missouri Attorney General

Austin Knudsen
Montana Attorney General

John M. Formella
New Hampshire Attorney General

Drew Wrigley
North Dakota Attorney General

David Yost
Ohio Attorney General

Alan Wilson
South Carolina Attorney General

Ken Paxton
Texas Attorney General

Sean D. Reyes
Utah Attorney General

Jason S. Miyares
Virginia Attorney General

Patrick Morrisey
West Virginia Attorney General

Bridget Hill
Wyoming Attorney General