

WON'T GET FOOLED AGAIN:
HOW MARKET DISCIPLINE CONTROLLED THE THREAT OF
BLACKROCK'S CLIMATE AND SOCIAL ACTIVISM

*J.B. Heaton**

ABSTRACT

Commentators have expressed concern about the voting power of the largest asset managers. However, this concern is valid only if their voting deviates from the intentions of their investors. This is not necessarily assured, as investors wield significant power over these asset managers. If they disagree with the manager's voting, they can threaten to pull, or actually withdraw, assets under management which are the lifeblood of the business.

BlackRock's foray into climate and social activism between 2017 and 2021 is a strong example. Through its co-founder and Chief Executive Officer, Larry Fink, BlackRock came on strongly in 2017 in favor of a climate agenda, later adding a corporate social responsibility approach to business, and then pivoting hard back to an expanded climate agenda. By 2021, BlackRock had voted in favor of dissident directors who were proposed and fought for at great expense by a climate activist fund.

The backlash was swift and hard. BlackRock received considerable pushback from investors who disagreed with the strategy. For example, many investors believe that corporations exist to make money for their shareholders, that affirmative action is discrimination, and that there is no realistic way for the world to transition away from fossil fuels in the next several decades absent some breakthrough in physics. They did not want BlackRock voting their beneficial ownership in favor of opposing views. And the pushback of those investors

* J.B. Heaton is an expert witness and consultant on financial and litigation matters. He holds a J.D., M.B.A., and Ph.D. in finance, each from the University of Chicago.

worked. Under both threats and actual withdrawals of assets under management, BlackRock turned tail and returned to a mostly neutral approach, leaning ever so slightly toward the previously aggrieved investor base. All of a sudden, oil and gas had never looked so good to Mr. Fink.

This article lays out the history of BlackRock's journey into climate and social activism, and its scampering retreat. That story has important implications for the ongoing debate about the power and influence of large asset managers.

INTRODUCTION	136
I. OVER THE RAINBOW: THE ALLURE OF MILLENNIAL MONEY	139
II. INTO THE MYSTIC: BLACKROCK'S JOURNEY INTO ACTIVISM.....	142
III. COME AS YOU ARE: BLACKROCK AIDS A CLIMATE ACTIVIST	150
IV. UNDER PRESSURE: BACKLASH FOR BLACKROCK	158
V. SO WHAT?: IMPLICATIONS AND CONCLUSIONS.....	161

INTRODUCTION

How concerned should we be about the concentration of assets among the largest asset management firms known as the Big Three: BlackRock, Vanguard, and State Street? Some believe we should be very concerned. These asset managers control significant voting power of the companies whose stock they hold, wielding the most powerful tool a shareholder has to shape corporate policy by determining who sits on the board of directors. They also vote on shareholder proposals. This makes shareholders important to the non-director executives who serve at the directors' instruction. To have the shareholder vote is to hold almost all the power that a shareholder possesses.

This has concerned some commentators. They worry that agency problems will be out of control with excessive deference incentives afflicting the decisions of the largest fund managers.¹ They worry that the concentrated ownership and structural prominence of the Big Three may impair shareholder engagement.² They worry that in voting too often with management, the Big Three increases managerial short-termism.³ Overall, their view is summed up well as calling on “[p]olicymakers and market participants [to] take the Giant Three scenario

¹ See Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B. U. L. REV. 721, 725 (2019); Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the ‘Big Three’ Investment Advisers to Index Funds*, 48 J. OF CORP. L. 464 (2023).

² See Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. AND POL. 298, 322 (2017).

³ See Jan Fichtner & Eelke M. Heemskerk, *The New Permanent Universal Owners: Index Funds, (Im)patient Capital, and the Claim of Long-termism* (Nov. 13, 2018) (working paper) <https://ssrn.com/abstract=3321597> (claiming the Big Three do tend to vote with management, though not without exception) [<https://perma.cc/T3MP-33T6>]; See Alon Brav, Wei Jiang, Tao Li & James Pinnington, *Shareholder Monitoring Through Voting: New Evidence from Proxy Contests*, (ECGI, Working Paper, No. 923, 2023), <https://ssrn.com/abstract=4316541> (arguing that passive funds, particularly those managed by the Big Three (BlackRock, Vanguard, and State Street), tend to be more pro management, but they still engage actively in high-stakes voting events) [<https://perma.cc/2JC9-XGBX>].

seriously and pay close attention to the agency problems of index fund managers which pose a key challenge for corporate governance.”⁴

Some are skeptical of this view. All shareholders come with their problems, and it is not clear that this problem is worse than any available alternative.⁵ Others find evidence that, in fact, the Big Three do not seem to engage in any meaningful discussions with their portfolio companies.⁶ And when they do, the power of concentrated ownership could be beneficial.⁷

This essay joins that skeptical view which is often ignored. While it certainly is reasonable to ask whether these large asset managers can be trusted with their voting power, that is true only if they are exercising that voting power differently from the way their investors would like. After all, the asset managers can already transfer the voting power back to the ultimate investor. The question, then, is whether the large asset managers are deviating from the wishes of their investors.

The most obvious test of a large asset manager's behavior is whether investors take their assets away from that management. An asset manager's investors can easily vote with their feet, transferring their assets to an identical product or near-identical product at the same cost. After all, the market for assets to manage is highly competitive at both the retail and institutional levels.

A good test, however, requires an example of investors threatening to pull or actually pulling assets from management based on voting behavior. This article presents BlackRock's climate and social activism between 2017 and 2021 as

⁴ Bebchuk & Hirst, *supra* note 1, at 741; See also Lucian Bebchuk & Scott Hirst, *Big Three Power, and Why it Matters*, 102 B. U. L. REV. 1547, 1552 (2022) (describing how the influence of the Big Three on corporate outcomes is profound due to their large ownership stakes in public companies).

⁵ See Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders be Shareholders*, 100 B. U. L. REV. 1771, 1815 (2020) (arguing all shareholders have conflicts and imperfect incentives to varying degrees, different institutions have different advantages that complement each other in governance, and letting shareholders be shareholders is preferable to limiting voting rights).

⁶ See Dhruv Aggarwal, Lubomir P. Litov & Shivaram Rajgopal, *Big Three (Dis)Engagements*, (Nw. L. & Econ., Research Paper No. 23-17, 2023) <https://ssrn.com/abstract=4580206> (arguing the Big Three's engagement practices are not effective in driving substantial changes in corporate governance or improving firm performance) [<https://perma.cc/NPL2-P9QK>].

⁷ Alexander I. Platt, *Index Fund Enforcement*, 53 UC DAVIS L. REV. 1453, 1456 (2020)

paradigmatic of this investor power to discipline the conduct of a large asset manager.

Section II explains how the voting behavior at issue in this example is likely related to BlackRock's financial motive: to curry favor with millennial investors who embrace the climate and social agenda. The article explains how strong BlackRock's incentives are to increase flows to actively managed—that is, high-fee—ESG (“Environmental, Social, and Governance”) products even at the cost of inflicting losses on the index funds it managed.

Section III sets out the beginning and development of BlackRock's climate and social activism agenda starting in 2017. It started with climate, added a plea for corporate social responsibility, focused harder on climate, and reached a climax in a May 2021 proxy contest at ExxonMobil (Exxon), the nation's largest integrated oil and gas corporation.

That climax is the subject of Section IV. This article describes the efforts of a climate activist fund to elect a slate of dissident directors, an effort that BlackRock may or may not endorse. That would be an enormous affront to Corporate America and the Big Energy states, and a considerable part of BlackRock's business depended on managing corporate and government pension assets.

