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# Client Alert: Antitrust and ESG—How to Stay Ahead of the Game

**Publications**

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On May 15, 2023, 22 state attorneys general sent a letter to several insurance companies warning that the companies' Environmental, Social, and Governance (ESG) policies may violate the antitrust laws. Just six weeks earlier, on March 30, 2023, 21 state attorneys general sent a letter to 53 investment fund managers criticizing their ESG efforts. These letters are the latest in a string of attacks on ESG initiatives led by state attorneys general and federal lawmakers.

In addition to providing social and environmental benefits, ESG commitments can create opportunities for more efficient or innovative competition and ensure compliance with regulations. Those opposing ESG efforts, however, have raised concerns under the antitrust laws about collaboration between competitors that employ similar ESG criteria or benchmarks. This alert examines these issues, identifies potential risks, and provides guidance for companies seeking to balance their ESG commitments and obligations with antitrust laws.

ESG has been a priority among many industry leaders for more than a decade. Lately, these efforts have come under fire from a growing anti-ESG movement. Much of that movement has focused on securities and consumer protection issues. Indeed, the March state AG letter specifically cites consumer protection and fiduciary law. The state AG letters, however, also provide insight into where the anti-ESG movement is headed.

In particular, without expressly laying out an antitrust legal theory, the March letter suggests there are "antitrust implications" to ESG efforts, referencing "[c]oordinated efforts," "horizontal agreements," and "colluding asset managers." The May letter provides additional insights into the direction of the anti-ESG movement by suggesting that United-Nations-convened working groups charged with implementing climate change goals may constitute an "illegal boycott" or a "collective agreement to fix prices" in violation of U.S. state and federal antitrust laws.

Anti-ESG momentum is also growing at the federal level. For instance, a recent letter from members of the House Judiciary Committee made clear their belief that an effort by major investors to promote ESG priorities "may be unlawful under U.S. antitrust laws." The letter raised concerns about entities it described as "woke" corporations for enacting progressive values. Similarly, in a letter sent to executives of the Steering Committee for Climate Action 100+, House members described

the coalition as "seem[ing] to work like a cartel to 'ensure the world's largest corporate greenhouse gas emitters take necessary action on climate change.'"

Because ESG policies often take the form of pledges and sometimes involve interactions between competitors, companies engaged in these efforts should be sensitive to potential antitrust issues. This sensitivity appears to be further warranted in light of some ESG critics in Congress who have expressed concern that "cooperation among competitors in ways that restrict price, output, or quality" has occurred through such pledges.

Many companies, however, unilaterally make ESG pledges because they believe ESG targets align with their corporate values and are beneficial to their bottom lines. Corporations seek to improve their products and compete for customers who value certain environmental or social issues. In the same vein, asset managers might adopt ESG policies to attract investors seeking to direct capital towards socially and environmentally responsible businesses or consider ESG criteria to be required as part of their fiduciary duty.

Many companies prioritize ESG to promote internal productivity as well. Some may seek to build diverse teams that can often produce more efficient and higher quality work. Others seek to attract talent or motivate an increasingly socially conscious workforce, which can also enhance employee and overall performance. A company pursuing ESG based on a unilateral business decision rather than as a commitment made alongside others is well-positioned against critics in the anti-ESG movement.

Coordinated ESG commitments between competitors, on the other hand, could present risk. Antitrust law scrutinizes industry coordination, and navigating such scrutiny requires tailored legal advice that considers an array of factual circumstances. In the ESG context, counsel should consider: (1) the nature of any collaboration or discussions between companies surrounding ESG commitments; (2) the identity of the other industry participants; (3) the business goals associated with a company's ESG commitment; (4) the impact, if any, of agreements between competitors on competition in the market; (5) whether any exemptions to the antitrust laws (such as the *Noerr-Pennington* doctrine) apply; plus a plethora of other case-specific facts.

To evaluate whether an ESG commitment opens the door to antitrust risk, companies should keep the following in mind:

- Consult experienced antitrust counsel before entering into an ESG pledge or commitment.
- A company's ESG strategy should be driven by its core business mission and values (*e.g.*, offering sound investment advice that provides a return to customers).
- Unilateral conduct is typically less risky than coordinated conduct.

This guidance can provide a starting point for companies and their counsel in navigating increased scrutiny of ESG efforts. When in doubt, go back to the basics of the antitrust laws: compete vigorously to provide great products, high returns, and increased value to customers. If ESG policies are adopted in pursuit of those unilateral ends, antitrust risk is substantially reduced.

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## Related Capabilities

ESG: Environmental, Social, and Governance


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