Asset Manager Capture

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For invaluable comments we thank John Coates, Lev Menand, Kobi Kastiel, and David Pozen, Reilly Steel. We also thank Sean Deresh Larin, Joseph Taied, Catrin Thomas, Nada Younis, and Stewart Zelnick for excellent research assistance.

Abstract

One of the most significant corporate governance developments of the past half-century is the rise of asset managers with large ownership stakes that provide them with outsized influence over public companies. As asset managers have grown in size, concerns about their potential to capture the government and secure favorable regulation have increased as well. In this Article, however, we describe an equally important risk that runs in the other direction: large asset managers are vulnerable to "reverse capture," whereby government actors can pressure them to deploy their governance power in service of the government's agenda. This dynamic has intensified as presidential power has expanded over several decades. Expanded presidential authority not only enables administrations to bypass legislative and independent agency processes for regulating asset managers but also allows the White House to harness asset managers' quasi-regulatory power to promote its agenda. These dynamics have implications not only for U.S. corporate governance and asset manager fiduciary duties, but also for global investors who rely on American asset managers. They also pose a democratic concern: government actors may increasingly pursue policy through concentrated private intermediaries rather than through more transparent and accountable channels.

Keywords: asset managers, regulatory capture, presidential power, ERISA, fiduciary duties, ESG, investor stewardship

JEL Classifications: K22, K23

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Abstract

One of the most significant corporate governance developments of the past half-century is the rise of asset managers with large ownership stakes that provide them with outsized influence over public companies. As asset managers have grown in size, concerns about their potential to capture the government and secure favorable regulation have increased as well. In this Article, however, we describe an equally important risk that runs in the other direction: large asset managers are vulnerable to "reverse capture," whereby government actors can pressure them to deploy their governance power in service of the government's agenda.

This dynamic has intensified as presidential power has expanded over several decades. Expanded presidential authority not only enables administrations to bypass legislative and independent agency processes for regulating asset managers but also allows the White House to harness asset managers' quasi-regulatory power to promote its agenda. These dynamics have implications not only for U.S. corporate governance and asset manager fiduciary duties, but also for global investors who rely on American asset managers. They also pose a democratic concern: government actors may increasingly pursue policy through concentrated private intermediaries rather than through more transparent and accountable channels.

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Assaf Hamdani and Dorothy S. Lund

I. INTRODUCTION

Giant asset managers have become some of the most powerful actors in corporate America,[1] and their concentrated ownership has fueled widespread concern that these Wall Street titans will capture the government, translating their economic might into political influence.[2] This Article identifies a novel and equally pressing risk that runs in the opposite direction: the risk of "reverse capture," whereby government actors deploy regulatory leverage to compel the largest asset managers to use their corporate governance power to advance the government's policy agenda.[3]

This risk is exacerbated by the rise of presidential control over the federal government. Although presidential power has been growing for decades, recent developments demonstrate an unprecedented willingness and ability for the White House to intervene in areas that have traditionally been insulated from direct political direction. For example, in the economic sphere, President Trump's efforts to assert control over the Federal Reserve have drawn significant media attention, as have the administration's moves to secure government ownership stakes in private companies.[4] And we show that expansive presidential power dramatically increases the risk of the reverse capture of large asset managers.

Asset managers' striking pivot on ESG investing illustrates the risk of this dynamic. Starting in 2018, the "Big Three" asset managers of BlackRock, Vanguard, and State Street Global Advisors pressured portfolio companies to adopt climate-related disclosures, commit to cutting emissions, and pursue other social objectives.[5] Some commentators cheered this activity, believing that powerful asset managers could compensate for the political system's failure to enact meaningful legislation addressing corporate externalities.[6] Others were more critical, arguing that the policies were adopted in response to political influence and pressure from vocal clients.[7] By 2022, when political forces began pushing

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[1] Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2046 (2019) (finding that the increasingly large stakes held by the Big Three give them significant influence over corporate vote outcomes and the decisions of corporate managers, even prior to votes).

[2] JOHN COATES, THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING (Columbia Glob. Reps. 2023).

[3] Although we focus on reverse capture of asset managers, reverse capture of corporations is also possible. However, because asset managers hold large ownership stakes across the public market and thus have influence beyond a single company, they are particularly appealing tools of capture, especially when the administration would like to push for market-wide policies. For this reason, we focus our framework on asset manager capture.

[4] Colby Smith, *Tests of Fed's Independence Intensify as Trump Seeks to Reshape Institution*, N.Y. TIMES (Jan. 7, 2026), https://www.nytimes.com/2026/01/07/business/fed-independence-trump.html; Tony Romm & Anna Swanson, *After U.S. Takes Stake in Intel, Trump Pledges 'Many More' Deals*, N.Y. TIMES (Aug. 25, 2025), https://www.nytimes.com/2025/08/25/us/politics/trump-intel-economy-strategy.html.

[5] Letter from Laurence D. Fink, Chairman & CEO, BlackRock, Inc., to CEOs, *A Sense of Purpose* (Jan. 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/

[6] *See, e.g.*, Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance,* 7 ANN. CORP. GOVERNANCE 93, 95 (2022) (describing the "increasingly broad global consensus that the asset management sector has a vital role to play in helping society solve existential challenges such as the current climate crisis"); *see also* Marcel Kahan & Edward Rock, *Corporate Governance Welfarism*, 15 J. LEGAL ANALYSIS 108, 110 (2023).

[7] Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 120 (2023) [hereinafter Lund, *Asset Managers as Regulators*]; Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 441 (2022).

in the opposite direction,[8] the Big Three asset managers quickly changed course. After several years of threatened litigation, regulation, and divestment, these asset managers fled investor associations promoting ESG goals and stopped supporting ESG shareholder proposals,[9] which caused ESG activism to slow to a trickle.[10] Accordingly, companies dropped DEI programs[11] and scaled back climate commitments.[12]

This rapid reversal, which accelerated after Trump's election, cannot be explained by state-level legislation alone. Rather, it underscores a deeper structural dynamic that has become increasingly salient amid recent legal, market, and political developments. Specifically, the ESG episode shows not only that asset managers' stewardship priorities are vulnerable to political pressure but also how growing presidential power may heighten the stakes for asset managers. While the initial anti-ESG wave was fragmented across red states, Trump's election suggested an even more potent federal threat: a powerful presidential administration can create existential risks to asset managers. And these risks cause a form of capture whereby asset managers' stewardship priorities and activities are shaped in the shadow of state intervention.

We are not the first to observe that asset manager stewardship priorities might be driven by their concerns about political retribution or punitive regulation,[13] or that expanded presidential power can heighten the risk of systematic corruption.[14] This Article, however, offers a concrete account of the mechanisms behind reverse capture, providing a framework to identify and evaluate it. Our analysis is also unique in focusing on the interplay between asset manager influence and presidential power: A powerful president, we show, can harness asset manager stewardship (or its absence) to implement sweeping policy goals. This concern is especially pressing in an era of renewed industrial policy, geopolitical competition, and increased governmental willingness to steer private markets toward public objectives. Under these conditions, the possibility that large asset managers will be drawn into the service of state priorities deserves serious attention,[15] and we explore its implications

[8] Saijel Kishan & Danielle Moran, *Republicans Ramp Up Anti-ESG Campaign for 2023*, BLOOMBERG (Dec. 29, 2022), https://www.bloomberg.com/news/articles/2022-12-29/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023.

[9] Ross Kerber & Noor Zainab Hussain, *Vanguard quits net zero climate effort, citing need for independence*, REUTERS (Dec. 7, 2022), https://www.reuters.com/business/sustainable-business/vanguard-quits-net-zero-climate-alliance-2022-12-07; Saijel Kishan, *Big Three Money Managers Cut Support for Climate Proposals*, BLOOMBERG (Sept. 20, 2024), https://www.bloomberg.com/news/articles/2024-09-19/big-three-money-managers-cut-support-of-environmental-proposals.

[10] Colin Mayer, *ESG is Dead, Be True and Fair Instead*, ECGI Blog (May. 22, 2025), https://www.ecgi.global/publications/blog/esg-is-dead-be-true-and-fair-instead. One lesson from this dramatic reversal is that the same political dynamics stalling government regulation can also inhibit attempts by the private sector to pursue environmental and social objectives. *See* Mark J. Roe, *Why Shareholder-Driven Corporate Social Responsibility Failed* (Feb. 12, 2026) (unpublished manuscript), https://ssrn.com/abstract=6329838.

[11] Viki Auslender, *Corporate America's Retreat from ESG and DEI Accelerates Under Trump,* CALCALISTECH (Feb. 18, 2025), https://www.calcalistech.com/ctechnews/article/nixdwef19#google_vignette

[12] Neil Hawkins & Kelly Cooper, *Are Companies Actually Scaling Back Their Climate Commitments?*, HARV. BUS. REV. (Sept. 23, 2025), https://hbr.org/2025/09/are-companies-actually-scaling-back-their-climate-commitments

[13] *See* Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, *supra* note 1 at 2066-2071 (arguing that fear of political backlash may constrain stewardship that is disfavored by management); John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407, 1442-1443 (2019) (same); Lund, *Asset Managers as Regulators*, *supra* note 7, at 121 (noting that asset manager-led disclosures could reduce the risk of government intervention); Schwartz, *Stewardship Theater, supra* note 7.

[14] *See* Reilly S. Steel, *Systematic Corruption,* COLUM. L. REV. (forthcoming 2026).

[15] Government pressure may affect stewardship in other jurisdictions. *See, e.g.,* Lauren Yu-Hsin Lin, *BlackRock Exceptionalism in the Geopolitics of Proxy Voting* (ECGI Law Working Paper No. 905/2026, Feb. 25, 2026),https://ssrn.com/abstract=6301641.

for corporate governance, asset managers' fiduciary duties, and the future of the global financial system.

Our account identifies three primary channels through which the federal government can exert influence over large asset managers: regulatory measures that limit stewardship activity, direct threats to the asset manager's business model (including antitrust actions and restrictions on ownership stakes), and inducements in the form of regulatory reforms that create new business opportunities. We then explain that the corresponding rise of presidential power has vastly increased the risk of asset manager capture. Government measures against (or in favor of) asset managers historically require either Congress to pass legislation or standalone regulatory agencies such as the SEC to issue rules. These processes are often slow, subject to procedural safeguards, and can be influenced by lobbying and partisan politics. However, as presidential power exhibits increased reliance on executive orders and greater control over both executive and independent agencies, the administration can act more swiftly to punish or reward asset managers. This shift therefore diminishes the insulation of asset managers from political influence.

Likewise, for an administration intent on securing policy victories by any means necessary, the presence of powerful asset managers provides another channel to exert pressure on the private sector. The Big Three hold large stakes across the entire public market.[16] Their initiatives on ESG investing and board diversity were quite impactful, leading to a rise in female directors as well as increased voluntary disclosure of greenhouse gas emissions.[17] In the same vein, the absence of their influence has a profound deregulatory effect. As such, by targeting large asset managers, the government can achieve political victories without having to go through the process of engaging in legislation and regulation. And given the trend toward expansive presidential power and interference in private markets in modern times, the risk of interference becomes more pronounced.

This Article makes several contributions to the academic literature. First, we complicate the conventional view of the interplay between concentrated economic power and the government. As discussed, the classic account contends that businesses will leverage economic power to capture government policy, thereby posing a threat to democracy.[18] Our analysis, however, reveals a distinct dynamic, with grave consequences for both democracy and investor protection: we show that the government has both the ability and incentive to pressure the largest asset managers to use their influence over corporate America to advance the government's agenda.[19] Although theoretically

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[16] Alon Brav, Dorothy S. Lund & Lin Zhao, *Flows, Financing Decisions, and Institutional Ownership of the U.S. Equity Market*, 51 J. CORP. L. 261, 285 (2026).

[17] Todd A. Gormley, Vishal K. Gupta, David A. Matsa, Sandra C. Mortal & Lukai Yang, *The Big Three and Board Gender Diversity: The Effectiveness of Shareholder Voice 3* (Eur. Corp. Governance Inst., Finance Working Paper No. 714/2020, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724653 [https://perma.cc/K3C5-8QKK]; *see* Marc S. Gerber, Caroline S. Kim & Jeongu Gim, *Enhancing Disclosure Controls and Procedures Relating to Voluntary Environmental and Social Disclosures*, SKADDEN (June 29, 2021), https://www.skadden.com/insights/publications/2021/06/enhancing-disclosure-controls-and-procedures [https://perma.cc/W38B-FJEY] ("The percentage of S&P 500 companies publishing sustainability or corporate social responsibility (CSR) reports that address E&S matters continues to grow, reaching 90% in 2019. Similarly, one study found that, in 2020, 98% of the top 100 companies by revenue in the United States reported on their sustainability efforts."). Lund, *supra* note 7.

[18] This concern has been specifically raised by John Coates in the context of the "Big Three" asset managers of BlackRock, Vanguard, and State Street. COATES, *supra* note 2. Coates also notes that this power depends on a government favor, and that the political response to the concentration of power "can threaten the financial institutions in which wealth and power are accumulating, even when those institutions create economic benefits." *Id.*

[19] Lev Menand has made a related claim about banks. *See, e.g.*, Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 961 (2021). A related phenomenon is that of "systematic corruption"—the "repeated practice of conditionally dispensing state-created economic privilege to secure the political loyalty of

possible before now, the fact that presidential and asset manager power have reached an apex renders the threat of reverse capture especially potent and deserving of scholarly and regulatory attention.

Second and relatedly, we show that the risk of asset manager capture intensifies as asset managers scale. As assets under management grow, asset managers become more appealing targets for capture; they also become increasingly dependent on favorable regulatory treatment. At the same time, their scale and market concentration lends legitimacy to government interventions aimed at curbing their power. Americans have long been skeptical of concentrated economic power,[20] and such distrust provides additional cover for a government that seeks to control large asset managers. Consolidated presidential power converts these regulatory vulnerabilities into credible threats and inducements that allow the administration to exert pressure over asset managers. Indeed, the government need not even articulate these threats and inducements; in an era of presidential interference with industrial policy, asset managers will rightly perceive that their futures depend on exerting their power with an eye toward the administration.

At the same time, we identify the outer boundaries of this dynamic. Market forces and fiduciary duties may constrain the most overt or value-destroying forms of political influence, but they are unlikely to prevent subtler forms of pressure, especially when asset managers can plausibly characterize their actions as consistent with long-term value maximization. Nor would asset managers' reluctance to pursue firm-specific stewardship eliminate the risk of capture: asset managers could adopt market-wide stewardship policies aligned with an administration's industrial or social priorities. And while the ESG episode demonstrates negative capture, the structural mechanisms we identify provide the executive with levers for affirmative co-optation as well. The ESG retreat therefore should not be understood as an isolated backlash against a uniquely controversial agenda.

Third, we highlight the risks posed by asset manager capture to democratic accountability and investor returns and offer concrete legal mechanisms to insulate stewardship.[21] Asset manager capture is an opaque form of policymaking that avoids public notice, judicial review, and legislative debate.[22] If the government can pursue its economic agenda by capturing asset managers, why would it take the pains to use proper regulatory channels? Asset manager capture also presents the risk of investor harm. When asset managers choose stewardship policies that mitigate the risk of unfavorable regulation, they are putting their own interests ahead of their investors.

To counter these risks, we advance a simple policy change: interpret asset manager fiduciary duties more narrowly. Although asset managers are duty bound to act in their investors' best interests, the standard is sufficiently broad that it is difficult to attribute a stewardship policy change to political influence alone. Therefore, the threat of investor litigation is unlikely to provide a sufficient deterrent. By contrast, a narrower conception of fiduciary duty that limits asset managers' discretion to pursue objectives beyond maximizing financial returns would make it easier for courts and clients to hold

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recipients through economic dependence." In a comprehensive article, Reilly Steel discusses how systematic corruption has become a pronounced problem over the past decade and offers solutions for addressing it. *See* Reilly S. Steel, *Systematic Corruption*, COLUM. L. REV. (forthcoming 2026).

[20] MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (Princeton Univ. Press 1994) (arguing that the dispersed ownership structure of U.S. public companies reflects a longstanding political aversion to concentrated financial power).

[21] *Cf.* Steel at 14 (describing how systematic corruption erodes democratic accountability).

[22] To be clear, we do not argue that all forms of state interference with fund manager investment and stewardship are problematic. Of course, Congress could legislate and administrative agencies could issue rules that direct asset managers to act in ways that may not maximize financial returns for savers. This result may harm investors, but it would at least be transparent, enacted pursuant to a democratic process, and subject to public debate and judicial review.

asset managers accountable and reduce the risk that government pressure will shape stewardship decisions.[23] Structural reforms and market developments—such as limiting the size of the largest asset managers and pass-through voting—could also reduce the susceptibility of asset managers to governmental cooptation, though these measures may also weaken investor protection and increase costs for investors.

Finally, we examine the geopolitical implications of reverse capture for American financial dominance. We show how the vulnerability of U.S. asset managers to domestic political pressure threatens their international competitiveness, particularly among foreign pension funds and global institutional investors. As foreign asset owners recognize that U.S. managers may tailor stewardship priorities to accommodate American executive branch preferences, reverse capture risks triggering regulatory backlash abroad and accelerating the deglobalization of financial intermediation as foreign jurisdictions seek technological and financial sovereignty from U.S. political influence.

The Article proceeds as follows. Part II describes the parallel rise of asset manager and presidential power in the past several decades. It describes how presidential power has expanded with each administration, with an increasing focus on using private market interference to accomplish political goals, and with no sign of slowing. Part III details the tools of asset manager capture, ranging from diminishing their influence to threatening harm to their business model. It also shows how these tools were employed to threaten and punish asset managers for their ESG activity. Part IV discusses the implications of our analysis for investors, U.S. democracy, and global markets. It offers a series of structural reform proposals that could limit the risk of asset manager capture.

II. THE RISE OF ASSET MANAGER AND PRESIDENTIAL POWER

This Part traces the parallel rise of asset manager equity ownership and presidential power in the United States. It first explains how the growth and concentration of the mutual fund industry made large asset managers central players in corporate governance. It then describes a corresponding consolidation of authority in the public sphere: the increasing dominance of the federal executive branch. Although this trend has been underway for decades, presidential power has reached a new highwater mark in President Trump's second term, accompanied by an unprecedented willingness to intervene in markets.

a. Expansion of Asset Manager Power in the U.S.

Two trends have led U.S. equity markets to become increasingly dominated by a small number of institutional asset managers. The first is the growing use of mutual funds as a retirement vehicle. Congress set this development in motion with the 1974 enactment of ERISA, which required employers to fund their pension obligations. The later shift toward defined-contribution retirement plans that typically invest in equity mutual funds accelerated this trend.[24] As a result, retirement assets invested in capital markets skyrocketed during the 80s and early 90s, with most employers choosing broadly diversified mutual funds for their employees.[25]

The second trend is the rising popularity of passively managed funds, which include index funds and ETFs, both of which replicate their underlying stock (or bond) indices promising broad

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[23] Steel advocates a similar approach to address the risk of systematic corruption. *See* Steel, *supra* note 14, at 5 (constraining the discretion of decision makers leaves less room for favoritism).

[24] Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 879-80 (2013).