The backlash against BlackRock after its activism went “parabolic,” in the words of two Bloomberg analysts,⁸ was swift and hard. This is the subject of Section V. BlackRock faced backlash from expected quarters: big energy states and other states of conservative values. Almost single-handedly, Mr. Fink and BlackRock made ESG a bad word and one Mr. Fink, in fact, no longer uses.⁹ After the backlash, Mr. Fink and BlackRock turned tail and proclaimed again and again their role as one of the largest owners of energy company stocks in the world. BlackRock dropped its climate and social activism agenda like the hot potato it had become.

⁸ Rob DuBoff & Shaheen Contractor, *BlackRock's Climate Pressure Goes Parabolic*, BLOOMBERG INTELLIGENCE (Jul. 22, 2021).

⁹ See Isla Binnie, *BlackRock's Fink Says He's Stopped Using 'Weaponised' Term ESG*, REUTERS (June 26, 2023), [https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/\[https://perma.cc/SF39-CT5R\]](https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/[https://perma.cc/SF39-CT5R]).

Section VI discusses the implications of the BlackRock example, focusing, in particular, on the possibility of some hysteria in the developing literature on the problems of large asset managers. No one makes it through life without thinking a terrible idea was good on the front end. Larry Fink is no exception to that rule. Perhaps his own social and political leanings, all in good faith, made him optimistic that the gains from favor with left-leaning millennials would more than pay for any slight backlash. He was wrong on that calculation. Nevertheless, he and BlackRock quickly corrected the situation under market pressure. The quick power of that pushback makes it unlikely that the largest asset managers are consistently deviating from the wishes of their investors. This is even more true with efforts to make it easy for retail and institutional investors to vote for the shares they beneficially own.¹⁰

I. OVER THE RAINBOW: THE ALLURE OF MILLENNIAL MONEY

Asset management firms like BlackRock Inc. manage funds that can be categorized into two types: active and passive. Each of the Big Three—BlackRock, Vanguard, and State Street—is a large manager of passive funds. Passive funds are managed with extremely low fees as they only require positions to match the returns of a specified passive index, such as the S&P 500 or Russell 1000. On the other hand, active funds require costly efforts to identify investments meant to outperform passive funds.

The managers also provide active funds alongside their passive funds. But while those funds earn much higher fees, all asset managers in the large-cap U.S. space have long struggled to demonstrate that their much more expensive active offerings are worth the fees that they charge.¹¹

¹⁰ See Salim Ramji & Joud Abdel Majeid, *BlackRock Gives Investors a Say*, WALL ST. J. (Aug. 3, 2023), <https://www.wsj.com/articles/blackrock-gives-investors-a-say-voting-proxy-choice-advisory-firm-57d9f403> (describing BlackRock's program to allow investors to vote directly)[<https://perma.cc/9W24-ABDC>]. It was a rather brilliant move after the backlash to get out of the voting business for anyone who might have other views.

¹¹ See Karen Langley, *Stock Pickers Trailed Market Again in Roller Coaster 2020*, WALL ST. J. (Mar. 11, 2021), <https://www.wsj.com/articles/stock-pickers-trailed-market-again-in-roller-coaster-2020-11615464001> (based on data from S&P Dow Jones Indices)

Either way, there is far less money in managing passive funds than in managing active funds, and the Big Three do both. The largest asset managers prefer small growth in high-fee active funds to growth in low-fee passive funds. As one financial reporter puts it “[m]any index managers are working to make up for their outsized low-margin strategies with more expensive funds and actively-managed products.”¹²

Consider BlackRock Inc.’s S&P 500 ETF, the iShares Core S&P 500 ETF (ticker: IVV). In June 2020, BlackRock cut its fee from 0.04% to 0.03% to match the lowered fee on Vanguard’s S&P 500 ETF (VOO). By contrast, BlackRock’s Future Climate and Sustainable Economy ETF (ticker: BECO), an actively managed ESG fund, has a management fee that is *23 times higher* at 0.70%.

Indeed, BlackRock discloses to its investors that “[n]et flows in institutional index products generally have a small impact on BlackRock’s revenues and earnings.” Behavior that marginally reduces assets under management in a low-fee index fund that results in a corresponding marginal increase in assets under management in a high-fee ESG fund will result in a positive net impact on BlackRock’s total fee compensation.¹³

[<https://perma.cc/M8NC-TK5G>]; Chris Newlands & Madison Marriage, *99% of actively managed US equity funds underperform*, FIN. TIMES (Oct. 23, 2016), <https://www.ft.com/content/e139d940-977d-11e6-a1dc-bdf38d484582> (“The suitability of investing with asset managers that try to beat the market has been thrown into question by figures that show almost all US, global and emerging market funds have failed to outperform since 2006.”) [<https://perma.cc/YD5M-DJRZ>]; Robin Wigglesworth, *Yeah, about that active comeback . . .* FIN. TIMES (Mar. 7, 2023), <https://www.ft.com/content/c331b279-00e5-4e7d-954f-468f4ee44c31> (discussing data from S&P Dow Jones Indices) [<https://perma.cc/ETW5-NFB7>]; Bryan Armour, *Active Funds Fell Short of Passive Peers in 2023*, MORNINGSTAR (Mar. 12, 2024), <https://www.morningstar.com/funds/active-funds-fell-short-passive-peers-2023> [<https://perma.cc/B26V-FT7R>].

¹² Dawn Lim, *BlackRock Profit Rose 23% in 3rd Quarter, Helped by Actively Managed Funds*, WALL ST. J. (Oct. 13, 2021), <https://www.wsj.com/articles/blackrock-profit-rose-23-in-third-quarter-11634122455> [<https://perma.cc/89VA-RTB9>].

¹³ Cf. Dawn Lim, *BlackRock Closes in on the Once Unthinkable, \$10 Trillion in Assets*, WALL ST. J. (July 14, 2021), <https://www.wsj.com/articles/blackrock-now-has-close-to-10-trillion-under-management-11626259550> (“BlackRock has also been trying to become a bigger purveyor of funds that can profit from governments’ new focus on climate risks. It generated \$35 billion in net flows from sustainable-branded funds in the quarter.”) [<https://perma.cc/BKM4-JVAD>].

The ESG example is chosen deliberately. As we will see in the next section, by all appearances, BlackRock saw an exciting opportunity for its business. Millennials are accumulating assets from inheritance, careers, and businesses. The affluent among them lean strongly on the issues of the day, climate, diversity, and gender equality. BlackRock does not hide its aspiration to manage millennial assets and its link to ESG products. Its website contains the following discussion:

Millennials will inherit \$73 trillion by 2045.

Millennials are particularly interested in sustainable investing, with 86% of surveyed millennial investors expressing an interest in sustainable investing. As a record generational transfer of assets takes place, offering sustainability can help investment professionals capture the next generation of clients.¹⁴

Blackrock's frontman, Larry Fink, co-founder, chairman, and chief executive, would lead the charge. Most importantly, in this calculus, ESG offerings that were not invested in fossil fuel companies would not suffer if the value of those companies fell. Moreover, BlackRock held most of those companies in its low-fee index products. Losses to those companies would have a minuscule impact on BlackRock's bottom line, while the gains from actively managing millennial money could be huge.

The possibility of inflicting such losses was not theoretical for BlackRock. At the end of 2017, BlackRock owned 6% of the stock of Exxon, 7% of the stock of Chevron, and comparable percentages in all other large U.S. publicly traded energy companies.¹⁵ If it chose to use it, BlackRock could cast determinative votes on key issues regarding climate and social activism. This gets ahead of the story, however. For the most part, that story begins in 2017.

