March 30, 2023

Dear Asset Manager:

We, the undersigned attorneys general, are the chief legal officers of our respective states. Among other duties, we enforce our states' civil laws against unfair and deceptive acts and practices and state and federal civil laws prohibiting agreements to restrain competition. Truthful representations to consumers and fair competition are fundamental pillars of our economic prosperity. We are writing this open letter to asset manager industry participants to raise our concerns about the ongoing agreements between asset managers to use Americans' savings to push political goals during the upcoming proxy season.

Your companies are some of the largest asset managers in the United States, collectively controlling trillions of dollars of investments. Many individuals and organizations count on you to provide sound investment products and advice. The top three asset managers alone cast about a quarter of votes at S&P 500 companies' shareholder meetings.[1] You are therefore not only bound to follow the general laws discussed above but also have extensive responsibilities under both federal and state laws governing securities. Broadly, those laws require you to act as a fiduciary, in the best interests of your clients and exercising due care and loyalty. Simply put, you are not the same as political or social activists and you should not be allowing the vast savings entrusted to you to be commandeered by activists to advance non-financial goals.

Many asset managers, however, have made commitments that cast doubt on their adherence to fiduciary requirements, representations to consumers about their services, and compliance with antitrust laws. As explained further below, asset managers have committed to use client assets to change portfolio company behavior so that it aligns with the Environmental, Social, and Governance (ESG) goal of achieving net zero by 2050. This specific, political commitment changes the terms of the products offered, as well as engagements with individual companies. These changes may be especially apparent in the 2023 proxy season that presents several resolutions related to net zero and social issues. This letter lays out our concerns with this course of

[1] Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 724 (2019).

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conduct and highlights several legal issues presented by upcoming proposals in this proxy season.

I. Asset Managers Have Extensive Legal Duties Under Federal and State Law

Without attempting to comprehensively list all the overlapping legal regimes you must comply with, your overarching role as investment advisers under federal law is to act as a fiduciary to your clients, exercising "a duty of care and a duty of loyalty."[2] "[T]he duty of care requires an investment adviser to provide investment advice in the best interest of its client, based on the client's objectives," and the duty of loyalty requires an adviser to "eliminate or make full and fair disclosure of all conflicts of interest which might incline [her]—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict."[3] To put it simply, you "cannot place [your] own interests" or those of other clients "ahead of the interests of [your] client."[4] These duties are important to "mitigate" the risk of advisers "tak[ing] actions that increase their well-being at the expense of investors, thereby imposing agency costs on investors."[5] In addition, you have a duty to comply with state laws prohibiting unfair or deceptive trade practices, as well as securities laws that prohibit investment advisers from engaging in fraudulent or misleading practices and self-dealing.[6]

II. Asset Managers Appear To Be Disregarding Their Legal Duties

Despite the extensive duties that you owe to your clients under federal and state law, many of you have committed to take actions inconsistent with your clients' financial interests. We outline several of these apparent inconsistencies below.

Many in your industry have joined the Net Zero Asset Managers Initiative ("NZAM"), which, among other things, directs members to "accelerate the transition towards global net zero emissions and for asset managers to play our part to help deliver the goals of the Paris Agreement."[7] Members commit to "[i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is

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[2] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669, 33,669 (2019); *see SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); 15 U.S.C. § 80b-6; 17 C.F.R. § 240.10b-5.
[3] 84 Fed. Reg. at 33,671; *see id.* at 33,670 (noting such disclosure reflects "Congressional intent" (citing *Capital Gains Research*, 375 U.S. at 191-92)).
[4] *Id.* at 33,671.
[5] *Id.* at 33,679.
[6] *E.g.*, Utah Code §§ 61-1-1, 61-1-2; Tex. Bus. & Com. Code Ann. § 17.46; Tex. Gov't Code Ann. § 4008.101.
[7] Net Zero Asset Managers ("NZAM"), Commitment ("NZAM Commitment").

consistent with [their] ambition for all assets under management to achieve net zero emissions by 2050 or sooner."[8] Far from being optional, NZAM describes this requirement as core to the initiative and one that is "comprehensively implemented" to prevent allegations of greenwashing.[9] Perhaps most shockingly, NZAM members have committed to "challenge" and "seek to overcome" the "constraints [they] face," which in context appears to include "legal duties to clients" and "applicable law" to achieve net zero by 2050.[10] These are not the words of a dedicated fiduciary and these commitments color any votes taken on these issues.

Many of you also participate in Climate Action 100+, which exerts coordinated pressure to seek "commitments from boards and senior management" to "reduce greenhouse gas emissions across the value chain" consistent with the Paris Agreement and achieving net zero by 2050."[11] Members of Climate Action 100+ commit to forcing portfolio companies to "align[] political lobbying with the Paris Agreement," without allowance for whether such an alignment would be in the financial best interests of the company.[12] Potential unlawful coordination appears throughout Climate Action 100+'s documents. Despite boilerplate disclaimers, initiative members clearly speak for the group as they commit to communicate "a central message" to companies: "[I]naction by companies following engagement may result in investors taking further action."[13] None of this is financially defensible. Instead, it is a transparent attempt to push policies through the financial system that cannot be achieved at the ballot box.

The assumptions behind your commitments have also been shown to be false. Your commitments were made on the "expectation that governments will follow through on their own commitments to ensure the objectives of the Paris Agreement are met,"[14] as well as on many other assumptions about science, financial impacts, and public policy. As is commonly known (and as at least one of you has acknowledged), "[g]overnments are not implementing policies to require net zero."[15] In fact, none of the world's biggest emitters—China, the United States, the European Union, and India—are on track to meet Paris Agreement goals.[16] A recent United Nations report confirms the gap between countries' carbon commitments and actual policies and an even greater gap between the theoretical commitments and what would be

[8] *Id.*
[9] NZAM, FAQ.
[10] NZAM Commitment, *supra* note 7.
[11] Climate Action 100+, The Three Asks.
[12] Climate Action 100+, 2021 Year in Review, at 8; *see also infra* notes 74–75.
[13] Climate Action 100+, Engagement Process.
[14] NZAM Commitment, *supra* note 7.
[15] Arizona Attorney General Mark Brnovich et al., Letter from 19 State Attorneys General to Laurence D. Fink, at 4 (Aug. 4, 2022).
[16] Max Bearak & Nadja Popovich, The World is Falling Short of Its Climate Goals. Four Big Emitters Show Why, N.Y. Times (Nov. 8, 2022).

required to fully realize the energy transition you assume will take place.[17] Full implementation of all nations' updated pledges would result in a global greenhouse gas emissions level 15.9% *above* the 2010 level in 2030, while the 1.5°C target requires global carbon emissions to *decrease* by 45% in 2030.[18] Many of you appear to have actual knowledge that this assumption is false because the climate organization many of you have joined issued a "Call to Action" for governments to "follow through on their commitments to the Paris Agreement objectives."[19]

Given these facts, we have significant concerns with how many of you advertise your products and how you are engaging with individual companies. *First*, given that many of you have committed "all assets under management" to certain environmental goals, your failure to label or advertise all your funds as ESG funds suggests a breach of your duties of care and loyalty. As far as we can tell, your non-ESG funds do not disclose to investors that their investments will be used to further ESG goals, including pressuring companies to reduce emissions in economically destructive ways. Relatedly, many of you have seemingly failed to disclose that your funds marketed as "passive" funds are being used to actively influence company behavior. Indeed, pressuring companies to reach zero commitment is one of the most radical active investment strategies imaginable. The organizations you have joined describe the goal as "transforming the economy" and the financial system at a cost of over $100 trillion.[20] Investors looking for low cost, passive indexing investments may be unwittingly funding your ESG activism. Any misrepresentations regarding the funds you are offering is legally troubling.

Second, many of you have not adequately explained to investors the downsides and risks of the funds you *do* market as ESG funds—even as you charge much higher fees for these funds. As noted above, many of your environmental assumptions appear to be dubious, making it perhaps unsurprising that ESG funds perform poorly.[21] At the same time, by one estimate, ESG funds "have 43% higher fees than widely popular

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[17] U.N. Environment Programme, Emissions Gap Report 2022: The Closing Window — Climate Crisis Calls for Rapid Transformation of Societies (Oct. 27, 2022).

[18] U.N. Framework Convention on Climate Change, Nationally Determined Contributions Under the Paris Agreement, ¶ 13, U.N. Doc. FCCC/Pa/CMA/2021/8/Rev.1 (Oct. 25, 2021).

[19] Glasgow Financial Alliance for Net Zero ("GFANZ"), Call to Action ("GFANZ Call to Action").

[20] GFANZ, Amount of Finance Committed to Achieving 1.5°C Now at Scale Needed to Deliver the Transition (Nov. 3, 2021).

[21] *See*, *e.g.*, Sanjai Bhagat, An Inconvenient Truth About ESG Investing, Harv. Bus. Rev. (Mar. 31, 2022) ("ESG funds certainly perform poorly in financial terms."); Sally Hickey, Large Cap ESG Funds Perform Worse Than Non-Sustainable Counterparts, FT Adviser (Jul 13, 2022) ("[T]he higher a fund's ESG rating, ranked based on Morningstar's sustainability ratings, the worse its returns over the year to June 22.").

standard ETFs."[22] Tariq Fancy, BlackRock's former Chief Investment Officer for Sustainable Investing, noted that ESG investing "provided the opportunity for . . . a bump in what were otherwise plummeting fees as competition had grown in recent years."[23] These higher fees are charged even though the makeup of many ESG funds are "closely aligned" with generic S&P 500 funds.[24] Thus, two possibilities exist: many asset managers are charging higher fees for a nearly-identical product, or they are charging higher fees for a product that carries lower returns or, at minimum, is based on unstudied and unreasonable assumptions. Either way, the disclosures around these offerings raise significant legal questions.[25]

Third, engagements with companies raise more questions about whether asset managers have complied with their fiduciary duties, particularly the duty of loyalty to disclose all conflicts of interest. These engagements often come in connection with voting decisions about company directors and shareholder proposals, and with the start of the 2023 proxy season, this remains an item of particular concern, as discussed further below.[26] Rather than being based on a rational financial calculus regarding potential changes to government policy, such actions force companies to comply with rules that governments will likely not institute. Companies are already required to disclose "impacts related to climate change" that "have a material effect on a [company's] business and operations."[27] Only extraneous motives could explain efforts by asset managers to require companies to disclose non-material risks associated with climate change. Such engagement will, in many cases, destroy value and make companies and their investors worse off.

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[22] Michael Wursthorn, Tidal Wave of ESG Funds Brings Profit to Wall Street, Wall St. J. (Mar. 16, 2021).
[23] Tariq Fancy, The Secret Diary of a 'Sustainable Investor,'The Secret Diary of a 'Sustainable Investor' — Part 1, Medium (Aug. 2021); *see also id*. ("Since ESG products generally carry higher fees than non-ESG products, [sustainable investing] represents a highly profitable and fast-growing business line for BlackRock and other financial institutions.").
[24] Akshat Rathi et al., How Blackrock Made ESG the Hottest Ticket on Wall Street, Bloomberg (Jan. 18, 2022) ("ESGU's fees are lower than industry averages for sustainable funds but are still five times higher than an S&P 500 tracker that trades under the ticker IVV – a popular BlackRock fund whose makeup and expected performance are closely aligned with those of ESGU.").
[25] *See generally* Uniform Prudent Investor Act § 5 cmt. (1994) ("No form of so-called 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause.").
[26] *See, e.g.*, Travelers Cos., Inc., Letter from Yafit Cohn to SEC ("Travelers As You Sow Letter") (Jan. 17, 2023); Press Release, As You Sow, As You Sow Files Resolutions With 5 Largest U.S. Banks Seeking Transition Planning to Meet Net-Zero Targets (Jan. 24, 2023); Dan Romito, The Top 15 Anticipated ESG-Related Considerations That Will Influence Strategy in 2023, Harv. L. Sch. F. Corp. Governance, (Dec. 31, 2022).
[27] SEC, Commission Guidance Regarding Disclosure Related to Climate Change (17 CFR Parts 211, 231 and 241; Release Nos. 33-9106; 34-61469; FR-82) ("SEC Guidance"), at 6 (Feb. 2, 2010).

