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TO: Hon. John M. Schroder, *Treasurer*  
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Hon. Phillip DeVillier, *Chairman House Retirement Committee*  
Louisiana Retirement Boards (La. R.S. 11:262)

FROM: Jeff Landry, Attorney General

DATE: August 30, 2022

RE: ESG Guidance regarding interaction between financial institutions and the State of Louisiana, and the possible adverse impact on state pension funds.

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On August 4, 2022, I, along with eighteen other Attorneys General around the country, sent a letter to BlackRock, Inc. CEO Larry Fink, challenging his company’s reliance on Environmental, Social, and Governance (“ESG”) criteria rather than shareholder profits in managing state pension funds.<sup>1</sup> This letter came in response to evidence that BlackRock may be using the private money of public and state employees to circumvent the best possible return on investments. Our preliminary investigation shows that based on past public comments, BlackRock may have used state employees’ assets to pressure companies to comply with international agreements that force the phase-out of fossil fuels, increase energy prices, drive inflation, and weaken the national security of the United States—all without ratification by the United States Senate.

As the Chief Legal Officer of the State of Louisiana, I am writing this guidance to make you aware that there is a trend among some investment management firms, such as BlackRock, to use money from public and state employee pension plans to push their own political agendas and force social change through use of ESG criteria. Some of the ESG goals, while well-intentioned, may have a direct adverse effect on Louisiana’s economy and state pension fund performance. More importantly, some of these practices likely conflict with Louisiana securities law as discussed below.

As a bit of background, ESG are a set of criteria or factors that purportedly aim to channel investments to companies that abide by that set of criteria. The ESG factors cover a wide-ranging field of policies that may sound righteous and virtuous at the surface level. For example, at the environmental level, factors such as

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<sup>1</sup> Exhibit 1, Letter to Laurence D. Fink, CEO, BlackRock, Inc., dated August 4, 2022.

the impacts of climate change are used to determine investments. From a social aspect, factors used by investment firms include a company's relationship with its employees and policies on diversity and inclusion. Finally, as to the governance criteria, topics such as political engagement, corporate leadership, and corporate ethics, etc. are employed. Collectively, these criteria are commonly referred to as ESG.

ESG factors (which may be perceived by some as noble in their purported purpose) have been applied by the three largest investment firms (i.e., the "Big Three"): BlackRock, Vanguard, and State Street.<sup>2</sup> Together, the Big Three control more than \$22 trillion in wealth.<sup>3</sup> To put this in perspective, this number could encompass the entire GDP of the United States,<sup>4</sup> and is "equivalent of more than half of the combined value of all shares for companies in the S&P 500...."<sup>5</sup> Thus, it is clear that the use of ESG by these large investment firms has a substantial impact on not only the companies they choose to invest in, but the economy as a whole.

Both state and federal law have long recognized fiduciary duties for those who manage other people's money. For example, the Employee Retirement Income Security Act ("ERISA"), demands that a fiduciary:

[D]ischarge that person's duties with respect to the plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.<sup>6</sup>

Here in Louisiana, like most states, we have a set of securities laws that govern the conduct of investment advisors. In Louisiana, a registered investment advisor ("RIA") is any dealer who offers for sale or sells any securities from this state and is registered.<sup>7</sup> An RIA, being "in a position of trust or authority," owes fiduciary duties to their investor-clients.<sup>8</sup> Fiduciaries owe both a duty to be free from conflicts of interests and the duty of loyalty.<sup>9</sup> With respect to the duty of loyalty, La. R.S. 51:712 A(2) specifically provides that any offer to sell or to sell any security by means of a false or misleading statement of material fact, including omissions, is unlawful.<sup>10</sup> This statute unambiguously imposes a fiduciary duty to disclose (or to tell the whole truth) all material facts regarding the sale or attempted sale of any security.

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<sup>2</sup> 43 No. 11 Securities and Federal Corporate Law Report NL 1.

<sup>3</sup> Farhad Manjoo, *What BlackRock, Vanguard and State Street Are Doing to the Economy*, New York Times (May 12, 2022), <https://www.nytimes.com/2022/05/12/opinion/vanguard-power-blackrock-state-street.html>.