¹⁴ Sustainable Investing, BLACKROCK, <https://www.blackrock.com/us/financial-professionals/investment-strategies/sustainable> (last visited Jan. 9, 2025) [<https://perma.cc/BY93-6VUP>].

¹⁵ See Exxon Mobil Corp., *Proxy Statement (Schedule 14A)* (Apr. 13, 2017); See Chevron Corp., *Proxy Statement* (2017).

II. INTO THE MYSTIC: BLACKROCK'S JOURNEY INTO ACTIVISM

In February 2016, BlackRock informed its staff that “the firm is seeing increased client interest and increased competition in the sustainable investment space and wants to position itself as a leader while the market evolves.”¹⁶ Nevertheless, BlackRock remained on the sidelines of climate controversies throughout the year. “In September 2016, The Asset Owners Disclosure Project, a nonprofit, criticized BlackRock for voting against “an Exxon Mobil Corp. shareholder proposal that would have asked the oil giant to disclose long-term risks to its business from climate change policies.””¹⁷

In October 2016, the Seattle City Employees' Retirement System was reported to be reconsidering its \$318.5 million investment in BlackRock's MSCI World ex-U.S. index fund, given that “BlackRock generally has voted with management of companies and has been less supportive of ESG considerations.”¹⁸

In January 2017, BlackRock and Vanguard were criticized for voting against climate-related proposals at nearly all portfolio companies.¹⁹ BlackRock's proxy voting guidelines at the time stated that BlackRock does not “see it as our role to make social, ethical or political judgments on behalf of clients.”²⁰ This soon changed.

On May 12, 2017, it was reported that BlackRock would cast its first vote against management to support a climate-change-related shareholder proposal

¹⁶ Emily Chasan, *BlackRock Builds ESG Data into Investment Platform*, BLOOMBERG LAW (Feb. 11, 2016), <https://www.bloomberglaw.com/product/blaw/bloombergtterminalnews/bloombergtterminal-news/O2EAKM6JIJ4> [https://perma.cc/5HSS-3JQQ].

¹⁷ Emily Chasan, *Big Investors Need a 'Stomach for a Fight' on Climate Change*, BLOOMBERG LAW (Sept. 9, 2016), <https://www.bloomberglaw.com/product/blaw/bloombergtterminalnews/bloombergtterminal-news/OD94796K50YC> [https://perma.cc/PJW7-LTH4].

¹⁸ Ainslie Chandler, *Seattle Pension Mulls Withdrawing from BlackRock Fund Over ESG*, BLOOMBERG LAW (Oct. 20, 2016), <https://www.bloomberglaw.com/product/blaw/bloombergtterminalnews/bloombergtterminal-news/OFCYV86S972O> [https://perma.cc/6G8V-JC6B].

¹⁹ Emily Chasan, *BlackRock, Vanguard Take Heat on Climate Proxy Votes*, BLOOMBERG LAW (Jan. 5, 2017), <https://www.bloomberglaw.com/product/blaw/bloombergtterminalnews/bloombergtterminal-news/OJBHC46JIJ4> [https://perma.cc/A6BB-AQS7].

²⁰ *Id.*

initiated at Occidental Petroleum by a group including the California Public Employees Retirement System.²¹

On May 25, 2017, the Wall Street Journal and Bloomberg reported that Vanguard and BlackRock might support a shareholder proposal seeking to have Exxon conduct a climate stress test.²²

On May 31, 2017, BlackRock voted for that shareholder proposal, stating its position in a published bulletin:

In the past year, we've engaged more directly on Exxon's reporting of climate-related risks. We have also engaged with the shareholder proponents to better understand their views. We believe it is in long-term shareholders' best economic interests for Exxon to enhance its disclosures. We therefore voted in favor of the shareholder proposal focused on the 2-degree Celsius warming target (the "2-degree scenario") as outlined in the Paris Agreement under the United Nations Framework Convention on Climate Change . . . At Exxon's May 31, 2017, annual general meeting (AGM), BlackRock supported a shareholder proposal seeking publication of the long-term portfolio impacts of technological advances and global climate change policies. The requested reporting would address the financial risks associated with a global economic scenario consistent with the globally agreed upon 2-degree scenario. We note that climate-related scenario analysis, including but not limited to a 2-degree scenario, is a key aspect of

²¹ Emily Chasan, *BlackRock to Back Climate Shareholder Proposal at Occidental*, BLOOMBERG LAW (May 12, 2017), <https://www.bloomberglaw.com/product/blaw/bloombergtterminalnews/bloombergtterminal-news/OPUF0CSYF01S> [<https://perma.cc/X5WN-5N4H>].

²² Bradley Olson, Sarah Krouse & Sarah Kent, *BlackRock, Vanguard Mull Pressuring Exxon to Disclose Climate Risks*, WALL ST. J. (May 25, 2017), <https://www.wsj.com/articles/blackrock-vanguard-mull-pressuring-exxon-to-disclose-climate-risks-1495704601> [<https://perma.cc/Z7SY-LG6H>]; Emily Chasan, *Exxon Investors Rally to Back Climate Change Plan Board Opposes*, BLOOMBERG (May 25, 2017), <https://www.bloomberg.com/news/articles/2017-05-25/exxon-investors-amass-to-back-climate-change-plan-board-opposes> [<https://perma.cc/3R2K-U3DN>].

the TCFD [Task Force on Climate-related Financial Disclosures] recommendations.²³

On June 1, 2017, in response to President Trump's decision to exit the Paris climate agreement, BlackRock's CEO, Larry Fink, stated, "I do not agree with all of the President's policies and decisions, including today's announcement to exit the United States from the Paris Agreement, which I believe is a critical step forward in addressing climate change."²⁴

In December 2017, BlackRock sent letters to approximately 120 companies "urging them to report climate dangers in line with the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures, set up by Bank of England Governor Mark Carney."²⁵

The scope of Mr. Fink's activism then widened. On January 16, 2018, BlackRock published "Larry Fink's Annual Letter to CEOs" under the title "A Sense of Purpose."²⁶ Mr. Fink complained about the disparity between those with capital (for whom BlackRock is a fiduciary, it bears stating) and those without:

Since the financial crisis, those with capital have reaped enormous benefits. At the same time, many individuals across the world are facing a combination of low rates, low wage growth, and inadequate retirement systems. Many do not have the financial capacity, the resources, or the tools to save effectively; those who are invested are too often over-allocated to cash. For millions, the

²³ *Vote Bulletin Statement Exxon Mobil May 2017*, BLACKROCK (June 7, 2017), <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-exxon-may-2017.pdf> [<https://perma.cc/UC5E-KRD3>].

²⁴ *Blankfein Tweets, Iger Quits Trump Council in CEO Climate Fury*, BLOOMBERGNEF (June 2, 2017), <https://about.bnef.com/blog/blankfein-tweets-iger-quits-trump-council-in-ceo-climate-fury/> [<https://perma.cc/4VBD-LWVK>].

²⁵ Emily Chasan, *BlackRock Wields its \$6 Trillion Club to Combat Climate Risks*, BLOOMBERG (Dec. 8, 2017), <https://www.bloomberg.com/news/articles/2017-12-08/blackrock-wields-its-6-trillion-club-to-combat-climate-risks> [<https://perma.cc/UD5C-82GG>].

