Consumers' Research
established 1929

Will Hild
8300 Boone Boulevard Suite 500
Vienna, VA 22182
P: (202) 898 - 0542
info@consumersresearch.org

January 15, 2025

Fortune 500 Companies

Dear Board of Directors,

This letter is to inform you about a recent ruling that may expose your Company to significant current and future liability. Businesses and other fiduciaries placing client money in BlackRock funds may be breaching their duties. In *Spence v. American Airlines, Inc.*, a federal court concluded after a full bench trial that American Airlines and key employees breached their duty of loyalty under ERISA by offering BlackRock funds like popular S&P 500, Russell 1000, and Russell 3000 index funds in the Company's 401k plans.[i]

Offering these funds violated the Company's duty to focus only on financial returns because publicly available evidence put the plan fiduciaries on notice that BlackRock uses its funds to pursue goals other than financial return—like the ESG goal of reducing greenhouse gas emissions.[ii] Given this violation, remaining with BlackRock because of lower fees was no defense.[iii] In reasoning potentially applicable to nearly every public company, the court also found that BlackRock's outsized influence over American Airlines created a conflict of interest that prevented management from effectively supervising the asset manager.[iv]

The court's decision squares with prior Congressional findings, state Attorney General opinions on fiduciary duty, and multiple state enforcement actions alleging that BlackRock pursues ESG goals across all its funds, whether the funds are labeled ESG or not.

Although BlackRock exited one of its net zero alliances last week, the firm proudly proclaimed that the "departure doesn't change the way ... we manage [clients'] portfolios."[v] And BlackRock maintains its membership in UN PRI where it has pledged to "incorporate ESG issues into [its] ownership policies and practices."[vi] Fiduciaries, therefore, risk violating their duties by continuing to entrust plan assets to BlackRock.

In conclusion, any corporation or company using BlackRock to manage their pension plans is now effectively aware that BlackRock has acted with a dual motive in the past and is still publicly committed to doing the same moving forward. Furthermore, publicly traded companies where BlackRock is a major shareholder should be even more concerned about utilizing BlackRock.

DEFENDING CONSUMERS

Consumers' Research
established 1929

As the judge noted, a conflict of interest exists between corporate managers, who rely significantly on the support of BlackRock to maintain their position, and the interests of plan participants, who aim to maximize their investment returns. This conflict enhances the potential liability and may give rise to shareholder derivative suits against management for their malfeasance. Attached to this letter is a detailed memorandum outlining in full the potential liability. We highly recommend that your company strenuously review its relationship with BlackRock and whether continuing with them as a retirement plan manager is worth the colossal risks to your companies and yourselves.

Sincerely,

Will Hild

Will Hild
Executive Director

---

[i] No. 4:23-cv-552, Slip Op. at 12 (N.D. Tex Jan. 10, 2025).
[ii] *Id.* at 35-36.
[iii] *Id.* at 66.
[iv] *Id.* at 57.
[v] https://www.esgtoday.com/blackrock-exits-net-zero-coalition-says-move-wont-change-how-it-manages-investments/
[vi] https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment

DEFENDING CONSUMERS

Consumers' Research
established 1929

Will Hild
8300 Boone Boulevard Suite 500
Vienna, VA 22182
P: (202) 898 - 0542
info@consumersresearch.org

January 15, 2025

MEMORANDUM

This memorandum should not be construed as legal or investment advice, or a legal opinion on any specific facts or circumstances. This letter also is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. The contents are intended for general informational purposes only, and you are urged to consult your attorney and investment professionals concerning any particular situation and any specific questions you may have.

ANALYSIS

On January 10, 2025, a federal court ruled that American Airlines and the fiduciaries running two employee retirement plans violated their duty of loyalty under ERISA by continuing to entrust plan assets to BlackRock despite BlackRock's ESG commitments and actions. In a lengthy and detailed analysis, the court found that the fiduciaries violated their duty "by doing nothing to ensure BlackRock acted in the best financial interests of the Plan," despite the public evidence that BlackRock was pursuing ESG investment strategies instead.[i] The decision is highly critical of BlackRock's pursuit of non-financial goals with fund assets over the past several years, and it should give fiduciaries serious pause regarding entrusting plan assets to BlackRock.