Political climate goals are at the heart of your ESG commitments, as the initiatives you have joined describe themselves as playing a "critical role" to "mobile[ze] capital" and "protect[] nature."[28] Your co-members in these initiatives are some of the most radical ESG activists, who routinely try to change company behavior through shareholder resolutions.[29] These activists have little ownership stake in public companies, yet the assets clients have entrusted to you provide these activists with leverage. Public documents indicate that some large government clients asked their asset managers to join these political ESG initiatives,[30] potentially compromising their fiduciary duty to pursue financial return for other clients. To our knowledge, asset managers have not disclosed that their ESG commitments were made at the request of clients who may have a political agenda. Votes cast in support of activist members and certain government clients, in line with your political ESG commitments, present multiple conflicts of interest and are unlikely to be justifiable on financial grounds.

We also have concerns that horizontal agreements related to voting and engagement through organizations such as Climate Action 100+ and NZAM unreasonably restrain and harm competition. As noted above, NZAM members commit to "[i]mplement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050 or sooner."[31] An agreement to limit the types of asset stewardship services offered by asset managers across "all assets under management" will have adverse effects on competition. And there appear to be less restrictive means that accomplish most of the goals related to disclosure while also providing significantly less exclusion of competition in asset-manager services offered in our states.

Finally, we have similar concerns about certain asset managers' approach to social issues and how they engage companies on such issues. For instance, many of you have imposed racial and gender-based quotas for company board members.[32] And many of you have pledged to support so-called racial equity audits and similar company actions. One especially problematic trend has been shareholder proposals that insurance companies base their underwriting decisions on race rather than actuarially justified risk.[33] These proposals claim in part that insurance companies charge higher premiums "in minority communities versus whiter communities" and urge companies to "identify and close potential gaps" to alleviate any disparate impact.[34] In other words, activist shareholders request that companies report "racial impacts of [the

[28] GFANZ Call to Action, *supra* note 19.
[29] Climate Action 100+, InvestorsInvestor Signatories ("Climate Action 100+ Investor Signatories").
[30] Climate Action 100+, How We Work.
[31] NZAM Commitment, *supra* note 7.
[32] *E.g.*, State Street, Guidance on Diversity Disclosures and Practices, at 2–3 (Jan. 2022).
[33] *See, e.g.*, Travelers Cos., Inc., 2022 Proxy Statement (DEF 14A), at 79 (Apr. 8, 2022).
[34] *Id.*

company's] policies, practices, products and services" and request that they (illegally) alter their underwriting criteria or pricing to achieve different outcomes based on race.[35] Yet similar proposals continue to appear in 2023, as discussed below.[36]

III. Asset Managers' Fiduciary Duties In The 2023 Proxy Season

The 2023 proxy season will present multiple occasions on which asset managers will have to choose between their legal duties to focus on financial return, and the policy goals of ESG activists.

A. Banking

Banks are facing multiple proposals in 2023 from climate-initiative activists affiliated with organizations many asset managers have joined. These include Climate Action 100+ "engagement service providers" As You Sow, Seventh Generation Interfaith, and Shareholder Association for Research & Education. They also include Climate Action 100+ affiliated asset managers Arjuna Capital, New York City Comptroller, New York State Comptroller, and Trillium Asset Management. Resolutions (implicitly or explicitly) backed by horizontal asset-manager organizations that do not on their face evidence value to the underlying shareholders are particularly troubling.

Specifically, climate change resolutions have been filed for at least ten North American banks.[37] Some of these proposals require banks to explain the "specific measures and policies" required to align their financing "with [their] 2030 sectoral greenhouse gas emissions reduction targets" tied to net zero by 2050 and quantify resulting emissions reductions.[38] The proposals further note that "targets alone are insufficient" and instead seeks "banks' concrete transition strategies to credibly achieve their disclosed emission reduction targets."[39] As an example, one proposal specifically criticizes a bank for "increas[ing] its fossil fuel funding above 2019 levels."[40] These resolutions are a transparent attempt to use large banks to cut off funding to

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[35] *See* Travelers Cos., Inc., Letter from Yafit Cohn to SEC ("Travelers Trillium Letter") (Jan. 17, 2023).
[36] *See, e.g.*, *id.*
[37] These are Bank of America, Bank of New York Mellon Corporation, Citigroup, Goldman Sachs, JP Morgan, Morgan Stanley, Royal Bank of Canada, Scotiabank, TD Bank, and Wells Fargo. *See* Ceres, Engagement Tracker.
[38] As You Sow, Goldman Sachs Group Inc: Report on Climate Transition Planning ("As You Sow Goldman Sachs Report") (Nov. 18, 2022); *see also* As You Sow, JPMorgan Chase & Co: Report on Climate Transition Planning (Dec. 2, 2022); As You Sow, Morgan Stanley: Report on Climate Transition Planning (Dec. 9, 2022); As You Sow, Wells Fargo & Co: Report on Climate Transition Planning ("As You Sow Wells Fargo Report") (Nov. 17, 2022).
[39] As You Sow Goldman Sachs Report, *supra* note 38.
[40] As You Sow Wells Fargo Report, *supra* note. 38.

business in our states that may be out of step with environmental activists' net zero goals.

As another example, a bank is facing a proposal by Trillium Asset Management to limit high-carbon financing and by the New York State Comptroller to establish "2030 absolute greenhouse gas emissions reduction targets for … energy sector lending and underwriting."[41] In a similar vein, the New York City Comptroller has submitted proposals for two major banks to establish targets limiting "both lending and underwriting for … oil and gas and power generation."[42] The Sierra Club has sponsored proposals specifically calling for four major banks to cut off lending, *i.e.* to "phase out financing of new fossil fuel exploration and development."[43] Banks are currently subject to an investigation by nineteen Attorneys General regarding their existing coordinated net zero commitments through Net Zero Banking Alliance (NZBA), yet your fellow Climate Action 100+ members believe they should double down.[44]

Finally, at least one bank made a commitment to Climate Action 100+ member Arjuna Capital in return for withdrawal of a shareholder proposal for the bank to set near- and long- term GHG reduction targets aligned with the Paris Agreement and address emissions associated with the company's lending, investment, and underwriting for its highest-emitting sectors.[45] Using the threat of Climate Action 100+ action to obtain a commitment from a bank not to lend to certain sectors is just as problematic as voting on such a proposal.

In addition to the climate proposals noted above, other proposals seek to fully align banks with one political party.[46] One proposal complains that a bank donated to political campaigns of candidates who have sponsored pro-life legislation—undoubtedly all Republicans.[47] Voting for this transparently political proposal, or others like it, would demonstrate plainly that you are more concerned about political goals than maximizing financial returns for investors.

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[41] Ceres, Limit High Carbon Financing (BAC, 2023 Resolution); *see also* Ceres, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKCewAAHReport on GHG Emissions Targets (BAC, 2023 Resolution).
[42] These are Goldman Sachs and JP Morgan. *See* Ceres, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKJQ2AAPReport on GHG Emissions Targets (GS, 2023 Resolution); Ceres, https://engagements.ceres.org/ceres_engagementdetailpage?recID=a0l5c00000JKJQ7AAPReport on GHG Emissions Targets (JPM, 2023 Resolution).
[43] *E.g.*, Ceres, Limit High Carbon Financing (WFC, 2023 Resolution).
[44] *See* Press Release, Missouri Attorney General Leads 19 State Coalition in Launching Investigation into Six Major Banks Over ESG Investing (Oct. 19, 2022).
[45] *See* Ceres, Report on GHG Emissions Targets (BK, 2023 Resolution).
[46] As You Sow, JPMorgan Chase & Co: Disclosure of Incongruent Lobbying Activity (Dec. 2, 2022).
[47] *Id.*

In addition, voting for proposals that direct a bank's lending behavior may expose asset managers having exercised control over a bank. Indeed, a United States Senate report warned that net zero agreements or a coordination of voting through proxy advisors could lead to "a finding of concerted or other associated effort that could be deemed 'control' by an 'association' or 'similar organization.'"[48] Many of the proposals noted above are from As You Sow, a Climate Action 100+ "Engagement Service Provider,"[49] and many Climate Action 100+ members (including some of you) likely will vote for it, which may demonstrate coordination through the group. Such a finding could take place even without coordination if the asset manager is of sufficient size.[50]

B. Insurance

Several insurers also face climate proposals that push for unlawful alterations of underwriting activities in order to achieve the ESG goal of aligning insurance underwriting with net zero by 2050.[51]

A Climate Action 100+ member appears to be attempting to control the operation of insurance companies. According to one company, As You Sow "acknowledged that … they had in fact specifically aimed to restrict and circumscribe" the insurer's products and services.[52] Specifically, As You Sow pressed for specific actions including:

- "[C]harg[ing] higher premiums for cars that run on conventional fuels";
- Using client relationships to "disincentivize the emissions of oil and gas clients"; and
- "Terminating clients based on their activities—namely, their failure to transition their GHG emissions activity."[53]

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[48] *See* Minority Staff of the S. Comm. on Banking, Housing & Urban Affairs, The New Emperors: Responding to the Growing Influence of the Big Three Asset Managers ("The New Emperors"), at 15 (Dec. 2022).
[49] Climate Action 100+ Investor Signatories, *supra* note 29.
[50] *See* The New Emperors. As the report observes, in order to avoid such a designation, BlackRock has sought assurances from federal regulators, and promised not to "take any action to control the" regulated company under certain federal laws. *Id.* at 15; *see* Federal Reserve, Ltr. from Federal Reserve to BlackRockLetter from Mark E. Van Der Weide to BlackRock, at 3 (Dec. 3, 2020).
[51] *See, e.g.* As You Sow, Berkshire Hathaway Inc: Disclose and Reduce GHG Emissions From Underwriting, Insuring, and Investment Activities Aligned with Net Zero (Nov. 15, 2022); As You Sow, Chubb Ltd: Disclose and Reduce GHG Emissions From Underwriting, Insuring, and Investment Activities Aligned With Net Zero (Dec. 7, 2022); As You Sow, Travelers Companies Inc: Disclose and Reduce GHG Emissions From Underwriting, Insuring, and Investment Activities Aligned With Net Zero (Dec. 9, 2022); *see also* Chubb Ltd., Ltr. from Edward Best to SECLetter from Edward Best to SEC; Travelers As You Sow Letter, *supra* note 26.
[52] *See* Travelers As You Sow Letter, *supra* note 26, at 9–10.
[53] *Id.*

As You Sow "conceded" that its proposed actions "could subject the Company to litigation and regulatory scrutiny beyond the obvious impact to the Company's business," but continued to push for its proposal.[54]

Voting for such proposals could not only expose insurers to liability, but also expose you to liability for violating fiduciary duties by exposing companies to liability in order to support the ESG goals of your fellow climate initiative members.