²⁶ Larry Fink, *Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> [<https://perma.cc/XHD9-GH4W>]; Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html> [<https://perma.cc/U55C-XJN9>].

prospect of a secure retirement is slipping further and further away – especially among workers with less education, whose job security is increasingly tenuous. I believe these trends are a major source of the anxiety and polarization that we see across the world today.²⁷

Mr. Fink further stated:

Indeed, the public expectations of your company have never been greater. Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate. Without a sense of purpose, no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders. It will succumb to short-term pressures to distribute earnings, and, in the process, sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth.²⁸

Mr. Fink stated that, as an index provider, BlackRock could not sell shares in companies whose policies it did not approve of, but would instead use its votes, stating:

Globally, investors' increasing use of index funds is driving a transformation in BlackRock's fiduciary responsibility and the wider landscape of corporate governance. In the \$1.7 trillion in active funds we manage, BlackRock can choose to sell the securities of a company if we are doubtful about its strategic direction or long-term growth. In managing our index funds, however, BlackRock cannot express its disapproval by selling the

²⁷ Fink, *supra* note 26.

²⁸ *Id.*

company's securities as long as that company remains in the relevant index. As a result, our responsibility to engage and vote is more important than ever. In this sense, index investors are the ultimate long-term investors – providing patient capital for companies to grow and prosper.²⁹

Mr. Fink stated his expectation that portfolio companies “understand the societal impact of your business as well as the ways that broad, structural trends – from slow wage growth to rising automation to climate change – affect your potential for growth.”³⁰ BlackRock would continue to emphasize the importance of a diverse board: “Boards with a diverse mix of genders, ethnicities, career experiences, and ways of thinking have, as a result, a more diverse and aware mindset.”³¹

Mr. Fink stated his belief that “stakeholders”³² are right that “a company’s ability to manage environmental, social, and governance matters demonstrates the leadership and good governance that is so essential to sustainable growth, which is why we are increasingly integrating these issues into our investment process.”³³

Mr. Fink’s January 2018 letter generated considerable reaction. An article from Bloomberg is titled, “Fink’s Letter to CEOs Upends a Half-Century of Business Thought.”³⁴ The Financial Times reported that “Larry Fink, BlackRock’s chief executive, has warned companies that they must contribute to society and deliver financial performance or risk losing the support of the world’s largest asset manager.”³⁵

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Eric Roston, *Fink’s Letter to CEOs Upends a Half-Century of Business Thought*, BLOOMBERG (Jan. 17, 2018), <https://www.bloomberg.com/news/articles/2018-01-17/fink-s-letter-to-ceos-upends-a-half-century-of-business-thought> [<https://perma.cc/5RZD-57H3>].

³⁵ Attracta Mooney, *BlackRock Chief Larry Fink Issues Companies with Code of Conduct*, FIN. TIMES (Jan. 16, 2018), <https://www.ft.com/content/dd72c4b4-faca-11e7-9b32-d7d59aace167> [<https://perma.cc/3XQ5-X5JM>].

In January 2019, BlackRock published Mr. Fink's next letter to CEOs.³⁶ Mr. Fink stated his belief that "society is increasingly looking to companies, both public and private, to address pressing social and economic issues. These issues range from protecting the environment to retirement to gender and racial inequality, among others."³⁷ As a result, Mr. Fink stated that "BlackRock's Investment Stewardship engagement priorities for 2019 are: governance, including your company's approach to board diversity; corporate strategy and capital allocation; compensation that promotes long-termism; environmental risks and opportunities; and human capital management."³⁸

A year later, Mr. Fink pivoted hard back to climate change. On January 9, 2020, The Wall Street Journal reported³⁹ that BlackRock had joined Climate Action 100+, telling the paper, "evidence of the impact of climate risk on investment portfolios is building rapidly and we are accelerating our engagement with companies on this critical issue." Climate Action 100+ is "a group of investors that's pressing the world's biggest emitters of greenhouse gases to change their ways."⁴⁰ In an emailed statement to Bloomberg, BlackRock stated that joining Climate Action 100+ "is a natural progression of the work our investment stewardship team has done."⁴¹

On January 14, 2020, BlackRock published Mr. Fink's next letter to CEOs.⁴² Writing "as an advisor and fiduciary to [BlackRock's] clients," Mr. Fink asserted

³⁶ Larry Fink, *Letter to CEOs*, BLACKROCK (2019), <https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter> [https://perma.cc/5CUR-S8YE].

³⁷ *Id.*

³⁸ *Id.*

³⁹ Dieter Holger & Maitane Sardon, *BlackRock Joins World's Largest Investor Group on Climate Change*, WALL ST. J., (Jan. 9, 2020), <https://www.wsj.com/articles/blackrock-joins-worlds-largest-investor-group-on-climate-change-11578594349> [https://perma.cc/29BY-C2LX].

⁴⁰ Laura Hurst, Annie Massa & Emily Chasan, *BlackRock Joins \$41 Trillion Investor Climate Campaign*, BLOOMBERG (Jan. 10, 2020), <https://www.bloomberg.com/news/articles/2020-01-09/blackrock-joins-investor-group-campaigning-for-climate-action> [https://perma.cc/39UJ-Q9MQ].

⁴¹ *Id.*

⁴² Larry Fink, *Letter to CEOs*, BLACKROCK (2020), <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> [https://perma.cc/6S8N-9UTZ].

that “[c]limate change has become a defining factor in companies’ long-term prospects. Last September, when millions of people took to the streets to demand action on climate change, many of them emphasized the significant and lasting impact that it will have on economic growth and prosperity – a risk that markets to date have been slower to reflect. But awareness is rapidly changing, and I believe we are on the edge of a fundamental reshaping of finance.”⁴³

Mr. Fink touted the facts that “BlackRock was a founding member of the Task Force on Climate-related Financial Disclosures (TCFD)[...] a signatory to the UN’s Principles for Responsible Investment,” and a signatory to “the Vatican’s 2019 statement advocating carbon pricing regimes, which we believe are essential to combating climate change.”⁴⁴ According to Mr. Fink, “[e]very government, company, and shareholder must confront climate change.”⁴⁵ Mr. Fink announced a substantial expansion of BlackRock’s climate agenda:

This year, we are asking the companies that we invest in on behalf of our clients to: (1) publish a disclosure in line with industry-specific [] guidelines by year-end, if you have not already done so, or disclose a similar set of data in a way that is relevant to your particular business; and (2) disclose climate-related risks in line with the TCFD’s recommendations, if you have not already done so. This should include your plan for operating under a scenario where the Paris Agreement’s goal of limiting global warming to less than two degrees is fully realized, as expressed by the TCFD guidelines. We will use these disclosures and our engagements to ascertain whether companies are properly managing and overseeing these risks within their business and adequately planning for the future. In the absence of robust disclosures, investors, including BlackRock, will increasingly conclude that companies are not adequately managing risk.⁴⁶

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The demand can easily be read as prodding fossil fuel companies to acknowledge that in the possible, if not likely, scenario where the Paris Agreement's goal is reached, they would probably have lost a lot of value. Of course, the opposite is just as true. In the scenarios where those goals are not reached, it is likely because there was no actual transition to a low-carbon economy, a scenario that seems more and more likely and one that will benefit from investment in so-called "brown" assets.⁴⁷ Mr. Fink remained silent on this possibility.

On May 27, 2020, BlackRock voted against two directors at Exxon "for lack of progress in driving greater action on climate risk".⁴⁸

A July 23, 2020, Bloomberg News report titled, "BlackRock: Covid, Racial Injustice Boost Case for ESG Reporting" quotes a BlackRock Head of Investment Stewardship for the Americas as stating:

We're looking for alignment in terms of how the executive team is being compensated and how that compares with how the company has treated its employees during this period ... Some companies are furloughing workers while continuing to pay dividends.⁴⁹

This was a particularly concerning claim since BlackRock's investors benefit from dividends and workforce reductions when companies are no longer profitable. After all, the companies in which BlackRock invests on behalf of beneficial holders are for-profit corporations, not charities.

