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## Joining Forces and Moving Forward: Navigating the ESG Antitrust Controversy

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### At a Glance

- ESG strategy is meant to help businesses sustain access to key resources (natural, financial and human) through cross-functional, well-informed decision-making aimed at enhancing corporate resilience, circular economic principles (e.g., “cradle-to-cradle” use of resources) and overall wellness.
  - Implementing ESG strategies often means collaborating with competitors which can lead to antitrust scrutiny if not done properly.
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With an increasing number of companies implementing environmental, social and governance (ESG) initiatives, ESG strategies are becoming more nuanced and complex. While not without controversy, these initiatives can be worthwhile — creating value for companies and stakeholders. Notably, ESG initiatives — in their complexity and variety — are moving the needle forward in innovation and sustainability, but these efforts sometimes involve collaboration with other companies, often competitors. When competitors collaborate, even for good reasons, there are inherent antitrust risks. This is especially true now as regulators and lawmakers are focused on the implications of antitrust law in advancing ESG efforts, strategies and outcomes. This update provides an overview of ESG antitrust concerns and strategies companies should consider to help avoid — or in some cases, proactively manage — antitrust scrutiny before implementing ESG efforts.

## What Is ESG?

Conceptually, ESG is one of the driving forces of the “Great Transition” — the departure from “business as usual”

and the movement toward sustainable practices across industries and disciplines. In its purest form, ESG strategy is meant to help businesses sustain access to key resources (natural, financial and human) through cross-functional, well-informed decision-making aimed at enhancing corporate resilience, circular economic principles (e.g., “cradle-to-cradle” use of resources) and overall wellness. Importantly, various market forces (investor demands, regulatory shifts, geopolitical dynamics, increased competition for resources, evolution of workplace culture and expectations, etc.) are converging on companies finding themselves increasingly considering and implementing ESG initiatives in response.

Yet, there is no “one size fits all” ESG approach. Pharmaceutical companies’ ESG strategy will have distinct differences from (but also some similarities to) an energy company’s or a widget manufacturer’s ESG strategy. In addition to industry-specific nuances, geography and politics continue to increase complexity — often resulting in competing (or diametrically opposed) viewpoints and goals that create scenarios in which companies are forced to choose “the least bad decision.” As the ESG-sphere seemingly never sleeps, certain ESG opponents have lobbed antitrust concerns into the fray — a trend to which prudent risk managers should pay attention.

## Recent ESG Initiatives Subject to Antitrust Scrutiny: The Headlines

Over the course of the last year, a series of communications and inquiries by government officials scrutinizing ESG policies and antitrust concerns have made headlines. And this trend is expected to continue. <sup>[ 1 ]</sup> Most recently, nearly half of the state attorneys general wrote a letter to 28 insurance companies <sup>[ 2 ]</sup> belonging to the Net-Zero Insurance Alliance and Net-Zero Asset Owner Alliance requesting records to investigate potential antitrust concerns arising from the alliances, prompting some insurance companies to leave the alliance altogether. These alliances encourage companies to comply with the Paris Agreement — an international treaty aimed at reducing the impact of climate change. Relatedly, Republicans on the House Judiciary Committee recently sent a letter to a founding member of the Climate Action 100+, <sup>[ 3 ]</sup> an investor-led initiative focused on investing in companies critical to net-zero emissions transitions, about concerns that their coordination of efforts to advance ESG policies is anti-competitive. The Judiciary Committee Republicans criticize the dearth of materials produced in response to a December 2022 information request inquiring about ESG antitrust concerns. The letter threatens to escalate to a subpoena if the requests remain outstanding.

Criticisms over ESG policies recently have focused on climate change initiatives, but investigations have not been limited to this issue. Non-climate ESG policies also are subject to scrutiny. For instance, nearly half of the nation’s attorneys general previously coordinated an investigation into a company’s sale of ESG products that focused on <sup>[ 4 ]</sup> human rights issues. Indeed, as Federal Trade Commission (FTC) Chair Lina Khan made clear in a WSJ

op-ed last year concerning mergers, <sup>[ 5 ]</sup> “the antitrust laws don’t permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit.”

Further complicating this issue, international agencies focused on competition law have taken a starkly different approach to ESG policies. For instance, in the European Union and the United Kingdom, competition authorities have issued draft guidance to support industrywide ESG initiatives <sup>[ 6 ]</sup> so these endeavors do not run afoul of competition law. Moreover, these international policies aim to ease the concerns of companies reluctant to engage in ESG initiatives for fear of being sanctioned. Similar guidelines have been enacted in Germany and the Netherlands.

