

West Virginia Goes After Banks on Fossil Fuels

Shoot First, Ask Questions Later

Executive Summary

Several states have recently passed laws that target banks and investment houses seen as hostile to the fossil fuel industry.¹ Offending financial services companies will be barred from competing on contracts for state banking services and pension fund management. The banks may also be the targets of pension fund divestment. The laws are part of a broader and coordinated attack on policies and entities supporting solutions to climate change.² The attackers argue that fossil fuel divestment is an abusive policy instrument based on ideological prejudices. But the basis of these laws is specious, and their implementation leaves these states vulnerable to lawsuits. Banks and other financial services companies have a strong case to reverse this misguided initiative.

Although the various statutes take slightly different paths, all are aimed at punishing banks and investment houses for using lending and investment criteria that purportedly harm the fossil fuel industry. The determination to punish financial services companies is typically carried out by a state finance officer. The officer is usually required to report negative findings about financial services companies to various public finance agencies (pension funds, treasurers, procurement officers), who are instructed to initiate a divestment or contract prohibition.³

For the purpose of understanding the impact of these policies and state laws, this commentary reviews a prime example, the West Virginia statute, and subsequent follow-up actions by the state's treasurer, Riley Moore.

How the West Virginia Statute Works

West Virginia adopted legislation (S.B. 262) in 2022, requiring the state treasurer to develop a target list of financial services companies that potentially are boycotting the energy sector, defined in the statute specifically as the fossil fuel sector.⁴ The state treasurer is directed to notify those companies that they are on a list and are at risk of being denied the right to participate for banking service contracts; solicit the views of the targeted companies; and review the responses and other publicly available data. The treasurer then makes final a determination as to whether each targeted financial services company is boycotting energy companies.

¹ Politico. [Climate investing boycott bills flood state capitals](#). February 15, 2022. See: Texas, Arkansas, Louisiana, West Virginia, Oklahoma, Wyoming and Kansas.

² New Republic. [Conservatives have a new bogeyman: Critical energy theory](#). December 7, 2021.

³ Politico, *op. cit.*

⁴ West Virginia Legislature. [S.B. 262](#). June 10, 2022.

Once the treasurer has determined that a financial services entity is boycotting an energy company, the offending company is placed on an official list posted on the treasurer's website. The treasurer may bar any listed financial company from competing for certain banking services contracts.⁵ The law in West Virginia exempts contracts with the West Virginia Investment Management Board, which is the state pension fund.⁶

To date, the West Virginia treasurer has issued exclusion notices to five companies: BlackRock, Goldman Sachs, JPMorgan Chase, Morgan Stanley and Wells Fargo.⁷

The Statute's Requirements Are Not Reasonably Related to the Legislative Goal

The statute refers to harm done to the West Virginia economy by reason of the financial services boycott of energy companies. Yet the statute does not establish or require the treasurer to provide a link between financial service company actions and harm to either West Virginia energy companies or the state economy. If a bank decides to curtail activity with an Australia- or India-based coal mining company, for example, how does that hurt the West Virginia economy? In a competitive landscape, such actions may be to the advantage of West Virginia companies.

The statute does not specify the procurement status of the companies once they are placed on the exclusion list. It lacks clarity as to whether companies on the exclusion list for the energy boycott are generally barred.⁸ The law states that the treasurer may deny a company on the list an opportunity to participate in competitive bidding processes for banking services.⁹ The treasurer has made no clarification that identifies which contracts for "banking services" are covered by the statute. It is also a message to other states that the company engages in questionable business practices.¹⁰

⁵ The state treasurer is empowered to act on behalf of the state generally in matters pertaining to cash management. See West Virginia Law Chapter 12-1-7, Public Moneys and Securities.

⁶ The West Virginia Investment Management Board is charged with the responsibility of managing and investing state and local government assets. The board is responsible for the state's various employee retirement and benefit programs and local and some state government cash accounts. Neither the statute nor the websites of the state treasurer specifically spell out which contracts are covered by the statute. The top advisors are UBS Asset Management, Sterling Capital and Federated Hermes.

⁷ Riley Moore, West Virginia State Treasurer. [Restricted Financial Institutions List](#). Visited August 30, 2022. Also see: Riley Moore, West Virginia State Treasurer. [Press Release: Treasurer Moore Publishes Restricted Financial Institution List](#). July 28, 2022.

⁸ West Virginia Purchasing Division. [Debarred and Suspended Vendors](#). Visited August 30, 2022.

⁹ West Virginia Legislature, *op. cit.*

¹⁰ New York Times. [Targeting woke capital](#). July 29, 2022.