The court found that beginning in 2017 BlackRock was incorporating ESG into its investment strategies for its actively and passively managed funds.[ii] The court cited votes related to Occidental Petroleum and ExxonMobil.[iii] It also cited open letters by CEO Larry Fink over multiple years that showed BlackRock's escalating commitment to non-financial goals.[iv] These letters publicly disavowed President Trump's decision to leave the Paris climate agreement, urged companies to report climate change in line with the Task Force on Climate Related Disclosures (TCFD), announced that BlackRock would use its proxy voting power to drive corporate social change, touted BlackRock's involvement in groups such as Climate Action 100+ and the United Nations Principles for Responsible Investment, and "affirmed BlackRock's socio-political agenda by fundamentally reshaping finance based on its belief that every government, company, and shareholder must confront climate change."[v]

The court also found that by 2020 BlackRock had published proxy voting and stewardship policies requiring companies to disclose a plan for aligning their business model with an economy where global warming is held to below two degrees Celsius and net zero emissions by 2050 are achieved.[vi] And BlackRock publicly vowed to support shareholder proposals aligned with these goals, even at energy companies that make money from the production of fossil fuels.[vii] The court then reviewed BlackRock's 2021 Exxon Mobil director votes, which the court

noted were dispositive in electing three dissident directors; as well as noting "a dozen or so additional oil and gas companies" where BlackRock opposed management-recommended directors because they failed to meet the desired climate goals and failed to diversify their boards.[viii]

The court dissected—and rejected—BlackRock's claims that ESG investing was based on financial considerations.[ix] It found that while "BlackRock couched its ESG investing in language that superficially pledged allegiance to an economic interest[,] BlackRock never gave more than lip service to *how* its actions were actually economically advantageous to its clients."[x] It described BlackRock's financial justifications for its ESG actions as "pretext."[xi] And it found that BlackRock "at a minimum" had an impermissible mixed motive of financial and non-financial interests.[xii]

In addition to these factual findings, the court also issued conclusions of law. It held that by continuing to entrust plan assets to BlackRock, Defendants had violated their duty of loyalty, which is among "the highest known to the law."[xiii] The court found that the fiduciaries' failure to address BlackRock's use of client assets to promote ESG was "evidence of disloyalty," because BlackRock's ESG promotion did "not make any rational economic sense."[xiv] The court stated:

Defendants acted disloyally by doing nothing to ensure BlackRock acted in the best financial interests of the Plan. This conclusion is particularly alarming given that BlackRock's investment strategy during the Class Period was focused on ESG investing. Such a pursuit of non-pecuniary interests, in whole or in part, was an end itself rather than as a means to some financial end. This was a major red flag that Defendants wholly ignored.[xv]

The court also found that American Airlines had a conflict of interest in placing employee money with BlackRock. It found the fiduciaries knew that BlackRock was a large shareholder in American Airlines itself, American was susceptible to a proxy challenge if it did not comply with BlackRock's dictates and otherwise stay in BlackRock's good graces, and fiduciaries appear to have allowed American's corporate support for ESG to influence their decision to turn a "blind eye" to BlackRock's detrimental ESG investment strategy.[xvi] These factors "paint[ed] a convincing picture that [the fiduciaries] breached the duty of loyalty."[xvii] Most, if not all, of these factors are potentially present for plan fiduciaries across the country, given that BlackRock owns a substantial amount of stock in virtually every publicly listed American company.

Importantly, the court also concluded that fiduciaries did not satisfy the duty of loyalty by picking BlackRock on the basis of lower fees, in light of BlackRock's failure to "provide[] the promised performance at reasonable fees rather than intervention in proxy voting" and the fiduciaries' failure to otherwise maximize financial benefits and identify conflicts of interest.[xviii]

Finally, American Airlines' liability for this fiduciary breach could be massive. The court

ordered the parties to submit briefing regarding plan losses and potential remedies later this month.[xix] The court noted in its findings that "[b]y focusing on non-pecuniary interests, ESG investments often underperform traditional investments by approximately 10%."[xx] The court also noted that BlackRock managed "approximately $11 billion in Plan assets as of the end of 2022," and the class period stretched from 2017 until the date of the judgment.[xxi]

CONCLUSION

Far from being an outlier, the court's conclusion that focusing on promoting ESG is contrary to maximizing shareholder returns is consistent with allegations in state enforcement actions, attorney general opinions, and Congressional committee findings.

The Tennessee Attorney General alleged in a consumer fraud complaint that BlackRock misled investors by claiming that its purportedly non-ESG funds did "not seek to follow a sustainable, impact, or ESG investment strategy," even though "ESG considerations in fact drive portions of its investment strategy—including for non-ESG funds."[xxii] The Mississippi Secretary of State[xxiii] and Indiana Secretary of State[xxiv] have made similar allegations related to state securities fraud.

The Indiana Attorney General issued an opinion that trustees of public pension funds in Indiana owe fiduciary duties to beneficiaries to invest and manage trust assets "solely in the interests of the beneficiaries," and further reasoned that they may not exercise rights appurtenant to those investments (such as proxy voting) based on extraneous considerations.[xxv] The Attorney General also concluded that investment managers hired by the state pension boards are required to act in the same manner. The Attorney General then applied these principles and opined that investment managers such as BlackRock who are retained by pension boards "may not consider ESG factors in making investment decisions or exercising voting rights appurtenant to ownership of securities."[xxvi] The Kentucky Attorney General similarly concluded that "stakeholder capitalism" and ESG investment practices, which introduce mixed motivations into investment decisions, are inconsistent with Kentucky law governing fiduciary duties owed by investment management firms to Kentucky's public pension plans.[xxvii] The *American Airlines* findings mean that a federal court has now concluded that BlackRock acted contrary to what the Indiana and Kentucky Attorneys General opined is required by state pension fund fiduciary duties.