[25] *Id.*

diversification at a low cost.[26] By the mid-2000s, investors had embraced the finance gospel that it is not possible to beat the market and that the best strategy is to hold a diversified portfolio. And as this shift occurred, investors began flocking to index funds in droves.[27]

Because passive funds compete primarily on fees and accuracy of tracking the index, economies of scale are important. Therefore, as trillions of dollars flowed into passive funds, the asset management industry became increasingly concentrated in the hands of the "Big Three" of BlackRock, Vanguard, and State Street, each of which specializes in passive investment vehicles. By 2015, the Big Three together constituted the largest shareholder in 90% of public companies in the S&P 500, up from 25% in 2000.[28] In the 2010s, more than 80% of all inflows into mutual funds went to the Big Three, leading some scholars to predict that these asset managers will continue to grow.[29]

When investors select a mutual fund, they essentially hand their governance rights to the fund manager. Therefore, as asset managers grow in size, their potential for influence increases apace.[30] Already, the Big Three play a sizeable role in corporate governance because the Big Three typically vote while other shareholders often do not, their 20% average ownership interest culminates in about a 25% average voting power at S&P 500 companies, with the ability to exercise control at some.[31]

The rapid increase in ownership concentration among a handful of asset managers—and their influence over public companies—has generated a large critical literature. Some scholars (including one of us) have argued that these institutions have weak incentives to engage in informed stewardship;[32] others predict that the rise of large diversified owners would undermine competition and harm consumers.[33] More broadly, in a thought-provoking essay and then book, John Coates pointed out the risk of democratic harm that arises from concentrated power in the hands of private market actors: "[T]he rise of indexing presents a sharp, general, political challenge to corporate law. The prospect of twelve people even potentially controlling most of the economy poses a legitimacy and accountability issue of the first order – one might even call it a small 'c' constitutional challenge."[34] Coates's fear is that large powerful asset managers would continue the historic trend of capturing government via "litigation and lobbying" that would undermine the government's ability to constrain these institutions.[35]

The concern that powerful market actors will use their clout to influence government is familiar, and it is clearly implicated by the growing concentration of equity ownership in the hands of

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[26] *Id.*
[27] Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 507-08 (2018) [hereinafter Lund, *The Case Against Passive Shareholder Voting*].
[28] Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 674 (2017); *see also* Brav, Lund & Zhao, *supra* note 16.
[29] Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 732, 740 (2019).
[30] *See* Lund, *The Case Against Passive Shareholder Voting*, *supra* note 27, at 494. This development may change with the rise of pass-through voting. *See infra* Section III.D.3.
[31] *Id. See also* Alon Brav, Matthew D. Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492 (2022) (finding retail investors provide meaningful feedback to firms through the voting process).
[32] *See* Lund, *The Case Against Passive Shareholder Voting*, *supra* note 27, at 512; Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, *supra* note 1, at 2095; Bebchuk & Hirst, *The Specter of the Giant Three, supra* note 29, at 741; Gilson & Gordon, *The Agency Costs of Agency Capitalism*, *supra* note 24, at 888; Morley, *Too Big to Be Activist*, *supra* note **Error! Bookmark not defined.**, at 1412.
[33] José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018).
[34] COATES, *supra* note 2.
[35] *Id.*

a few asset managers. In this Article, however, we focus on a mirror-image concern: that government actors will pressure large private actors to deliver policy outcomes that the government cannot secure through other means. This risk of *reverse capture* is heightened by the rise of an increasingly dominant executive branch, a trend that has accelerated in the United States over the past several decades, as the next Section describes in detail.

b. Expansion of Presidential Power in the U.S.

For better or worse,[36] presidential power has expanded steadily over the last decades.[37] This Section traces that expansion in three steps. It first describes two key mechanisms: executive orders and presidential direction of administrative agencies (sometimes informally, other times through changes to OMB review). It then describes the second Trump administration's expansive campaign to assert presidential control over both executive and independent agencies. Finally, it shows how these tools have increasingly been used to intervene in firms' investment, ownership and strategic decisions. The pattern is familiar: once presidential channels of influence start flowing, they rarely dry up entirely in later administrations.

i. Presidential Primacy and the Tools of Presidential Power

According to the separation of powers theory that has animated American constitutional law since the founding, governmental authority is divided among various actors.[38] In the Madisonian account, this division is meant to prevent tyranny by ensuring that no single institution of government accumulates too much power.[39] Yet, over the past half-century, the president's power has increasingly grown at the expense of other governmental actors. Presidents have repeatedly found ways to exert control over administrative agencies, sidestep Congress, and shape policy through unilateral tools—even in periods when the president's party controls Congress.[40]

Throughout American history, presidents have used tools such as executive orders to expand the reach of the presidency.[41] But many accounts treat the Reagan presidency as the beginning of "an era of presidential primacy" marked by comparatively weak constraints from other branches of government.[42] Subsequent presidents built on this trajectory, justifying expansion of their authority by reference to shifting necessities—from national security in the Bush administration to legislative dysfunction in the Obama years.[43]

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[36] Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39, 43 (2021) ("Those who have followed scholarly debates over presidential primacy will recognize a well-worn path between ideas about executive branch leadership and the idea of democracy."); *cf.* John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 901 (2001); *with* Thomas W. Merrill, Essay*, Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1957 (2015); *and* Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2140 (2024).
[37] Glenn Sulmasy, *Executive Power: The Last Thirty Years*, 30 U. PA. J. INT'L L. 1355, 1362 (2008).
[38] Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 464-65 (2012).
[39] *Id.* at 465.
[40] For a historical account arguing that presidents regularly set public policies over objections by Congress, interest groups, and the bureaucracy, see WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (Princeton Univ. Press 2003).
[41] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–77 (2001); *see also* Ahmed, Menand & Rosenblum, *The Making of Presidential Administration*, *supra* note 36, at 2215.
[42] Ahmed, Menand & Rosenblum, *The Making of Presidential Administration*, *supra* note 36, at 2137; *see also* Kagan, *Presidential Administration*, *supra* note 41, at 2348.
[43] Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-President-state-union-address ("I urge

Two features of this expansion became salient: increased reliance on executive orders and the erosion of agency independence. All presidents since Washington have issued executive orders,[44] but their frequency has increased markedly in recent years.[45] Subject to relatively few constraints—including that they may not directly contravene Congressional action,[46] or direct spending that has not been appropriated[47]--executive orders allow presidents to act quickly in pursuit of the administration's goals.[48] The Emancipation Proclamation issued by President Lincoln was an executive order;[49] President Harry Truman used an executive order to desegregate the armed forces in 1948;[50] and President Nixon used executive orders to impose wage and price controls that generated a spike in inflation shortly after their adoption.[51] In recent decades, presidents have used executive orders for initiatives as varied as Obama's minimum-wage order for federal contractors and Biden's pandemic-era mask mandate.[52]

The second facet of presidential power is the ability to direct administrative agencies, including independent ones, either formally (through executive orders) or informally (through behind-the-scenes pressure or threats to remove members of the agency). Elena Kagan famously described this trend toward "presidential administration" in 2001, showing that presidents across the political spectrum increasingly used "directive authority" to pursue deregulatory and regulatory agendas.[53] President Clinton, for example, issued hundreds of directives demanding that agencies adopt regulatory policies aligned with his administration's objectives.[54] In a 1999 commencement speech, he directed the Secretary of Labor "to use a rule to allow States to offer paid leave to new mothers and fathers," a directive that culminated in a formal rule only six months later.[55] In this way, Clinton was able to sidestep a hostile Congress and advance policy quickly.

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this Congress to get together, pursue a bipartisan, market-based solution to climate change. . . . But if Congress won't act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.").

44 William Hebe, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688, 688 (1972).

45 Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743 (2019) (noting that beginning with President Ronald Reagan, presidents of both political parties have increasingly have relied on executive orders).

46 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

47 U.S. Const. art. I, § 9, cl. 7; *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1351 (1988); *see also* Adam White, *The Who's and What's of Presidential Power*, SCOTUSBLOG (Dec. 5, 2025), https://www.scotusblog.com/2025/12/the-whos-and-whats-of-presidential-power/ (discussing an increase in the president's power over agency personnel).

48 We note that there are different types of executive orders. Some purport to have legal effect because they are issued pursuant to specific statutes empowering the President to make determinations or take actions with force of law. Other executive orders may have legal effect because the Constitution gives the President the power to take an action. *See, e.g.,* Kevin M. Stack, The President's Statutory Powers to Administer the Laws, 106 COLUM. L. REV. 263 (2006). Others may not be formally binding but purport to "instruct" agencies how to exercise their power. With agencies becoming less independent, the latter type of executive orders may become more effective.

49 Andrew Haffner, *Trump's Executive Orders: How Do They Work—and What's Their Legal Basis?*, UCHICAGO NEWS (Sept. 15, 2025), https://news.uchicago.edu/story/trumps-executive-orders-how-do-they-work-and-whats-their-legal-basis.

50 Exec. Order No. 9981, Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services, 13 Fed. Reg. 4,313 (July 26, 1948).

51 Susan A. Hughes, *Explainer: Executive Orders as a Governing Tool*, HARV. KENNEDY SCH. (June 4, 2025), https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/explainer-executive-orders-governing-tool.

52 Exec. Order No. 13,658, Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 9,851 (Feb. 20, 2014).

53 Kagan, *Presidential Administration*, *supra* note 41, at 2247.

54 *Id.* at 2294-95.

55 *Id.* at 2284.

Beyond presidential directives, presidents have harnessed review by the U.S. Office of Management and Budget (OMB) to advance regulatory or deregulatory agendas. Soon after taking office, for example, President Reagan issued an executive order requiring OMB review of major agency regulations—an intervention intended to slow down new regulatory initiatives.[56] In a play that was followed by subsequent presidents,[57] President Clinton left OMB review in place but added language about the benefits of regulation and streamlined the process by, among other things, imposing time limits on review.[58]

A parallel path has been forged at the state level. In particular, a wave of state executive branch reform beginning in the 1960s enhanced the powers of state governors, including by expanding their terms in office and giving them stronger power to shape their budgets and veto legislation.[59] These state governors and their agencies have continued to push the boundaries of their own powers in recent years via executive orders and the use of emergency powers, paralleling the trend at the federal level.[60]

ii. Expanded Presidential Power in the Second Trump Administration

In his second term in office, President Trump has decisively moved to expand the power of the President.[61] He has issued more executive orders in his first 100 days than any other president.[62] As has become commonplace, some of these early directives did nothing more than rip up orders issued by previous presidents, or announce priorities for agencies.[63] And like his conservative predecessors, he took a deregulatory stance in many orders—committing to not enforce certain regulations or criticizing state regulations of business.[64]

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[56] *Id.* at 2277-80; *see also* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062 (1986).
[57] *Id.* at 2285-86.
[58] *Id.* at 2286.
[59] Troy E. Smith, *Governors and Federalism*, CTR. FOR THE STUDY OF FED. (2006), https://federalism.org/encyclopedia/no-topic/governors-and-federalism/; *see also* Thad L. Beyle & Margaret Ferguson, *Governors and the Executive Branch, in* POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 211 (Virginia Gray, Russell L. Hanson & Thad L. Beyle eds., 10th ed. 2013).
[60] *See id.* (quoting COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1960–1961, at 124–25 (1960); COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2004, at 175–80 (2004)). For examples of governors expanding executive authority, *see* Nick Corasaniti & Reid J. Epstein, *G.O.P. States Seek More Power Over Elections*, N.Y. TIMES (June 19, 2021), https://www.nytimes.com/2021/06/19/us/politics/republican-states.html (describing efforts by state executives to expand control over election administration, including by removing Democrats from local election boards); *see also* Lomi Kriel, *Greg Abbott's Executive Power Play*, PROPUBLICA (Oct. 25, 2022), https://www.propublica.org/article/greg-abbotts-executive-power-play (reporting that Texas Governor Greg Abbott used disaster authority to bus migrants to other states); Bill Scher, *How Biden Is Using Federal Power to Liberate Localities*, WASH. MONTHLY (Apr. 4, 2023), https://washingtonmonthly.com/2023/04/04/how-biden-is-using-federal-power-to-liberate-localities/ (discussing the use of federal executive authority to influence local regulation).
[61] Andy Kroll, *The Shadow President*, PROPUBLICA (Oct. 17, 2025), https://www.propublica.org/article/russ-vought-trump-shadow-president-omb (quoting Steven Vladek, "We are seeing exertions of executive power the likes of which we have never seen in this country.").
[62] Fin Daniel Gómez & Anne Bryson, *Trump Sets Executive Order Record in His First 100 Days*, CBS NEWS (Apr. 29, 2025), https://www.cbsnews.com/news/trump-first-100-days-executive-order-record/.
[63] Bridget Neill & John Hallmark, *Seven Key Issues from President Trump's First 100 Days and What's Next*, ERNST & YOUNG (May 15, 2025), https://www.ey.com/en_us/insights/public-policy/trump-100-days.
[64] *Id.; see also* Alison B. Torbitt & Danielle O. Griffin, *Executive Order Targets State Energy and Environmental Laws*, NIXON PEABODY (May 5, 2025), https://www.nixonpeabody.com/insights/alerts/2025/05/05/executive-order-targets-state-energy-and-environmental-laws.

But President Trump used the executive order to reach far beyond his predecessors, raising questions about the legality of its measures. For example, the administration has relied on the Alien Enemies Act of 1798 to justify mass deportation policies,[65] and on the International Emergency Economic Powers Act of 1977 to justify global tariffs.[66] These orders have been challenged, but the litigation has not halted the administration's strategy of using executive orders to pursue its agenda.[67]

The Trump administration has also utilized control over OMB to bring about drastic change to the administrative infrastructure of the U.S. It has frozen funding for agencies and ongoing government programs, ranging from SNAP benefits to school funding, even though those funds had been lawfully appropriated by Congress.[68] The legality of these actions is contested,[69] but that uncertainty has not stopped the administration from taking these steps.

Perhaps most dramatically, President Trump has also sought to exert control over *independent* administrative agencies.[70] Independent agencies differ from executive agencies (such as the Department of Commerce) in that Congress has limited the President's ability to remove their leaders at will.[71] These agencies include the Federal Reserve, the SEC, FDIC, and the FTC.[72] They exist to insulate expert policymaking from political pressure and powerful interest groups.[73] Independent

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[65] Yan Zhuang & Tim Balk, *A Timeline of Legal Battles Over Trump's Use of the Alien Enemies Act*, N.Y. TIMES (Sept. 3, 2025), https://www.nytimes.com/article/alien-enemies-act-timeline.html.

[66] Madeleine Ngo, *What is IEEPA, the Law Trump Used to Levy Tariffs?*, N.Y. TIMES (Feb. 20, 2026), https://www.nytimes.com/2026/02/20/us/politics/what-is-ieepa-trump-tariffs.html.

[67] On September 2, 2025, the Fifth Circuit blocked the administration from using the Alien Enemies Act to quickly deport Venezuelan migrants, finding that the Act did not apply to the migrants because there had been no "invasion or predatory incursion by a foreign power." *See supra* note 65. On February 20, 2026, the Supreme Court struck down President Trump's use of the IEEPA to levy tariffs, ruling that the law does not grant the president the independent power to impose tariffs on imports from any country, of any product, at any rate, for any period of time. *See supra* note 66.

[68] Jennifer Scholtes & Nicholas Wu, *Trump Administration Orders Sweeping Freeze of Federal Aid,* POLITICO (Jan. 27, 2025), https://www.politico.com/news/2025/01/27/trump-freezes-federal-aid-omb-00200891; David A. Lieb & Geoff Mulvihill, *Trump Administration Renews Supreme Court Appeal to Keep Full SNAP Payments Frozen*, PBS NEWS (Nov. 10, 2025), https://www.pbs.org/newshour/politics/trump-administration-renews-supreme-court-appeal-to-keep-full-snap-payments-frozen.

[69] *See* Kroll, *The Shadow President*, supra note 61 ("The president has no authority to not spend money Congress has appropriated — that's not a debate.").

[70] *See* Gary Gensler & Lev Menand, *Presidential Supremacy Over Administrative Agencies*, in THE ECONOMIC CONSEQUENCES OF THE SECOND TRUMP ADMINISTRATION: A PRELIMINARY ASSESSMENT (Gary Gensler, Simon Johnson, Uga Panizza & Beatrice Weder di Mauro eds., CEPR Press 2025), https://cepr.org/publications/books-and-reports/economic-consequences-second-trump-administration-preliminary.

[71] *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L REV. 599, 610 (2010) (what gives agencies their independence is that "the President lacks authority to remove their heads from office except for cause."); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

[72] *See* Gensler & Menand, *supra* note 70, at 52.

[73] *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L. J. 257 (1988); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design,* 89 TEX. L. REV. 15, 17 (2010) (the goal of independence is to protect the diffused public from "well-financed and politically influential" interest groups); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. R EV. 459, 463 (2008) (independent agencies exist "to facilitate a nonpolitical environment where regulatory experts can apply their knowledge to complex policy problems").

agencies often have rulemaking authority,[74] the ability to enforce their own rules,[75] and other powers required to carry out their responsibilities.

While prior presidents often relied on informal pressure to influence independent agencies, the Trump administration has pursued direct control, including by removing independent-agency leaders notwithstanding statutory for-cause protections. The President has justified these removals by invoking the unitary executive theory, which holds that Article II vests the President with authority over the entire executive branch, including the power to remove agency heads and other executive officials at will. On this account, statutory limits on removal are unconstitutional.[76] And despite a legislative for-cause removal requirement, President Trump fired Gwynne Wilcox from the National Labor Relations Board, Cathy Harris from the Merit Systems Protection Board, and members of the Consumer Product Safety Commission, without asserting cause.[77] Although these removals were challenged in court, the Supreme Court blessed them in *Trump v. Slaughter*, which held Congress may not restrict the president's power to remove members of independent executive agencies and effectively wrote the unitary executive theory into law.[78]

President Trump has even attacked the Federal Reserve. The semi-autonomy of Fed policy makers has been viewed as sacrosanct since the 1980s,[79] and is widely believed to be an important component of financial stability.[80] As former Fed Chair Ben Bernanke explained in 2010, "Policymakers in a central bank subject to short-term political influence may face pressures to overstimulate the economy to achieve short-term output and employment gains that exceed the economy's underlying potential. Such gains may be popular at first, and thus helpful in an election campaign, but they are not sustainable and soon evaporate, leaving behind only inflationary pressures that worsen the economy's longer-term prospects."[81]

Yet, the President has repeatedly attempted to undermine the Fed's independence.[82] The President's 2025 executive order targeting independent agencies applies to the Federal Reserve even though it includes language carving out monetary policy.[83] And in January 2026, the Department of

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[74] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002); Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 696 (2013) (providing examples of legislation tasking the SEC with promulgating rules).
[75] Stone Washington & Izam Karukappadath, *Political Review of Agency Adjudication and Recommendations for Reform*, REG. STUD. CTR. (Sept. 17, 2024), https://regulatorystudies.columbian.gwu.edu/political-review-agency-adjudication-and-recommendations-re; Max Minzner, *Should Agencies Enforce*?, 99 MINN. L. REV. 2113 (2015); David Zaring, *Enforcement Against the Biggest Banks*, 7 J. FIN. REG. 1 (2021).
[76] *See* Gensler & Menand, *supra* note 70, at 60; *see also Trump v. Slaughter* and *Trump v. Cook*.
[77] *See* Eric C. Stuart & Zachary V. Zagger, *D.C. Circuit Upholds Presidential Power to Remove NLRB and MSPB Members Without Cause*, OGLETREE DEAKINS (Dec. 17, 2025), https://ogletree.com/insights-resources/blog-posts/d-c-circuit-upholds-presidential-power-to-remove-nlrb-and-mspb-members-without-cause.
[78] *Trump v. Slaughter*, 609 U.S. _ (2026).
[79] Jessie Romero, *The Treasury-Fed Accord*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/treasury-fed-accord.
[80] *See* Gensler & Menand, *supra* note 70, at 50, 57.
[81] David Wessel, *Why Is the Federal Reserve Independent, and What Does That Mean in Practice?*, BROOKINGS (Dec. 12, 2025), https://www.brookings.edu/articles/why-is-the-federal-reserve-independent-and-what-does-that-mean-in-practice/.
[82] Jeff Cox, *Trump Says He Should Get a Say on Federal Reserve Interest Rate Decision*, CNBC (Aug. 8, 2024), https://www.cnbc.com/2024/08/08/trump-says-he-should-get-a-say-on-federal-reserve-interest-rate-decisions.html; *Trump says anybody that disagrees with him will never be Fed Chair,* REUTERS, (Dec. 23, 2025), https://www.reuters.com/world/us/trump-says-anybody-that-disagrees-with-him-will-never-be-fed-chair-2025-12-23/.
[83] *See* Exec. Order No. 14,215, Ensuring Accountability for All Agencies, 90 Fed. Reg. 10,447 (Feb. 24, 2025), https://www.federalregister.gov/documents/2025/02/24/2025-03063/ensuring-accountability-for-all-

Justice announced a criminal investigation of the Fed chair, Jerome Powell, concerning his testimony to Congress.[84] The case was eventually dropped,[85] but critics, including Jerome Powell,[86] described this investigation as an attempt to undermine the Federal Reserve's monetary policy independence.[87]

Although the Supreme Court embraced the unitary executive theory in *Slaughter*, the Court carved out an exception for the Federal Reserve in a companion case, *Trump v. Cook*.[88] In August 2025, after a series of public announcements attacking the Fed for being slow to reduce interest rates,[89] President Trump attempted to remove Federal Reserve Board Governor Lisa Cook, without any formal notice or developing an administrative record to support a finding of cause.[90] The Supreme Court, however, rejected President Trump's effort to remove Lisa Cook and indicated that the statutory removal protections would remain intact.