In addition, state regulations presume that "control" of an insurer exists when a person has at least 10% of the voting shares.[55] Coordinated efforts (such as through proxy advisors or coalitions) may result in sufficient consolidation of shares well beyond the 10% mark, leading to a presumption that colluding asset managers are "controlling" an insurer and thus can be regulated as an insurer.[56]

One of your fellow ESG initiative members is also asking an insurer to discriminate on the basis of race in providing insurance,[57] which would likely violate the laws in many if not all of our states.[58] Voting for proposals that encourage companies to engage in prohibited race discrimination could violate fiduciary duties, as the proposals would unnecessarily expose an insurer to liability and also reduce the insurer's returns, as insurance premiums would be set based on race rather than purely on risk.

C. Net Zero Compliance at Utility, Energy, and Other Companies

Your fellow climate initiative activists are pushing climate change resolutions on many other companies as well to force those companies to comply with the ESG net zero goals you have committed to achieve.

With respect to utility companies, As You Sow has filed proposals for multiple utilities to require "short and long-term targets aligned with the Paris Agreement's

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[54] *Id.*
[55] Notably, in at least some states, this threshold is lower than for other types of businesses. *Compare, e.g.*, Fla. Stat. § 624.10(3) ("Control [under the Insurance Code] is presumed to exist if a person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing 10 percent or more of the voting securities of another person."), *withid.* § 607.0901 (20% interest presumed to have control).
[56] *See supra* notes 48–50 and accompanying text; *see also* Motion to Intervene and Protest, at 14, *In re Vanguard Grp., Inc.*, No. EC19-57-001 (Fed. Energy Regulatory Comm'n Nov. 28, 2022) (motion by over a dozen attorneys general raising concerns about whether a "group effort" by asset managers who joined NZAM may result in those managers collectively exceeding percentage ownership markers related to the Federal Power Act).
[57] *See* Travelers Trillium Letter, *supra* note 35.
[58] *Id.* at 10–12 n.7.

1.5°C goal requiring Net Zero emissions by 2050 for the full range of its Scope 3 value chain GHG emissions."[59] It is highly doubtful that requiring utility companies to adopt Scope 3 emissions targets, when those are not required by applicable federal or state law, is in the interests of shareholders.

With respect to energy companies, Follow This has introduced proposals requiring large energy producers to align their Scope 3 emissions with Paris targets.[60] These resolutions seek to coerce medium-term Scope 3 emission reductions by these companies. As with the resolutions targeting utility companies, it is highly doubtful these resolutions are in the interests of shareholders.

Some proposals push for greater "transparency" from energy producers about how those producers are reducing emissions, without any explanation of why this transparency would benefit the company or its shareholders.[61] Other proposals attempt to force companies to "achieve deforestation-free commodity supply chains by 2025,"[62] while warning those companies that "[f]inancial institutions with nearly $9 trillion in assets under management have committed to eliminating agricultural commodity-driven deforestation from their portfolios by 2025."[63] In other words, activists have forced banks to create ESG mandates, and now try to convince non-banks that they must go along with those mandates or risk losing funding from the banks.

In a different vein, As You Sow is also pushing three companies to stop using Vanguard as the default plan for their employee 401(k) accounts, claiming that Vanguard funds "invest significantly in fossil fuel companies."[64] As You Sow has brought three resolutions targeting Vanguard specifically without any resolutions related to the other members of the "Big Three." Perhaps it has something to do with the fact that Vanguard withdrew from the Net Zero Asset Managers Initiative in early

[59] Ceres, Adopt GHG Reduction Targets (AEE, 2023 Resolution).
[60] Follow This, Follow This Resolutions 2023.
[61] *See, e.g.*, As You Sow, ExxonMobil Corp: Report Impact of Asset Transfers on Disclosed Greenhouse Gas Emissions (Dec. 7, 2022); As You Sow, Chevron Corp: Impact of Asset Transfers on Emissions Disclosure (Dec. 7, 2022).
[62] *See, e.g.*, As You Sow, Papa John's International Inc: Eliminate Deforestation From Company Supply Chains ("As You Sow Papa John's Proposal") (Nov. 2, 2022); As You Sow, Pilgrims Pride Corp: Eliminate Deforestation From Company Supply Chains ("As You Sow Pilgrims Pride Proposal") (Dec. 5, 2022).
[63] As You Sow Papa John's Proposal, *supra* note 62; As You Sow Pilgrims Pride Proposal, *supra* note 62.
[64] As You Sow, Comcast Corp: Report on Assessing Systemic Climate Risk From Retirement Plan Options (Dec. 21, 2022); As You Sow, Netflix Inc: Report on Assessing Systemic Climate Risk From Retirement Plan Options (Dec. 22, 2022); As You Sow, Amazon.com Inc: Report on Assessing Systemic Climate Risk From Retirement Plan Options (Dec. 15, 2022).

December 2022—the same month that all three resolutions were filed.[65]Asset managers voting for the exclusion of one of their competitors has clear antitrust implications.

Once again, votes for these proposals are votes to promote political ESG purposes, not the maximization of returns for investors as demanded by fiduciary duties. As noted above, companies already must disclose "impacts related to climate change" that "have a material effect on a [company's] business and operations."[66] As for these additional disclosures, investors will not get better returns if energy companies disclose potentially damaging information, food sellers switch to more expensive but activist-approved supply chains, or other companies pick a different provider for their employee 401(k) plans. But activists will be pleased if those proposals pass and will be able to use those proposals as leverage to pressure other companies to do the same.

D. Abortion and Political Spending

According to one activist group, more abortion-related proposals are on proxy ballots this year than on all other previous years *combined*.[67] These proposals include: (1) "political spending misalignment" and (2) "risk mitigation."[68]

1. "Political Spending Misalignment"

Like the proposal described above, these proposals seek to force companies to explain donations to candidates of only one party. Another variation of these proposals attempts to force companies to (1) obtain reports from third-party organizations before donating to those organizations, and (2) publicly file those reports from the third-party organization.[69] Like the other proposals noted above, the explanatory notes are focused on denying donations to Republicans, with the proposals worrying that donated funds could end up being given to "attacks on voting rights, efforts to deny climate change, and efforts to impose extreme restrictions on abortion."[70]

At least two lobbying proposals are sponsored by Climate Action 100+ members, which include government agencies. Seventh Generation Interfaith sponsored a proposal asking a large bank to align its lobbying with commitment to achieve Net Zero

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[65] Ross Kerber & Noor Zainab Hussain, Vanguard Quits Net Zero Climate Effort, Citing Need for Independence, Reuters (Dec. 7, 2022).
[66] SEC Guidance, *supra* note 27, at 6.
[67] *See* Press Release, Rhia Ventures, Press: Shareholders File Numerous Proposals Addressing Access to Reproductive Health Care for 2023 Proxy BallotsShareholder Proposals Address Reproductive & Maternal Health Benefits (Jan. 24, 2023).
[68] *Id.*
[69] *See, e.g.*, SEC, Ltr. From SEC to Eli LillyLetter from Rule 14a-8 Review Team to Eli Lilly (Mar. 6, 2023).
[70] *Id.*

by 2050.[71] Similarly the Vermont Pension Investment Commission sponsored a resolution requiring an energy company to align its lobbying and political activities with a commitment to achieve net zero.[72] It is troubling that members of a horizontal organization of asset managers that includes many government actors would be trying to limit political speech, particularly when there does not appear to be a shareholder financial basis for the limitation.

As noted above, voting for these political proposals would prioritize political goals over financial interests, which could violate fiduciary duties and would also raise Hatch Act concerns.

2. "Risk Mitigation"

Finally, proposals seek to force companies to issue reports "detailing any known and potential risks and costs to the company caused by enacted or proposed state policies severely restricting reproductive rights."[73] The proposals also encourage companies to consider "related political contribution policies" and "public policy advocacy."[74] The proposed report would not include any analysis of risks and costs created by enacted or proposed state policies advocating *for* "reproductive rights."

Given the polarization of this issue, these proposals raise similar concerns and liability risks to the political contribution proposals. The supposed financial impacts of these proposals are especially flimsy, with the proponents weakly offering that the company "may find it more difficult to recruit employees to … states which have outlawed abortion."[75] Clearly, in context, these proposals are attempts to force companies to (1) spend time and money creating reports containing anything as minor as a "potential risk[]" from a "proposed state polic[y]," which can then be used by abortion rights advocates, and (2) announce "related political contribution policies" to restrict donations to pro-life (Republican) political candidates. Voting for these proposals prioritizes political goals over the financial interests of the company's shareholders and raises Hatch Act concerns.

3. Race and Gender Quotas

As in other years, many proposals push for "diversity, equity, and inclusion" initiatives designed to incorporate race or gender quotas into board or employee composition. One activist group lists 25 "Diversity and Gender Equality" proposals it filed

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[71] Ceres, Report on Lobbying in Line with Net Zero GHG Target (WFC, 2023 Resolution).
[72] Ceres, Report on Lobbying in Line with Net Zero GHG target (DVN, 2023 Resolution).
[73] *See, e.g.*, Rhia Ventures, Coca-Cola Reproductive Resolution.
[74] *Id.*
[75] *Id.*

for this proxy year alone, and already, 11 of the recipient companies have "reached agreement" with the activist group on the issue.[76] The remaining holdouts must defend proposals seeking to require their companies "to report to shareholders on the effectiveness of the Company's diversity, equity, and inclusion efforts."[77] Although the reports supposedly are for the purpose of "understand[ing] how well [the company is] hiring, promoting, and retaining the best possible employees," the requested reports make no mention of qualitative performance by employees, instead seeking "*quantitative* metrics … including data by gender, race, and ethnicity"[78] – in other words, quotas.

As discussed further below, the supposed evidence behind these proposals is inconclusive at best.[79] Without such evidence, requiring companies to pay for expensive reports merely to satisfy the whims of activists is not in line with the fiduciary duty to act in the sole interest of shareholders.

IV. Asset Managers Lack Valid Defenses

Several defenses have been raised by ESG proponents when confronted with the issues raised above. Those defenses are unavailing, as discussed below.

A. Shareholder Proposals Are Not Merely "Precatory"

Although one proxy advisor recently has defended its recommended votes by arguing that shareholder proposals are merely "precatory" and "not binding," that is not the case in practice.[80] Every proposal carries the implied threat to directors that their failure to respond to that proposal in the desired fashion will result in a coordinated effort to have those directors removed.[81] Two proxy advisors, Institutional Shareholder Services (ISS) and Glass Lewis, control nearly the entire proxy advisor

[76] As You Sow, ResolutionsCurrent Resolutions. To find the proposals, filter by "Diversity and Gender Equity" and "2023."
[77] *See id.*
[78] *See, e.g.*, As You Sow, Berkshire Hathaway Inc: Greater Disclosure of Material Corporate Diversity, Equity, and Inclusion (Nov. 14, 2022) (emphasis added).
[79] *See infra* notes 107–111 and accompanying text.
[80] Glass Lewis, Ltr. from Glass Lewis to State AGsLetter from Kevin Cameron to State Attorneys General ("Glass Lewis State Attorneys General Letter"), at 6 (Jan. 31, 2023). This explanation begs the question of why companies would pay proxy advisors hundreds of millions of dollars a year to get advice on "precatory," non-binding proposals. *See, e.g.*, Press Release, Inst'l S'holder Servs., Deutsche Börse Acquires Leading Governance, ESG Data and Analytics Provider ISS (Nov. 17, 2020) (stating that ISS's 2020 revenue was expected to be more than $280 million).
[81] *See* Inst'l S'holder Servs., 2022 U.S. Voting Guidelines2022 U.S. Proxy Voting Guidelines ("ISS 2022 Proxy Voting Guidelines"), at 13; Glass Lewis, 2022 Policy Guidelines, at 19.

market.[82] ISS's U.S. guidelines vow to advocate for votes against members or entire boards "as appropriate" if the board fails to act on a successful shareholder proposal.[83] Glass Lewis goes even further and warns that even if a shareholder proposal fails, Glass Lewis nevertheless may advise its clients to vote against directors who do not "demonstrate some initial level of responsiveness" to a failed shareholder proposal that scraped together as little as *20% of the vote* – never mind the fact that up to 80% of shareholders disagreed with the proposal.[84] These advisors' recommendations on director votes carry tremendous sway, giving their threats real teeth.