These developments add yet another layer of complexity and risk to the ESG landscape — and companies must ask how their particular ESG initiatives align with current and conflicting antitrust laws both in the United States and abroad.

## Antitrust Law Implicated by ESG Efforts: The Basics

### *Foundational Antitrust Concepts*

To help analyze where antitrust and ESG intersect, it is important to understand fundamental antitrust concepts. For example, antitrust concerns often materialize in two unique ways: hub-and-spoke conspiracies and information exchanges.

Hub-and-spoke conspiracies involve separate agreements between competitors and a central actor — who acts as a hub between the competitors. The competitors can communicate with the central actor instead of each other but can nonetheless form agreements. These agreements may be adverse to an independent company’s business interest or result in parallel conduct among competitors that change market dynamics.

Information exchanges, on the other hand, create opportunities for competitors to reach implicit, if not explicit, agreements. For example, by exchanging competitively sensitive information to further ESG initiatives, competitors may have insights into their rivals’ prices or levels of output that would cause a competitor to alter its own activity, which, in turn, could change market dynamics. Historically, governmental agencies have recognized that there may be pro-competitive benefits to exchanging confidential information so long as certain guidelines were followed. And, up until recently, <sup>[ 7 ]</sup> the Department of Justice (DOJ) provided “safety zones” for information exchanges among competitors. However, these safety zones were recently withdrawn <sup>[ 8 ]</sup> by the DOJ (but not yet by the FTC), further elevating the potential antitrust risk for exchanging sensitive, confidential

information relating to ESG initiatives. The DOJ stated that it would review information exchanges on a case-by-case basis going forward.

Federal and state agencies and the plaintiffs' bar actively investigate or search for allegations of, or facts consistent with, hub-and-spoke conspiracies and information exchanges. This is especially prevalent when trade associations and other agencies bring together competitors for even pro-competitive initiatives like safety, social welfare and environmental standards. Implementing the standards for any of these initiatives costs money and impacts market dynamics as increased costs of production ultimately are passed on to customers.

### *How ESG Efforts Can Implicate Antitrust Scrutiny*

ESG policies often concern systemic issues that require collective action for meaningful results, thereby causing potential antitrust issues. ESG initiatives rarely raise antitrust concerns when a single company independently and unilaterally develops and implements an ESG policy. And while exceptions to this general rule may exist for companies with a large market share or that operate a complex organizational structure, ESG antitrust issues are most likely to arise when a company attempts to coordinate with competitors on ESG efforts. A notable example includes global insurance companies facing pressure for their involvement in the United Nations' Net-Zero Insurance Alliance, such that several insurers have left the alliance.

Coordination sometimes occurs because a company is unable to implement ESG priorities without altering its position in the marketplace. For example, if a company seeks to use only ethically sourced inputs for the manufacture of its product, its operating costs could increase — leading to the price of its products also increasing and becoming less competitive. If, however, the manufacturing company could legally assure others in the industry committed to the same ESG effort, the prices of all impacted competing products would rise together. Likewise, a company that stops doing business with a particular customer because the customer's policies are inconsistent with the company's ESG initiatives could experience a decrease in operating gains, making that company less competitive. But, if that company could legally motivate other companies doing business with that customer to conform to its ESG initiatives, then all companies would have a smaller operating gain.

## Navigating ESG Initiatives Under Antitrust Law: The Takeaways

While governmental agencies and the plaintiffs' bar actively scrutinize associations that bring together competitors for pro-competitive initiatives, it is generally lawful for a company to collaborate with other companies or competitors in the same industry to design industry standards — so long as participants remain free to compete

and unilaterally decide whether to comply with a particular standard. And it is generally true that most standard-setting efforts are, and should be, overseen by knowledgeable counsel and/or standard-setting advisors to ensure compliance with the Standards Development Organization Act of 2004. [ 9 ] Accordingly, the safeguards outlined below exist to help mitigate risk for ESG initiatives of various competitor associations. However, given the complex nature of ESG efforts and federal and state governments' focus on antitrust compliance and violations, companies should engage antitrust counsel before implementing any of the guidelines described below.