Beyond asserting control over agency personnel, the Trump administration has taken steps to control agency rulemaking. It issued executive orders claiming oversight authority over rulemaking at independent agencies,[91] and has asserted the ability to rescind existing rules at both independent and executive agencies, without participation by the public in a notice and comment process.[92] The second Trump administration has also signaled its intent to control agencies' enforcement. It issued an executive order directing agencies to terminate enforcement proceedings that are inconsistent with the administration's policies.[93] Likewise, agencies have initiated investigations on matters aligned with the President's agenda.[94] Given the President's steps to control independent agencies, commentators have raised concerns that specific prosecution and enforcement actions would be influenced by the

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agencies. Although the order carves out the Federal Reserve's conduct "of monetary policy," such a distinction may lack much of a difference. *See* Gensler & Menand, *supra* note 70, at 61.

84 Nick Timiraos & James Romoser, *Supreme Court Will Decide if Fed Independence Has Any Legal Teeth*, WALL ST. J. (Jan. 20, 2026), https://www.wsj.com/economy/central-banking/jerome-powell-federal-reserve-supreme-court-de15b2d1; *see* Romero, *The Treasury-Fed Accord*, *supra* note 79.

85 Ann Saphir, *How the DOJ Went from Investigating Powell to Dropping the Case*, REUTERS (Apr. 24, 2026), https://www.reuters.com/world/us/how-doj-went-investigating-powell-dropping-case-2026-04-24/.

86 Timiraos & Romoser, *supra* note 84.; *See* Romero, *The Treasury-Fed Accord*, *supra* note 79.

87 Robert Armstrong, *Criminalising the Fed*, FIN. TIMES (Jan. 12, 2026), https://www.ft.com/content/21b5418c-0c55-4a10-94ac-cb4faeafea32.

88 *Trump v. Cook*, 609 U.S.___(2026).

89 Nick Timiraos, Sadie Gurman & C. Ryan Barber, *U.S. Prosecutors Are Investigating Fed Chair Jerome Powell*, WALL ST. J. (Jan. 12, 2026), https://www.wsj.com/economy/central-banking/jerome-powell-justice-department-investigation-e9e3f84d (noting that "Trump has publicly berated Powell for being too slow to lower interest rates").

90 Steve Kopack, *Trump Says He's Removing Fed Governor Lisa Cook, Citing His Administration's Allegations of Mortgage Fraud*, NBC NEWS (Aug. 25, 2025), https://www.nbcnews.com/politics/white-house/trump-removing-federal-reserve-governor-lisa-cook-rcna227138.

91 *See* Exec. Order No. 14,215, Ensuring Accountability for All Agencies, *supra* note 83.

92 *See* Gensler & Menand, *supra* note 70, at 63.

93 THE WHITE HOUSE, Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Regulatory Initiative (Feb. 19, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency-regulatory-initiative/ (Agency heads shall coordinate with the Director of the Office of Management and Budget, who "shall, on a case-by-case basis and as appropriate and consistent with applicable law, then direct the termination of all such enforcement proceedings that do not comply with the Constitution, laws, or Administration policy.").

94 Tom Wheeler, *Not "Deregulation" but Heavy-Handed Regulation at the Trump FCC*, BROOKINGS (Feb. 25, 2025), https://www.brookings.edu/articles/not-deregulation-b (claiming that the Chair of the FCC used coercive tactics in a manner that did not require a vote by the commissioners).

President's agenda.[95] These concerns are bolstered by claims that the Administration is weaponizing law enforcement against political opponents.[96]

To summarize, the Trump administration has gone a long way to assert control not just of executive agencies, but also of independent ones, viewing them as mere arms of the President. The administration has done so despite its party having control of the legislative branches of government and thus the ability to enact legislation, suggesting that such expansion is not merely a response to partisan gridlock. Moreover, the Administration has demonstrated its willingness to use not only direct measures of executive power (like removing FTC commissioners) but also indirect ones (like opening investigations into members of independent agencies).

And although the Trump administration has expanded presidential power further than its predecessors, it bears repeating that this playbook has been in the works for decades. Moreover, the "unitary executive theory" that legitimates such expansion as consistent with the constitution has continued to gather steam.[97] Therefore, commentators generally expect these norms to remain and potentially deepen even after the Trump administration ends.[98]

iii. Presidential Influence over Markets and Business

The second Trump administration has signaled a willingness to intervene in private markets, including by influencing firms' ownership arrangements and strategic decisions. This willingness may reflect the global resurgence of "industrial policy," as governments increasingly seek to steer capital and corporate conduct toward national economic objectives (for example, supply-chain resilience or the transition to green energy) rather than relying on market ordering alone.[99] For administrations with such an interventionist agenda, large asset managers can become an especially attractive instrument, and expanded presidential power makes this strategy easier to execute.

The trend toward presidential intervention in markets began with prior administrations. The Biden administration, for example, used competition policy to shape markets according to its agenda. In 2021, President Biden issued an executive order targeting corporate consolidation with seventy-two directives. It ordered the DOJ and FTC to challenge "bad mergers," with focus on healthcare, banking, and "big tech" and urged the FTC to restrict non-compete agreements.[100] President Biden

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[95] Jonathan B. Baker, *Threats to Competition Policy in the Second Trump Administration: Is Antitrust Enforcement Following Alice Down the Rabbit Hole?*, PROMARKET (Apr. 12, 2025), https://www.promarket.org/2025/04/12/threats-to-competition-policy-in-the-second-trump-administration-is-antitrust-enforcement-following-alice-down-the-rabbit-hole/; Ariel Ezrachi, *The Political Instrumentalization of Competition and Antitrust Enforcement*, PROMARKET (Oct. 31, 2025), https://www.promarket.org/2025/10/31/the-political-instrumentalization-of-competition-and-antitrust-enforcement.

[96] *See, e.g.,* Aaron Blake, *Trump's Open Weaponization of the Government*, CNN (Sept. 22, 2025), https://edition.cnn.com/2025/09/22/politics/weaponization-trump-biden-analysis.

[97] Christopher S. Kelley & Graham G. Dodds, *From Enhancing Administrative Control to Abetting Authoritarianism: The Presidency and the Unitary Executive Theory*, in AMERICA IN CRISIS: PRESIDENTIAL POWER, POPULISM, AND THE GLOBAL STRUGGLE FOR TRUTH (Adebowale Akande ed., Springer Nature 2025), https://doi.org/10.1007/978-3-031-98627-7; Jeffrey Crouch, Mark J. Rozell & Mitchel A. Sollenberger, *The Law: The Unitary Executive Theory and President Donald J. Trump*, 47 PRESIDENTIAL STUD. Q. 561, 570–71 (2017).

[98] *Id.* at 217.

[99] *See* Réka Juhász et al., *The New Economics of Industrial Policy*, 16 ANNU. REV. ECON. 213 (2024); Chad P. Bown & Dan Wang, *Semiconductors and Modern Industrial Policy*, 38 J. ECON. PERSP. 81 (2024).

[100] THE AMERICAN PRESIDENCY PROJECT, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.presidency.ucsb.edu/documents/fact-sheet-executive-order-promoting-competition-the-american-economy/.

also used executive tools to advance industrial-policy aims. Like his predecessors,[101] he issued an executive order directing the federal government to use its procurement and other powers to encourage domestic production.[102]

The Trump administration has further expanded this playbook, leveraging expanded presidential power to secure industrial policy goals. For example, President Trump has used executive orders to impose a broad array of tariffs that have dramatically reshaped global trade.[103] Trump has also relied on ad-hoc measures. Tariff policies, for example, vary by country, industry, and product. This ad hoc nature of trade regulation by executive order has further expanded the power of the office and raised concerns about the considerations that drive these policies.[104]

But perhaps the most novel mode of intervention has been direct interference with firms' contractual arrangements and strategic choices, sometimes without relying on formal legal instruments of executive power. We highlight two main avenues for this intervention: first, direct participation in private firms and second, an expanded political role for merger review.

First, the Trump administration has demanded, on behalf of the government, equity stakes and privileged governance arrangements in private firms.[105] Historically, the federal government had taken equity stakes in private firms only during crises and on typically a temporary basis. For example, pursuant to the Treasury's Troubled Asset Relief Program, the government took stakes in insurance and automobile companies that it bailed out, but only until those companies repurchased the government's shares.[106] The government has also relied on *legislation* to demand profit-sharing arrangements (rather than share ownership) from industry. Under the CHIPS and Science Act,[107] for

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[101] Exec. Order No. 13,061, Improving Federal Procurement, 63 Fed. Reg. 43,541 (Aug. 14, 1998) (directing federal agencies to preserve and restore river resources, foster economic revitalization, and encourage voluntary community partnerships, aiming to protect natural and cultural heritage); Exec. Order No. 12,873, Federal Acquisition, Recycling, and Waste Prevention, 58 Fed. Reg. 54,911 (Oct. 22, 1993) (mandating that executive agencies incorporate waste prevention and recycling into daily operations, increase the procurement of environmentally preferable products, and maximize the purchase of items containing recovered materials).

[102] Exec. Order No. 14,005, Ensuring the Future Is Made in All of America by All of America's Workers, 86 Fed. Reg. 7,475 (Jan. 28, 2021) (establishing a government-wide "Made in America" policy).

[103] THE WHITE HOUSE, Fact Sheet: President Donald J. Trump Declares National Emergency to Increase Our Competitive Edge, Protect Our Sovereignty, and Strengthen Our National and Economic Security (Apr. 2. 2025), https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security/; Robert McClelland & John Wong, *TPC Tariff Tracker*, TAX POLICY CENTER (Mar. 10, 2026), https://taxpolicycenter.org/features/tracking-trump-tariffs.

[104] *See, e.g.,* Doug Palmer & Ari Hawkins, *Trump Announces 'Very Large' Trade Deal with UK, Final Details* TBD, POLITICO (May 8, 2025), https://www.politico.com/news/2025/05/08/trump-announces-very-large-trade-deal-with-u-k-final-details-tbd-00335534.

[105] *See* Romm & Swanson, *After U.S. Takes Stake in Intel, Trump Pledges 'Many More' Deals*, *supra* note 4.

[106] *See* Matthew Jaffe, *Treasury Secretary Timothy Geithner Defends Planned Reuse of Tarp Funds*, ABC NEWS (May 21, 2009), https://abcnews.com/Business/Politics/story?id=7648241&page=1 (quoting Geithner: "[TARP] is not a permanent program…. I would never support a program designed to nationalize banks or other businesses"). The U.S. government also purchased warrants in U.S. airlines during the COVID-19 pandemic but unwound those positions by 2024. *See* David Shepardson, *US Treasury Receives $556.7 Million from Auction of Airline Warrants,* REUTERS (June 21, 2024), https://www.reuters.com/business/aerospace-defense/us-treasury-receives-5567-million-auction-airline-warrants-2024-06-21/.

[107] David Shepardson, *Biden to Require Chips Companies Winning Subsidies to Share Excess Profits,* REUTERS (Mar. 1, 2023), https://www.reuters.com/technology/us-require-companies-winning-chipmaking-subsidies-share-excess-profits-2023-02-28/.

example, the government required a cut of profits from semiconductor companies that received major federal grants.

President Trump has expanded these policies and incorporated them into the administration's "industrial policy" by negotiating ad-hoc deals in which the Department of Commerce invests in U.S. companies while seeking a perpetual return for the federal government.[108] For example, in August 2025, the President announced that the government had purchased a 10% stake in Intel, making it one of the company's largest shareholders.[109] Similar equity investments have been made by the Department of War in minerals, mining and missile companies,[110] as well as by the Department of Energy investing in lithium production.[111]

In other instances, the government has sought a profit-sharing arrangement without any upfront investment, and often as a condition for necessary government support for expansion plans or mergers. For example, President Trump refused to allow Nvidia to ship AI chips to China unless the company agreed to give the U.S. a 25% cut.[112] And the Trump administration demanded a payment "in the low billions" from a group of U.S. investors who sought government approval for its acquisition of TikTok's U.S. business.[113]

Perhaps more dramatically, the Trump administration (via the Committee on Foreign Investment in the United States) agreed to allow Nippon Steel Corp. to purchase U.S. Steel, under the condition that the United States government receive a golden share in the company. Such a governance arrangement is common in other countries but has rarely been used in the U.S. in this context.[114] A golden share gives the government the right to appoint and remove an independent director, as well as veto important strategic and operational decisions involving U.S. Steel's production in the U.S.[115]

Beyond these formal measures of influence, the Trump administration has shown a willingness to target corporate leaders and threaten and shame them to secure operational and strategic changes that align with the government's agenda. For example, Amazon's decision to show the component of

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108 *See* Romm & Swanson, *After U.S. Takes Stake in Intel, Trump Pledges 'Many More' Deals*, *supra* note 4.
109 *Id.*
110 L3HARRIS, L3Harris Accelerates 'Arsenal of Freedom' with Creation of a New Missile Solutions Company (Jan. 13, 2026), https://www.l3harris.com/newsroom/press-release/2026/01/l3harris-accelerates-arsenal-freedom-creation-new-missile-solutions
111 Michelle Chapman, *U.S. Government Taking Stake in Company Operating Massive Lithium Mine in Nevada*, PBS NEWS (Oct. 1, 2025), https://www.pbs.org/newshour/nation/u-s-government-taking-stake-in-company-operating-massive-lithium-mine-in-nevada.
112 Kevin Breuninger, *Trump Greenlights Nvidia H200 AI Chip Sales to China if U.S. Gets 25% Cut, says Xi Responded Positively*, CNBC (Dec. 8, 2025), https://www.cnbc.com/2025/12/08/trump-nvidia-h200-sales-china.html. The same playbook has applied to AMD and Intel.
113 Bobby Allyn & David Folkenflik, *Trump's TikTok Deal Terms Called a 'Shakedown' by Experts*, NPR (Sept. 26, 2025), https://www.npr.org/2025/09/26/g-s1-90598/tiktok-deal-trump-oracle; Miriam Gottfried & Amrith Ramkumar, *Trump Administration Set to Receive $10 Billion Fee for Brokering TikTok Deal*, WALL ST. J. (Mar. 13, 2026), https://www.wsj.com/tech/tiktok-deal-fee-trump-administration-5aa31c9f.
114 *See* Rachel Looker, *In Rare Deal for US, Government Owns a Piece of US Steel*, S&P GLOBAL ENERGY (June 26, 2025), https://www.spglobal.com/energy/en/news-research/latest-news/metals/062625-in-rare-deal-for-us-government-owns-a-piece-of-us-steel.
115 HOLLAND & KNIGHT, Nippon Steel and U.S. Steel Announce Finalized Merger Agreement (June 20, 2025), https://www.hklaw.com/en/insights/publications/2025/06/nippon-steel-and-us-steel-announce-finalized-merger-agreement.

a product's cost attributable to tariffs brought about a personal call from the president to Jeff Bezos, the firm's founder. Amazon scrapped the plan shortly thereafter.[116]

Second, the Trump administration has demonstrated a willingness to facilitate or block mergers for reasons unrelated to their economic or legal merits. Critics have described its interventions as rendering antitrust review "a mere tool of political power."[117] To take a few examples, President Trump (in his first term in office) pushed the Justice Department to block the merger between AT&T and Time Warner due to disfavor with Time Warner's asset CNN, which had criticized the president.[118] Likewise, in the ongoing bidding for Warner Brothers by rivals Paramount and Netflix, the President explicitly pledged to "be involved,"[119] suggesting that major changes to CNN may be a condition for any sale.[120] The FCC also held up a telecommunications merger between Verizon and T-Mobile only after the companies agreed to eliminate DEI policies, which have drawn ire from the president.[121] As a result of these and other interventions, M&A dealmakers have focused on administration appeasement in deal structure. For example, the DOJ challenged a deal between Live Nation-Ticketmaster in 2024, leading the company to announce venue development projects in red states and appoint a Trump ally to its board shortly thereafter.[122]

These examples reveal the administration's willingness to use presidential power to pursue a range of market interventions. Some are undertaken on an ad-hoc basis and interfere with firms' ownership, governance, contractual arrangements and strategic choices. Such interventions have led critics to describe the U.S. regime as moving in the direction of state capitalism;[123] likewise, their ad-hoc, opaque, and transactional character has fueled concerns about crony capitalism.[124] For our

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[116] Kevin Breuninger, *Trump Complained to Bezos Before Amazon Said it Scrapped Idea to Display Tariff Cost*, CNBC (Apr. 29, 2025), https://www.cnbc.com/2025/04/29/white-house-blasts-amazon-over-tariff-cost-report-hostile-and-political-act.html. When popular talk show host Jimmy Kimmel made critical comments about the recently-slain conservative thought leader Charlie Kirk, the chairman of the FCC threatened action against ABC, leading to the show's suspension. John Koblin, Michael M. Grynbaum & Brooks Barnes, *ABC Pulls Jimmy Kimmel Off Air for Charlie Kirk Comments After F.C.C. Pressure*, N.Y. TIMES (Sept. 17, 2025), https://www.nytimes.com/2025/09/17/business/media/abc-jimmy-kimmel.html.

[117] Eleanor M. Fox & Harry First, *How the Pursuit of Bigness, Geopolitical Hegemony, and Crony Capitalism Are Threatening Antitrust's Rule of Law*, PROMARKET (Nov. 3, 2025), https://www.promarket.org/2025/11/04/how-the-pursuit-of-bigness-geopolitical-hegemony-and-crony-capitalism-are-threatening-antitrusts-rule-of-law/.

[118] Steven Overly & Josh Gerstein, *Trump Administration Sues to Block AT&T-Time Warner Merger*, POLITICO (Nov. 20, 2017), https://www.politico.com/story/2017/11/20/trump-lawsuit-att-time-warner-merger-250956.

[119] Michael M. Grynbaum, *Trump Stands in the Middle as Netflix and Paramount Vie for a Megadeal*, N.Y. TIMES (Dec. 8, 2025), https://www.nytimes.com/2025/12/08/business/media/trump-netflix-paramount-deal.html.

[120] Brian Stelter, *Trump Enters Warner Bros. Fight, says it's 'Imperative that CNN be sold'*, CNN BUSINESS (Dec. 10, 2025), https://www.cnn.com/2025/12/10/media/trump-cnn-sold-paramount-warner-bros-netflix.