Moreover, ISS has effectively joined the efforts of Climate Action 100+ by committing to use its climate benchmark in board votes.[85] For example, ISS's 2023 benchmark policy states it will recommend "generally vot[ing] against" directors at companies "on the current Climate Action 100+ Focus List" that have not adopted "medium-term [greenhouse gas (GHG)] reduction targets or Net-Zero-by-2050 GHG reduction targets."[86] They also state that ISS will use the Climate Action 100+ Focus Group list as a proxy for "significant [greenhouse gas] emitters."[87] It is unsurprising that ISS would adopt these policies given that NZAM members commit "[a]cross all assets under management" to "[e]ngage with actors key to the investment system including credit rating agencies, auditors, stock exchanges, proxy advisers, investment consultants, and data and service providers to ensure that products and services available to investors are consistent with the aim of achieving global net zero emissions by 2050 or sooner."[88] Given the horizontal agreements between asset managers that underlie Climate Action 100+ and NZAM, any asset manager using that benchmark in engagement or supporting that benchmark in votes should know that their efforts could lead to changes in control of target companies.

Moreover, major asset managers have made clear that they will vote against boards even for "insufficient progress" on ESG issues – let alone refusing to implement voted-for shareholder proposals, which certainly would lead to asset managers targeting boards. For example, BlackRock previously identified "244 companies that were making insufficient progress integrating climate risk into their business models or

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[82] *See* James K. Glassman & Hester Peirce, How Proxy Advisory Services Became So Powerful, Mercatus Ctr. at George Mason Univ. (June 18, 2014) (finding that ISS and Glass Lewis controlled 97% of the proxy advisor market).
[83] ISS 2022 Proxy Voting Guidelines, *supra* note 84, at 13.
[84] Glass Lewis, https://www.glasslewis.com/wp-content/uploads/2022/11/US-Voting-Guidelines-2023-GL.pdf2023 Policy Guidelines, at 10.
[85] Utah Attorney General Sean D. Reyes et al., Letter from State AGs to Glass Lewis and ISSLetter from 21 State Attorneys General to Institutional Shareholder Services and Glass Lewis ("State Attorneys General Glass Lewis Letter") (Jan. 17, 2023).
[86] ISS 2022 Proxy Voting Guidelines, *supra* note 84, at 17.
[87] *Id.* at 17 n.10.
[88] NZAM Commitment, *supra* note 7.

disclosures" and took voting action against 53 of them.[89] It also placed 191 companies "on watch" for "insufficient progress on climate," and threatened that if "significant progress" was not made, BlackRock might take "voting action against management."[90] In one high-profile episode, BlackRock voted against the re-election of board members for ExxonMobil due to their (perceived) failure to adjust to a "net zero economy."[91] BlackRock also voted against directors for increasing exposure to coal-fired power generation.[92]

B. SEC Staff Letters Are Not Legal Opinions

Many companies seek permission from SEC staff to exclude shareholder proposals. One proxy advisor recently suggested that when SEC staff does not exclude the proposal and says it is unable to conclude the proposal violates state law, others can rely on that response as a legal conclusion.[93]

In fact, as the SEC clearly states on its website, its staff responses to companies are "informal," not approved by the SEC itself, not legally binding, and "do not constitute legal advice."[94] In an analogous context, the FTC recently decried the "problem" of companies choosing to "rely on [nonbinding guidance] as a substitute for their own legal analysis," despite the "agency's clearly stated assertion that informal interpretations are not a legal determination."[95]

C. Climate Change Proposals Are Not Financially Justified

Some investment managers defend investments and votes for environmental purposes based on the assumption that there is an impending "transition to decarbonize the world."[96] BlackRock stated that the net zero transition is "inevitabl[e]" and for that reason, it expects its portfolio companies to have a "plan for operating under a scenario where the Paris Agreement's goal of limiting global warming to less than two

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[89] BlackRock, Investment Stewardship Annual Report, at 37 (Sept. 2020).
[90] *Id.* at 11.
[91] BlackRock, Vote Bulletin: Exxon Mobil Corporation, at 3 (May 26, 2021) (explaining that BlackRock voted against the board in support of three nominees who "would be better able to help management align the business with a net zero economy"); *see also* State Street, 2021 Proxy Context: Exxon Mobil Corporation (XOM) (May 27, 2021).
[92] BlackRock, Voting Bulletin: Fortum Oyj (Apr. 23, 2020).
[93] Glass Lewis State Attorneys General Letter, *supra* note 83, at 6.
[94] *See* SEC, Requests for No-Action, Interpretive, Exemptive, and Waiver Letters; SEC, Staff Interpretations (cautioning that because responses such as no-action letters "represent the views of staff, they are not legally binding").
[95] Holly Vedova, Fed. Trade Comm'n, Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt (Aug. 26, 2021).
[96] BlackRock, Managing the Net Zero Transition.

degrees is fully realized."[97] The NZAM Commitment—of which BlackRock and State Street are signatories—is crucially premised on the prediction that "governments will follow through on their own commitments to ensure the objectives of the Paris Agreement are met."[98]

As discussed above, these assumptions are speculative and unrealistic.[99] The road to the Paris Agreement's desired temperatures or to global net zero carbon emissions is far from inevitable. The International Energy Agency ("IEA") even describes the pathway as "narrow" and "unprecedented" and admits that the technology to reach net zero by 2050 does not yet exist.[100] Fiduciary duties cannot be fulfilled by relying on aspirational, unrealistic assumptions to guide investments and shareholder votes.

Notably, J.P. Morgan Asset Management voted in favor of a 2022 resolution requiring Costco to disclose its greenhouse gas emissions.[101] However, when JPMorgan Chase received a shareholder proposal in 2020 asking the company to disclose its greenhouse gas emissions, the board opposed the proposal,[102] which narrowly failed.[103]

D. Quotas Are Not Financially Justified

Similarly, in pressuring companies to impose board-diversity quotas, BlackRock and State Street operate under the assumption that race- and gender-based quotas "lead[] to . . . better long-term economic outcomes."[104]

This assertion lacks evidentiary support regarding board behavior. Indeed, a California state court was unable to find academic studies to support the state's contention that there is "a causal connection between women on corporate boards and corporate governance," leading the court to deem California's gender quotas

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[97] BlackRock, A Framework for Our Clients: How to Invest in the Net Zero Transition.
[98] NZAM Commitment, *supra* note 7.
[99] *See supra* notes 14–19 and accompanying text.
[100] Press Release, Int'l Energy Agency, Pathway to Critical and Formidable Goal of Net-Zero Emissions by 2050 Is Narrow But Brings Huge Benefits, According to IEA Special Report (May 18, 2021) ("[I]n 2050, almost half the reductions come from technologies that are currently only at the demonstration or prototype phase.").
[101] J.P. Morgan Asset Mgmt., Global Equities Voting Summary Report Q122Global Equities Voting Summary Report Q1 2022, at 63.
[102] JPMorgan Chase & Co., 2020 Proxy Statement, at 97–98.
[103] Proxy Monitor, Proxy Monitor. Search "JPMorgan Chase."
[104] BlackRock, Investment StewardshipInvestment Stewardship 2022 Policies Updates Summary, at 3; *see also* Cyrus Taraporevala, CEO's Letter on SSGA 2021 Proxy Voting Agenda, Harv. L. Sch. F. Corp. Governance (Jan. 13, 2021) (post by State Street CEO stating that management teams with a "critical mass of racial, ethnic, and gender diversity are more likely to generate above-average profitability").

unconstitutional.[105] The SEC recently found that "studies of the effects of board diversity are generally inconclusive, and suggest that the effects of even mandated changes remain the subject of reasonable debate."[106]

Blindly promoting the positive effects of diversity quotas for businesses' bottom lines and dogmatically voting against board members on the basis of diversity quotas is inconsistent with fiduciary duties and the prudent investor rule.

Notably, despite its many votes against other companies on racial equity grounds, in 2021, State Street itself received a shareholder proposal requesting a comprehensive racial equity audit.[107] State Street management unanimously opposed the proposal, and the proposal failed.[108]

E. Deference to Proxy Advisors Is Unjustified

Some asset managers believe that deferring to proxy advisors on these issues will avoid liability for votes. This is incorrect for multiple reasons.

First, a fiduciary cannot simply rely on the advice of a third party. The fiduciary must continue to exercise its fiduciary duties in deciding whether the third party's advice should be followed. If evidence emerges that the third party is giving biased advice, the fiduciary must take that into consideration. Here, the undersigned as attorneys general have highlighted, ISS and Glass Lewis appear to have engaged in conflicts of interest, failed to focus on financial return in vote recommendations, committed to use Climate Action 100+ benchmarks, and promoted and relied upon false and misleading statements.[109] In response to these concerns, both companies failed to describe a financial basis for requiring companies to align with net zero aspirations.[110]

Second, the policies that ISS and Glass Lewis advertise as their "benchmark" policies have a clear political bent that is not solely in the interest of generating shareholder value, even just comparing them with other policies that those two companies

[105] *See Crest v. Padilla*, No. 19STCV27561 (Cal. Super. Ct. May 13, 2022), *available at* https://s.wsj.net/public/resources/documents/Crest-et-al-v-Padilla-05-13-2022.pdf.
[106] SEC, Order Approving Proposed Rule ChangesOrder Approving Proposed Rule Changes to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service (Release No. 34-92590) (Aug. 6, 2021).
[107] State Street, STT-2021-Proxy-Statement2021 Proxy Statement.
[108] *Id.*; *see also* Press Release, Majority Action & SEIU, State Street AGM Statement -— 5/19/21Shareholders Issue Strong Rebuke to State Street for Racial Justice Failures at Annual Meeting, With Over One Third Supporting Resolution In Support of Racial Equity Audit (May 20, 2021).
[109] State Attorneys General Glass Lewis Letter, *supra* note 88.
[110] Glass Lewis State Attorneys General Letter, *supra* note 83; Inst'l S'Holder Servs., Letter from ISS to State AGsLetter from Institutional Shareholder Services to State Attorneys General (Jan. 31, 2023).

offer. For example, ISS recently released its Global Board-Aligned International Proxy Voting Guidelines.[111] ISS explained that "[o]n environmental or social matters, the Global Board-Aligned Policy will generally result in recommendations that are in line with those of a company's board, with recommendations in support of shareholder proposals limited to circumstances where it is considered that greater disclosure will directly enhance or protect shareholder value and is reflective of a clearly established reporting standard in the market."[112] Similarly, Glass Lewis has a "Governance-Focused Policy," which it claims "are ideal for investors who want to promote effective governance mechanisms on boards without taking strong positions on other types of issues."[113] Whether these policies are in fact free of political bias, they are certainly presented as being less political than the "benchmark" policies. Given these alternative options, asset managers cannot simply rely on the fact that they followed ISS or Glass Lewis's "benchmark" policies to show they were acting to further shareholders' interests.

In light of this information, following ISS and Glass Lewis's proxy recommendations will not shield asset managers from liability – and in fact, may expose them to liability.

V. Conclusion

We will continue to evaluate activity in this area in line with our ongoing investigations into potential unlawful coordination and other violations that may stem from the commitments you and others have made as part of Climate Action 100+, Net Zero Asset Managers Initiative, or the like.