- **ESG efforts should be voluntary and nonbinding.** ESG initiatives among competitors should be voluntary and non-binding as any agreement among rivals mandating certain ESG-related conduct likely will draw antitrust scrutiny. This is true even if the agreement does not concern per se illegal conduct under the antitrust laws, like fixing or stabilizing prices, rigging bids, dividing markets or customers or boycotting suppliers.
- **ESG initiatives should be open to all in the industry.** Any voluntary standards should be designed so as not to disadvantage small or nascent competitors or bar entry into the industry market. To the extent that selective criteria are required to advance ESG initiatives, such criteria should be objective so that the criteria do not selectively disadvantage certain competitors in the industry.
- **ESG efforts should maintain proper documentation.** ESG efforts and the positive effects these efforts intend to achieve should be properly documented and vetted by antitrust counsel. Relatedly, any meetings between competitors regarding ESG policies should be formally scheduled with an agenda pre-screened by antitrust counsel to ensure no improper information sharing or requests to improperly coordinate on prices, outputs or other business strategies. Any such meetings also should include written meeting minutes to demonstrate the scope of discussions did not include improper anti-competitive topics. Additionally, any source of information obtained regarding a competitor should be documented (e.g., demonstrating that it was accessed publicly or provided by a customer).
- **ESG initiatives should keep sensitive, confidential information secure.** Competitively sensitive information should not be shared with others engaged in the ESG initiative. If the exchange of any competitively sensitive information is required to advance the ESG initiative, antitrust counsel can assist in implementing a process to exchange certain information in an anonymized and aggregated way.
- **ESG collaborators should avoid certain topics.** As noted, competitively sensitive information should not be shared with others so as to trigger potential anti-competitive conduct. To that end, discussions between ESG collaborators should avoid the following topics and terminate any discussions that veer into these subject areas:
  - Future actions related to strategic plans, output plans and products under development.

- Competitively sensitive information concerning, for instance, price, costs or strategic plans, about products or services that are inside or outside of the ESG collaboration.
  - Facts or opinions related to contract or product prices, costs, margins, pricing terms, promotional allowances, profitability, bidding or pricing strategies.
  - Projected or intended process to be bid or offered for any project, contract or series of contracts.
  - Relationships with specific customers or vendors or information you or your competitors are contractually obligated to keep confidential under the terms of your respective agreements with customers or vendors.
  - The terms of potential sales and bids or the terms of a particular purchase from a customer.
  - Anything that relates to prices or the costs of inputs that impact prices.
  - Verification of prices or exchange of price lists.
  - Which company or contractor will serve what competitors, customers, classes of customers, markets and/or geographies.
  - Employee salaries, wages or benefits.
- **ESG collaborators can consider petitioning for federal enforcement.** Competitors collaborating on ESG initiatives may consider jointly petitioning the federal government to regulate and enforce particular ESG goals. So long as the companies' petition to the government is a genuine attempt to influence the passage or enforcement of laws relating to ESG initiatives, the entities may be immune from liability under antitrust laws. However, any such petition will not protect companies from the plaintiffs' bar at least attempting to pursue timely and costly antitrust allegations in the first instance.

Companies should contact antitrust counsel immediately if their participation in an ESG initiative with competitors begins to stray away from these permissible guidelines. Antitrust counsel can assist a company in assessing any changes to its antitrust exposure and whether to participate in the ESG initiative on a forward basis.

Implementing these ESG strategies can have a pervasive impact across a company's operations. Though worthwhile, folding ESG initiatives into business operations also may trigger additional issues worth considering. For instance, would the consideration of ESG policies as part of a supplier audit or as a widely used key performance indicator trigger antitrust scrutiny? How would implementing a net zero program or goal potentially trigger antitrust concerns? Would the consideration of ESG initiatives in selecting acquisition targets or valuing merger and acquisition transactions draw antitrust complaints? Antitrust counsel can help ensure that companies are balancing the complexities of ESG initiatives and their antitrust implications.

## FOOTNOTES

1. <https://www.faegredrinker.com/en/insights/publications/2022/12/three-esg-trends-to-follow-into-2023>.
2. <https://attorneygeneral.utah.gov/ag-reyes-asks-insurance-group-to-disclose-esg-commitments/>.
3. <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-05-05-db-jdj-to-lubber-ceres-re-follow-up.pdf>.
4. <https://www.oag.state.va.us/media-center/news-releases/2428-august-17-2022-virginia-attorney-general-miyares-joins-investigation-into-esg-ratings-company-morningstar-and-its-subsiidiary-sustainalytics>.
5. <https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135?page=1>.
6. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1139264/Draft\\_Sustainability\\_Guidance\\_document\\_\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document__.pdf).
7. <https://www.faegredrinker.com/en/insights/publications/2023/2/doj-withdraws-health-care-antitrust-statements-whats-next-for-the-health-care-industry>.
8. <https://www.faegredrinker.com/en/insights/publications/2023/2/doj-withdraws-policy-statements-governing-information-exchanges>.
9. <http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-section4301&edition=prelim>.

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