The Statute Sets No Standards for Identifying Target Companies for Review

The law sets no standards regarding how the treasurer should select target companies for notification that they are under suspicion of boycotting energy companies.¹¹ The treasurer sent initial notification letters to BlackRock, U.S. Bank, Morgan Stanley, JPMorgan Chase, Wells Fargo and Goldman Sachs. Yet UBS and Federated Hermes (discussed below) are major advisors to the West Virginia state government. They have climate policies. They did not receive letters.

The law sets no standards regarding how the treasurer should select target companies.

This lack of standards regarding the selection of the original list of targeted companies is a concern. Most, if not all, banking institutions in the world have some kind of climate change policies. Most target some or all of the coal industry. How the treasurer plans to gauge a specific company's culpability is a serious question. For example, BlackRock is on the West Virginia treasurer's list as an offending party. Yet BlackRock is the target of a worldwide campaign by climate activists because its policies are unresponsive to the issue of climate change.¹² The company has generally opposed divestment from fossil fuel companies.

The Process Lacks Procedural Protections

There is a rush to judgment written into the law. The treasurer sends a letter to a financial services company under the presumption that the entity is boycotting energy companies. The treasurer's review appears to be a quasi-administrative proceeding with virtually no procedural rules. The statute contains no right to in-person hearings, meetings or depositions.¹³ A company that receives notification must offer its defense without having a full understanding of the charges against it.

The state treasurer is an elected official. Without clear standards, procedural protections and a public process, actions under the statute are highly vulnerable to backdoor lobbying.

The treasurer has not issued any statement that provides details regarding how the office reached a determination that the companies it targeted were actually boycotting fossil fuels companies.

To the contrary, substantial information exists that the investment houses identified by the treasurer are *not* boycotting coal, oil, gas or other companies that process,

¹¹ West Virginia Legislature, *op. cit.*

¹² EcoWatch. [Climate activists criticize BlackRock CEO for supporting a slow green energy transition away from oil and gas](#). January 20, 2022.

¹³ West Virginia Legislature, *op. cit.*

transport or use fossil fuels.¹⁴ According to published reports, each company denies that they are boycotting fossil fuels. None of these companies have adopted any wide-ranging policy to divest from fossil fuels (oil, gas and coal).

Most major banks have developed climate policies with regard to lending and other forms of investment in coal, oil and gas companies.¹⁵ All investment decisions were made after several years of financial underperformance. For example, energy sector stocks commanded 28% of the market in 1980, but today they command only 4.4%. Prior to the Russian invasion of Ukraine, the industry hit a low of 2.3% of the market. These financial facts would be reason enough for any investor to make inquiries into the performance of companies in this industry.

Coal mining companies have been in decline for most of the last decade, with several going bankrupt more than once. Coal power plants are closing in the face of competition from natural gas and renewable energy. Natural gas and renewable energy each produce electricity at substantially lower prices than coal power plants.¹⁶ And actions taken by investment houses to shield against value loss in the Canadian oil sands came only after substantial market decline.¹⁷

**The treasurer's actions
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These issues notwithstanding, the treasurer's actions thus far display a certain arbitrariness in the selection of companies.

One significant example can be seen in the selection of the companies to be targeted for the exclusion list. The treasurer chose Morgan Stanley, JPMorgan Chase, BlackRock, Wells Fargo, Goldman Sachs and U.S. Bancorp. Yet thousands of banks and investment houses in the world have climate policies.¹⁸

All of the targeted companies have established various plans that align their business strategies with net-zero goals by 2050 or before.¹⁹ Most (not all) have specific coal-related restrictions prohibiting no new mining or coal-fired power plants. For example, BlackRock prohibits lending to companies that derive more

¹⁴ New York Times, *op. cit.*

¹⁵ IEEFA. [Coal Divestment](#). Visited August 30, 2022.

¹⁶ IEEFA. [U.S. 2022 Power Sector Outlook: The renewable energy transition takes off](#). April 2022.

¹⁷ Yale Climate Connections. [Canada's oil sands industry is taking a big hit](#). March 5, 2021.

¹⁸ There are approximately 4600 bank holding companies in the United States as of 2021.

Wikipedia. [List of largest banks in the United States](#). Visited August 30, 2022.

¹⁹ United Nations Environment Programme. [Net-Zero Banking Alliance members](#). Visited August 30, 2022. Also see: Bloomberg. [JP Morgan joins net-zero banking alliance with emissions pledge](#). October 8, 2021.