Despite this, BlackRock and Mr. Fink were soon to turn it up to 11.⁵⁰

⁴⁷ See Alon Brav & J.B. Heaton. *Brown Assets for the Prudent Investor*, 12 HARV. BUS. L. REV. 1, (2021).

⁴⁸ BLACKROCK, *Voting Bulletin: Exxon Mobil Corporation*, <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-exxon-may-2020.pdf> [<https://perma.cc/7GKK-YTEJ>].

⁴⁹ Nicola M. White, *BlackRock: Covid, Racial Injustice Boost Case for ESG Reporting*, BLOOMBERG LAW (July 23, 2020), <https://news.bloombergtax.com/financial-accounting/blackrock-covid-racial-injustice-boost-case-for-esg-reporting> [<https://perma.cc/MN9E-JJ84>].

⁵⁰ If you've never seen the 'rockumentary' SPINAL TAP, you need to do so to understand this reference, and also because it is one of the greatest films ever made about the world of rock 'n' roll.

III. COME AS YOU ARE: BLACKROCK AIDS A CLIMATE ACTIVIST

On December 7, 2020, climate activist investing firm Engine No. 1 sent and published a letter to the Board of Directors of Exxon asserting that

ExxonMobil should fully explore ways to leverage its scale and expertise in delivering energy by exploring growth areas, including more significant investment in net-zero emissions energy sources and clean energy infrastructure, under the guidance of a special committee of the Board with relevant experience created for this purpose. Improved long-term capital allocation discipline, combined with this effort to diversify, should help create a more favorable long-term risk/reward scenario for shareholders and ensure the Company can not only set Scope 1, 2, and 3 carbon emission reduction targets, but also make them part of a sustainable, transparent, and profitable long-term plan focused on accelerating rather than deferring the energy transition.⁵¹

Engine No. 1 indicated that it would nominate a dissident set of directors. Engine No. 1 plugged its support from the California State Teachers' Retirement System (CalSTRS), which held a 0.2% position in Exxon stock (about \$331 million) compared to Engine No. 1's stake of just \$40 million.⁵²

On December 9, 2020, the Church Commissioners for England, managers of the Church of England investment fund, announced that they were supporting

⁵¹ Letter from Engine No. 1 LLC to Board of Directors, Exxon Mobil Corporation, REENERGIZE EXXON (Dec. 7, 2020), <https://reenergizexom.com/documents/Letter-Engine-No.-1-Letter-to-the-ExxonMobil-Board-12-7-20.pdf> [<https://perma.cc/A62E-TL3X>].

⁵² Simon Casey, *Exxon Investor Backed by CalSTRS Threatens Board Shake-Up* (3), BLOOMBERG LAW (Dec. 7, 2021), <https://news.bloomberglaw.com/employee-benefits/exxon-investor-to-seek-board-shake-up-gets-calstrs-backing> [<https://perma.cc/7PME-6U22>]. Given its small position and the high costs of the proxy contest, it is clear that Engine No. 1's campaign was not financially successful and could not have been intended to generate a typical shareholder activist's profit. For an excellent analysis of this fact, see Bernard S. Sharfman, *The Illusion of Success: A Critique of Engine No. 1's Proxy Fight at ExxonMobil*, 12 HARV. BUS. L. REV. 1, (2021).

Engine No. 1's board slate at Exxon.⁵³ Also, on December 9, 2020, hedge fund D.E. Shaw, which, like Engine No. 1, held a very small position in Exxon, sent a letter to Exxon seeking to have the company reduce its investments in fossil fuels and improve its environmental reputation.⁵⁴

On December 10, 2020, BlackRock published its latest standards for proxy voting, which set out BlackRock's "expectation that companies disclose a plan for how their business model will be compatible with a low-carbon economy, that is, one where global warming is limited to well below 2 degrees Celsius and consistent with a global aspiration of net zero GHG [greenhouse gas] emissions by 2050."⁵⁵ BlackRock vowed to support more shareholder proposals on climate change.⁵⁶

On December 14, 2020, Exxon announced that it would make efforts to reduce the emissions intensity of its businesses—the percentage of emissions for a given activity—but did not commit to absolute levels of emissions reduction, which would have required commitment to a decline in its fossil fuel production.⁵⁷ Engine No.

⁵³ Ortenca Aliaj, Derek Brower & Myles McCormick, *ExxonMobil Under Pressure as Church of England Joins Investor Campaign*, FIN. TIMES (Dec. 10, 2020), <https://www.ft.com/content/c0639fb0-d81f-4ee9-8d58-d8e8da05c454> [<https://perma.cc/FK8Y-893U>].

⁵⁴ Scott Deveau, *D.E. Shaw Is Said to Push Exxon to Cut Spending, Costs*, BLOOMBERG (Dec. 9, 2020), <https://www.bloomberg.com/news/articles/2020-12-09/d-e-shaw-is-said-to-push-exxon-to-cut-spending-costs> [<https://perma.cc/XRG2-7YFR>]. Ownership data from Bloomberg Terminal show that D.E. Shaw held only about 4.2 million shares in the first two quarters of 2021, with an approximate market value of between \$160 million and \$250 million.

⁵⁵ BLACKROCK, *Our 2021 Stewardship Expectations: Global Principles and Market-level Voting Guidelines*, WACHTELL, LIPTON, ROSEN & KATZ, <https://www.wlrk.com/docs/blackrock-our-2021-stewardship-expectations.pdf> [<https://perma.cc/JGV2-MWQY>].

⁵⁶ Attracta Mooney, *BlackRock Vows to Back More Shareholder Votes on Climate Change*, FIN. TIMES (Dec. 9, 2020), <https://www.ft.com/content/d47a23bb-5c50-4aa6-adde-de0113395827> [<https://perma.cc/W5E5-Q297>].

⁵⁷ Kevin Crowley, *Exxon Sets New Emissions Goals Following Investor Criticism*, BLOOMBERG (Dec. 14, 2020), <https://www.bloomberg.com/news/articles/2020-12-14/exxon-announces-new-emissions-targets-after-investor-criticism> [<https://perma.cc/TY6N-7VRL>].

1 criticized Exxon's plan for failing to "position[] it for long-term success in a world seeking to reduce total greenhouse gas emission."⁵⁸

On January 26, 2021, BlackRock posted Mr. Fink's latest letter to CEOs.⁵⁹

[T]he pandemic has presented such an existential crisis – such a stark reminder of our fragility – that it has driven us to confront the global threat of climate change more forcefully and to consider how, like the pandemic, it will alter our lives. It has reminded us how the biggest crises, whether medical or environmental, demand a global and ambitious response. In the past year, people have seen the mounting physical toll of climate change in fires, droughts, flooding and hurricanes. They have begun to see the direct financial impact as energy companies take billions in climate-related write-downs on stranded assets and regulators focus on climate risk in the global financial system. They are also increasingly focused on the significant economic opportunity that the transition will create, as well as how to execute it in a just and fair manner. No issue ranks higher than climate change on our clients' lists of priorities. They ask us about it nearly every day.

The next day, on January 27, 2021, Engine No. 1 formally nominated its four-member dissident slate of directors.⁶⁰ On February 22, 2021, Engine No. 1 released a letter calling on Exxon to be put "on a path to net zero total emissions by 2050"

⁵⁸ *Engine No. 1 Comments on ExxonMobil's New Emission Targets*, BUSINESSWIRE (Dec. 14, 2020), <https://www.businesswire.com/news/home/20201214005855/en/Engine-No.-1-Comments-on-ExxonMobil's-New-Emissions-Targets> [<https://perma.cc/8EDT-PNZX>].