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[111] Inst'l S'holder Servs., Global Board-Aligned Proxy Voting Guidelines: 2023 Policy Recommendations (Mar. 15, 2023).
[112] Press Release, Inst'l S'holder Servs., ISS Launches Global Board-Aligned Voting Policy (Mar. 16, 2023).
[113] Glass Lewis, Glass Lewis Proxy Voting Policies.

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ABA Antitrust Section Spring Meeting 2022
Panel on "Making Antitrust Sustainable"

ESG Considerations and Antitrust: Why ESG-Focused Efforts Have Little to Fear from Antitrust Law

Hill Wellford, Ryan Will, and Laura Muse[1]
Vinson & Elkins LLP | Washington, DC

Contents (hyperlinked):

I. Executive Summary

This paper explains the basic antitrust standards and methods of analysis that usually apply when companies attempt to develop environmental, social, and governance ("ESG") goals and plans, whether companies do so unilaterally (each single firm, by itself) or collaboratively (via multi-company agreements and associations). General counsel increasingly are asking for such antitrust guidance, and they have good reason to do so, since ESG efforts often involve collaborations between competitors or large firms upon which legal scrutiny already falls for other reasons.

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Virtuous intentions do not immunize companies from antitrust laws. The antitrust laws (as interpreted by courts) assume as their fundamental premise that unfettered competition will lead, in the long run, to "the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress"[2]; therefore, antitrust law applies skepticism to actions that would reduce competition, even if those actions are done, or are claimed to be done, in the service of other important goals. That said, antitrust laws should not be seen as a barrier to the implementation of ESG commitments, provided that firms take reasonable precautions. While companies should seek qualified antitrust counsel for guidance about any specific plans, the following principles should help illustrate that antitrust and sustainability practices can coexist:

- It is axiomatic that antitrust laws are for the "protection of competition, not competitors."[3] Antitrust liability requires actionable harm to be to competition as a whole, not just to a particular one or a few aggrieved firms. So, harms that are speculative or unimportant to competition should not lead to antitrust liability.

- Aside from hardcore cartel conduct such as price fixing (which has no particular relevance to ESG commitments), antitrust liability requires a demonstration of "market power," which in the United States means no lower than a 30% market share threshold, and usually 50% or more. In fact, most recent antitrust enforcement actions of both the European Commission and the United States competition authorities have alleged market shares at or above 70%. Thus, ESG commitments among industry participants with low or moderate market shares have little to fear from antitrust.

- In appropriate contexts, market share safe harbors also may apply at the level of a 30% market share or below for vertical agreements in Europe, and at a 20% market share or below for both vertical and horizontal agreements in the United States.

- When it comes to unilateral conduct, antitrust liability is particularly difficult for plaintiffs to establish. Importantly, a unilateral, unconditional refusal to deal—as might be the case if a purchaser refuses to buy products from suppliers that do not meet a particular ESG profile—is effectively beyond the reach of antitrust law in the United States. It is nearly so in Europe, unless the purchaser has certain "indispensable" and unusual characteristics.

- Antitrust risk is highest when ESG efforts involve collaborative conduct. But for collaborative conduct (again with the exception of cartel conduct), antitrust law applies a reasonableness or balancing standard that is feasible for well-counseled businesses to meet. In addition, not all conduct is alike. Vertical conduct, such as

[2] *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).
[3] *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

a purchaser-vendor agreement, is particularly likely to be found reasonable under such standards. Thus, it will not be inherently suspect for a purchaser to demand that an existing supplier improve the ESG profile of its product.

- Collaborative horizontal conduct, meaning agreements between direct competitors, is where the highest antitrust risk applies. Even here, the risk is manageable and certain collaborations are more risky than others (this paper provides examples by way of a list).

Lastly, this paper briefly discusses the debate about how ESG principles might be used as justifications within existing or new antitrust reasonableness or balancing tests.

The overall message is that while companies implementing ESG commitments should be conscious of antitrust law, they should be confident that antitrust will not stand in the way of ESG efforts that are well justified and carefully implemented.

II. "Unilateral" ESG Efforts — No Significant Antitrust Risk

Antitrust law applies less scrutiny to unilateral conduct than to horizontal conduct, so this paper begins by defining and discussing unilateral conduct as a separate case.

A. Unilateral Conduct Standards

Under the antitrust laws, single-firm conduct analysis is known as analysis of "monopolization" in the United States or "dominance" in the European Union and much of the rest of the world.[4] There are some differences in the U.S. approach versus those of the EU and other jurisdictions but the analysis is far more similar than divergent.[5] There is a global consensus on the starting point for single-firm conduct: that such conduct is unlikely to be problematic unless the firm engaging in the conduct possesses a significant degree of market power.[6] While there is no formal minimum for determining single-firm conduct market power, courts in the United States typically employ no lower than a 30% market share threshold when determining market power,[7] and it is rare for a single firm to be found to possess market power if it has less than 50% of a properly defined antitrust market.[8] In the EU, some national competition authorities bring single-

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[4] Unilateral conduct and single firm conduct are the same thing, and monopolization and dominance are equivalent legal terms. Again, this paper uses these terms interchangeably.

[5] The ABA concluded as much in a major study in 2019, *Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards* (2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf.

[6] *See* ICN, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws: Recommended Practices* (2007), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_DomMarPower.pdf; Organisation For Economic Co-operation & Development, *Evidentiary Issues in Proving Dominance*, (2006), http://www.oecd.org/competition/abuse/41651328.pdf.

[7] 1 Antitrust Law Developments § 1.B.3.b(1)(c) (8th ed. 2017) [hereinafter ALD 8th].

[8] *See generally* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), at Part 4 "Market Definition," https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#4.

firm cases involving dominant firms with market shares closer to 50 percent, which is the share that triggers a presumption of dominance according to European case law,[9] but more recent enforcement actions of both the United States and the European Commission have alleged market shares at or above 70%.[10] Even if a presumption of market power is applied, the accused company can rebut the presumption by conducting an analysis of the strength of actual competitors, barriers to entry, and countervailing buyer power.

If market power is established, single-firm conduct analysis then examines market impact.[11] The analysis usually proceeds to apply particular tests for particular types of conduct, and only one of these,[12] refusals to deal, has significant relevance to ESG topics (as discussed below). All the conduct tests have some common elements, which include that, under U.S. law, a court will not find a violation unless the conduct at issue has "market-wide" impact, as distinguished from harm to a particular market participant. For example, in a monopoly-maintenance case, the conduct must be "reasonably capable of contributing significantly to a defendant's continued monopoly power,"[13] and in an attempt-to-monopolize case, the conduct must create a "dangerous probability" of propelling the defendant into a dominant position with similar likely effects.[14] European law likewise applies an effects-on-competition test, although EU law is somewhat more likely than U.S. law to infer effects on competition as a whole if there are demonstrable effects to a few important competitors.[15]

Refusals to deal with another company are a special case under single-firm conduct law. When a company makes a unilateral, unconditional refusal to deal, such purely unilateral action does not create significant antitrust risk in the United States. The U.S. Supreme Court has stated that a company (even one that possesses market power) generally does not have a duty to assist any vendor or rival, and a unilateral, unconditional refusal to deal is generally beyond the reach of the antitrust laws.[16] Such a refusal is also unlikely to raise antitrust objections in Europe, although a combination of extreme market power and significant effects could still raise concerns. In the EU, in deference to the dominant firm's qualified prerogative to select its partners and customers, the legal test for liability requires that the refusal involves an "indispensable input" controlled by the dominant firm and that the refusal therefore results in the elimination of "all

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[9] *See* Case C-62/86, *AKZO Chemie BV v. Comm'n*, 1991 E.C.R. I-3439, ¶ 60.

[10] *See* Frances Dethmers & Jonathan Blondeel, *EU enforcement policy on abuse of dominance: Some statistics and facts*, 38 E.C.L.R., Issue 4 (2017).

[11] *See generally* the section entitled "Assessing Market Impact," *Differences and Alignment, supra*, at 39-41.

[12] Some of the most common are refusal to deal, margin squeeze, exclusive dealing, loyalty discounts, leveraging and technical tying, and predatory pricing. *See Differences and Alignment, supra,* at 41-60.

[13] *United States v. Microsoft Corp*., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc).

[14] *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 459 (1993) ("We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize").

[15] *See Differences and Alignment, supra*, at 40-41.

[16] *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004).

effective competition downstream"[17]; in addition, the refusal must cause consumer harm, for example by keeping a new or improved product from the market.[18]

In contrast to the foregoing unconditional refusals, a conditional refusal involving an anticompetitive condition—e.g., "do not trade with my rivals, or I will not trade with you"—is outside the shelter of the foregoing precedent. But most conditional refusals (discussed in more detail below) still would not be considered dangerous to competition in the absence of market power.

B. Examples and Analysis of Single-Firm ESG Efforts

If a company decides by itself to adopt ESG policies, this action is unilateral. If a company decides by itself to refuse to do business with another company because that other firm does not employ good ESG practices, this action, too, is unilateral. Such purely unilateral action does not create significant antitrust risk, due to the almost unfettered right of a company to refuse to deal without conditions, as explained above.

In our experience, ESG and antitrust counseling questions in the unilateral context most often arise when a company does want to place conditions, such as stating explicitly that it will reconsider a refusal to deal if a vendor implements particular ESG policies, or providing discounts or financial incentives for partners that are conditional on meeting particular ESG benchmarks. Such conditions, in theory, could cause an antitrust enforcer to conduct an in-depth antitrust analysis, which it would do by examining the legitimacy of the condition (does the condition genuinely reflect an ESG goal?) and the market impact (does the condition exclude other companies from an important percentage of the overall market, or otherwise affect competition overall for the worse? are consumers likely to be harmed?). While such an inquiry is theoretically possible, it is made unlikely by the threshold requirement of market power: few single firms are likely to have such a large presence that their imposition of ESG conditions potentially would damage competition in a market as a whole.

As an illustration, imagine a major cloud internet storage provider whose key inputs are the purchase of computer servers, building space for server farms, and electrical power. If the storage provider implements an ESG policy stating that it will refuse to purchase servers that are not ethically produced, building space that does not use green-building materials, or power that is non-renewable, would there be any antitrust risk? The first step should be to consider market

[17] *See* Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH* & Co. KG, 1998 E.C.R. I-7791, ¶¶ 38, 41, 45. The indispensability requirement aims at ensuring that the dominant firm is not forced to share the fruit of its investments with its current or potential competitors simply because it could be more difficult for those competitors to develop their own upstream input. Thus, in addition to protecting the dominant firm's own incentives, this requirement also is intended to provide incentives for competitors to invest and innovate. The Microsoft case clarified that the refusal need only eliminate all "effective competition," not all competition in the market. Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3619, ¶¶ 229, 563.

[18] *See* Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eirann & Indep. Television Pubs. v. Comm'n*, 1995 ECR I-743, ¶ 54. Preventing the appearance of a new or improved product is unnecessary for the requisite consumer harm. The Court of First Instance held that Microsoft's withholding of interoperability information could have limited "technical development to the prejudice of consumers" and hence infringe Article 102. Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3619, ¶¶ 647–65.

power, and this first step usually will end the inquiry in the company's favor. Our research suggests that even the largest household-name cloud storage providers in the United States have only single-digit shares of the purchase of servers nationally, or of building space or electrical power on a regional or metropolitan area level (if the geographic market should be defined that narrowly). Accordingly, antitrust risk appears implausible under this scenario.