Also see: GoldmanSachs. [2025 ESG and net-zero commitments](#). Visited August 30, 2022. Also see: BlackRock. [BlackRock's 2030 net-zero statement](#). Visited August 30, 2022.

than 25% of revenue from coal activities.²⁰ JPMorgan Chase sets the level at 50% of revenue. Wells Fargo states it will not do business with coal companies except under strict conditions.²¹ Morgan Stanley will not finance new mines or coal-fired power generation without meeting strict enhanced diligence. Morgan Stanley is reducing its exposure to companies with more than 20% of revenue from coal.²² Goldman Sachs prohibits new investment in coal mining and coal power generation except under certain conditions requiring an enhanced diligence process.²³ Goldman Sachs has one of the more specific plans related to achieving a no-coal portfolio over time.²⁴

Yet UBS—which is a major advisor to the West Virginia pension systems,²⁵ and provides services to the state’s cash pool management—also has an aggressive climate change program.^{26,27} Like the companies on the treasurer’s exclusion list, UBS has a net-zero pledge by 2050. The net-zero pledge contains policies that increase UBS restrictions on coal. It tightens the revenue thresholds for coal mining and coal plant operators to less than 20% of revenue from these sources. UBS also tightens its standard for global wealth management asset managers to 5% across its portfolio.²⁸ The net-zero commitment contains analytical statements. UBS has concluded that coal-fired power generation will be reduced to zero, worldwide. The company publishes an exclusion policy that provides the policy rationale for excluding coal mining and oil and gas companies, as well as coal-burning utilities.²⁹

The statutory basis for such disparate treatment of companies is not at all apparent.

The Process Lacks Transparency

The statute does not require the treasurer to publish the proposal to list a company, or results of the review described in the statute that led to the boycott determination.³⁰ The treasurer’s review presumably would provide standards and evidence that a company has participated in a list of boycott activities against energy companies. Such a record would be essential for any company on the list looking to improve its practices to be removed from the exclusion list, or to companies looking to do business with the state.

²⁰ S&P Market Intelligence. [Investment giant BlackRock marks a major milestone in coal divestment movement](#). January 22, 2020.

²¹ Wells Fargo. [Environmental and Social Impact Management](#). 2022.

²² Morgan Stanley. [Environmental and Social Policy Statement](#). Updated March 2022.

²³ Goldman Sachs. [Environmental Policy Framework](#). Updated December 2019.

²⁴ Goldman Sachs. [Goldman Sachs Adopts Strongest Fossil Finance Policy by a Major U.S. Bank](#). December 15, 2019.

²⁵ West Virginia Board of Treasury Investments. [Respected Advisors](#). Visited August 30, 2022.

²⁶ S&P Global Ratings. [Pool Profile: West Virginia Government Money Market Pool](#). March 25, 2021.

²⁷ UBS. [Sustainability and Impact: Get all the facts](#). Visited August 30, 2022.

²⁸ UBS. [UBS Climate Report 2021](#).

²⁹ UBS. [Sustainability Exclusion Policy](#). September 10, 2021.

³⁰ The Texas statute, for example, provides for the filing of a number of reports that identify the rationale for an action.

For example, the treasurer's press release explains that U.S. Bancorp, the parent company of U.S. Bank, was originally assumed to be a business that boycotts energy companies, but the company was not included in the final list.³¹ What were the facts or conditions specific to U.S. Bancorp that caused the treasurer to exclude it from the list?

The Statute Is Likely to Have a Chilling Effect

The statute declares that the findings of the treasurer do not reflect on the reputation of the company. Nevertheless, the presence of a company on a state's exclusion list sends a message to other states that the company engages in questionable business practices. This may affect how those states view the listed companies. BlackRock, for example has been targeted in several states.³² The lack of standards, procedural protections, and transparency could have a chilling effect on financial services companies and their ability to make investment decisions based on sound financial judgment.

Conclusion

Proponents of divestment encourage banks, investment houses and investment funds to base divestment decisions on the size, type and corrective action contained in companies' climate programs. The policy intervention ties the specific product and company behavior to specific investment decisions of a fund. Companies also have an opportunity to take corrective actions and have the divestment decision reversed.

The West Virginia statute and the state treasurer's actions provide:

- No rational basis for targeting companies;
- No standards for determining if objectionable behavior has taken place;
- No process for making distinctions between companies based on objective measures;
- No standards or process for reinstatement; and
- No transparency.

This is a recipe for arbitrary and capricious government misconduct, and it opens the door to legal challenges.

³¹ West Virginia State Treasurer. Restricted Financial Institutions List, *op. cit.* Also see: West Virginia State Treasurer. Press Release: Treasurer Moore Publishes Restricted Financial Institution List, *op. cit.*

³² New York Times, *op. cit.*

About IEEFA

The Institute for Energy Economics and Financial Analysis (IEEFA) examines issues related to energy markets, trends and policies. The Institute's mission is to accelerate the transition to a diverse, sustainable and profitable energy economy. www.ieefa.org

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