<sup>4</sup> Gross Domestic Product (Third Estimate), GDP by Industry, and Corporate Profits (Revised), First Quarter 2022 (June 29, 2022), <https://www.bea.gov/news/2022/gross-domestic-product-third-estimate-gdp-industry-and-corporate-profits-revised-first>.

<sup>5</sup> Farhad Manjoo, *What BlackRock, Vanguard and State Street Are Doing to the Economy*, New York Times (May 12, 2022), <https://www.nytimes.com/2022/05/12/opinion/vanguard-power-blackrock-state-street.html>.

<sup>6</sup> 29 CFR § 2550.404a1(a).

<sup>7</sup> La. R.S. 51:703 D(1).

<sup>8</sup> Elizabeth R. Carter, *Fiduciary Litigation in Louisiana: Mandataries, Succession Representatives, and Trustees*, 80 La. L. Rev. 661, 664–65 (2020) (internal citations and quotations omitted).

<sup>9</sup> E.g., 29 C.F.R. § 2550.408b-2(e); ¶ 822 CONFLICT OF INTEREST TRANSACTIONS, 2017 WL 11025937.

<sup>10</sup> La. R.S. 51:712 A(2).

Moreover, the law of mandate in Louisiana likely further governs a contract between an RIA and an investor-client.<sup>11</sup> Fiduciary duties in the civil law tradition are “imposed by the law of contract,”<sup>12</sup> which is codified at La. C.C. art. 2990. A “mandatary is obligated to act with prudence and diligence with respect to the mandate he has accepted and is generally prohibited from self-dealing.”<sup>13</sup> The common law refers to this prohibition on self-dealing as requiring a duty of loyalty.<sup>14</sup> Courts have stated that this prohibition from self-dealing (i.e., the duty of loyalty) should be applied using the sole interest rule.<sup>15</sup>

Louisiana’s sole interest rule states that “a trustee shall administer the trust solely in the interest of the beneficiary.”<sup>16</sup> While aimed at trusts, this provision provides adequate guidance because the relationship between a trustee and a beneficiary is much like the relationship between an RIA and their investor-client.<sup>17</sup> The sole interest rule further prohibits a mandatary from “placing himself in a position where his personal interest conflicts (or may possibly conflict) with the interests of the beneficiary.”<sup>18</sup> This rule even applies when the principal has incurred no loss.<sup>19</sup> As stated by scholars, “equity deems it better to ... strike down all disloyal acts, rather than to attempt to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests.”<sup>20</sup>

When analyzing the use of ESG under Louisiana laws, it appears that the Big Three are likely violating the fiduciary duty of loyalty (and within that duty, the sole interest rule) owed to their investor-clients. The Big Three have all violated their fiduciary duty by, among other things, pledging together as part of Climate Action 100+,<sup>21</sup> and, thus, have placed their interest in the ESG agenda above the interest of their investor-clients. In dereliction of their fiduciary duties, they have supplanted their client’s best monetary interest with their own agenda on climate change, politics, and other self-interests. They appear to have weaponized their client’s money to force changes in corporate structures and hierarchy, to change corporate policies, and to force companies to follow the ESG agenda all without their client’s best monetary interest at the forefront. When a person signs up with an RIA, it is typically for one purpose: they pay to have money invested in the most financially prudent manner. Instead, the Big Three have taken that money and attempted to use it to influence corporate policy or change large facets of the business sector in order to fit their policy agenda.

Furthermore, when an RIA attempts to selectively use ESG criteria, it seems impractical to fulfill a fiduciary duty to all clients. Consider that in 2021 BlackRock was the second largest shareholder of Exxon and one

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<sup>11</sup> La. C.C. art. 2989 states “[a] mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.”

<sup>12</sup> Elizabeth R. Carter, *Fiduciary Litigation in Louisiana: Mandataries, Succession Representatives, and Trustees*, 80 La. L. Rev. 661, 664–65 (2020) (internal citations and quotations omitted).

<sup>13</sup> *Id.*

<sup>14</sup> John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005).