III. "Collaborative" ESG Efforts — Risk versus "Reasonableness"

Collaborative conduct—meaning, agreements and similar multi-firm efforts—is traditionally the greatest focus of antitrust law. But not all collaborations are equally suspect; to the contrary, most collaborations are competition-enhancing or at least competitively benign. This field of analysis is tremendously broad, encompassing the smallest bilateral agreements to the largest mergers, joint ventures, and industry-wide standards development efforts. Accordingly, it is helpful to break it up by category and by general rules. An obvious but useful observation is that the fewer firms are involved, the lower the risk generally applies, and the more firms are involved, the greater the risk due to the likelihood that they represent greater combined market power.

This paper does not cover mergers specifically, although the principles mentioned here apply equally to mergers. This paper covers the basic standards of non-merger collaborative conduct; the use of market share safe harbors; the important difference between analysis of vertical versus horizontal agreements; and brief analysis of particular types of collaborative ESG conduct that the authors most commonly have observed.

A. Basic Standard: "Rule of Reason," "Effects Balancing," and the Difference between "Vertical" and "Horizontal" Agreements

The antitrust laws apply one of two standards to collaborative conduct, depending on the conduct at issue. Under the first standard, known as the "rule of reason" in the United States, if a collaboration causes a "restraint" of competition, the collaborators must demonstrate a legitimate procompetitive justification for the restraint. If they do so, then an objecting party must show that the restraint is not reasonably necessary to achieve the restraint's objectives or that the collaborators' justification is a mere pretext for some other, anticompetitive motivation. The final step is to evaluate the restraint's overall reasonableness, for which market power and market impact is important—collaborators with little market share are unlikely to impact a competitive market, and thus their burden to show reasonableness may be less than those of collaborators whose conduct impacts a market significantly.[19] The European Union applies a similar "effects balancing test" under Article 101(3) of the Treaty on the Functioning of the European Union. While businesses often find the vagueness of the rule of reason or effects balancing test to be frustrating, in practice these standards tend to be lenient, with credit given to reasonable business judgments and a tie going to the defense. Most business collaborations are analyzed under these standards, and have no difficulty being upheld under them.

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[19] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

For an agreement to create or enhance market power, the parties to that agreement must have "the ability to raise prices above those that would be charged in a competitive market."[20] A low market share usually will preclude a finding of market power, whereas a high market share indicates the possibility that market power exists.

The second standard applicable to collaborative conduct is "per se" treatment (in the United States) or restriction of competition "by object" (in the EU), which identifies conduct that is considered to be automatically unreasonable and therefore automatically illegal. Per se or by object conduct includes group boycotts and hardcore cartel actions such as price fixing, bid rigging, and the allocation of customers or geographic areas between rivals. Courts and antitrust enforcers believe that such conduct is so unlikely to have efficiency benefits that it can be condemned without any need for a balancing of justifications versus harmful effects; no justifications are permitted. Such conduct also is subject to the most severe penalties, often including criminal sanctions.

Note that an "agreement" in the antitrust sense may be written or oral, explicit or tacit. Similar to the test under contract law, the test for an agreement under antitrust requires only the exchange of consideration (which is not necessarily financial) and a meeting of the minds. The form of the agreement does not drive the substantive analysis.

The nature of the relationship between parties to an agreement is an important factor in whether an agreement may be condemned as unreasonable. Agreements between companies that are direct competitors, typically at the same level of the supply chain, are "horizontal agreements." An obvious example is a joint venture between two competitors, but horizontal agreements also include more nuanced collaborations such as standard setting or codes of conduct promulgated by an industry group of competitors. In contrast, agreements between firms at different levels in the supply chain are "vertical agreements." For example, an agreement through which a coffee producer sources coffee beans from a plantation is a vertical agreement. Under the antitrust laws, horizontal agreements are generally more suspect than vertical agreements because the number of subjects for legitimate, procompetitive coordination is fewer between rivals than between parties in a vertical relationship.

B. Market Share Safe Harbors

As mentioned above, courts in the U.S. typically employ no lower than a 30% market share threshold when determining market power.[21] The joint U.S. Federal Trade Commission (the "FTC") and U.S. Department of Justice (the "DOJ") Antitrust Division *Antitrust Guidelines for Collaborations Among Competitors* establish an "antitrust safety zone" or enforcement safe harbor, within which "absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than 20% of each relevant market in which competition may be affected."[22] Similarly, the European Commission's *Guidelines on Vertical Restraints* establish a

[20] *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984).
[21] ALD 8th, § 1.B.3.b(1)(c).
[22] U.S. Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 4.2 (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-

safe harbor for vertical agreements that do not contain blacklisted or excluded restrictions when "the supplier's and the buyer's market share is each 30% or less."[23] Note that the U.S. safe harbor applies to all agreements, whereas the EU safe harbor applies only to vertical agreements.

C. Vertical ESG Conduct — Lower Risk, but Beware "Ancillary Conditions"

Vertical ESG conduct, in the authors' experience, usually consists of attempting to persuade other companies in a supply chain to implement the same ESG policies as the originating company. Two examples will illustrate how antitrust law may apply in this context.

If a purchasing company demands that its supplier accept the purchaser's ESG commitments, the demand is a unilateral action but the resulting agreement is a vertical action, made between the purchaser and the supplier.[24] This is the simplest type of vertical agreement. While vertical agreements are, in principle, analyzed under the same rule of reason standard as are horizontal agreements, in practice vertical agreements face less antitrust scrutiny because there typically is no competition between the parties and therefore no risk of restricting competition between them. Accordingly, if a purchaser can articulate reasonable justifications for imposing such ESG commitments and those commitments are reasonably tailored to the justifications, a purchaser's use of ESG commitments with suppliers is unlikely to cause antitrust liability. Market share safe harbors may apply here as well.

Next, imagine that the company in the paragraph above again demands that its supplier accept ESG commitments, but this time also demands that the supplier refrain from selling to any other purchasers that do not implement ESG commitments. Here again, the resulting agreement is a vertical action; however, this time the agreement contains an "ancillary condition"—a condition additional to the core subject of the ESG commitments with regard to the purchasers' own products.

Ancillary conditions complicate the antitrust analysis because the antitrust balancing test must be applied not only to the ESG commitments in this example but also to the ancillary conditions. The ancillary conditions in this example qualify as a "restraint of trade" (the supplier cannot trade with a non-ESG-compliant firm)[25]; therefore, the antitrust analysis would ask whether the purchaser[26] has a legitimate business justification for demanding that its suppliers not work

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venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [hereinafter *Collaborations Among Competitors*]. "The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied." *Id.*

[23] Guidelines on Vertical Restraints, 2010 O.J. (C 130) 23.

[24] Assuming that this is a typical purchaser-supplier relationship, where the supplier does not compete with the purchaser. If the supplier also competes with the purchaser, this could be a "dual distribution" context with both vertical and horizontal elements to the analysis. *See generally*, ALD 8th § 1.D.1(b)(4).

[25] This vertical agreement normally would not be described as a "boycott" because the concept of "boycott" usually describes a horizontal agreement, or at least one that targets a particular other competitor by name ("Alpha Corporation"), not a concept or class of companies ("sellers who do not employ good ESG practices").

[26] Technically, all parties to an agreement face potential liability for conduct involving an agreement, if that agreement is found to be unlawful under the antitrust laws. *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff'd on other grounds*, 202 U.S. 390 (1906) (establishing joint

with other purchasers. The parties could avoid such an inquiry if the market share safe harbors mentioned above apply—in other words, if the supplier's and the buyer's market share is each 30% or less (in the EU) or collectively 20% or less (in the United States)—but otherwise, ancillary conditions inject an additional element of review and risk.

It seems likely that many companies wishing to require ESG commitments will be able to shelter under the market share safe harbors. Those that exceed a market share safe harbor, however, may wish to simplify their risk profiles by using simple ESG-committed agreements, as in the former example, rather than agreements with ancillary conditions, as in the latter.

D. Horizontal ESG Conduct — Risk Considerations and Safeguards

Since horizontal conduct by definition involves collaboration between competitors, concerns about the elimination of competition are highest in this area. In the United States, horizontal collaborations may still benefit from the 20% market share safe harbor; however, note that the European Union's 30% vertical agreement market share safe harbor would not apply because, of course, such collaborations are not vertical. If no safe harbor applies, then the lawfulness of any resulting restraint will be judged by the balancing test standards mentioned above.

Collaboration and competition are not inherently at odds with each other. While some collaborations can restrain competition, many are neutral in their impact and some are procompetitive. Recognizing this, courts and enforcement agencies applying the antitrust laws tend to apply differing levels of scrutiny to different types of conduct, such that we can (albeit only roughly) divide conduct into lower- and higher-risk types.

1. Collaborations Unlikely to Raise Antitrust Concern

Discussing and Exchanging Best Practices. Companies may want to discuss their experiences with adopting and implementing ESG principles. These discussions might cover an array of topics, such as which provisions are most effective or most difficult to implement, how to implement the provisions most efficiently into daily operations, or where they are finding gaps that need improvement. Such topics do not raise antitrust concerns provided that the parties do not share "competitively sensitive information."[27] (But see "Information Sharing," below.)

A natural forum for such discussions is an industry association or standard-setting organization. The antitrust laws do not prohibit collaborations in such forums, provided that appropriate safeguards are followed. Note that the Federal Trade Commission has published a web page, "Spotlight on Trade Associations," which discusses examples of topics that are innocuous and others that firms should avoid, and provides guidance on how to share information safely while avoiding undue risk of violating antitrust laws.[28]

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and several liability, which subsequently became the settled law of antitrust damages in the United States). In a purchaser/seller vendor context such as this, however, scrutiny generally falls most heavily on the purchaser.

[27] See definition in "Information Sharing," below.

[28] Fed. Trade Comm'n, *Spotlight on Trade Associations*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade (last visited Feb. 20, 2022). While the

Optional, Non-Exclusive Codes of Conduct. Collective statements and codes of conduct may recommend that multiple competitors implement and comply with a baseline standard of ESG commitments, or even a standard above any required by law or regulation. This may help mitigate participating companies' concerns about the possibility of being undercut on price by non-compliant firms who face lower costs, should meeting the standards result in increased compliance costs.[29]

Promulgating industry codes of conduct or joining in a collective statement should not raise antitrust concerns so long as members ensure that (i) participation is voluntary and non-binding, (ii) each participant has the ability determine its own path to compliance, (iii) membership does not involve intrusive rival-to-rival auditing of compliance, (iv) participants do not share competitively sensitive information, and (v) the question of enforcement and penalties is left to government officials.

For example, a group of major power consumers might release a statement saying that members of the collaboration commit to contracting with renewable power suppliers for a given percentage of their consumption. If each participant can determine its own path to realizing such an objective and members are not allowed to penalize one another, so that the only enforcement mechanism is reputational, then the collaboration is unlikely to significantly harm competition. Companies should, however, avoid crossing the line into a group boycott of any particular vendor or rival.

Certification Standards. Creating a certification process is a way further to formalize the aspirational goals of a code of conduct or collective statement. For example, an industry group may establish standards for measuring and awarding a seal of approval to "ESG compliant" companies. As a threshold matter, it is critical that participation in the certification process is voluntary and non-exclusive of other certifications. Having the option to opt out of a particular certification process or to partake in more than one minimizes the potential for anticompetitive effects.

A key antitrust danger is that certified companies could deny certification unjustifiably to a competitor in order to restrict that competitor's ability to compete against the certified companies.[30] This danger can be avoided if the participation criteria are transparent, access to the standard is on the basis of reasonable and non-discriminatory criteria, and certification is awarded objectively—particularly if the ultimate arbiter is an independent third party.