⁵⁹ Larry Fink, *Letter to CEOs*, BLACKROCK, (2021) <https://www.blackrock.com/corporate/investor-relations/2021-larry-fink-ceo-letter> [<https://perma.cc/H6R5-5BXP>].

⁶⁰ Scott Deveau, *Exxon Faces Proxy Fight After Activist Nominates Directors*, BLOOMBERG LAW (Jan. 27, 2021), <https://news.bloomberglaw.com/mergers-and-acquisitions/exxon-faces-proxy-fight-after-activist-nominates-four-directors> [<https://perma.cc/3NL2-4Q5M>].

and criticizing the company for a “short-term approach [that] falls far short of Paris Agreement consistency.”⁶¹

By March 2021, The Wall Street Journal ran a story headlined, “Tidal Wave of ESG Funds Brings Profit to Wall Street” describing the growth in such funds around the time of BlackRock’s accelerating climate activism.⁶²

On April 25, 2021, the Financial Times reported on Engine No. 1’s investor presentation regarding its proxy fight at Exxon. The investor presentation claimed that Exxon faced an “existential business risk,” with “no credible plan to protect value in an energy transition,” and criticized Exxon’s “refusal to accept that fossil fuel demand may decline.”⁶³ On April 26, 2021, Mr. Fink gave an interview to Bloomberg Television in which he stated:

The Earth’s health is deteriorating. So, it’s like a new pandemic. And we see it getting sicker. And we have to stop that disease curve for the Earth. And the sooner we start changing the course of carbon in our environment, the sooner that we can stabilize our global Earth’s health.

On April 28, 2021, BlackRock voted against a management-recommended director candidate at energy producer Ovintiv Inc. on the grounds that “the company does not meet our expectations of having adequate climate-related metrics and targets.”⁶⁴ On April 29, 2021, BlackRock voted against a management-recommended director candidate, Julie J. Robertson, at EOG Resources, Inc., on the same grounds.

⁶¹ Letter to the Board of Directors, REENERGIZE EXXON (Feb. 22, 2021), <https://reenergizexom.com/materials/letter-to-the-board-of-directors-february-22/> [<https://perma.cc/F8HR-LEFE>].

⁶² See Michael Wursthorn, *Tidal Wave of ESG Funds Brings Profit to Wall Street*, WALL ST. J. (Mar. 16, 2021, 5:30 AM), <https://www.wsj.com/articles/tidal-wave-of-esg-funds-brings-profit-to-wall-street-11615887004> [<https://perma.cc/5TY3-X36G>].

⁶³ Derek Brower & Justin Jacobs, *Exxon Faces ‘Existential’ Risk Over Fossil Fuel Focus, Activist Investor Warns*, FIN. TIMES (Apr. 25, 2021), <https://www.ft.com/content/5ab010de-43c8-4b60-80f2-020f01610eee> [<https://perma.cc/2R9P-964P>].

⁶⁴ All voting information quoted throughout this report for BlackRock’s votes are available at <https://www.blackrock.com/corporate/insights/investment-stewardship> by clicking on “Global Vote Disclosure” [<https://perma.cc/9ZFA-74LN>].

On May 6, 2021, BlackRock voted against a management-recommended director at CNX Resources Corporation on climate activism grounds and also voted against three management-recommended directors “for failure to adequately account for diversity on the board.” On May 7, 2021, BlackRock voted against two management-recommended directors at Occidental Petroleum “for failure to adequately account for diversity on the board.”

On May 12, 2021, BlackRock voted: (1) at Kinder Morgan, Inc. against three management-recommended directors “for failure to adequately account for diversity on the board.” BlackRock voted against another management-recommended director “as the company does not meet our expectations of having adequate climate-related metrics and targets” and (2) at both Range Resources Corporation and Murphy Oil Corporation against management-recommended directors for the reason that “the company does not meet our expectations of having adequate climate-related metrics and targets.”

On May 18, 2021, BlackRock voted against a management-recommended director at Southwestern Energy Corporation on the grounds that “the company does not meet our expectations of having adequate climate-related metrics and targets.”

On May 25, 2021, BlackRock voted against a management-recommended director at Targa Resources Corp. on the grounds that “the Company does not meet our expectations of having adequate climate risk disclosures against all 4 pillars of TCFD, including targets.” The same day, it was reported that BlackRock would vote for three of four of Engine No. 1’s dissident directors, a vote that occurred on May 26, 2021.

BlackRock explained its vote for three of the four directors nominated by Engine No. 1 in a bulletin⁶⁵ that includes the following discussion:

We believe these steps represent progress on issues critical for delivering financial performance, but we believe more needs to be done in Exxon’s long-term strategy and short-term actions in

⁶⁵ *Vote Bulletin: ExxonMobil Corporation*, BLACKROCK (May 26, 2021), <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-exxon-may-2021.pdf> [<https://perma.cc/NWL9-UQRE>].

relation to the energy transition in order to mitigate the impact of climate risk on long-term shareholder value. Specifically, unlike many of its peers, Exxon has committed limited capital expenditure toward the diversification of its portfolio. The company has invested approximately \$10.4 billion over the past twenty years (since 2000) to research, develop, and deploy lower-emission energy technologies, compared to its total capital expenditure of \$21.4 billion in 2020.

Additionally, unlike its peers, Exxon has not allocated capital toward scope 3 emissions reductions. Exxon has been clear about its position on the energy transition and the long-term demand for oil and natural gas, stating that “[u]nder most third-party scenarios that meet the objectives of the Paris Agreement, oil and natural gas continue to play a significant role for decades in meeting increasing energy demand of a growing and more prosperous global population.” In our view, Exxon and its Board need to further assess the company’s strategy and board expertise against the possibility that demand for fossil fuels may decline rapidly in the coming decades, as was recently discussed in the International Energy Agency’s (IEA) Net Zero 2050 scenario. The company’s current reluctance to do so presents a corporate governance issue that has the potential to undermine the company’s long-term financial sustainability.⁶⁶

On May 26, 2021, results showed that at least two of Engine No. 1’s dissident directors had been elected.⁶⁷ It was not the only impact BlackRock made that day. BlackRock also had voted against management-recommended directors: (1) at Chevron Corporation for a shareholder proposal to reduce Scope 3 emissions, (2) at Marathon Oil Corporation on the grounds that “the company does not meet our

⁶⁶ *Id.*

⁶⁷ Kevin Crowley & Scott Deveau, *Exxon CEO Is Dealt Stinging Setback at Hands of New Activist (2)*, BLOOMBERG (May 26, 2021), <https://www.bloomberg.com/news/articles/2021-05-26/tiny-exxon-investor-notches-climate-win-with-two-board-seats> [<https://perma.cc/N8XH-LSV9>].

expectations of having adequate climate-related metrics and targets,” and (3) at ONEOK, Inc. on the ground that “the Company does not meet our expectations of having adequate climate risk disclosures against all 4 pillars of TCFD, including targets.”

On May 27, 2021, Engine No. 1 asserted that Exxon’s future “success” would require “less oil and gas production going forward.”⁶⁸ On June 2, 2021, it was announced that Engine No. 1 had won a third board seat.⁶⁹

Importantly, BlackRock’s votes were determinative in the election of the three Engine No. 1 dissident directors. As of the date of the vote, BlackRock held approximately 283.3 million shares of XOM common stock.⁷⁰ BlackRock actually voted 251,679,327 of these shares.⁷¹ Using the final vote totals, Engine No. 1 director Kaisa Hietala received 1,510,819,249 votes, Engine No. 1 director Gregory J. Goff received 1,425,523,196 votes, and Engine No. 1 director Alexander A. Karsner received 1,218,032,919 votes.