The U.S. House Judiciary Committee also issued a report titled *Sustainability Shakedown: How a Climate Cartel of Money Managers Colluded to Take Over the Board of America's Largest Energy Company*.[xxviii] The report detailed how climate activists, including Japan's Government Pension Investment Fund and Scottish Widows, were able to pressure BlackRock to join Climate Action 100+ over its objections by withdrawing tens of billions of funds from it.[xxix] Internal meeting minutes from Climate Action 100+'s Global Steering Committee released by the Judiciary Committee show that "BlackRock understood that by joining CA100+, it was expected to shift its voting to support climate resolutions."[xxx]

Consumers' Research
established 1929

DEFENDING CONSUMERS

Although not mentioned in the court's opinion, BlackRock's recent exit from the Net Zero Asset Managers initiative (NZAM) does not change the material facts regarding the fiduciary analysis. The court based its decision on BlackRock's various ESG statements and commitments, and did not mention BlackRock's NZAM membership. In addition, BlackRock executives have expressly stated that the NZAM "departure doesn't change the way ... we manage [clients'] portfolios."[xxxi] BlackRock also remains a member of the United Nations Principles for Responsible Investment, which include "incorporat[ing] ESG issues into investment analysis and decision-making processes."[xxxii] BlackRock thus appears to be devoted to continuing to pursue its ESG investment strategy rather than acting solely in the interest of its clients, and fiduciaries must take this information into account in their decision-making.

According to the *American Airlines* court, fiduciaries should "meaningfully discuss[] the potential impact of BlackRock's known ESG-focused investing on" their plans and evaluate whether they need to divest, given the "major red flag" of BlackRock's ESG pursuits and the fact that it is "not possible ... to conclude that BlackRock's investment strategy maximized the financial benefits to the Plan."[xxxiii]

Consumers' Research
established 1929

DEFENDING CONSUMERS

[i] *American Airlines*, Slip Op. at 65.
[ii] *Id.* at 29.
[iii] *Id.* at 29.
[iv] *Id.* at 29-31.
[v] *Id.* at 31 (cleaned up).
[vi] *Id.* at 32.
[vii] *Id.* at 32.
[viii] *Id.* at 33.
[ix] *Id.* at 36-37.
[x] *Id.* at 37.
[xi] *Id.* at 37.
[xii] *Id.* at 37.
[xiii] *Id.* at 55.
[xiv] *Id.* at 66.
[xv] *Id.* at 65.
[xvi] *Id.* at 35, 55–64.
[xvii] *Id.* at 68.
[xviii] *Id.* at 51, 66–67.
[xix] *Id.* at 69.
[xx] *Id.* at 25.
[xxi] *Id.* at 12, 28.
[xxii] Complaint at ¶¶ 14–15, *Tennessee ex rel. Skrmetti v. BlackRock, Inc.*, No. 23CV-618 (Williamson County Circuit Court, filed Dec. 18, 2023), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-59-complaint.pdf.
[xxiii] *In re BlackRock, Inc.*, No. LS-24-6726 (Miss. Secretary of State, filed Mar. 26, 2024), https://www.sos.ms.gov/content/enforcementactionssearch/EnforcementActions/BlackRock%20Inc.,%20et%20al..pdf.
[xxiv] *In re BlackRock, Inc.*, No. 24-0013 CD(Indiana Secretary of State, filed Aug. 24, 2024), https://bloximages.chicago2.vip.townnews.com/nwitimes.com/content/tncms/assets/v3/editorial/1/d2/1d2224ee-60c5-11ef-8fd4-df487f3214e8/66c79fa362417.pdf.pdf.
[xxv] Official Opinion No. 2022-3 (Sept. 1, 2022), https://www.in.gov/attorneygeneral/files/Official-Opinion-2022-3.pdf.
[xxvi] *Id.* at 15, 17.
[xxvii] Official Opinion No. OAG 22-05 (May 26, 2022), https://www.ag.ky.gov/Resources/Opinions/Opinions/OAG%2022-05.pdf
[xxviii] Available at https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2024-12/2024-12-13-Sustainability-Shakedown-Report.pdf
[xxix] *Id.* at 42.
[xxx] *CA100+ Steering Committee Meeting Minutes* (Mar. 26, 2020), at page 460, CERES0001262 (cleaned up), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Appendix_Full.pdf.
[xxxi] Mark Segal, *BlackRock Exits Net Zero Coalition, Says Move Won't Change How it Manages Investments*, ESG Today (Jan. 10, 2025), https://www.esgtoday.com/blackrock-exits-net-zero-coalition-says-move-wont-change-how-it-manages-investments/
[xxxii] https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment
[xxxiii] *American Airlines*, Slip Op. at 65 (cleaned up).