Petitioning the Government**.** Most activities involving petitioning of the government and its agencies, filing and defending lawsuits or regulatory claims, and other use of judicial or administrative processes—even in collaboration with competitors or for explicitly anticompetitive purposes—enjoy immunity from the U.S. antitrust laws under the *Noerr-Pennington* doctrine, so long as any anticompetitive effects flow from the resulting actions of the government, not from the

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EC has not issued specific guidance for trade associations, its *Guidelines on Vertical Restraints* apply in this context. *See generally* Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1.

[29] In countries suffering from weak legal systems or inadequate law enforcement, compliance pledges may be especially important.

[30] *See Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (the plaintiff alleged such a theory of harm).

direct conduct of the private parties.[31] Collective actions by industry participants can play an important role in clarifying existing law and in working with governments to craft laws that are efficient and enforceable, and antitrust policy does not prevent rivals from jointly discussing clarifications or changes to laws. In fact, trade associations routinely engage in these types of lobbying efforts. In the EU, collaborations among competitors are subject to the competition rules but enforcement efforts never have been applied to collective government petitioning in the absence of independent, private anticompetitive actions.

2. Collaborations Likely to Draw Increased Scrutiny

Hardcore Cartel Conduct. So-called "hardcore" cartel conduct includes price fixing, bid rigging, and customer or territory allocation. Such agreements are considered to be "the supreme evil of antitrust."[32] Unlike other agreements and collaborations discussed in this chapter, cartel conduct is *per se* illegal, meaning it is conclusively presumed to be unreasonable and no inquiry is made into potential procompetitive effects. Cartel conduct is subject to stiff penalties, including criminal sanctions. Any legitimate competitor collaborations discussed in this chapter must not be used as cover or sham for hardcore cartel conduct.

Group Boycotts or Concerted Refusals to Deal**.** These are agreements among competitors not to do business with another firm (including a supplier or purchaser) or to limit or circumscribe the terms of doing business with another firm. For example, a group of smartphone manufacturers might agree with each other not to purchase computer chips from a particular chip producer suspected of polluting its environment.[33] Group boycotts also may arise in the context of membership in trade associations or standard-setting organizations. For example, that same group of smartphone manufacturers might be part of a trade association and refuse membership to competing manufacturers who do not implement ESG commitments into their own supply chains or who engage with non-ESG-compliant suppliers. Such actions may be found to be unreasonable, particularly if membership in the trade association provides benefits critical to competition.

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[31] *See E.R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). This so-called doctrine is found in a line of federal court precedent and rooted in the United States Constitution's First Amendment, which protects the "right . . . to petition the Government for a redress of grievances" against infringement. U.S. CONST. amend I. The cases hold that antitrust law does not apply to activities of parties seeking governmental action, even where the parties have anticompetitive motives. The key facts that confer *Noerr-Pennington* immunity are that the anticompetitive effects must result from the government action itself. If the anticompetitive effects flow from the private parties' acts independently of government acts, no immunity applies. Thus, lobbying for a law that imposes industry-wide railroad rate increases would be immune but having the railroads fix prices first, and then lobby later, would not be immune.

[32] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

[33] In January 2022, the Net Zero Insurance Alliance, a group of insurance companies pledging to eliminate greenhouse gas emissions from their underwriting businesses, was forced to limit the scope of their collaboration after being warned that a proposal to include a commitment to exit coal insurance as part of the terms of group membership may run afoul of antitrust laws. *See* Alistair Marsh, *Net-Zero Insurers Uncover New Climate Adversary in Antitrust Law*, Bloomberg News (Jan. 19, 2022), https://www.bloomberg.com/news/articles/2022-01-19/net-zero-insurance-coal-exit-plans-impeded-by-antitrust-law.

Joint Purchasing Arrangements. Smaller companies typically agree to joint purchasing arrangements as a way to increase purchasing power and lower costs by achieving economies of scale. Most such arrangements are procompetitive for these reasons and do not raise antitrust concerns. In the context of the ESG commitments, a group of buyers may decide to purchase goods from one or a few ESG-compliant suppliers via a joint purchasing agreement. This might give buyers comfort that their supplies are ethically sourced, provide more checks on compliance, and give buyers more leverage to ensure a particular supplier meets preferred standards. Participants should be mindful that such agreements, while they may serve procompetitive purposes, may draw antitrust scrutiny if they result in monopsony power (meaning the ability of the purchasing group to force suppliers to lower their prices below competitive levels) or facilitate collusion. The 20% U.S. market share safe harbor would apply here. The 30% EU market share safe harbor also may apply here, but only to vertical aspects of the agreement.

Information Sharing. Competitors often have legitimate business justifications for sharing information with each other, and likely will do so in furtherance of the collaborations discussed in this chapter. However, competitors should be very careful about whether or how to share "competitively sensitive information" because doing so may facilitate collusion or harm competition. Competitively sensitive information is any information of Competitor A that is not public or well-known, which, if learned by Competitor B, would allow it to predict A's pricing or output strategies or influence the competitive decisions of either party, particularly when the information increases their likelihood of engaging in parallel conduct or otherwise individually or collectively reducing the intensity of their competition (e.g., tend to cause them to compete less vigorously on price). Information concerning price, output, costs, or strategic planning is generally considered competitively sensitive when shared between competitors.[34] Collaborations related to adoption and implementation of ESG commitments should not, and likely need not, involve the exchange of competitively sensitive information. To the extent that companies do feel the need to share such information, it should be (i) historical, meaning generally a few months old depending on the industry; (ii) aggregated and anonymous, such that no individual firm's data is identifiable; and (iii) exchanged through a neutral third party, such as a trade association, so that no direct competitor receives another's raw, non-anonymous, identifiable and sensitive data. For instance, competitors should not share company-specific cost, margin, or volume information when discussing best practices or the effect of ESG commitments on their business. Similarly, businesses should not share forward-looking business plans as part of their efforts to develop a code of conduct or standards.

It is important to keep in mind that the relationship between parties affects whether information is competitively sensitive. While certain information may be competitively sensitive as between two competitors, that same information may be not competitively sensitive to share with suppliers as part of the vertical relationship. Regulatory authorities recognize this distinction.

[34] *Collaborations Among Competitors, supra*, § 3.31(b). This list is not exhaustive because the scope of competitively sensitive information varies by industry.

IV. Ongoing Debate: What to do with "Out of Market" Business Justifications?

What happens if—when conducting the balancing tests described above—the potential harms are suffered by a different group of consumers or individuals than the group who benefits? This question is the subject of a vigorous current debate. For example, there may be calls for sustainability benefits that primarily go to one group of people (e.g., lowered pollution near a computer hardware factory in Asia) while the costs are borne by an entirely different group (e.g., computer laptop consumers in the United States). Such "out of market" benefits traditionally are not recognized by antitrust law, but have particular relevance to broad efforts to address ESG issues. In February 2022, EU Competition Commissioner Margrethe Vestager said she is "not ready" to accept out of market sustainability benefits, but on this point, the Competition Commission faces pushback from EU member state competition authorities.[35]

At a broader level, the Organisation for Economic Co-operation and Development ("OECD") Competition Committee hosted a series of roundtable forums with antitrust authorities in February 2021 to discuss how antitrust laws interact with the United Nations sustainable development goals. The discussions examined potential conflicts between antitrust law and ESG goals, how antitrust authorities can account for sustainability goals in existing legal frameworks, and what improvements to antitrust laws would further sustainability goals.[36]

As of this writing in March 2022, perhaps the best discussion of ESG, antitrust, balancing tests, and out of market benefits is the Dutch Authority for Consumers and Markets ("ACM") *Second Draft Version: Guidelines on Sustainability Agreements – Opportunities within Competition Law* (Jan. 26, 2021).[37] In the ACM's summary:

> Agreements between undertakings can help, in an effective manner, towards the realization of public sustainability objectives. Furthermore, these agreements can broaden the support for the efforts that are needed to realize such objectives. The draft version of the Guidelines on Sustainability Agreements explains the application of competition law to sustainability agreements between undertakings. The Guidelines show the opportunities that market participants have for making sustainability agreements, but also where competition law draws the line.

At 25 pages, the ACM's *Guidelines* are too long to summarize here, but they are recommended reading. The Hellenic Competition Commission (the main competition authority in Greece) also recently hosted a forum and published a *Competition Law & Sustainability Staff Discussion* Paper analyzing the convergences and conflicts between sustainable ESG development and competition law.[38]

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[35] *See* Charley Connor, *Vestager Unwilling to Consider Out-of-Market Sustainability Benefits*, Glob. Competition Rev. (Feb. 3, 2022), https://globalcompetitionreview.com/european-commission/vestager-unwilling-consider-out-of-market-sustainability-benefits.

[36] *Sustainability and Competition*, OECD Competition Committee Discussion Paper (2020), https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf.

[37] Available in English at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[38] *Competition Law and Sustainability,* Hellenic Competition Comm'n, https://www.epant.gr/en/enimerosi/competition-law-sustainability.html (last visited Feb. 20, 2022). The

As of the publication of this paper, the foregoing debate is still in a development stage. Companies adopting ESG commitments should monitor the discussion, as it has the potential to affect the application of antitrust laws and perhaps other laws as well.

paper sets forth a number of suggestions to better reconcile competition law with sustainability objectives, including issuing general guidelines regarding when companies can collaborate to attain sustainability objectives, developing a competition law sustainability "sandbox" in which companies can work together on new approaches to meet sustainability goals in a competition law safe harbor, and the formation of an "advice unit," comprised of a variety of regulatory authorities, to provide informal consultation on proposed sustainability-related innovations.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
KARL A. RACINE

The Honorable Sen. Sherrod Brown, Chairman, Committee on Banking, Housing, and Urban Affairs
The Honorable Sen. Patrick J. Toomey, Ranking Member, Committee on Banking, Housing, and Urban Affairs
The Honorable Rep. Maxine Waters, Chairwoman, Committee on Financial Services
The Honorable Rep. Patrick McHenry, Ranking Member, Committee on Financial Services

November 21, 2022

Dear Senator Brown, Senator Toomey, Representative Waters, and Representative McHenry:

The undersigned Attorneys General write regarding fund managers' use of environmental, social, and governance factors (collectively known as ESG), particularly in light of recent commentary that the use of ESG factors is inconsistent with prudent investing, such as the August 4, 2022 letter sent to the CEO of BlackRock by nineteen Attorneys General of other states.[1] That commentary rejects consideration of ESG factors when assessing the risks and rewards associated with a particular investment. ESG factors, however, are like any other material factors—such as supply chain concerns or changing interest rates—that inform investment decision-making.[2] A rigorous consideration of ESG factors to evaluate *Value*—the risk and reward of a potential investment—not *Values*—a subjective preference as to whether a given business or entity merits investment based on the nature of its business—can provide significant financial benefits to investors.[3]

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[1] Ltr. from Nineteen Attorneys General to Laurence D. Fink, CEO, BlackRock, Inc. (Aug. 4, 2022) ("August 4 Letter"), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf; *see also* SEC.gov, Comments on Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies, https://www.sec.gov/comments/s7-17-22/s71722.htm; SEC.gov, Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors, https://www.sec.gov/comments/s7-10-22/s71022.htm.

[2] *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, FISCAL YEAR 2023 BANK SUPERVISION OPERATING PLAN (Sept. 6, 2022), https://occ.gov/news-issuances/news-releases/2022/nr-occ-2022-124a.pdf (listing as a "priority objective" for fiscal year 2023 better understanding of "climate-related financial risks" in addition to interest rate risk, liquidity risk management, cybersecurity, and other systemic risks).