[121] *See* Maria Aspan, *How Trump's 'Crony Capitalism' has Shaken up U.S. Business*, NPR (Dec. 22, 2025), https://www.npr.org/2025/12/22/nx-s1-5639916/trump-crony-capitalism-free-market.

[122] Diana L. Moss, *Weaponizing Antitrust and Regulation Will Hurt US Consumers*, PROMARKET (Aug. 11, 2025), https://www.promarket.org/2025/08/11/trump-is-weaponizing-antitrust-and-regulation-us-consumers-will-suffer.

[123] Michael Chapman, *Trump's "State Capitalism … a Hybrid Between Socialism and Capitalism" Won't Make America Great Again*, CATO AT LIBERTY BLOG (Aug. 28, 2025), https://www.cato.org/blog/trumps-state-capitalism-hybrid-between-socialism-capitalism-wont-make-america-great-again.

[124] John Cassidy, *Donald Trump's TikTok Deal Looks Like Crony Capitalism*, NEW YORKER (Sept. 29, 2025), https://www.newyorker.com/news/the-financial-page/donald-trumps-tiktok-deal-looks-like-crony-capitalism; Victoria Guida, *'He's Actually Weakening the Economy': Why Trump's Strategy May Fail*, POLITICO (Nov. 12, 2025), https://www.politico.com/news/magazine/2025/11/12/trump-economy-strategy-industrial-policy-interview-00646509.

purposes, the key lesson is that the administration is directly and indirectly using presidential power, including the threats of regulatory action, to intervene in markets to advance its policies.

Before we conclude, we should note that the Trump administration has used the power of the executive order to push for agency action in the financial realm. For example, in December 2025, President Trump used an order to direct the SEC, the FTC, and the Department of Labor to issue regulations governing the proxy advisor industry; it further directed the SEC to revise rules related to the shareholder proposal process under 14a-8.[125] Of course, politics has always infused the regulation of proxy advisors and shareholder proposals, but typically those changes had originated within the agencies themselves, rather than by presidential directive.[126]

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Presidential power is on an expansive path. The Trump administration has accelerated this shift, cultivating a strong-man model of a president who uses whatever tools are available, from government authority (sometimes with questionable legal bases) to control over independent agencies—to advance its policy objectives. With these tools, the Trump administration has increasingly sidestepped Congress, taking action that the legislative branch would not or could not embrace. Moreover, the lack of a strong check from the judicial and legislative branches effectively enables the administration to use threatened regulatory action (or promises of deregulatory action) as leverage over the corporate sector.

Expanded presidential power shows few signs of abating in the near future. It represents the culmination of efforts by prior presidents, of both parties, who have sought new avenues to advance their agendas. It is also supported by increasing acceptance of the unitary executive theory of constitutional law that embraces such moves as consistent with democratic legitimacy. And as this history reveals, despite changes in administrative priorities and policies, expanded presidential power is likely to be a one-way ratchet.

III. ASSET MANAGER CAPTURE

The conventional view holds that the substantial economic power held by asset managers allows these financial institutions to capture the government.[127] As we explain in this Part, however, the sources of this power—scale and market concentration--make these asset managers susceptible to pressure to deploy their governance power in service of the government's agenda, allowing the president to shape markets without legislation or rule-making. We further show that the expansion of presidential power heightens this vulnerability by making regulatory threats and inducements more credible, immediate, and difficult to resist.

This Part offers a comprehensive account of asset manager vulnerability to capture across three important dimensions. We first identify the different channels through which the government can capture asset managers, showing that the size of the largest asset managers increases their

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125 THE WHITE HOUSE, Protecting American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors (Dec. 11, 2025), https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/.

126 Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1648–49 (2016) (describing the evolution of shareholder proposal regulation through SEC rulemaking and political pressures).

127 *See* Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance*, *supra* note 1 (discussing "the significant economies of scale inherent in operating a fund tracking an index").

susceptibility to government pressure.[128] We then examine the striking pivot in stewardship priorities of the largest asset managers as evidence of how political pressure can affect stewardship policies. We conclude by explaining how the dramatic rise of presidential power, and the increasing willingness of the federal government to intervene in markets to pursue industrial policy objectives, increases the risk of asset manager capture.

a. Tools of Capture

This Section details the tools through which the government can capture asset managers. The government can both reward and punish asset manager conduct by constraining their voice or by levying threats (and particularly those that affect the business model) and promising benefits. Size further amplifies this vulnerability: the larger the asset manager, the more exposed it becomes to regulatory intervention—and the easier it is for the government to justify targeting it. After describing these tools, we explain how the rise of presidential power makes the threat of capture significantly more credible.

1. Diminishing Voice

Asset managers are governance intermediaries, which means that they exercise the governance rights of their underlying investors.[129] As a result, large asset managers' governance influence has grown in parallel with their rapid accumulation of investor dollars. Because the largest asset managers own large (and by some accounts, near-controlling) investment stakes across the public market, they have the potential to use their voice to push companies to take certain courses of action.[130]

The government, however, has many tools to limit the power of asset-manager voice and discourage asset managers from using their influence. Consider, for example, the distinction between "active" and "passive" investors for purposes of filings under Section 13 of the Securities Exchange Act.[131] Any shareholder holding more than 5% of a company's outstanding stock ownership must make a filing, but the precise requirements depend on whether the investment is classified as active or passive. An active investor must file a 13D and update its disclosure periodically as ownership changes, and each disclosure must detail all trades made in the prior 60-day period.[132] For a large asset manager with thousands of holdings, the compliance burden associated with requiring 13D filings would be enormous.[133]

For years, therefore, asset managers could comfortably rely on the 13G exemption even when engaging with management on key governance issues so long as they did not intend to influence

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128 *See* Morley, *Too Big to Be Activist*, *supra* note **Error! Bookmark not defined.** (discussing the link between asset managers' size and their exposure to government regulation).
129 In some cases, however, institutional investors retain voting authority or participate in "pass-through" voting arrangements that allow underlying investors to direct how shares are voted. *See* Dorothy S. Lund, *The Past, Present, and Future of Proxy Voting Choice*, 50 J. CORP. L. 1075, 1084, 1089 (2025). We discuss the implications below.
130 *See* Bebchuk & Hirst, *The Specter of the Giant Three, supra* note 29 at 735-36; *cf.* Jonathon Zytnick, *Shareholder Voting Power* 40 (Feb. 1, 2026), https://ssrn.com/abstract=6300182 (developing a measure of shareholder voting power based on pivotality and showing that influence depends on ownership structure rather than voting weight alone).
131 *See* 15 U.S.C. § 78m(d); 17 C.F.R. § 240.13d-1 (distinguishing between investors who acquire more than five percent of a class of equity securities with the purpose or effect of influencing control (Schedule 13D) and certain passive or institutional investors eligible to file abbreviated Schedule 13G disclosures).
132 *See* 17 C.F.R. § 240.13d-2(a); 17 C.F.R. § 240.13d-101, Item 5(c).
133 *See* Morley, *Too Big to Be Activist*, *supra* note **Error! Bookmark not defined.** at 1429-30; *see also* Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance*, *supra* note 1, at 2066.

control.[134] That regime changed in February 2025, when the SEC issued new guidance specifically targeting ESG activism, warning that "Schedule 13G may be unavailable to a shareholder who….recommends that the issuer….undertake specific actions on a social, environmental, or political policy and, as a means of pressuring the issuer to adopt the recommendation, explicitly or implicitly conditions its support of one or more of the issuer's director nominees at the next director election on the issuer's adoption of its recommendation…"[135]

This shift had immediate effects: BlackRock and Vanguard, two of the largest asset managers, immediately halted all shareholder engagement.[136] Although these asset managers eventually resumed stewardship activity, their ensuing communications were shaped by the government's guidance that cautioned against engaging with management on environmental and governance issues.[137] Additional proposals, such as requiring 13G disclosures of "concessions and arrangements" arising from discussions with management, could further chill interactions between asset managers and corporations.[138]

Politicians have also attempted to limit asset manager voting directly. For example, the proposed Investor Democracy is Expected (INDEX) Act, introduced in 2022 and reintroduced in subsequent Congresses, would prohibit investment advisers from voting shares in passive index funds unless explicitly instructed by the beneficial owners.[139] The intended effect of this legislative proposal is to "neutralize the dominance" of BlackRock, Vanguard, and State Street in corporate voting by re-empowering beneficial owners.[140] Although it has not passed, the INDEX Act has gained substantial support and continues to be reintroduced.[141] As these examples demonstrate, the government can readily propose or adopt measures that curtail asset manager voice when their stewardship activities conflict with the government's political goals.

We believe, however, that these restrictions, or the threat of imposing them, are unlikely to be the most effective means of capturing asset managers. While these tools can suppress activism, they are far less effective at steering asset managers toward the government's own priorities. Consider a

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134 *See* 17 C.F.R. § 240.13d-1(b), (c) (permitting certain institutional and passive investors to file Schedule 13G so long as they have not acquired securities with the purpose or effect of influencing control of the issuer).

135 U.S. SEC. & EXCH. COMM'N, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Compliance & Disclosure Interpretations (July 11, 2025), https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/exchange-act-sections-13d-13g-regulation-13d-g-beneficial-ownership-reporting.

136 Lamar Johnson, *SEC Updates Guidance on ESG Engagement Disclosures, Prompts Temporary Confusion*, ESG DIVE (Feb. 25, 2025), https://www.esgdive.com/news/sec-updates-esg-engagement-disclosures-schedule-13d-13g-blackrock-vanguard/740893/.

137 *See* Maia Gez, Scott Levi, & Michelle Rutta, *"Under Pressure": Walking the Fine Line of Section 13(d) Passive Investor* Status, HARV. L. SCH. F. ON CORP. GOV. (Mar. 29, 2025).

138 *See* S. BANKING COMM. MINORITY STAFF, THE NEW EMPERORS: RESPONDING TO THE GROWING INFLUENCE OF THE BIG THREE ASSET MANAGERS, at 18 (Oct. 2022) (calling for an amendment to Schedule 13G that would require asset managers to disclose "concessions and arrangement" arising from their engagement with management).

139 INDEX Act, S. 4241, 117th Cong. (2022); S. 2690, 118th Cong. (2023); S. 1670, 119th Cong. (2025). The Act would generally require mirror voting or abstention for uninstructed shares.

140 *See Sullivan Introduces INDEX Act to Empower Investors and Neutralize Wall Street's Biggest Investment Firms*, SENATE.GOV (May 18, 2022), https://www.sullivan.senate.gov/newsroom/press-releases/sullivan-introduces-index-act-to-empower-investors-and-neutralize-wall-streets-biggest-investment-firms.

141 Thomas W. Christopher & Taylor Pullins, *The INDEX Act: A Challenge to the Voting Influence of Institutional Investors that May Yield Unintended Consequences*, WHITE & CASE LLP (Nov. 3, 2022), https://www.whitecase.com/insight-our-thinking/index-act-challenge-voting-influence-institutional-investors-may-yield. As we explain below, large asset managers have since adopted policies to empower client to direct their voting.

president who wishes to use asset manager influence to encourage domestic investment or discourage offshoring. Measures that restrict asset manager voice will not induce such a shift. If anything, they chill engagement across the board, deterring asset managers from advancing *any* position—whether aligned with or contrary to the administration's preference.

More fundamentally, restrictions on stewardship lack credibility as a coercive threat because asset managers derive no direct economic benefit from activism. Stewardship is costly and widely understood as an obligation rooted in fiduciary compliance rather than a profit center for asset managers.[142] Limiting or even eliminating stewardship therefore does little to pressure asset managers into aligning with government priorities.

In short, government-imposed limits on asset manager voice are inherently deregulatory. They remove asset managers from the governance ecosystem but do not supply a mechanism for directing them to advance affirmative policy goals.[143]

2. Threats

A far more potent tool of influence than diminishing asset manager voice is measures that directly affect asset managers' bottom line. This Section focuses on the ways that the government can threaten an asset manager's revenue streams and business model; the next Section considers the other side of this equation—promised benefits in exchange for compliance.[144]

The dramatic growth of the largest asset managers (in terms of assets under management and corresponding ownership of the U.S. equity market) makes them more susceptible to capture via threats to their business model. Two key dynamics connect the scale of asset managers and their vulnerability to government capture. First, as asset managers accumulate more assets under management, they become increasingly dependent on favorable regulatory decisions, such as approvals required when ownership stakes in regulated entities surpass certain thresholds. This dependence in turn provides the government with more opportunities to exert pressure. Second, the growing prominence and influence of the largest asset managers not only attract greater public scrutiny but also bolster the legitimacy of regulatory action targeting them.[145] As a result, government action to constrain asset manager power is more likely to be viewed as justified, thereby enhancing the credibility and potential impact of threats to take such action.

In the paragraphs below, we outline the various regulatory threats that the government can wield to influence asset managers.

The Breakup Threat . As Mark Roe has explained,[146] the U.S. political system has traditionally been hostile to powerful financial institutions. Accordingly, as asset managers become larger and more powerful, public support for breaking them up or taking other measures to limit their power will likely

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142 *See, e.g.*, Lund, *Asset Managers as Regulators*, *supra* note 7, at 118 (describing the costs associated with stewardship in the context of reducing the risk posed by climate change).

143 Lund, *Asset Managers as Regulators*, *supra* note 7, at 133–34 ("[Asset manager regulation] should not be viewed as a substitute for government regulation; at best, [it] could be harnessed to respond to deficiencies in public regulation, but not replace it.").

144 Conceptually, threats and promises are likely to have similar effects. We discuss them separately for expositional convenience.

145 *Cf.* ROE, STRONG MANAGERS, WEAK OWNERS, *supra* note 20.

146 *See* Mark J. Roe, *Political Elements in the Creation of a Mutual Fund Industry*, 139 U. PA. L. REV. 1469, 1502 (1991).

increase.[147] Note that "breaking up" can take different forms. At one extreme, the government could require asset managers to sell off divisions or otherwise reduce their size. It could also prohibit a fund family from owning more than a certain percentage of public company shares within the same industry.[148]

Scholars have thus far proposed breaking up large asset managers simply because of their size and dominance in corporate governance.[149] For example, Lucian Bebchuk and Scott Hirst have called for measures that would limit asset managers from crossing certain ownership limits of public companies in order to improve corporate governance.[150] Likewise, Zohar Goshen and Doron Levit called for breaking up the Big Three by capping the assets under management that could be managed by a single fund family, on the grounds that the Big Three's influence leads managers to boost shareholder returns at the expense of employees' pay and investment in long-term growth.[151] And finally, Eric Posner, Glen Weyl, and Fiona Scott Morton have called for limiting the ownership stakes of any single asset manager to encourage competition.[152]

Each of these proposals, if enacted, would meaningfully constrain the growth opportunities of the largest asset managers. Their dependence on the avoidance of these measures therefore becomes a lever through which the government can exert influence. Moreover, the larger the asset manager, the more frequently these regulatory tripwires are triggered—and the more plausible it becomes for the government to justify intervention based on concerns about concentration or control.

Limits on Holdings. Although proposals to break up large asset managers are thus far hypothetical, asset managers are subject to additional scrutiny and reporting requirements when their ownership surpasses a certain level in companies in certain industries. Large asset managers must therefore navigate whether to limit their holdings or instead be subject to additional scrutiny and regulatory intervention unless they commit to passivity.

The banking sector provides a salient example. Under federal law, acquiring 10% or more of a bank's voting securities typically triggers a presumption of control,[153] requiring prior notice and approval from the relevant banking regulator. Although passive funds typically avoid direct influence on management or business strategy, instead seeking broad market exposure, ownership above the 10% threshold might require some form of regulatory approval.[154] Asset managers have historically addressed this constraint by entering into passivity agreements with regulators, committing to refrain from influencing bank management or policy.[155]

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[147] This is especially the case when the policies supported by large asset managers are controversial. *See* Schwartz, *Stewardship Theater*, *supra* note 7.
[148] *See* Posner et al., *supra* note 28, at 670.
[149] *See* Graham Steele, *The New Money Trust: How Large Money Managers Control Our Economy and What We Can Do About It*, AM. ECON. LIBERTIES PROJECT (Nov. 2020) (considering different regulatory measures to limit the size and influence of the Big Three).
[150] Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance*, *supra* note 1, at 2129.
[151] *See* Zohar Goshen & Doron Levit, *Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1517, 1520–22, 1574–75 (2023).
[152] *See* Posner et al., *supra* note 28, at 675–85 (proposing that index fund families holding significant shares across oligopolies be limited to one firm per industry or constrained by a low ownership cap across competitors).
[153] The Change in Bank Control Act (CBCA), codified at 12 U.S.C. § 1817(j).
[154] 12 C.F.R. § 225.41; Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board Finalizes Rule Clarifying Control Under the Bank Holding Company Act (Jan. 30, 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200130a.htm.
[155] *Id.*

In July 2024, however, the Federal Deposit Insurance Corporation (FDIC) decided to depart from its prior reliance on Federal Reserve determinations and initiated its own review for large holdings in FDIC-supervised banks.[156] In December 2024, the FDIC seemed to have concluded its review: Vanguard executed a detailed passivity agreement with the FDIC, and the agency demanded a similar commitment from BlackRock. BlackRock also contested the new requirement and warned that the FDIC was imposing a completely new regulatory framework on asset managers via this policy change.[157] A prohibition on owning more than 10% of banks directly threatens the business model of the largest asset managers. This example therefore illustrates the dependence of these asset managers on favorable treatment by regulatory agencies.

Another analogous sector in which size and corresponding large ownership stakes create regulatory vulnerability is public utilities. Significant share ownership of certain public utilities may require prior approval from the U.S. Federal Energy Regulatory Commission (FERC)—a requirement that, in practice, applies almost exclusively to the largest asset managers due to their scale. In 2023, FERC initiated an inquiry into whether its longstanding policy of granting "blanket approvals" for passive fund ownership of electric utilities remained appropriate in light of the growing concentration of ownership among a handful of asset managers.[158] In April 2025, however, the FERC extended BlackRock's permission to hold up to 20% of utility shares. Notably, the Commission's Chair issued a concurring opinion expressing concern about the increasing size and influence of asset managers in the utilities sector.[159]

In sum, these examples reveal that the larger the holdings, the greater the temptation and ability to regulate asset managers. Although proposals to limit the size of asset managers have yet to be acted on, regulatory tripwires exist for large owners, providing an additional lever for influence.

Antitrust Enforcement. While proposals to break up the largest asset managers typically require new legislation (making such threats less immediately effective), a more pressing concern arises from the federal government's ability to bring enforcement actions against the Big Three due to the issue of common ownership. According to the common ownership literature, when powerful asset managers hold significant stakes across competing firms, it can undermine competition in certain markets.[160] This concern has motivated efforts to suggest regulatory limits on asset managers'

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156 FDIC, Monitoring the Passivity of Index Fund Complexes: Vanguard's New Passivity Agreement (Dec. 27, 2024), https://www.fdic.gov/news/speeches/2024/monitoring-passivity-index-fund-complexes-vanguards-new-passivity-agreement.

157 Ross Kerber & Suzanne McGee, *BlackRock Seeks to Push FDIC Bank Oversight Deadline to March*, REUTERS (Jan. 9, 2025), https://www.reuters.com/business/finance/blackrock-seeks-push-fdic-bank-oversight-deadline-march-2025-01-09/. The debate seems to have ended with the new administration. *See* John Crabb, *BlackRock Gets FDIC Extension as Asset Managers Wait for a New Regulatory Regime*, INSTITUTIONAL INVESTOR (Jan. 15, 2025), https://www.institutionalinvestor.com/article/2eagprum5vthtwjyaf37k/corner-office/blackrock-gets-fdic-extension-as-asset-managers-wait-for-a-new-regulatory-regime.