This allowed them to receive more votes than three Exxon nominees: Douglas R. Oberhelman with 1,145,335,462 votes, Wan Zulkiflee with 1,099,727,702 votes, and Samuel J. Palmisano with 1,098,045,723 votes. BlackRock did not vote for any of the three Exxon nominees.⁷² As the table shows, if BlackRock had cast its 251,679,327 votes for the Exxon-nominated directors instead of the three Engine No. 1 dissident directors, none of the dissident directors would have been elected.

⁶⁸ Derek Brower, *Hedge Fund That Beat ExxonMobil Says It Will Have to Cut Oil Output*, FIN. TIMES (May 27, 2021), <https://www.ft.com/content/52645b30-c378-49e3-8609-4f537284889a> [<https://perma.cc/5TWB-N7XS>].

⁶⁹ Scott Deveau & David Wethe, *Exxon Activist Expands Boardroom Presence with Third Seat*, BLOOMBERG (June 2, 2021), <https://www.bloomberg.com/news/articles/2021-06-02/exxon-activist-seen-winning-third-board-seat-in-preliminary-vote> [<https://perma.cc/94UD-6V37>]; Christopher M. Matthews, *Activist Likely to Gain Third Seat on Exxon Board*, WALL ST. J. (June 2, 2021, 6:11 PM), <https://www.wsj.com/articles/activist-likely-to-gain-third-seat-on-exxon-board-11622664757> [<https://perma.cc/2S27-KX3T>].

⁷⁰ Ownership information from Bloomberg Terminal, accessed Sept. 26, 2023.

⁷¹ EXXON MOBIL CORP., *Current Report (Form 8-K/A)* (May 26, 2021).

⁷² BLACKROCK, *supra* note 67.

Director Nominee	With BlackRock Vote for Engine No. 1 Nominee	With BlackRock Vote for Exxon Nominee
Kaisa Hietala	1,510,819,249	1,259,139,922
Gregory J. Goff	1,425,523,196	1,173,843,869
Alexander A. Karsner	1,218,032,919	966,353,592
Douglas R. Oberhelman	1,145,335,462	1,397,014,789
Wan Zulkiflee	1,099,727,702	1,351,407,029
Samuel J. Palmisano	1,098,045,723	1,349,725,050

On July 20, 2021, Bloomberg reported on BlackRock's voting in connection with the Exxon proxy fight and its other actions in the article "BlackRock Voted Against 255 Directors for Climate Issues,"⁷³ stating:

BlackRock Inc. rejected almost five times more board directors at companies, including Berkshire Hathaway Inc. and Exxon Mobil Corp., during the recent proxy season because they failed to act on climate issues . . . [i]t also failed to support the management of 319 companies for climate-related reasons, compared with 53 in 2020 . . . in the recent proxy season . . . it backed about two thirds of the environmental resolutions, and about a third of the social and governance proposals.⁷⁴

For the same proxy year ending June 30, BlackRock had voted for 64% of shareholder proposals on the environment, up nearly a six-fold increase from the prior proxy season.⁷⁵

⁷³ Saijel Kishan, *BlackRock Voted Against 255 Directors for Climate Issues (2)*, BLOOMBERG LAW (July 20, 2021, 12:28 PM), <https://news.bloomberglaw.com/esg/blackrock-voted-against-255-directors-for-climate-related-issues> [<https://perma.cc/7DJ5-3ZLJ>].

⁷⁴ *Id.*

⁷⁵ Dawn Lim & Justin Baer, *BlackRock, Other Investors Target Climate Issues, Covid-19 Response and Board Seats in Shareholder Votes*, WALL ST. J. (Aug. 12, 2021, 7:00 AM), <https://www.wsj.com/articles/blackrock-other-investors-wield-growing-board-shareholder-vote-clout-11628766001> [<https://perma.cc/6WQF-ZFRT>].

IV. UNDER PRESSURE: BACKLASH FOR BLACKROCK

As of December 31, 2020, BlackRock's assets under management for institutions were approximately \$4.4 trillion, approximately 51% of BlackRock's total assets under management of approximately \$8.7 trillion.⁷⁶ Approximately \$2 trillion of the \$4.4 trillion that BlackRock managed for institutions as of December 31, 2020, was in equity index products.⁷⁷

BlackRock had disclosed to its investors in its 2020 Form 10-K filed on February 25, 2021, that it faced the risk of "the withdrawal of funds from BlackRock's products in favor of products offered by competitors."⁷⁸

BlackRock also disclosed to its investors that:

BlackRock's reputation is critical to its relationships with its clients, employees, shareholders and business partners. BlackRock's reputation may be harmed by, among other factors . . . a failure to manage conflicts of interest . . . [t]o the extent that BlackRock fails, or appears to fail, to deal appropriately with any conflict of interest, it may face adverse publicity, reputational damage, litigation, regulatory proceedings, client attrition, penalties, fines and/or sanctions, any of which may cause BlackRock's AUM, revenue and earnings to decline.⁷⁹

The disclosure was prescient. As it disclosed, BlackRock might have faced adverse publicity, reputational damage, litigation, and client attrition.

On June 30, 2021, approximately one month after its determinative vote at Exxon in favor of Engine No. 1's dissident directors, two U.S. senators wrote to the Federal Retirement Thrift Investment Board expressing concern that

⁷⁶ BLACKROCK, *2020 Annual Report (Form 10-K)* 5, 2 (Feb. 25, 2021), <https://fintel.io/doc/sec-blackrock-inc-10k-2021-february-25-18683-707> [<https://perma.cc/JJ3E-GGQY>].

⁷⁷ *Id.* at 6.

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 29–30.

“BlackRock and [State Street] may be prioritizing their CEOs’ personal policy views over retirees’ financial security.”⁸⁰

In January 2021, perhaps also in response to Texas state officials who “threatened to restrict BlackRock from managing pension money,”⁸¹ BlackRock attempted to belay concerns voiced over its push for climate activism through corporate governance actions in a January 3, 2021 letter, stating that it is “perhaps the world’s largest investor in fossil fuel companies.”⁸² Mr. Fink’s annual letter to CEOs later that month⁸³ did not mention climate concerns until its final sections, and then stressed that businesses “cannot be the climate police.”

BlackRock then disclosed as material the risk of disagreement with its ESG agenda in its 2021 Form 10-K, filed on February 25, 2022:

BlackRock’s business, scale and investments subject it to significant media coverage and increasing attention from a broad range of stakeholders. This heightened scrutiny has resulted in negative publicity for BlackRock and may continue to do so in the future. For example, different stakeholder groups have divergent views on ESG matters, including in the countries in which BlackRock operates and invests, as well as states and localities where BlackRock serves public sector clients. This divergence increases the risk that any action or lack thereof on ESG will be

⁸⁰ Dawn Lim, *Republicans Ask Federal Retirement Plan for Details on BlackRock, State Street’s Votes*, WALL ST. J. (July 1, 2021, 2:10 PM), <https://www.wsj.com/articles/republicansask-federal-retirement-planfor-details-on-blackrock-state-streets-votes-11625139430> [<https://perma.cc/3PV7-7RT7>].

⁸¹ Silla Brush, *Larry Fink Meets Big Oil and Its Foes to Navigate Climate Fight*, BLOOMBERG (Feb. 8, 2022, 12:45 PM), <https://www.bloomberg.com/news/articles/2022-02-08/larry-fink-meets-big-oil-and-its-foes-to-navigate-climate-fight> [<https://perma.cc/TE2N-MRZQ>].

