Kentucky Is Latest State to Blacklist Financial Institutions Over ESG Policies

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Investing

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To ring in the new year, Kentucky's Treasurer, Allison Ball, **announced** a list of eleven financial institutions that she claims are engaged in "energy company boycotts." According to Ball, the list "was crafted after careful review of publicly available statements and commitments made by the companies." The list includes Blackrock, BNP Paribas, Citigroup, HSBC and JPMorgan Chase, among others. Kentucky **enacted a law** in July 2022 requiring the treasurer to prepare and maintain such a list. The new law **defines** an energy company boycott as:

without an ordinary business purpose, refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company: 1. Engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law; or 2. Does business with a company described in subparagraph 1. of this paragraph;

KRS 41.42. A financial institution has ninety days from receiving notice of its inclusion on the list to "cease engaging in energy company boycotts in order to avoid becoming subject to divestment by state government entities."

For many of the impacted financial institutions, this situation is, unfortunately, not their first rodeo, and they previously have responded by objecting to characterizations of their relationship with the oil and gas industry. In September, for instance, Blackrock **published** a letter in response to an August 4 letter from 19 Republican state attorneys general, critical of Blackrock's ESG positions. Blackrock observed, among other things, that:

- Blackrock's participation in "various ESG-related initiatives" is "entirely consistent with our fiduciary obligations."

- “We believe investors and companies that take a forward-looking position with respect to climate risk and its implications for the energy transition will generate better long-term financial outcomes.”
- “Climate risk and the economic opportunities from the energy transition have become a top concern for many of our clients.”
- “As the recent historic floods across the country as well as the droughts and wildfires throughout the West and around the world this past year have shown, climate change is testing the resilience of many industries and businesses.”
- “As prudent risk managers and stewards of our clients’ assets, it is imperative that we seek to understand and assess how these risks and opportunities will impact the companies in which we invest on our clients’ behalf.”
- “BlackRock does not boycott energy companies or any other sector or industry. As we have noted previously, BlackRock, on behalf of our clients, is among the largest investors in public energy companies, and has hundreds of billions of dollars invested in these companies globally, with approximately $170 billion invested in US companies.”

Taking The Temperature: Kentucky is not alone in seeking to financially punish banks deemed insufficiently supportive of the energy industry. West Virginia and Texas have similar laws, and numerous other states, including Arizona, Florida, Louisiana, Missouri, South Carolina, and Utah, have announced that they may or will divest from banks or cease other financial activities with financial services firms (such as underwriting municipal securities) that are engaging in “energy boycotts.” Pressure also has been exerted by the Minority Staff of the U.S. Senate Banking Committee, Republican members of the House Judiciary Committee, and the Ranking Member of the Senate Banking Committee. But as we have articulated, investment managers have fiduciary duties to clients that they likely would breach if they ignored a material issue, including climate change.

We also question how state treasurers are arriving at a conclusion that a financial institution is engaged in an energy boycott, which is vaguely defined in the applicable state laws, especially given the basis for the decision as to any particular institution is not publicly articulated in a meaningful way. Ball’s press release, for instance, states that her conclusions were based on a “thorough review of publicly available statements, commitments, and/or an institution’s failure to respond to inquiry.” The West Virginia Treasurer’s press release stated that “each financial institution placed on the Restricted Financial Institution List today has published written environmental or social policies categorically limiting commercial relations with energy companies engaged in certain coal mining, extraction or utilization activities, rather than considering the financial or risk profile for each company,” and “these policies explicitly limit commercial engagement with an entire energy sector based on subjective environmental and social policies.” The absence of a publicized rationale for placing a particular institution on a boycott list implies that these decisions are largely subjective, and poorly supported, and it leaves financial institutions without insight into how their conduct could potentially impact their ability to keep or win state business.