158 *FERC Launches Inquiry into Investment Interests in Utilities*, FERC (Dec. 19, 2023), https://www.ferc.gov/news-events/news/ferc-launches-inquiry-investment-interests-utilities.

159 Ross Kerber, *BlackRock Can Keep Big US Utility Stakes, Regulator Rules,* REUTERS (Apr. 17, 2025), https://www.reuters.com/business/finance/blackrock-wins-renewed-permission-own-big-utility-stakes-2025-04-17/.

160 *See* José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1513 (2018) ("A long theoretical literature in industrial organization predicts that partial common ownership of natural competitors by overlapping sets of investors can reduce firms' incentives to compete: the benefits to one firm of competing aggressively – for example, gains in market share – come at the expense of firms that are part of the same investors' portfolio, reducing total portfolio value.").

ownership within specific industries discussed above.[161] But according to some, existing antitrust laws may already provide sufficient grounds for enforcement, suggesting that congressional action may not be necessary to address these risks.[162] As we explain below, it is this view that makes the threat of regulatory capture more effective.

SIFI Designation. Another regulatory threat directly tied to the scale of asset managers is their potential designation as systemically important financial institutions (SIFIs). The Financial Stability Oversight Council has the authority to designate certain nonbank financial companies as SIFIs if their distress or failure could pose a threat to the stability of the broader financial system.[163] Elizabeth Warren, for example, has called for the designation of BlackRock as a SIFI, citing its vast assets under management and interconnectedness with financial markets.[164] A SIFI designation would subject BlackRock to regulatory oversight by the Federal Reserve, which could include stricter capital, liquidity, and risk management requirements. And while the Federal Reserve has historically been an independent agency, its independence has come under threat during the Trump administration.[165] As a result, SIFI status could become a tool of political influence, with the risk of significant compliance costs for asset managers and regulatory constraints that would negatively impact their profitability.[166]

Affecting Asset Flows. Large asset managers are dependent on an influx of retirement funds for growth. Federal and state governments can control where retirement assets are invested, and they can use this power in response to stewardship practices they disfavor. As for the former, the federal government controls the regulatory landscape for ERISA assets, and it can use this control to reward or punish the largest asset managers for their stewardship conduct. For example, consider the Department of Labor's changed position on ESG investments, which over the past decade has shifted to match the priorities of the administration. During President Trump's first term in office, the DOL issued a rule indicating that ERISA plan fiduciaries were prohibited from considering non-pecuniary factors.[167] This rule was reversed under a 2022 Biden administration rule that explicitly allowed consideration of ESG investing;[168] it has recently been resurrected by an executive order by Trump and the passage of an anti-ESG investing bill that once again tethers ERISA fiduciaries to pecuniary value.[169] These changes can affect the revenues of asset managers to the extent that ESG funds charge

[161] *See* Posner et al., *supra* note 28, at 675–85 (proposing that index fund families holding significant shares across oligopolies be limited to one firm per industry or constrained by a low ownership cap across competitors).

[162] *See* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1269–71 (2016) (arguing that high common ownership concentrations violate Clayton Act § 7 and advocating enforcement to break up such holdings).

[163] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 113, 12 U.S.C. § 5323; Joshua S. Wan, *Systemically Important Asset Managers: Perspectives on Dodd-Frank's Systemic Designation Mechanism*, 116 COLUM. L. REV. 904 (2016).

[164] *See* Jeff Cox, *Yellen Supports Banks' Share Buybacks. Sen. Warren Wants BlackRock Designated Too Big to Fail*, CNBC (Mar. 24, 2021), https://www.cnbc.com/2021/03/24/yellen-supports-buybacks-warren-wants-blackrock-deemed-too-big-to-fail.html.

[165] *See supra* notes XX96-101.

[166] *See* Kate Duguid & Saqib Iqbal Ahmed, *BlackRock, Others' Risks Should Be Studied, 'Systemic' Tag May Not Be Best – Yellen*, REUTERS (Mar. 25, 2021), https://www.reuters.com/business/yellen-important-look-risks-posed-by-huge-asset-managers-like-blackrock-2021-03-24/.

[167] Elizabeth S. Goldberg & Rachel Mann, *US Administration Announces Intent to Replace Biden-Era ESG* Rule, ML BENEBITS (Morgan Lewis, June 24, 2025), https://www.morganlewis.com/blogs/mlbenebits/2025/06/us-administration-announces-intent-to-replace-biden-era-esg-rule.

[168] The Biden rule was held up in litigation in federal courts. In 2025, the DOL announced that it would not defend it. *See* Joshua A. Lichtenstein et al., *Trump DOL Withdraws Biden-Era ESG Rule and Crypto Guidance for ERISA Plans*, ROPES & GRAY LLP (May 30, 2025), https://www.ropesgray.com/en/insights/alerts/2025/05/trump-dol-withdraws-biden-era-esg-rule-and-crypto-guidance-for-erisa-plans.

[169] Exec. Order No. 14,366, Protecting American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors (Dec. 11, 2025), https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-

higher fees.[170] More generally, they demonstrate the power of the federal government to control flows to the largest asset managers.

Beyond the federal government, numerous states have enacted "Anti-Boycott" laws requiring state agencies and pension funds to divest from asset managers that restrict business with politically sensitive sectors such as fossil fuels or firearms.[171] These measures are explicitly aimed at shaping asset managers' stewardship conduct by threatening the loss of significant institutional mandates.

The force of this state level threat is partly constrained by countervailing dynamics: states with different agendas have adopted—or may adopt—legislation encouraging or even requiring the type of stewardship that would lead to divestment by other states.[172] As a result, asset managers face conflicting political demands across jurisdictions, limiting the influence of a single state. Once again, therefore, the net result of such pressure may be to chill stewardship activity entirely.

Other Areas. Some regulatory threats are not directly tied to the sheer size of asset managers. Yet, they are likely to have a disproportionate impact on the largest asset managers because they engage in related business activities. For example, consider the regulation of stock lending. Passive funds typically compete on the basis of relative performance net of fees, and one important way that they have brought fees down is by lending securities to short sellers.[173] If that income were to dissipate, their competitive advantage relative to competing funds would be significantly diminished. Therefore, tighter restrictions on stock lending would in theory apply to all market actors that engage in stock lending, but would have a significant adverse effect on the business model of passive fund managers.

More broadly, this list of regulatory threats to asset managers is not exhaustive. While we have identified the most probable sources of regulation at this moment, other avenues are possible and could be pursued in the coming years. The important point is that the size and market concentration of asset managers make them inherently dependent on favorable government regulation. Moreover, asset managers' size, market concentration, and perceived influence provide the government with legitimacy to target them. All in all, these tools offer substantial leverage for the government to push asset managers to implement their desired policies.

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from-foreign-owned-and-politically-motivated-proxy-advisors. Although it primarily targets proxy advisory firms, this order also indicates support for the 2020 DOL rule. *See* Martha Carter & Sydney Carlock*, President Trump's Executive Order on Proxy Advisors: The Potential Pros and Cons for Companies,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 22, 2026), https://corpgov.law.harvard.edu/2026/01/22/president-trumps-executive-order-on-proxy-advisors-the-potential-pros-and-cons-for-companies*; see also* Ted Godbout, *ESG Backlash Bill Passes House,* PSCA (Jan. 15, 2026), https://www.psca.org/news/psca-news/2026/1/esg-backlash-bill-passes-house/.

170 *See* Ringe, *Investor-Led Sustainability, supra* note 6, at 135 ("specialized ESG indices … allow fund managers to charge higher fees that drive up revenues").

171 Leah Malone, Emily B. Holland & Carolyn Houston, *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2023), https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/.

172 *See, e.g.*, Joshua A. Lichtenstein, Michael R. Littenberg & Jonathan M. Reinstein, *Navigating State Regulation of ESG Investments by Investment Managers: A Rapidly Evolving and Contradictory Landscape*, ROPES & GRAY (June 30, 2021), https://www.ropesgray.com/en/insights/alerts/2021/06/navigating-state-regulation-of-esg-investments-by-investment-managers-a-rapidly-evolving (describing various policy areas where state laws have "take[n] opposite stances").

173 *See, e.g.,* Darius Palia & Stanislav Sokolinski, *Passive Asset Management, Securities Lending, and Stock Prices,* 148 J. FIN. ECON. 646 (2023) (higher passive fund holdings increases the supply of lendable shares); Pekka Honkanen*, Securities Lending and Trading by Active and Passive Funds,* 60 J. FIN. & QUANT. ANAL. 1272 (2025); Joshua Mitts, *The Price of Your Vote: Proxy Choice and Securities Lending,* CLS BLUE SKY BLOG (Oct. 11, 2021), https://clsbluesky.law.columbia.edu/2021/10/11/the-price-of-your-vote-proxy-choice-and-securities-lending/.

3. Offering Benefits

Another powerful channel of influence lies in the government's ability to create new growth opportunities for these firms. Because financial institutions operate within a highly regulated environment, the relaxation of regulatory constraints can not only reduce compliance costs but also open new avenues for revenue generation. Like threats, benefits will have a direct effect on asset managers' bottom line. The size of asset managers is a factor in this context as well: The largest asset managers that specialize in low-fee, passive investment products and economies of scale are especially well positioned to benefit from regulatory changes that facilitate further expansion or new sources of income.

We note at the outset that a distinct form of benefit is the removal of regulatory obstacles—the inverse of the last sub-Section. We do not dwell on this point beyond noting that every regulatory burden that is imposed can also be withdrawn as a carrot for practices that the government condones. But we instead focus this section on two examples of growth opportunities that the government can offer asset managers, beyond simply removing regulatory red tape.

Democratizing Finance. In a significant shift in retirement policy, in August 2025, President Trump announced a plan to allow 401(k) retirement accounts to invest in private market assets, including private equity and infrastructure funds.[174] In support of "democratizing" private markets, the Department of Labor has since drafted proposed rules that would facilitate the use of private assets in 401(k) and defined contribution retirement plans.[175] While this move to increase public investment in private markets will mostly benefit private equity and other sponsors of private funds, it tends to benefit asset managers as well. Indeed, Larry Fink, the founder and CEO of BlackRock, had also called for "unlocking" the benefits of private markets to retail clients.[176] By unlocking private market investment opportunities, passive fund managers will also have the ability to expand profit margins[177] by including more expensive fund offerings in retirement accounts and blending alternative investments with more traditional passive funds.[178] These managers can capture this "fee uplift" by embedding high-cost private equity, private credit, or infrastructure "sleeves" into existing target-date funds, effectively blending expensive alternative offerings with low-cost passive vehicles.[179] Moreover, BlackRock, for example, owns proprietary data platforms specializing in private markets and is the largest infrastructure investor in setting the benchmarks for these new retirement products. Therefore,

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174 *See* Exec. Order No. 14,330, Democratizing Access to Alternative Assets for 401(k) Investors, 90 Fed. Reg. 38,921 (Aug. 12, 2025), https://www.federalregister.gov/documents/2025/08/12/2025-15340/democratizing-access-to-alternative-assets-for-401k-investor.

175 Adam Scoll & Jesse T. Foley, *Coming Soon: DOL's Proposed Rules Facilitating Alternative Assets in 401(k) Plans*, COMP. & BENEFITS BLOG (Proskauer Rose LLP, Jan. 22, 2026), https://www.erisapracticecenter.com/2026/01/coming-soon-dols-proposed-rules-facilitating-alternative-assets-in-401k-plans/.

176 Larry Fink, *The Democratization of Investing: Expanding Prosperity in More Places, for More People*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 14, 2025), https://corpgov.law.harvard.edu/2025/04/14/the-democratization-of-investing-expanding-prosperity-in-more-places-for-more-people/.

177 *See* Hank Tucker & Sergei Klebnikov, *Inside Private Equity's $29 Trillion Retirement Savings Grab,* FORBES (July 24, 2025), https://www.forbes.com/sites/hanktucker/2025/07/24/private-equitys-29-trillion-retirement-savings-opportunity-under-trump/ (reporting that mutual fund sponsors welcome this change because their margins have shrunk as competition and the share of money in low-cost index funds have grown. A private-assets kicker is a new way to differentiate their offerings and charge higher fees).

178 *See* Anne Tergesen, *BlackRock Deepens Push into Private Investments for the Masses*, WALL ST. J., June 27, 2025, at B1 (discussing the integration of alternative assets into target date funds).

179 *See* Rachel Christian, *Trump Pushes for Private Equity in 401(k)s, Opening the Door to Riskier Retirement Bets*, BANKRATE (Aug. 9, 2025), https://www.bankrate.com/retirement/trump-pushes-for-private-equity-in-401ks-opening-the-door-to-riskier-retirement-bets/.

the expansion of private market investing for retail investors offers the largest asset managers a lucrative pathway to offset the thinning margins of their core passive index businesses.

Tax-Advantaged Investment Vehicles. The One Big Beautiful Bill Act (OBBBA) created a new tax-advantaged investment vehicle for children under the age of 18 (colloquially referred to as "Trump Accounts").[180] The accounts, which have an inflation-adjusted contribution limit of $5,000 per year, are expected to begin on July 4, 2026.[181] Employers can contribute up to $2,500 per year for an employee's dependent child, excluded from the employee's taxable income. During the period prior to the beneficiary turning 18, the accounts are limited to investing in mutual funds and ETFs that track to a qualified index with at least 90 percent U.S. company weighting (e.g., S&P 500), without leverage and annual fees and expenses below 0.1 percent. Cash and money market funds are not permitted.[182] As such, the creation of this investment vehicle will benefit asset managers by providing them with new sources of assets under management; moreover, given the concentration of the mutual fund market and the focus on passive management, it is likely that the largest asset managers will benefit in a disproportionate way.

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We have thus far elaborated on a set of levers that the government can use to target asset managers for benefits or threats, but we emphasize that this is not an exhaustive list. Moreover, we note that although in certain cases, the government has made explicit threats, it need not do so—indeed, in an era of presidential interference in private markets, asset managers will understand that their business model depends on keeping the government (and particularly the president) happy. We return to the implications of this dynamic in the next Part. But first, we describe the rise and fall of asset manager's interest in ESG in response to government pressure.

b. The ESG Example

This Section describes how asset managers responded to political pressure by redirecting their stewardship away from ESG activism. This example underscores the broader concern underlying our capture thesis: stewardship priorities may be shaped less by investor interests than by external pressure, including from politicians. The Section proceeds as follows: First, we describe the rise of asset-manager ESG activism and the forces that produced it. Second, we trace the subsequent green retreat amid political backlash and consider the lessons from ESG activism and the green retreat. Third, we argue that the risk of further episodes of asset-manager capture becomes significantly more acute as the executive branch consolidates power.

1. *Asset Managers as ESG Boosters*

Whether asset managers have the incentive to be active and engaged participants in corporate governance is subject to debate. On the one hand, mutual fund portfolio managers are compensated on the basis of relative performance net of fees, leading to a profound collective action problem—

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[180] *See The Ins and Outs of the New Trump Kids Accounts*, CHARLES SCHWAB (Mar. 6, 2026), https://www.schwab.com/learn/story/ins-and-outs-new-trump-kids-accounts ("As part of the One Big Beautiful Bill Act passed in July 2025, new Trump accounts give eligible American children born between January 1, 2025, and December 31, 2028, a one-time deposit of $1,000 from the U.S.").

[181] *See id.* (detailing that the accounts are "expected to be available after July 4, 2026").

[182] STATE STREET, Trump Accounts: What you need to know (Dec. 2025), https://www.statestreet.com/ie/en/insights/trump-accounts.

why invest in stewardship if it benefits rivals and increases the fund's costs?[183] The incentive to free ride is particularly pronounced for index funds, which offer investors the ability to track a market index as cheaply as possible.[184] Unlike active funds, index fund portfolio managers don't generate firm-specific information as a byproduct of trading. Moreover, index fund investors are particularly cost sensitive, further dampening any incentive to spend resources in market research.[185] Nonetheless, large asset managers may benefit from economies of scale and scope in governance, and their large stakes may provide some financial incentive to invest in high-stakes votes.[186]

For years, market participants and scholars have criticized the largest asset managers for their passive approach to governance, mirroring their investing strategy.[187] One of us argued that large asset managers' weak incentives to participate in governance warranted a regulatory prohibition on their voting.[188]

Starting in the late 2010s, however, asset managers started using their governance power to push companies to address climate change risk and other social goals. Beginning in 2018, BlackRock CEO Larry Fink penned letters announcing the asset manager's focus on greenhouse gas emissions and asking corporations to serve a social purpose.[189] These letters used lofty language but were careful to maintain that the goals were consistent with shareholder value maximization over the long term.[190] And each of the Big Three backed up their stated priorities with voting, for example, by supporting some green shareholder proposals.[191] As a result, such proposals passed in record numbers and

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183 Gilson & Gordon, *supra* note 24, at 890 (describing the collective action problem faced by mutual funds in particular); Lund, The *Case Against Passive Shareholder Voting*, *supra* note 27, at 495 ("[P]assive funds face an acute collective action problem because investments in governance equally benefit all funds tracking the index, while only the activist fund bears the costs.").

184 *See* Gilson & Gordon, *supra* note 24, at 892 (explaining that "[t]he gains will be enjoyed by all other index investors, except that the activist fund will have incurred costs that lower its net relative performance").

185 Lund, The *Case Against Passive Shareholder Voting*, *supra* note 27, at 495 ("[Investments in governance] would undo the cost savings that attracted investors to the passive fund in the first place.").

186 Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019); Marcel Kahan & Edward B. Rock, *Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1776 (2020) ("We show that the Big Three's incentives in the small number of high profile contests, which tend to have the greatest impact on share value, are more than adequate to encourage them to devote substantial resources to deciding between competing positions.").

187 Lund, The *Case Against Passive Shareholder Voting*, *supra* note 27, at 49 (explaining that the Big Three have typically "take[n] a passive approach to governance"); Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance, supra* note 1, at 2039 (criticizing the Big Three for the failure to incorporate firm-specific information into their decisions); Jan van Eck, *How to Save Corporate Governance from Passive Investing*, WALL ST. J. (Dec. 10, 2025), https://www.wsj.com/opinion/how-to-save-corporate-governance-from-passive-investing-22ff588b (criticizing passive investing by VanEck, a market participant).

188 Lund, The *Case Against Passive Shareholder Voting*, *supra* note 27, at 525 ("Without regulatory action, therefore, it is possible that millions of investors would experience social welfare losses for many years. For these reasons, lawmakers would be wise to consider taking action to reduce the influence of passive funds in governance.").

189 *See* Larry Fink, A Sense of Purpose (2018),https://aips.online/wp-content/uploads/2018/04/Larry-Fink-letter-to-CEOs-2018-BlackRock.pdf.

190 *See id.* ("Without a sense of purpose . . . [companies] 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.").