<sup>15</sup> *Id.*, at 931; *Succession of Dunham*, 408 So. 2d 888, 900 (La. 1981); La. R.S. 9:2082.

<sup>16</sup> La. R.S. 9:2082.

<sup>17</sup> See La. C.C. art. 13.

<sup>18</sup> John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005) at 931.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (quoting George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 543, at 217 (rev. 2d ed. 1993)).

<sup>21</sup> See statement from BlackRock, Inc.’s website, “We have joined Climate Action 100+ to help ensure the world’s largest greenhouse gas emitters take necessary action on climate change.” at <https://www.blackrock.com/us/individual/about-us/road-to-net-zero> (last accessed August 30, 2022).

of PetroChina's largest investors.<sup>22</sup> Based on the ESG agenda, BlackRock led an activist campaign that forced Exxon to cut oil production. Many of these oil fields dropped by Exxon, however, are poised to be acquired by PetroChina. This raises the following questions: why is BlackRock imposing its ESG agenda on Exxon but not PetroChina? How can BlackRock fulfill its duty of loyalty to both Exxon and PetroChina? These competing interests among their own investments illustrate that BlackRock cannot adequately protect the interests of individual investor-clients even if those investor-clients chose BlackRock specifically because of their ESG agenda.

These same competing interests demonstrate that the Big Three cannot possibly be complying with the complete disclosure of material facts required by La. R.S. 51:712 A(2). The holding in the seminal federal case on the duty of disclosure (*SEC v. Capital Gains Research Bureau, Inc.*,<sup>23</sup>) closely mirrors this Louisiana statute. In that case, the Supreme Court found that investment advisors owe fiduciary duties including, at least, the duties of "utmost good faith," a duty of "full and fair disclosure of all material facts," and a duty to use "reasonable care to avoid misleading clients."<sup>24</sup> Consider the facts above, in which BlackRock is clearly imposing its ESG agenda on Exxon but not on PetroChina. Thus, whether a client has invested with BlackRock because of their ESG agenda or solely for financial benefit (as most investors do), BlackRock is in violation of their duty of full disclosure.

Therefore, investment firms which operate as a registered investment advisor in Louisiana, and which utilize ESG factors or criteria without full disclosure to their investor-clients, are likely in violation of their fiduciary duties imposed by Louisiana law. In Louisiana, those investor-clients include entities such as the Louisiana Treasury and Louisiana State Retirement Boards (La. R.S. 11:262), including the Louisiana State Employees Retirement System ("LASERS").

I must note that this legal guidance should not be construed as concluding that the ESG agenda or the use of ESG criteria when selecting investments is inherently unlawful in any context. Instead, it explains that where investment firms, such as the Big Three, utilize ESG without full disclosure, they are likely in violation of a Louisiana registered investment advisor's fiduciary duties owed to investor-clients. It also illustrates how ESG has been exploited by the largest wealth management funds in our country at the expense of investors. As Attorney General, I encourage each of you to consider the aforementioned legal guidance when selecting investment firms to do business in the State of Louisiana.

For Louisiana,



Jeff Landry  
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<sup>22</sup> Jennifer Hiller and Ross Kerber, *BlackRock's Climate Views Put it Center Stage in Exxon Boardroom Fight* (Mat 19, 2021), <https://www.reuters.com/business/sustainable-business/blackrocks-climate-views-put-it-center-stage-exxon-boardroom-fight-2021-05-19>; see also *BRIEF-BlackRock's long position in PetroChina rises to 8.1 pct - HKEx filing* (December 5, 2017), <https://finance.yahoo.com/news/brief-blackrocks-long-position-petrochina-100317374.html>. (in 2017 BlackRock's long position in PetroChina was 8.1%).

<sup>23</sup> *Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 184; 84 S.Ct. 275, 278; 11 L.Ed.2d 237 (1963).

<sup>24</sup> *Id.* at 201 ("The high standards of business morality exacted by our laws regulating the securities industry do not permit an investment adviser to trade on the market effect of his own recommendations without fully and fairly revealing his personal interests in these recommendations to his clients.")