⁸² BLACKROCK, *BlackRock Letter 1* (Jan. 3, 2021), <https://drive.google.com/file/d/1g3Aa8VdcD1xpJrxTT3oG2ofLBPPotyL/view> [<https://perma.cc/M7F4-MALR>].

⁸³ Larry Fink, *The Power of Capitalism*, BLACKROCK (2022), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/D5E8-D3HE>].

perceived negatively by at least some stakeholders and adversely impact BlackRock's reputation and business.⁸⁴

On May 10, 2022, Bloomberg reported that BlackRock would not back climate proposals to the same level as it had in the 2021 proxy season.⁸⁵ That month, BlackRock stated: "Having supported 47% of environmental and social shareholder proposals in 2021, [BlackRock] notes that many of the climate-related shareholder proposals coming to a vote in 2022 are more prescriptive or constraining on companies and may not promote long-term shareholder value."⁸⁶

However, it was too late. In August 2022, nineteen state attorneys general wrote to BlackRock seeking information on its climate and social activism.⁸⁷

In December 2023, the State of Tennessee sued BlackRock for misleading investors about its climate and social activism.⁸⁸

In February 2024, BlackRock disclosed the risks associated with the backlash continuing against it.⁸⁹ In March 2024, Texas divested \$8.5 billion from BlackRock's funds.⁹⁰ A week later, the State of Mississippi warned BlackRock to

⁸⁴ BLACKROCK, *2021 Annual Report (Form 10-K)* (Feb. 25, 2022).

⁸⁵ Silla Brush, *BlackRock to Withhold Backing for Some Shareholder Climate Plans*, BLOOMBERG LAW, (May 10, 2022, 12:00 AM), <https://news.bloomberglaw.com/esg/blackrock-to-withhold-backing-for-some-shareholder-climate-plans> [<https://perma.cc/35BY-58VL>].

⁸⁶ BlackRock, *2022 Climate-Related Shareholder Proposals More Prescriptive than 2021*, <https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf> (last visited Jan. 18, 2024) [<https://perma.cc/KST2-PHWG>].

⁸⁷ The Editorial Board, *The ESG Investing Backlash Arrives*, WALL ST. J. (Aug. 15, 2022, 6:47 PM), <https://www.wsj.com/articles/the-esg-backlash-arrives-blackrock-mark-brnovich-strive-asset-management-attorneys-general-11660600459> (discussing the letter and its implications) [<https://perma.cc/W9DA-PP2B>].

⁸⁸ See Saijel Kishan, *BlackRock Accused by Tennessee of 'Misleading' ESG Strategy*, BLOOMBERG (Dec. 18, 2023, 10:56 AM), <https://www.bloomberg.com/news/articles/2023-12-18/blackrock-accused-by-tennessee-of-misleading-on-esg-strategy> [<https://perma.cc/YNW2-XY8B>].

⁸⁹ See Jack Pitcher, *BlackRock Warns Shareholders That ESG Scrutiny Could Harm Its Reputation and Business*, WALL ST. J. (Feb. 23, 2024, 7:24 PM), <https://www.wsj.com/livecoverage/stock-market-today-dow-jones-02-23-2024/card/blackrock-warns-shareholders-that-esg-scrutiny-could-harm-its-reputation-and-business-SWnOrWmOc6HMvw5auCaH> [<https://perma.cc/G7G5-MDZD>].

⁹⁰ Silla Brush, *BlackRock Says 'Reckless' Texas Divestment is Bad for Schools*, BLOOMBERG (Mar. 21, 2024, 12:30 PM),

cease and desist behavior, similar to the allegations outlined in Tennessee's complaint.⁹¹

Even worse, it also turned out that demand for ESG products was smaller than anticipated. And that market was shrinking.⁹² The funds were performing poorly, breaking the promise that one could do well just by doing good.⁹³

BlackRock had learned its lesson. It had returned to its pre-2017 neutral approach.⁹⁴ Mr. Fink switched his proselytizing from climate to the need to better fund retirements, a far more relevant goal for his business and its investors.⁹⁵

V. SO WHAT?: IMPLICATIONS AND CONCLUSIONS

Whether the concentration of voting power in the hands of the largest asset managers is cause for concern depends entirely on whether these managers engage in voting behavior contrary to the wishes of the beneficial owners. Otherwise,

<https://www.bloomberg.com/news/articles/2024-03-21/blackrock-says-reckless-texas-divestment-is-bad-for-schools/> [<https://perma.cc/2P9W-NL3F>].

⁹¹ See Saijel Kishan & Silla Brush, *BlackRock Gets Legal Warning Over ESG Funds From Mississippi*, BLOOMBERG (Mar. 27, 2024, 8:49 AM), <https://www.bloomberg.com/news/articles/2024-03-27/blackrock-issued-legal-warning-over-esg-strategy-by-mississippi> [<https://perma.cc/V3GR-A87M>].

⁹² Jon Sindreu, *Why ESG Investing Might Never Recover*, WALL ST. J. (Mar. 24, 2024, 5:30 AM), <https://www.wsj.com/finance/investing/why-esg-investing-might-never-recover-7aa9e7c9/> (describing the decline in ESG products) [<https://perma.cc/4GXX-SGL6>].

⁹³ Patrick Temple-West & Will Schmitt, *Investors Pull Cash from ESG Funds as Performance Lags*, FIN. TIMES (June 5, 2024), <https://www.ft.com/content/cf9001ab-e326-4264-af5e-12b3fbb0ee7b/> [<https://perma.cc/UA5L-Y4W8>].

⁹⁴ Some evidence suggests that such neutral approaches best serve corporations. See Mike Edleson & Andy Puzder, *Is ESG Profitable? The Numbers Don't Lie*, WALL ST. J. (Mar. 10, 2023, 5:15 PM), https://www.wsj.com/articles/is-esg-profitable-the-numbers-dont-lie-benchmarks-analytics-politics-neutral-fiduciary-duty-market-woke-5da4a533?reflink=desktopwebshare_permalink (describing the research) [<https://perma.cc/H9FL-XAC2>].

⁹⁵ See Laurence Fink, *Larry Fink's 2024 Annual Chairman's Letter to Investors*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter/> [<https://perma.cc/45VP-PMPK>]; see also Andrew Ross Sorkin, Ravi Mattu, Bernhard Warner, Sarah Kessler, Michael J. de la Merced, Lauren Hirsch and Ephrat Livni, *Why BlackRock's C.E.O. Wants to Rethink Retirement*, N.Y. TIMES (Mar. 26, 2024), <https://www.nytimes.com/2024/03/26/business/dealbook/blackrock-fink-letter-retirement.html> [<https://perma.cc/K9LX-TR39>].

interesting questions concern the voting behavior of those beneficial shareholders, not the largest asset managers.

We can gain insight into this question by looking for an example of investor pushback to voting behavior, and we find a strong one in BlackRock's climate and social activism between 2017 and 2021. It is interesting to ask whether the scale and speed of the backlash were reasonably foreseeable to anyone, if not by Mr. Fink.

Given the polarization of the nation on the very issues that BlackRock pushed, it is hard to argue that Mr. Fink should not have foreseen the consequences of his actions. Importantly, this example provides some anecdotal evidence that the largest asset managers are not off on a spree at the expense of their investors. While it is just one example, it paints a persuasive image that should induce skepticism of assertions that the largest asset managers are threats due to their voting behavior. The market pressures to vote according to shareholder wishes is strong evidence to the contrary.