191 *See* José Azar et al., *The Big Three and Corporate Carbon Emissions Around the World*, 142 J. FIN. ECON. 674 (2021); Breanne Dougherty, Victoria Gaytan & Hilary Novik-Sandberg, *BlackRock's 2022 Engagement Priorities*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 28, 2022), https://corpgov.law.harvard.edu/2022/03/28/blackrocks-2022-engagement-priorities (describing Blackrock's expectation that companies comply with climate disclosure standards).

companies faced investor pressure to enhance their disclosure efforts accordingly.[192] And there is evidence that these efforts had an impact—a subsequent study revealed a strong negative association between Big Three ownership and later carbon emissions.[193]

What was the cause of the Big Three's newfound interest in climate-related governance? Scholars advanced several competing arguments. Some argued that broadly diversified asset managers rationally sought to mitigate intra-firm externalities[194] and systemic risk;[195] in other words, the Big Three's climate and social activism was undertaken in the service of promoting the interests of their underlying investors. Other scholars focused on client tastes and demands, arguing that certain subsets of the Big Three's client base—millennial retail investors or large institutional clients—had vocally demanded such conduct.[196] Finally, and most relevant for this Article, scholars argued that the Big Three's social and environmental stewardship was driven by their desire to satisfy politicians.[197] In particular, Jeff Schwartz noted that the uptick in support for climate-related shareholder proposals corresponded with the election of President Biden and the corresponding focus by the SEC on climate disclosure.[198]

The full answer is likely a combination of the above. In earlier work, one of us advanced the thesis that profit-maximizing asset managers will adopt stewardship policies that take into account the preferences of their clients, subject to a separate constraint of avoiding government backlash.[199] In other words, because an asset manager's profits depend on attracting clients, the asset manager's most vocal clients may influence stewardship policies, unless those policies risk bringing about government disapproval.[200] The ESG example may be a proof of concept—before 2018, the Big Three were essentially blank canvases with regard to stewardship. But when their clients began clamoring for ESG action (that was initially aligned with the views of some politicians), ESG efforts took focus in their engagement and voting.

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192 Lund, *Asset Managers as Regulators*, *supra* note 7, at 116 ("One empirical study found that the Big Three generally target the highest emitting companies in their portfolio for engagements, and there is a strong negative association between Big Three ownership and subsequent carbon emissions.").

193 *See* Azar et al., *supra* note 191, at 675 (finding a "negative relation between Big Three ownership and carbon emissions"); *see also* Lund, *Asset Managers as Regulators*, *supra* note 7, at 116 (citing the Azar study).

194 Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020). For a critique, *see* Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 J. CORP. L. 497, 505–08 (2023); Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511 (2023).

195 *See* Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627, 629 (2022) ("Systematic stewardship grounds engagement to reduce climate change risk in the economics of investor welfare. Such engagement aims to lower systematic risk and thus improve risk-adjusted returns for portfolio investors."); Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 UC DAVIS L. REV. 875 (2022).

196 Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020); Lund, *Asset Managers as Regulators*, *supra* note 7, at 119 ("The more likely explanation for policies mandating ESG disclosure and targeting high carbon emitters is that these policies maximize support from the Big Three's clients.").

197 *See* Schwartz, *supra* note 7, at 399 ("[L]arge asset managers view voting as a way to reduce the political heat.").

198 *Id.* ("This shift lines up with the change from the Trump administration, which was hostile to institutional-investor involvement in environmental issues, to the Biden administration, which has pressed for it.").

199 Lund, *Asset Managers as Regulators*, *supra* note 7, at 95 ("I describe the incentives that shape this regulatory activity, theorizing that the Big Three seek to maximize a weighted utility function that takes into account the preferences of their clients, subject to a separate constraint of avoiding governmental backlash.").

200 *Id.* at 96–105 (theorizing that asset managers "will seek to adopt policies that secure broad support from clients (and institutional clients in particular), as well as the institution's own regulators").

2. *Retreat*

By 2022, the ESG environment had become politically fraught and red state officials began targeting asset managers for their pro-ESG policies.[201] In August 2022, for instance, nineteen attorneys general sent a letter to BlackRock accusing the company of prioritizing "activism over its fiduciary duty to their state pension funds."[202] Around this same time, "anti-ESG legislation" began cropping up across the U.S. that limited ESG consideration by state and local pension funds, prohibited government from utilizing asset managers that boycott oil and gas companies, and restricted certain financial sector companies from utilizing ESG criteria in the provision of services.[203] In addition, red states began directing their comptrollers to pull pension assets from the Big Three in light of their favorable stance toward ESG policies.[204]

By November 2024, President Trump had won a second election. This development dramatically increased the anti-ESG pressure on the Big Three. For example, as discussed below, after President Trump's second election, the federal government supported the lawsuit filed by state attorneys general alleging that BlackRock, State Street, and Vanguard violated antitrust laws through climate activism that increased energy prices.[205]

In 2025, President Trump issued an executive order directing the attorney general to ensure that state laws supporting ESG not be enforced,[206] and Senator Cruz adopted a bill proposing that asset managers investing federal employee funds be prohibited from exercising their voting rights.[207] In February 2025, the SEC began targeting shareholder proposals and providing companies with greater tools to exclude ESG proposals.[208]

Predictably, this vocal pushback led to a steep shift in Big Three priorities. By 2024, State Street exited and BlackRock severely limited its involvement in Climate Action 100+, an investor coalition aimed at pushing companies to mitigate greenhouse gas emissions.[209] By 2025, Vanguard and BlackRock had withdrawn from the Net Zero Asset Managers alliance and the organization

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201 Chris Flood, *Under-fire US Fund Manager Pulls Controversial Sponsorship of Climate Sceptics*, FIN. TIMES (Sept. 20 2022), https://www.ft.com/content/b4d1c0c5-b9e0-4df2-b7e0-c0f9f460fe7b.

202 *See* Letter by Attorneys General to BlackRock, (Aug. 4, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf.

203 Loyti Cheng & David Zilberberg, *US Legal Developments Targeting ESG: Implications for the Financial Industry,* FINANCIER WORLDWIDE (Sept. 2025), https://www.financierworldwide.com/us-legal-developments-targeting-esg-implications-for-the-financial-industry#:~:text=States%20have.

204 *See* Lamar Johnson, *State Finance Officials Press US Asset Managers to Denounce ESG, Climate*, ESG DIVE (Aug. 4, 2025), https://www.esgdive.com/news/state-gop-finance-officials-press-us-asset-managers-denounce-esg-climate-blackrock-vanguard-jpmorgan/756716/ (describing recent moves by Republican state officials to "denounce climate and net-zero commitments"). For an analysis tying some of the forces driving these anti-ESG efforts to the potentially regressive effect of climate action, *see* Zohar Goshen, Assaf Hamdani & Alex Raskolnikov, *Poor ESG: Regressive Effects of Climate Stewardship*, 51 BYU L. REV. 1039 (2026).

205 *See infra* note 226.

206 *See* Cheng & Zilberberg, *supra* note 203.

207 *See* Mark Segal, *Ted Cruz Targets BlackRock, State Street with New Bill to Block ESG Voting in $1 Trillion Federal Retirement Plan*, ESGTODAY (Nov. 26, 2025), https://www.esgtoday.com/ted-cruz-targets-blackrock-state-street-with-new-bill-to-block-esg-voting-in-1-trillion-federal-retirement-plan/.

208 *See* Kevin M. LaCroix & Sarah M. Abrams, *Guest Post: Is the SEC Signaling the End of ESG Shareholder Proposals?*, THE D&O DIARY (Dec. 16, 2025), https://www.dandodiary.com/2025/12/articles/securities-regulation/guest-post-is-the-sec-signaling-the-end-of-esg-shareholder-proposals/.

209 *See* Simon Jessop & Ross Kerber, *JPMorgan, State Street Quit Climate Group, BlackRock Steps Back*, REUTERS (Feb. 15, 2024), https://www.reuters.com/sustainability/sustainable-finance-reporting/jpmorgan-fund-arm-quits-climate-action-100-investor-group-2024-02-15/.

subsequently suspended its activities.[210] Likewise, Big Three support for ESG shareholder proposals fell precipitously.[211] In other words, stewardship priorities that the largest asset managers had embraced as value maximizing were abandoned,[212] with ripple effects for the entire market.[213]

The Big Three's embrace of climate stewardship—and their subsequent retreat—illustrates a core feature of asset-manager capture: stewardship priorities can be shaped by political pressure and other external forces, not solely (or even primarily) by fiduciary duties. Even if climate engagement could be defended as long-term value maximizing, the speed and direction of the pivot is hard to explain without reference to external pressure and political threats. Once public officials began threatening the Big Three's business model, the firms rapidly backed away from the "lofty" stewardship positions they had recently championed. That response is unsurprising: these are profit-maximizing institutions, and the state has multiple levers (as described in the prior Section) to impose concentrated costs on their core business.

Beyond the reality of politicized stewardship, the ESG retreat has important implications for democracy. It reveals that government influence need not operate through formal lawmaking: The government can effectively regulate asset manager conduct through credible threats and inducements, without passing legislation or completing notice-and-comment rulemaking. Compare these events to the Biden administration's push for ESG consideration and even the prior Trump administration's position against it. In his first term, President Trump's DOL issued *rules* that forbid ERISA fiduciaries from considering ESG issues when selecting pension plan investments.[214] The DOL under President Biden rolled those rules back; in addition, the Biden-era SEC adopted sustainability reporting rules and created an environmental task force focused on ESG issues.[215] However, in an era of expanded executive power, the president need not rely on these same channels to influence asset manager conduct. We develop these observations in detail in the next Section.

Finally, these events reveal an additional uncomfortable reality: that asset managers can be harnessed as regulators of economic activity. The priorities set by these large "universal owner" asset managers can move the market, as they did here. As such, they are prime targets for a powerful president, as the next Section describes in detail.

c. Presidential Power: A New Era of Asset Manager Capture

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[210] *See* Lamar Johnson, *BlackRock Leaves NZAM as Wall Street Runs from Climate Groups*, ESG DIVE (Jan. 10, 2025), https://www.esgdive.com/news/blackrock-leaves-nzam-wall-street-runs-from-climate-groups-nzba-ca100/737064/.

[211] *See Big Three US Money Managers Cut ESG Support*, INVESTMENTNEWS (Sept. 20, 2024), https://www.investmentnews.com/ria-news/big-three-us-money-managers-cut-esg-support/257321.

[212] This has led to blowback in other direction, and European sovereign wealth funds have pledged to pull assets from the Big Three as a result of their green retreat. *See, e.g.,* Mark Segal, *BlackRock Loses $5.9 Billion Mandate with Dutch Pension Fund over ESG Stance,* ESGTODAY (Dec. 16, 2025), https://www.esgtoday.com/blackrock-loses-5-9-billion-mandate-from-dutch-pension-fund-over-esg-stance/.

[213] Steven Mufson & Tom Hamburger, *Corporate America Retreats from Climate-Conscious Investing Amid Republican Attacks,* THE ATLANTIC (July 22, 2025), https://www.theatlantic.com/politics/archive/2025/07/leonard-leo-consumers-research-esg-climate/683581/ ("With banks pulling out of climate coalitions and shareholder activism in retreat, investment decisions are increasingly decoupled from climate risk. The result is a resurgence of fossil-fuel backing in the financial system, just as heat records shatter and extreme weather intensifies."); Ross Carney, *Boards Enjoy Increased Investor Support as Markets Deliver and DEI Pressure Fades,* HARV. L. SCH. F. ON. CORP. GOVERNANCE (Jan. 17, 2026), https://corpgov.law.harvard.edu/2026/01/17/boards-enjoy-increased-investor-support-as-markets-deliver-and-dei-pressure-fades/.

[214] *See* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,864 (Nov. 13, 2020).

[215] Schwartz, *supra* note 7, at 442.

We have thus far reviewed the various mechanisms through which the federal government can exert influence over the largest asset managers. In this Section, we argue that the risk of asset manager capture becomes significantly more acute as the president amasses greater power relative to both Congress and independent regulatory agencies.

The growth of asset managers has given them the power to influence corporate America; it has also led to political backlash. Moreover, the size and concentration of the largest asset managers have increased their dependence on favorable regulatory treatment, thereby making them susceptible to regulatory threats. However, the government's ability to translate threats or promises into concrete regulatory action is often constrained by institutional complexities and the checks and balances of a modern regulatory state. While our discussion in the previous Section did not distinguish between the different branches of government, certain regulatory interventions—such as breaking up the largest asset managers—require legislation. Others require action by independent regulatory agencies. Both processes make it difficult to adopt swift action to reward or punish asset managers, thereby making capture a more remote concern.

Consider threats or promises that require legislation.[216] Federal legislation is often a protracted and unpredictable process, requiring sustained political initiative and broad support in Congress.[217] Given the extent of partisan gridlock in modern times, even proposed legislation with broad popular support often fails to become enacted into law.[218] Asset managers, for their part, can deploy significant lobbying resources to resist, delay, or reshape proposed legislation.[219] The fate of the INDEX Act, which sought to curtail the voting power of the largest asset managers but failed to gain traction, exemplifies the challenges and uncertainties inherent in legislative reform of asset manager stewardship. And even when legislative proposals become law, their final form may diverge substantially from the original intention of their sponsors. To be sure, proposed legislation may signal asset managers about the possibility of a political backlash. Yet, while asset managers may be mindful of the possibility that their actions could provoke adverse federal legislation, such threats tend to have limited practical impact.

Other forms of regulatory intervention require rulemaking, enforcement or other action by independent federal agencies, such as the FTC, the SEC, or the FERC. Issuing new rules, for example, is subject to notice-and-comment requirements and judicial review,[220] while enforcement actions may require a vote by commissioners.[221] Moreover, agencies that regulate financial markets are often independent in order to insulate their decision-making from pressure by the President.[222] In normal

[216] For a theory of the use of legislative threats to influence corporate conduct, *see* Guy Halfteck, *Legislative Threats*, 61 STAN. L. REV. 629 (2008).
[217] *See* Valerie Heitshusen, *Introduction to the Legislative Process in the U.S. Congress*, CONGRESS.GOV (Nov. 9, 2025), https://www.congress.gov/crs-product/R42843.
[218] *See, e.g.*, Grace Segers, *The Popular, Bipartisan Bills That Can't Get Passed*, YAHOO!NEWS (Mar. 22, 2024), https://www.yahoo.com/news/popular-bipartisan-bills-t-passed-100000079.html.
[219] *See* Schwartz, *Stewardship Theater*; Coates, *supra* note 2.
[220] *See* Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185 (1996); Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733 (2018).
[221] *See* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623 (2016).
[222] *See* Greg Rosalsky, *Trump Is Asserting Extraordinary Power Over Independent Agencies. Is the Fed Next?*, NPR (Mar. 4, 2025), https://www.npr.org/sections/planet-money/2025/03/04/g-s1-51515/trump-asserting-extraordinary-power-over-independent-agencies-is-the-fed-next ("One common feature of [independent agencies] is they have buffers against presidential control — like making it hard for presidents to fire their leaders; giving those leaders really long tenures, so

times, this independence presumably makes it more difficult for a President to deploy these agencies' rulemaking or enforcement powers for retaliation against asset managers.

This dynamic changes substantially, however, as presidential authority expands along the two dimensions described in Part II. As discussed, the current administration has accelerated this trend by seeking to make even independent agencies mere arms of the President and by relying on executive orders to implement economic policies. And as the President gains greater authority over agency leadership and priorities, these agencies become more likely to align their enforcement, rulemaking, and other regulatory actions with presidential objectives. With consolidated control over the institutions that shape the business environment of asset managers, a President can more effectively steer their conduct—whether through explicit threats or the promise of regulatory benefits. As a result, the risks facing asset managers are no longer limited to distant and uncertain legislative developments. Instead, the President now possesses the ability to impose punitive or favorable measures rapidly in response to an asset manager's stewardship decisions.

Consider one ESG-related example. As we explained above, critics have long argued that common ownership by large asset managers can undermine competition.[223] For years, however, the FTC and the DOJ Antitrust Division did not act on this theory.[224] In November 2024, as part of the anti-ESG backlash, Texas and other Republican-led states filed a complaint in the Eastern District of Texas alleging that BlackRock, Vanguard, and State Street colluded to suppress coal production through coordinated ESG stewardship, in violation of Sections 1 and 7 of the Sherman and Clayton Acts.[225] Several months after President Trump took office, the DOJ and FTC filed a Statement of Interest supporting the states' theory, emphasizing that concerted efforts to reduce output are per se unlawful regardless of environmental justifications.[226]

The agencies' intervention illustrates how expanded Presidential power can increase the risk of capture. A determined president can have agencies like the FTC take action against large asset managers. A legal theory that had long remained largely dormant became a more immediate threat once it aligned with the administration's policy priorities. Interestingly, the Statement by the DOJ and FTC referenced President Trump's executive orders declaring a national energy emergency underscoring the importance of coal as a source of energy for artificial-intelligence development.[227] This episode therefore suggests how agencies subject to presidential influence can use enforcement

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new presidents don't necessarily appoint them when they take office; and allowing these agencies to make rules and regulations without a president's stamp of approval.").

223 *See supra* note 162.

224 *See* Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at Fordham University School of Law (May 1, 2019), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law.

225 Complaint, Texas v. BlackRock, Inc., No. 6:24-cv-00437-JDK (E.D. Tex. Nov. 27, 2024), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Order%20on%20MTD%20-%20Blackrock.pdf.

226 *FTC and DOJ File Statement of Interest in Energy Collusion Case Against BlackRock, State Street, and Vanguard*, FED. TRADE COMM'N (May 22, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-doj-file-statement-interest-energy-collusion-case-against-blackrock-state-street-vanguard. In August 2025, the District Court denied most of the defendants' motions to dismiss.

227 *See* Statement of Interest of the Fed. Trade Comm'n & the United States of America, Texas v. BlackRock, Inc., No. 6:24-cv-00437-JDK (E.D. Tex. May 22, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/StatementofInterest-TexasvBlackRock.pdf.

positions to signal their willingness to target asset managers when their stewardship campaigns conflict with the administration's agenda.[228]

To summarize, our analysis has described how the rising influence of asset managers and expansive presidential power intersect, creating the temptation for targeting by government and the risk that asset managers will proactively change stewardship practices in anticipation. Large asset managers now exert substantial raw power over public corporations through their ownership and corresponding governance rights. At the same time, their scale makes them highly dependent on favorable regulatory treatment. A powerful executive, able to bypass Congress and exert influence across multiple regulatory agencies, can therefore act swiftly either to reward or to punish asset managers. This combination gives the government considerable leverage over institutions whose business models depend on favorable regulatory treatment.

d. The Limits of Capture

We have described how the government—and particularly a powerful president—can leverage the vast influence of the largest asset managers to advance its policy objectives. In the most extreme scenario, the concentration of economic power in the hands of a few asset managers furnishes a determined administration with a potent mechanism for shaping corporate behavior.

In this Section, we further assess the market-based and structural constraints that might limit the government's ability to use asset managers as policy instruments. As we explain, these constraints temper—but do not eliminate—the risk of capture, particularly when a powerful president can exert pressure on asset managers and public companies simultaneously.

1. The Limited Lessons from the ESG Retreat

To date, the U.S. government has effectively compelled the largest asset managers to adopt a more passive stance on climate policy and ESG more broadly,[229] leading them to roll back prior sustainability-related stewardship policies. One may argue, however, that this example is unrepresentative because it amounts to "negative" influence—or pressuring asset managers to stop certain stewardship activities. Under this view, negative influence is easier for the government to achieve compared to "affirmative" influence—pressuring asset managers to push public companies to pursue specific policies.[230]

But the distinction between negative and affirmative influence is far from clear. The Big Three's earlier embrace of ESG activism appeared to be dictated by a combination of client pressure and a favorable political environment;[231] indeed, several commentators have argued that political pressure by Democrats was its driving force.[232] If so, the rise of ESG stewardship reflected a form of affirmative government influence.

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[228] *See* Matt Toledo, *DOJ, FTC Side Against Largest Asset Managers in ESG-Related Coal Suit,* CIO (May 23, 2025), https://www.ai-cio.com/news/doj-ftc-side-against-largest-asset-managers-in-esg-related-coal-suit/.
[229] As we explained above, the green retreat started after state-level anti-ESG campaigns.
[230] A related argument is that the anti-ESG campaign aligned with the administration's broader agenda of limiting activism by shareholders. Under this view, pushing asset managers to change corporate behavior would also require the administration to promote policies that make managers more accountable to shareholders.
[231] *See supra* notes 194–200 and accompanying text.
[232] *See, e.g.*, Schwartz, *supra* note 7, at 429 (detailing Democratic lawmakers' pressuring BlackRock on "climate-related issues").

And in theory, such affirmative influence could continue. Suppose, for example, that a future administration sought to raise wages across corporate America. Rather than (or in addition to) pursuing legislation or agency rulemaking, it could pressure the Big Three—through threats of regulatory action or promises of regulatory relief—to use their stewardship influence to push portfolio companies in that direction. For example, large asset managers could adopt guidelines that incorporate companies' 'living wage' policies into their vote on electing directors. The pressure on asset managers need not be explicit; it could be conveyed through informal, behind-the-scenes signals. And given the recent trajectory of political intervention in private markets, this possibility is no longer far-fetched.

A related constraint on asset manager capture stems from their business model. As corporate governance scholars have pointed out, large asset managers lack the incentive to initiate activist campaigns on the basis of firm-specific information;[233] instead, asset managers depend on activist hedge funds to catalyze firm-specific interventions.[234] Activist hedge funds, however, will not initiate campaigns that sacrifice profits.[235] As a result, political pressure is unlikely to push asset managers to push for firm-specific interventions.[236]

However, there is plenty of influence that asset managers can exert without firm-specific information. In fact, "regulation" by asset managers has typically proceeded based on market-wide policies imposed across firms in different industries.[237] As such, asset managers could easily advocate for systemic governance and other measures that would align with the government's agenda. For example, asset managers could adopt guidelines that would encourage boards to reshore production or increase their investment within the U.S. Notably, profit-maximizing activist funds would struggle to counter this pressure (even if it was expected to reduce company value), as they often require the backing of large asset managers to succeed.[238]

Moreover, the line between using stewardship to advance the government's policies and profit-maximization may become murky when the government also applies pressure on companies themselves. The risk of asset manager capture further intensifies when the administration's economic agenda focuses on pursuing policies that seek to intervene in markets through a mix of formal and informal measures described above. Therefore, asset manager pressure may serve to supplement direct government pressure on companies to conform with the government's policies.[239] There are reports

[233] *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 892 (2013) (explaining that "benefit-cost calculation typically will point to de minimis governance expenditures by the diversified intermediary institutions") [hereinafter Gilson & Gordon, *Agency Capitalism*]; Lund, The *Case Against Passive Shareholder Voting*, *supra* note 27, at 495 (noting that passive investors lack adequate incentives to become informed shareholders); Bebchuk & Hirst, *Index Funds and the Future of Corporate Governance*, *supra* note 1, at 2039(criticizing the Big Three for the failure to incorporate firm-specific information into their decisions).
[234] *See* Christie, *supra* note 195, at 912 (describing how activist hedge funds "fill[ed] the monitoring shortfall left by institutional investors" by being "specialists in initiating firm-specific activist campaigns at companies where institutional investors were rationally reticent").
[235] *See* Zohar Goshen & Assaf Hamdani, *Will Systematic Stewardship Save the Planet*?, 70 Vill. L. Rev. 467 (2025)
[236] *See also* Giovanni Strampelli, *Can BlackRock Save the Planet? The Institutional Investors' Role in Stakeholder Capitalism.* 12 HARV. BUS. L. REV. ONLINE 1, 14-15 (2021) (noting that asset managers lack the resources for firm-specific analysis required for promoting virtuous corporate conduct); Amanda Rose, *A Hard Look at Portfolio-Focused Stewardship*, [2024] COLUM. BUS. L. REV. 313 (2024) (arguing that climate disclosure will fail to induce climate stewardship by universal owners that lack incentives and competence to engage in firm-specific engagement).
[237] Lund, *Asset Managers as Regulators*, *supra* note 7.
[238] *See* Goshen & Hamdani, *supra* note 235.
[239] Veronique de Rugy, *Trump Is Embracing "Daddy State" Economics,* REASON (Sept. 18, 2025, 3:32 PM), https://reason.com/2025/09/18/trump-is-embracing-daddy-state-economics/.

that CEOs already view the U.S. government as one of the participants in corporate governance[240] and believe that they need to foster good relationships with the administration.[241] This interaction blurs the line between asset manager stewardship that is motivated by efficient operations and production and the need to maximize the value of firms that are subject to government pressure.[242]

And yet one could argue that the ESG retreat is not a helpful example because ESG stewardship is particularly controversial and not necessarily aligned with financial returns.[243] But if this is the case, it raises a broader question—why did the asset managers pursue controversial and not necessarily value maximizing stewardship in the first place? Indeed, the greater one's confidence in the assumption that the ESG focus was misguided, the more likely that a similar episode could occur again. Which raises a deeper question: to what extent can market forces be expected to limit the government's ability to shape asset-manager stewardship? We address this question in the next subsection.

2. *Market-based Constraints*

Asset managers are profit-maximizing institutions subject to a variety of competing considerations: their need to attract clients, the value of their portfolio, their varying sources of fee revenue, and of course, their need to avoid harmful government regulation.[244] In theory, therefore, asset managers may resist government pressure to adopt policies that would depress the value of companies in their portfolio or that would alienate broad swathes of clients.[245] Yet, we believe that, by themselves, these incentives are unlikely to be an effective constraint on government capture.

Stewardship affects asset managers through two channels. First, because management fees are calculated as a percentage of assets under management, increasing the value of the portfolio also increases fee income. Second, portfolio under-performance may lead clients to choose other fund managers. These channels, however, are likely to have an indirect and limited effect on the largest asset managers: fees represent only a tiny fraction of assets under management, and asset managers specializing in passive funds do not compete on the basis of portfolio performance; instead, they promise to track an underlying market index.

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240 *See* Emily Stewart, *The New American Capitalism*, BUS. INSIDER (Jan. 5, 2026), https://www.businessinsider.com/new-era-america-capitalism-socialist-trump-economy-2026-1.

241 *See* SMGN Publishing, *Trump's Corporate Power Shift*, SMGN (Aug. 14, 2025), https://smgn.org/trump-corporate-control-policies/ (noting that the administration often demands "financial concessions or operational adjustments from businesses seeking favorable regulatory conditions"); Greg Ip, *CEOs Are Learning to Live with Trump's Turn to State Capitalism*, WALL ST. J. (Dec. 15, 2025), https://www.wsj.com/politics/policy/ceos-trump-state-capitalism-f7111bf3.

242 *See* Jill E. Fisch & Jeff Schwartz, *How Did Corporations Get Stuck in Politics and Can They Escape?*, 3 U. CHI. BUS. L. REV. 325 (2024); Ann Toniolo, *Corporate Participation in Social Debates*, 3 U. CHI. BUS. L. REV. 361 (2024); Emily Stewart, *The New American Capitalism: Trump Is Having the Government Buy Stakes Directly in Companies—and It's Going to Change the Way We All Do Business and Reshape the Economy*, BUS. INSIDER (Jan. 5, 2026, 9:11 AM GMT), https://www.businessinsider.com/new-era-america-capitalism-socialist-trump-economy-2026-1.

243 On the tension between climate stewardship and financial returns, *see* Goshen & Hamdani, *supra* note 235. Note that asset managers insist that their ESG stewardship aligns with value maximization. *See, e.g.,* Paul Brest, Ronald J. Gilson & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value*, 44 J. CORP. L. 205, 208 (2018) (explaining that the literature published by asset managers "manifests considerable optimism" that they can create social value without sacrificing financial returns).

244 *See* Jonathan Lewellen & Katharina Lewellen, *Institutional Investors and Corporate Governance: The Incentive to Be Engaged*, 77 J. FIN. 213 (2021); Kahan & Rock, *supra* note 186.

245 *See also* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2566–67 (2021) ("[A] vast array of institutional players—proxy advisors, stock exchanges, ratings agencies, institutional investors, and associations—enshrine shareholder primacy in public markets.").

The government, in contrast, can levy threats or promises that *directly* target asset managers' bottom line. For any single asset manager specializing in passive funds, a strategy of resisting government pressure with the hope that increasing fund performance would attract clients is not sensible—the fund manager risks government retribution while sharing the benefits of improved corporate performance with competing funds.[246]

Instead, the more plausible constraint is reputational and commercial: large asset managers are unlikely to adopt overtly political stewardship positions that alienate a broad swath of their investor base and, in turn, threaten AUM and fee revenue. Even that constraint, however, is best understood as an outer bound. Most stewardship choices will not trigger meaningful exit because policies with political valence can often be plausibly framed as consistent with long-term value maximization, as the ESG episode illustrates. And even when stewardship is controversial, it may escape sustained investor discipline: the choice to select a particular fund is sticky, and rationally apathetic investors rarely monitor voting and engagement closely.[247] In addition, "negative" influence—quietly withholding support from activists or declining to challenge management—tends to be difficult to observe, and therefore difficult to penalize.

Other market-based constraints are unlikely to address the risk of asset manager capture. In theory, if investors fear asset manager capture, they might prefer smaller asset managers that are less prominent or less susceptible to government pressure. But the economies of scale characterizing the asset management industry means that such a move would be costly for clients.[248] Moreover, smaller institutions also have worse incentives to engage in stewardship given that their votes are not pivotal, nor will they accrue as much benefit to informed voting.[249] For these reasons, it is unlikely that the market will prefer smaller institutions even when large institutions are subject to capture risk.

3. *Diffusion Instead of Power*

One could also look at the ESG example and argue that it reveals that government pressure on asset managers will lead to the diffusion of their voice and power. Indeed, in the wake of the Big Three's ESG activity, the government has sought to restrict their participation in governance, rather than keep them as regulatory agents. The result of this pressure has been both a decreased willingness to intervene in corporate governance in an activist way, and also moves toward disintermediation. Thus far, disintermediation has occurred via two channels: first, the expansion of proxy voting choice programs that will pass the Big Three's governance rights to their underlying investors, and second, the dividing of stewardship groups across institutions.

Regarding the first, contemporaneous with political backlash, each of the Big Three has voluntarily implemented proxy voting choice programs. These programs provide underlying investors

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[246] *See supra* note **Error! Bookmark not defined.** and accompanying text.

[247] *See* Schwartz, *supra* note 7, at 445 ("Mutual fund investors are notoriously apathetic . . . ."); Christopher Bebbington, Robert B. Durand, Joye Khoo & Joyce Khuu, *The Implications & Determinants of an Investor's Initial Choice Within Retirement Savings Schemes* 3 (Nov. 2022) (unpublished manuscript), https://acfr.aut.ac.nz/__data/assets/pdf_file/0008/725642/C-Bebbington-UPDATE-690944-ImplicationsandDeterminants_Cbebbington.pdf ("It is well documented in the literature that the decisions people make regarding their investments within their retirement plans are "sticky", that is, people make few changes to their investment strategy over their lifetimes, they "stick" with their initial choice.").

[248] Lund, *Asset Managers as Regulators*, *supra* note 7, at 140 ("[T]he market for index funds is very concentrated, with over 80% of mutual fund inflows going to the Big Three. There are many causes of this concentration, including economies of scale and scope that allow the largest players to charge the lowest fees, but the fact remains that it would be very difficult for an entrant to break in and disturb the Big Three's lock on the market.").

[249] Kahan & Rock, *supra* note 186.

with greater say over stewardship by giving those that opt in the ability to select a voting guidelines policy developed by a third-party proxy advisor. And each of these asset managers seeks to expand the scope of the program to encompass most (if not all) of their equity index assets. If this occurs, the implementation of proxy voting choice could diffuse the power of the Big Three, making them less appealing targets for capture.

Such diffusion would thus reduce the risk of capture, but we doubt it would eliminate it. For one, investors who fail to opt in continue to have their shares voted pursuant to the asset manager's stewardship group, and thus far, very few investors have opted in. In 2025, less than 2% of eligible investors participated, meaning that the asset manager continued to control the remaining 98%.[250] For those investors that did opt in, the majority that selected the pro-management policies that were highly aligned with Vanguard's own voting. Without a dramatic change in the default selection or investor uptake and preferences, proxy voting choice will be unlikely to diffuse asset manager power.

There is a second reason why asset manager capture could continue in a world of proxy voting choice. Because the asset managers continue to act as gatekeepers over voting policy choices, they can influence the options available to investors. For example, asset managers could eliminate or make less attractive the ESG policy, and instead push investors toward anti-ESG policies. Indeed, something like this has already occurred, when BlackRock and Vanguard introduced "wealth-focused" anti-ESG policies in 2024.[251] Through this choice (and many other design elements), asset managers could continue to move the needle on stewardship priorities, even if proxy voting choice becomes increasingly impactful.

Regarding the second development, each of the Big Three has recently taken steps to divide its stewardship groups into two groups—one that focuses on equity index strategies, and one that focuses on active strategies.[252] Each group employs its own staff and creates its own policy guidelines, and thus can be viewed as an additional form of disintermediation. But although splitting stewardship groups may make government targeting more costly, it does not change the fact that the members of the stewardship group will understand that the implementation of a government policy that the government disapproves of can have negative implications for the institution. For this reason, the dividing of stewardship groups does not eliminate capture risk.

4. *Will the Government Need to Target Asset Managers?*

One may wonder why the government, which can target business directly, needs to rely on asset managers. After all, asset managers have large but not controlling stakes in many public companies; moreover, the extent of their ownership is limited to the public market.[253] A far more direct way to accomplish the government's regulatory goals would be to target businesses themselves and not add the additional step of targeting intermediaries.

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[250] Alon Brav, Tao Li, Dorothy S. Lund, & Zikui Pan, *The Proxy Voting Choice Revolution* (ECGI Law Working Paper No. 875/2025, May 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5500098.

[251] *Id.*

[252] David Sotiroff, *Vanguard Restructures to Better Handle Its Growth,* MORNINGSTAR (June 18, 2025), https://www.morningstar.com/funds/vanguard-restructures-better-handle-its-growth; David A. Katz, Elina Tetelbaum & Loren Braswell, *The "Big Three" Shift Approach to Stewardship*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 27, 2025), https://corpgov.law.harvard.edu/2025/08/27/the-big-three-shift-approach-to-stewardship/.

[253] Lund, *Asset Managers as Regulators*, *supra* note 7, at 80–81 ("[T]he Big Three now hold large (and in the not-so-distant future, controlling) stakes across the public market . . . .").

While we agree that the government can and does target business directly,[254] the government can secure a far more reaching scope of influence by directing asset managers. The largest asset managers exhibit significant degree of market concentration, allowing the government to secure economies of scale in regulation by targeting a small number of dominant institutions.[255] As the events of the ESG movement revealed, a change in asset manager voting policies led to dramatic changes in the scope of voluntary emissions disclosure as well as an increase in board diversity.[256]

Moreover, the paths of influence are not mutually exclusive; instead, they can complement one another. Indeed, if the threat of business-specific targeting is great enough, it can justify the imposition of a stewardship response from asset managers as a matter of their fiduciary duty. For these reasons, we expect that the government will seek to harness large asset manager influence into the future.

IV. IMPLICATIONS

Given that the risk of government capture of asset managers is here to stay, we now turn to evaluating this dynamic. In Section A, we discuss whether asset manager capture should be welcomed as an effective way to advance government policies and conclude that any benefits are outweighed by costs. Section B considers regulatory and market measures that could mitigate the risk of government capture. Sections C and D turn to broader implications, including lessons for the globalization of financial markets and the political economy of financial markets.

a. Evaluating Asset Manager Capture

We have shown that a powerful executive can pressure asset managers to use their influence over companies to advance the administration's agenda. But is asset manager capture a cause for concern? After all, what is wrong with a democratically elected president using its regulatory powers to advance the administration's agenda, particularly in an era of partisan gridlock that impedes even initiatives with strong public support?

We do not take a stand in the ongoing debate about the desirable scope of presidential power, especially over independent agencies regulating the financial sector.[257] We also abstract from the specific policies advocated by the current (or any future) administration. Clearly, those who disagree with the economic agenda of an administration will disagree with providing the administration with more power to pursue its policies. Instead, we focus on the specific concerns arising from using asset manager capture as a policy tool. We identify several related concerns.

The first concern is the misalignment of interests between savers and fund managers. Asset managers invest other people's money.[258] Their fiduciary duties require that their stewardship and

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[254] *See supra* notes 214–215 and accompanying text.
[255] *See* Steel, *supra* note 14, at 7 (arguing that economic concentration may facilitate systematic corruption by making it easier for politicians to secure political loyalty).
[256] *See* Lund, *Asset Managers as Regulators*, *supra* note 7, at 81 ("[T]he Big Three have launched policymaking initiatives in two areas of great social importance: improving board gender diversity and reducing climate risk.").
[257] *See, e.g.*, Graham Steele, *Agency Independence and the Federal Reserve's Regulatory Functions*, YALE J. ON REG. (2025), https://www.yalejreg.com/nc/agency-independence-and-the-federal-reserves-regulatory-functions-by-graham-steele/.
[258] *See* Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89 (2017).

engagement be guided only by the best interests of their clients. The persistent concern, however, is that fund sponsors will leverage their power and influence to advance their own interests.[259]

Our analysis identifies a new source of conflicts between savers and fund managers. The size and voting power of the largest fund complexes grants their sponsors substantial power to influence their portfolio companies. This power could make them an attractive target for government capture. As discussed above, government influence is most potent when its threats and promises directly target asset managers' sources of income and bottom line. Further, note that asset managers need not wait for formal prodding from the administration—they will be keenly aware that favorable regulatory treatment depends on aligning their stewardship with government priorities. And when stewardship decisions are driven by government pressure (and asset managers' concern for their own profits) rather than client interests, asset managers prioritize their own business interests at the expense of their clients, potentially breaching their fiduciary duties in the process.[260]

A related concern is that client savings—including retirement savings—may be leveraged to advance the government's political agenda rather than clients' interests. Beyond the potential financial harm to savers, asset manager capture risks undermining confidence in the integrity of the private pension system. As we explain in the next Section, diminished confidence in U.S. managers' independence could, in turn, also weaken their international competitiveness.

Finally, asset manager capture can distort government regulatory policies. In other words, instead of basing regulatory action on merit, the administration might use it as a bargaining chip to induce asset managers to change their conduct.[261] Consider, for example, an administration that removes some regulatory barriers to the growth of asset managers not because this deregulatory step is justified, but because it can motivate asset managers to align their stewardship with the administration's agenda. Therefore, asset manager capture can distort government action and priorities; it also undermines governmental transparency.

Moreover, the ability to secure regulatory goals via asset manager capture reduces the government's incentives to enact laws or even executive orders pursuant to more formal channels. Consider, for example, a presidential administration that wishes to adopt a higher federal minimum wage than $7.25 currently prescribed by the Fair Labor Standards Act.[262] Under the Constitution's separation of powers, the President would need to secure this victory by entreating Congress to act via an amendment of the statute. Targeting asset managers and pushing them to demand higher wages from portfolio companies may achieve a similar outcome much more quickly. And although this policy change could be easily reversed by the next administration, the ability to enact it is surely appealing, particularly given the extent of ossification and partisanship facing the modern legislative state. In other words, the prospect of asset manager capture creates bad incentives not just for asset managers, but also for the government that will be tempted to eschew policymaking by democratically elected legislators and subject to judicial review.[263]

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[259] *See* Fisch, Hamdani & Solomon, *The New Titans of Wall Street*, *supra* note 186.

[260] Asset managers that prioritize their own interests over those of their clients may breach their fiduciary duties to their clients. *See supra* note 202 and accompanying text. But as discussed in Part III, bowing to an administration's pressure may be consistent with wealth-maximization if companies are also being targeted, which complicates the fiduciary duty analysis.

[261] *See* Steel, *supra* note 14 (describing how in a world of systematic corruption, "politicians have worse incentives to provide high-quality public policy").

[262] 29 U.S.C. § 206 (setting the minimum wage at $7.25 an hour).

[263] A similar logic may apply to implementing policies by going through the formal process of agency rule-making.

To be clear, we do not argue that all forms of state interference with fund manager investment and stewardship are problematic. Rather, our analysis focuses on the shortcomings of using asset manager capture as a strategy to achieve policy objectives. Of course, Congress could enact legislation and administrative agencies could issue rules that direct asset managers to act in ways that may not maximize financial returns for savers.[264] This result would also create a tension between the financial interests of savers and the administration's economic agenda, but it would be transparent, enacted pursuant to a democratic process, and subject to public debate and judicial review. The alternative, where the government bypasses these policies to enact industrial policy via asset managers, raises not just concerns about investor welfare, but also about transparency and rule-making by undemocratic processes.

b. Insulating Stewardship and Engagement from Political Interference

Having described the risks to investors and public administration of asset manager capture, as well as our belief that market mechanisms will not constrain it, we now discuss what can be done. In this Section, we evaluate possible legal strategies to mitigate the risk of government capture of asset managers. We do not address efforts to cabin presidential power, which are beyond the scope of our Article, and instead focus our attention on asset managers and their regulatory environment.

i. Fiduciary Duties

Asset managers owe fiduciary duties to their clients.[265] The rise of the ESG movement has rekindled the debate whether these fiduciary duties permit—or even require—investment managers to integrate climate and other ESG factors into their investment and stewardship policies even when these factors do not directly impact risk-adjusted returns.[266] Some scholars have argued that ESG investing is valid under fiduciary law only if it is reasonably assessed by the trustee to improve risk-adjusted returns.[267] Under this view, pension trustees, for example, should "neither engage in ESG investment practices nor allocate capital to asset management firms who engage in such practice."[268] In contrast, other commentators have argued that the duty to act in clients' best interests allows fund managers to consider a wider range of considerations that could affect member interests,[269] or that asset managers are *required* to integrate ESG considerations into their investment and stewardship decisions.[270]

264 For example, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) amends ERISA to provide a safe harbor to fiduciaries who divest plan assets from certain Iran-related investments. *See* Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, § 203, 124 Stat. 1312, 1377–79 (codified as amended at 22 U.S.C. § 8533 (2012)).

265 With respect to mutual funds, *see* Ann M. Lipton*, Family Loyalty: Mutual Fund Voting and Fiduciary Obligation,* 19 TENN. J. BUS. L. 175, 181 (2017). With respect to savings for retirement, *see* Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 14 (2023) (reviewing DOL guidance concerning voting obligations of plan fiduciaries under ERISA).

266 *See* Dana M. Muir, *Sustainable Investing and Fiduciary Obligations in Pension Funds: The Need for Sustainable Regulation*, 59 AM. BUS. L.J. 621 (2022).

267 Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience*, 72 STAN. L. REV. 381, 382 (2020).

268 *See* Matt Cole, *Fiduciary Duties of Public Pension Systems and Registered Investment Advisors*, HARV. L. SCH. F. ON CORP. GOVERNANCE. (Mar. 1, 2023), https://corpgov.law.harvard.edu/2023/03/01/fiduciary-duties-of-public-pension-systems-and-registered-investment-advisors/.

269 *See, e.g.,* Yifat Naftali Ben Zion, *Ethical Investments,* 57 CONN. L. REV. 945 (2025); David H. Webber, *The Use and Abuse of Labor's Capital*, 89 NYU L. REV. 2106, 2161-68 (2014).

270 UNEP FINANCE INITIATIVE & PRI, FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT (Oct. 2019).

The importance of the ongoing debate over the scope of investment managers' fiduciary duties is underscored by developments involving the U.S. Department of Labor's (DOL) guidance on the consideration of ESG factors in retirement plans. As discussed, in 2023, the DOL under President Biden issued interpretative guidance providing some room for integrating ESG factors into investment decisions.[271] Congress responded by passing a bill to nullify the new rule,[272] which President Biden vetoed.[273] Twenty-five states sued the DOL to enjoin the enforcement of this rule.[274]

Our analysis offers a *policy* rationale for favoring a narrower interpretation of asset managers' fiduciary duties as they relate to their stewardship obligations. A fiduciary duty that leaves fund managers with broad discretion may further strengthen the government's ability to capture stewardship. The more discretion asset managers have, the easier it becomes for a powerful administration to pressure them to advance its objectives even when doing so is inconsistent with the best interest of savers, broadly or narrowly defined.

As discussed above, stewardship decisions that reflect an asset manager's efforts to accommodate government pressure are generally inconsistent with the fiduciary duties owed to clients. The challenge, however, is that enforcing these duties becomes more difficult when fiduciary standards are defined broadly. The wider the range of considerations that asset managers may legitimately take into account, the easier it becomes for a powerful administration to push them toward advancing governmental preferences, even when doing so conflicts with the best interests of savers.

By contrast, a narrower interpretation of fiduciary obligations can serve as an important constraint because it is easier for clients and courts to assess whether stewardship decisions truly serve client interests.[275] Such a limited view of fiduciary duty will create a credible threat of litigation that would apply counter pressure that may dissuade asset managers from bending to government pressure.[276]

ii. Limiting Asset Manager Voice

As discussed, in response to asset manager ESG activism, the government has taken steps to chill asset managers from exercising stewardship rights over corporations such as changing the definition of "passive" investor for purposes of a 13F filing. While such measures reduce capture risk by making asset managers a less appealing target of government interference, they also weaken shareholder power and undermine investor protection. If shareholders fear that their conversations with management will subject them to onerous regulatory obligations, investors will be much less

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271 *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (Jan. 30, 2023,) 87 Fed. Reg. 73822 (to be codified at 29 C.F.R. 2550). This rule followed Biden's executive order instructing the DOL to reverse a rule issued by the DOL under President Trump. *See* Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 20, 2021); Financial Factors in Selecting Plan Investments (Nov. 13, 2020), 85 Fed. Reg. 72846, (to be codified at 29 C.F.R. pts. 2509, 2550)

272 *See* H.J. Res. 30, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-joint-resolution/30/text.

273 *See* Greg Iacurci, *Biden Used First Veto to Save a 401(k) Investment Rule. Here's What It Does*, CNBC (Mar. 21, 2023), https://www.cnbc.com/2023/03/21/biden-veto-401k-rule-esg-investment-funds.html.

274 *See* Leah Malone, Erica Rozow & George M. Gerstein, *Biden's First Veto: Understanding the Implications of the DOL's ESG Rule,* HARV. L. SCH. F. CORP. GOV. (Apr. 9, 2023), https://corpgov.law.harvard.edu/2023/04/06/bidens-first-veto-understanding-the-implications-of-the-dols-esg-rule/. For recent attempts to legislate in this area, *see* Lawrence Ukenye, *House Passes Bill to Limit ESG Factors in Retirement Investing*, POLITICO (Jan. 15, 2026), https://www.politico.com/live-updates/2026/01/15/congress/house-passes-anti-esg-retirement-bill-00730925.

275 *Cf.* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

276 Another strategy for addressing concerns about asset manager capture is reforms to the *government* sector. In this Article, however, we focus on implications for asset managers and corporate governance.

likely to serve as effective monitors by voicing concerns; moreover, they may avoid working with other investors who are pushing interventions. All in all, agency costs would increase, to the detriment of investors and the economy. Another possibility is that asset managers would continue to vote but reduce the incidence of their engagement with management; in this scenario, their voting may become even less informed.[277] By the same token, management, if unable to communicate with its largest shareholders, may struggle to predict the outcome of votes and voting contests. For these reasons, we think the downsides of restricting investor voice outweigh the benefits in the form of decreased capture risk.

As discussed, more drastic action has also been proposed, including mandating pass-through voting for large asset managers or breaking them up. As for the latter proposal, breaking up the Big Three would likely be costly for investors who currently benefit from economies of scale and scope in investing. And both solutions create the risk of a worsened corporate governance ecosystem given the many benefits that blockholders provide. The presence of blockholders reduces engagement costs for issuers and activist shareholders.[278] Moreover, a large block size provides greater financial incentives to invest in beneficial stewardship and allows for economies of scope and scale in corporate governance.[279] While diffusing the governance power of the Big Three would reduce the risk of capture, it could therefore harm investors in other ways. For these reasons, regulatory solutions that would diffuse the Big Three's voting block should be carefully considered, and private disintermediation efforts (such as expanded proxy voting choice programs) should be regulated with these concerns in mind.[280]

c. Geo-Politics and US Asset Managers

While our analysis has centered on the U.S. market, its implications extend well beyond American borders. Corporate governance and financial regulation are increasingly intertwined with geopolitics and economic nationalism.[281] Against this background, the growing risk of asset manager capture—driven by the expansion of Presidential power—may threaten the global dominance of the U.S.-based Big Three.

The largest U.S. asset managers are global institutions with a significant and growing presence in Europe and other international markets. Pension funds and other asset owners across Europe rely heavily on these firms to manage their assets both in the U.S. and globally.[282] BlackRock, for example, was the leading fund promoter in Europe in 2024.[283]

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[277] *See* Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1 (2023).
[278] Lund, *Proxy Voting Choice*, *supra* note 129, at 1093 ("The existence of market blockholders can make their job easier because the activist can focus on a small number of key investors to make their case, rather than trying to influence thousands of diffuse investors across the marketplace.").
[279] Kahan & Rock, *supra* note 186, at 1785–93 (describing the benefits of portfolio size "[i]n the context of voting and stewardship engagements").
[280] Lund, *Proxy Voting Choice*, *supra* note 129, at 1092–93 (discussing the risks associated with pass-through voting).
[281] Curtis J. Milhaupt, *Corporate Governance in an Era of Geoeconomics*, 25 J. CORP. L. STUD. 281 (2025).
[282] Harriet Agnew, *Asset Management: The Year That Was*, FIN. TIMES (Dec. 23, 2024), https://www.ft.com/content/e74df6e7-55d3-445c-8672-0bb743f20015 (noting that "Very large US groups are building an ever larger presence in the UK and Europe"); Harriet Agnew & Brooke Masters, *The Relentless Advance of American Asset Managers in Europe*, FT (Dec. 17, 2024), https://www.ft.com/content/bc1b6eaf-dd5f-4e63-b4dc-90a30e9bec58 (reporting the decision of British Airways, BAE, and Shell to rely on US asset managers to manage pension assets).
[283] Detlef Glow, *European Fund Industry Review – 2024*, at 14 (LSEG, Mar. 25, 2025), https://lseg-newsroom.prgloo.com/news/lseg-lipper-european-fund-industry-review-2024-and-janfeb-2025.

Several structural forces explain the continued expansion of U.S. asset managers abroad. The rising popularity of low-cost passive investment vehicles such as ETFs has allowed American firms to capitalize on economies of scale and maintain a fee advantage over domestic competition, reinforcing their dominance.[284] At the same time, European asset owners have increasingly allocated capital to U.S. financial markets, further deepening their reliance on U.S. managers.[285]

The premise underlying this dynamic is that, regardless of domicile, asset managers simply provide their clients with cost-effective portfolio management services. Under this premise, the clients of asset managers, including foreign pension funds and other asset owners, can choose (passive) asset managers based primarily on expected costs and quality of performance. Our analysis, however, suggests a more complicated reality. U.S. asset managers operate within the constraints of U.S. political and regulatory pressures. Given pressure by the U.S. government, and especially by a powerful President determined to advance its domestic economic agenda, the stewardship practices of the largest asset managers may be shaped by the priorities of the U.S. President: when facing government pressure, these firms may prioritize their own business interests—or respond to domestic political incentives—over the stewardship preferences of non-U.S. clients.

Our analysis suggests, therefore, that reliance on U.S. asset managers may also expose non-U.S. asset owners to the influence of U.S. domestic politics. Moreover, it suggests that the rise of presidential power in the U.S. and a greater willingness of the administration to use asset manager capture as a regulatory strategy may discourage foreign asset owners from using the services of U.S. asset managers. Consider, again, the green retreat. After non-U.S. asset owners discovered that the stewardship practices of their asset managers could be influenced by political and regulatory developments in the United States, many European asset owners responded by announcing that they would reallocate at least part of their mandates to non-U.S. managers.[286]

Moreover, the strategy of asset manager capture may trigger regulatory responses from other countries. The great retreat has led critics to call for EU-level regulation of U.S. asset managers.[287]

The long-term consequences of these developments are uncertain. Some may view this transatlantic gap as specific to ESG-related matters; others may view it as reflecting different views

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[284] Emma Dunkley & Harrier Clarfelt, *BlackRock and Vanguard lead US 'Super League' Dominating Europe,* FIN. TIMES (Aug. 12, 2025), https://www.ft.com/content/74b8a59b-d596-46fa-83fd-e3702d057581; Felix Wenger, Niklas Nolzen, and Nunzio Digiacomo, *The European Asset Management Industry: Navigating Volatile Times*, MCKINSEY & CO. (Jul. 9, 2025), https://www.mckinsey.com/industries/financial-services/our-insights/the-european-asset-management-industry-navigating-volatile-times ("[S]everal structural trends are shaping the European asset management industry. All have resulted in European players losing market share to their US peers over the past few years.").

[285] Dutch pension funds, for example, invest more in US companies than in European companies. *See Dutch Pension Funds Invest More in US Companies than in European Companies*, De Nederlandsche Bank (Mar. 11, 2025), https://www.dnb.nl/en/general-news/statistical-news/2025/dutch-pension-funds-invest-more-in-us-companies-than-in-european-companies/.

[286] *See* Lamar Johnson, *One of UK's Largest Pension Funds Picks Amundi, Invesco to Manage Bulk of Its Portfolio*, ESG DIVE (Feb. 28, 2025), https://www.esgdive.com/news/peoples-pensionpicks-amundi-invesco-to-manage-28-billion-state-street-esg/741284/; Simon Mundy, *US Asset Managers' Green Retreat Creates Opening for European Rivals*, FIN. TIMES (Mar. 26, 2025), https://www.ft.com/content/6aae8765-3250-4474-8838-c8217dc74a01; Zero Carbon Analytics, *Asset Managers Feeling the Heat on Climate from Pension Funds*, (Jan. 2026), https://zerocarbon-analytics.org/finance/asset-managers-feeling-the-heat-on-climate-from-pension-funds/; *BlackRock Loses €5 Billion Dutch Pension Mandate as Sustainable Investing Concerns Grow*, ESG NEWS (Dec. 16, 2025), https://esgnews.com/blackrock-loses-e5-billion-dutch-pension-mandate-as-sustainable-investing-concerns-grow/.

[287] Dirk Schoenmaker, *Risks for Europe of US Dominance of Global Asset Management*, Policy Brief 07/2026, BRUEGEL (Apr. 2026), https://doi.org/10.64153/CZVU6402.

about value vs. "values" based investing.[288] Whatever the cause, the possibility of asset manager capture may contribute to a growing movement toward the de-globalization of financial intermediation.[289] Geo-political developments, including the rise of economic nationalism, lead countries to question their reliance on U.S. providers of essential services. For example, policymakers in Europe seriously consider the need for "technological sovereignty": reducing the reliance on U.S. Big Tech for cloud, data, and software services.[290] The United States currently enjoys dominance over the global financial sector, but leveraging this dominance to advance its own economic policies can backfire.[291] In an era in which financial regulation is increasingly intertwined with geo-politics and economic nationalism, this strategy could contribute to the growing concern of other jurisdictions about financial sovereignty and the need to develop alternatives.[292]

d. Political Economy Lessons

Perhaps most significantly, our analysis offers new insights for conversations about the political economy of corporate governance and financial regulation. The conventional view is that as business entities grow larger and accumulate greater economic power, they may leverage this power to influence government policy, thereby posing a potential threat to democracy. This concern extends to powerful financial institutions and has been specifically raised by John Coates and others in the context of large asset managers.[293]

Our Article complicates the conventional narrative by showing that capture can move in two directions: yes, large asset managers can influence government, but the government can also influence large asset managers. In fact, the latter dynamic is particularly likely, not just because of the outsized influence of the President in modern times, but also because of historical skepticism of concentrated economic power. This observation builds on Mark Roe's seminal work attributing the prevalence of dispersed ownership in U.S. public companies to a deep-rooted political aversion to concentrated financial power.[294] According to Roe, this hostility produced a regulatory regime that had weakened institutional investors, thereby empowering corporate managers.[295] Today, a modern version of this dynamic is playing out, as large asset managers face scrutiny and backlash as a result of their size and potential governance power. We argue that this public distrust of concentrated financial power can, paradoxically, make it easier for the government to control large asset managers.

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288 *See* Fisch & Schwartz, *supra* note 265.
289 Proxy voting choice could ameliorate this effect by offering non-U.S. asset owners a reasonable compromise allowing them to enjoy lower management fees while retaining control over some elements of stewardship.
290 Barbara Moens, *EU Pushes for 'Tech Sovereignty' to Cut Reliance on US*, FIN. TIMES, May 27, 2026, https://www.ft.com/content/c05e152d-36e5-4446-a706-5f5fa5d98315.
291 *See* HENRY FARRELL & ABRAHAM NEWMAN, UNDERGROUND EMPIRE: HOW AMERICA WEAPONIZED THE WORLD ECONOMY (2023).
292 Maria Demertzis, *The EU's Financial Security in a Shifting Transatlantic Relationship*, EUROPEAN POLICY CENTRE (June 2, 2026), https://www.epc.eu/publication/the-eus-financial-security-in-a-shifting-transatlantic-relationship/; Patricia Cohen & Adam Satariano, *Europe Worries Trump Poses Threat to Its Financial and Tech Sovereignty* (Feb. 12, 2026), N.Y TIMES https://www.nytimes.com/2026/02/12/business/economy/trump-europe-sovereignty.html; Steven Everts, *Europe's Underestimated Weak Spot: Financial Dependence on the US*, ISS EUR. (Jan. 16, 2026) https://www.iss.europa.eu/publications/commentary/europes-underestimated-weak-spot-financial-dependence-us; Alessandra Martino et. al., *Why We Need an EU Perspective in the Supervision of Large Asset Managers*, ECB BLOG (Feb. 13, 2026), https://www.ecb.europa.eu/press/blog/date/2026/html/ecb.blog20260213~971ac2c623.en.html.
293 *See* Coates, *supra* note 2, and accompanying text.
294 ROE, *supra* note 20.
295 *Id.*

To be clear, we do not assert a causal relationship between the possibility of asset manager capture and the lack of effective government action to limit their size and influence. Yet, for an administration intent on shaping corporate behavior, the presence of powerful asset managers provides another channel through which to exert pressure on the private sector. Conversely, those who seek to insulate markets from political interference may support policies that limit their susceptibility to governmental cooptation.

V. CONCLUSION

The rise of giant asset managers is one of the most significant capital markets developments of the last fifty years. This Article identifies a novel reason for concern about their growth—the risk that large asset managers can become tools of government co-optation. This risk becomes more pronounced in the current era of expansive presidential authority and its focus on enacting policy change via private markets. This capture risk is not hypothetical, and we show how the Big Three's green retreat supports our theory. We further address the risks and concerns with this novel dynamic, and in particular, the problematic incentives that it creates for both asset managers and democratic actors, with the risk of investor and public harm. Expanded presidential authority not only enables administrations to bypass legislative and independent agency processes for regulating asset managers, but also allows the government to harness asset managers' quasi-regulatory power to promote its agenda. These dynamics have implications not only for U.S. corporate governance, but also for global investors who rely on American asset managers. They also pose a democratic concern: government actors may increasingly pursue policy through concentrated private intermediaries rather than through democratic channels. We also consider possible reforms, concluding that the risk of asset manager capture cautions in favor of a narrow interpretation of asset manager fiduciary duty.

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