[3] To be sure, many retail investors also choose to align their investment decision-making with their values, sometimes even at the expense of the size of short-term returns; that type of investment decision-making and the related investments are not at issue here. *See, e.g.*, Tim Gray, *Investing for Your Values, but Betting on Growth*, N.Y. TIMES, Oct. 14, 2022, https://www.nytimes.com/2022/10/14/business/mutual-funds/investing-environmental-social-governance-funds.html; Kevin Schmidt, *Profits Over Politics: the Case for Anti-ESG ETFs*, CNBC.COM, Oct. 5, 2022, https://www.cnbc.com/2022/10/05/profits-over-politics-the-case-for-anti-esg-etfs.html. And there is risk that asset managers overpromise the degree to which values-aligned investment can nevertheless result in better returns. *See* Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing (highest-rated ESG funds did not outperform lowest-rated funds). But the anti-ESG movement pushes against *any* consideration of ESG factors in investment decision-making and suggests that advisors should ignore those factors despite their materiality in most cases. *See*

Because ESG factors are material to investment decision-making, many of the undersigned Attorneys General wrote in support of the Security and Exchange Commission's (SEC) proposed rules regarding ESG practices and climate-risk disclosures.[4]

Given your committees' respective interest in and study of the impact of climate change, diversity, and governance on American corporations and the American economy more broadly, we believe it is critical that your committees be made aware of this issue as well as facts about the use of ESG factors in investment decision-making.[5]

I. ESG: *Value*, not *Values*

This letter addresses the consideration of ESG factors to promote *Value* to investors, rather than investor *Values*. The August 4 letter distorts the sound investment rationale for considering ESG factors in investment decision-making. Consideration of ESG factors alongside all other material factors does not "sacrifice[]" pensioner retirements to further a political agenda;[6] it simply acknowledges that environmental, social, and governance issues are material factors that can affect returns. For example, climate change poses significant risks to many corporations in the form of physical impacts like sea level rise, extreme drought, more powerful hurricanes, and longer-lasting and more intense wildfires.[7] As governments at all levels enact policies to respond to climate change, corporations face transition risks and opportunities.[8] Consideration of those risks and

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Amrith Ramkumar, *Some GOP States Push Back Against ESG Investing Trend*, WALL ST. J., Aug. 30, 2022, https://www.wsj.com/articles/esg-backlash-at-odds-with-shift-by-companies-and-investors-11661825320?mod=article_inline.

[4] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022); Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654 (proposed June 17, 2022).

[5] *See, e.g.*, *Borrowed Time: The Economic Costs of Climate Change before the S. Comm. On Banking, Housing & Urb. Aff.*, 117th Cong. (2022); *Addressing Climate as a Systemic Risk: The Need to Build Resilience within Our Banking & Fin. Sys. before the H. Subcomm. On Consumer Protection & Fin. Inst.*, 117th Cong. (2021); *A Review of Diversity & Inclusion Performance at America's Large Inv. Firms before H. Subcomm. On Diversity & Inclusion*, 117th Cong. (2021); *Building a Sustainable & Competitive Econ.: An Exam. Of Proposals to Improve Env'l, Soc., & Governance Disclosures before H. Subcomm. On Inv. Prot., Entrepreneurship & Capital Markets*, 116th Cong. (2019).

[6] Aug. 4 Letter, *supra* note 1, at 7.

[7] *See* IPCC, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION & VULNERABILITY SUMM. FOR POLICYMAKERS 11 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf; NOAA, BILLION-DOLLAR WEATHER & CLIMATE DISASTERS, Nat'l Ctrs. for Env't Info. (2021), https://www.ncdc.noaa.gov/billions/summary-stats; JESSICA WHITT & SCOTT GORDON, BARCLAYS, GLOOMY FORECAST: THE ECON. COSTS OF EXTREME WEATHER (May 4, 2022), cib.barclays/our-insights/extreme-weather/The-economic-costs-of-extreme-weather.html ("While extreme events have increased more than five times over the same number of decades, our Research analysts note the cost of extreme events has increased nearly eight times globally, inflation-adjusted, since the 1970s.").

[8] *See, e.g.,* Colo. Clim. Action Plan to Reduce Pollution, H.B. 19-1261 (2019), http://leg.colorado.gov/sites/default/files/2019a_1261_signed.pdf (requiring 50% reduction in statewide GHG emissions by 2030, 90% reduction in statewide GHG emissions by 2050); Act Concerning Conn. Global Warming Solutions, 2008 Conn. Acts 98 (Reg. Sess.), https://www.cga.ct.gov/2008/ACT/PA/2008PA-00098-R00HB-05600-PA.htm (80% GHG emissions reduction by 2050); An Act Creating A Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts. Ch. 8 §§ 8–10, https://malegislature.gov/Laws/SessionLaws/Acts/2021/Chapter8 (net zero economy-wide GHG emissions by 2050); Climate Solutions Now Act of 2022, 2022 Md. Laws Ch. 38, https://mgaleg.maryland.gov/2022RS/Chapters_noln/CH_38_sb0528e.pdf (net-zero GHG emissions by 2045); New Jersey Global Warming Response Act, N.J. Stat. Ann. § 26:2C-37 *et seq.* (West 2007), https://www.nj.gov/dep/aqes/docs/gw-responseact-07.pdf (reduce GHG emissions by 80% by 2050); N.Y. Env't

opportunities is simply part of prudent investment decision-making.[9] State pension funds and the asset managers that advise them are making a sensible choice to use ESG factors as part of an investment strategy to identify opportunities and protect state employees' retirement savings against foreseeable risks.[10]

The nineteen Attorneys General who signed the August 4 letter fail to cite any evidence to the contrary and instead appear to favor partisan politics and fidelity to the fossil fuel industry over the essential tenets that have long governed our capital markets.[11] And by doing so they risk their

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Conserv. Law § 75-0107 (McKinney 2020), https://www.nysenate.gov/legislation/laws/ENV/75-0107 (reduce GHG emissions by 85% from 1990 levels by 2050); 42 R.I. Gen. Laws § 42-6.2-9 (West 2021), webserver.rilin.state.ri.us/Statutes/TITLE42/42-6.2/42-6.2-9.htm (achieve net-zero emissions by 2050); Wash. Rev. Code § 70A.45.020 (2020), https://apps.leg.wa.gov/rcw/default.aspx?cite=70A.45.020#:~:text=RCW%2070A.45.020%20Greenhouse%20gas%20emissions%20reductions%20%E2%80%94%20Reporting,achieve%20the%20following%20emission%20reductions%20for%20Washington%20state%3A (reduce overall GHG emissions in the state by 95% from 1990 levels by 2050); CTR. FOR CLIMATE & ENERGY SOLS., *State Climate Policy Maps* (May 5, 2022), https://www.c2es.org/content/state-climate-policy/; MONT. CLIMATE SOLS. COUNCIL, *Mont. Climate Sols. Plan* (Aug. 2020), https://deq.mt.gov/files/DEQAdmin/Climate/2020-09-09_MontanaClimateSolutions_Final.pdf; Ore. Exec. Order No. 20-04, *Directing State Agencies to Take Actions to Reduce & Regulate GHG Emissions ("Ore. Clim. Action Plan")* (2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf; White House, *By the Numbers: The Inflation Reduction Act* (Aug. 15, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/15/by-the-numbers-the-inflation-reduction-act/; Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/; Regul. (EU) 2021/1119, of the Eur. Parl. & of the Council of 30 June 2021 Establishing the Framework for Achieving Clim. Neutrality & Amending Reguls. (EC No 401/2009 and (EU) 2018/1999, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1119&from=EN; Eur. Comm'n, *Delivering the Eur. Green Deal*, https://ec.europa.eu/clima/eu-action/european-green-deal/delivering-european-green-deal_en (last visited May 24, 2022).

[9] *See, e.g.*, GERALDINE ANG & HANNAH COPELAND, OECD, INTEGRATING CLIMATE CHANGE-RELATED FACTORS IN INST. INV. 13 (Feb. 2018), https://www.oecd.org/sdroundtable/papersandpublications/Integrating%20Climate%20Changerelated%20Factors%20in%20Institutional%20Investment.pdf ("[T]he majority of [] asset owners (81%) and asset managers (68%) already view climate change as a material risk or opportunity across their entire investment portfolio."); *Rsch. Announcement: Moody's – Fin. Firms that Take Rapid, Predictable Pace to Zero Financed Emissions Will Win the Race*, MOODY'S INV. SERV., Oct. 12, 2021, https://www.moodys.com/research/Moodys-Financial-firms-that-take-rapid-predictable-pace-to-zero--PBC_1305598.

[10] *See, e.g.*, Kailas Salunkhe, *These Three Stocks Could be Impacted by Droughts in 2022*, NASDAQ, Aug. 23, 2022, https://www.nasdaq.com/articles/these-three-stocks-could-be-impacted-by-droughts-in-2022 (reporting on buy/sell recommendations for Tesla, Tyson, and Dutch Bros based on falling water levels leading to electricity shortages, as well as decreased feed cultivation and coffee harvests); Cole Horton, Ross Kerber & Simon Jessop, *Analysis: As Drought Risks Rise, Investors Eye Thirsty Companies, Solutions*, REUTERS, Aug. 22, 2022, https://www.reuters.com/business/finance/drought-risks-rise-investors-eye-thirsty-companies-solutions-2022-08-22/ (highlighting Toyota's suspended production at a plant in China due to a drought-induced power shortage, and constraints on supply chains from the impact of shipping delays due to shrunken waterways); Chris Flood, *ESG Controversies Wipe $500 bn Off Value of US Companies*, FINANCIAL TIMES, Dec. 14, 2019 (reporting that 24 ESG controversies related to accounting scandals, data breaches, sexual harassment cases and other ESG issues resulted in $534bn in value losses to S&P 500 companies over the preceding five years); INT'L MONETARY FUND, GLOB. FIN. STABILITY REP. 46 (Oct. 2022) ("Underinvestment in climate change mitigation and adaptation in emerging market and developing economies may lead to global financial stability risks through greater exposure to systemic climate-related financial risks…. [G]reater use of and investment in fossil-fuel-based energy systems from delayed decarbonization…may lead to cross-border and global spillover effects as a result of the negative externalities on global climate change and contagion effects along value chains.").

[11] *See, e.g.*, SEC, *The Laws that Govern the Securities Industry*, Investor.gov (last visited Oct. 24, 2022), https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry (securities

residents' financial well-being. A 2021 study estimated that, in the eight months following a Texas law prohibiting municipalities from contracting with banks that utilize certain ESG strategies, Texas municipalities will have to pay $300 to $500 *million* more in borrowing costs.[12] In fact, recent data show that many of the state pension funds in states that signed the August 4 letter supported shareholder proposals to address corporations' ESG-related practices, suggesting that those funds agree that the underlying practices are likely to lead to better results for their beneficiaries.[13] Put simply, public pension funds are considering ESG factors because doing so yields positive results, even in states that would now prohibit the practice.

For over twenty years, the finance industry has understood—and studies have confirmed—that consideration of ESG factors yields important information about risks and rewards, which leads to greater value for beneficiaries.[14] Companies that fail to take climate-change risks into account, for example, can suffer serious financial consequences, both in terms of physical damage and litigation and regulatory costs. Increased severe weather patterns cause damage to transit infrastructure, which in turn interrupts services and hurts business.[15] Similarly, studies have shown that companies in the top 25th percentile for gender diversity on their executive teams were 21% more likely to experience above-average profits while more culturally and ethnically diverse executive teams were 33% more likely to see above-average profits.[16]

To be sure, companies must do more than simply pay lip service to the consideration of ESG criteria. Too many companies have falsely marketed and promoted themselves as deploying ESG-related strategies, while not being transparent about whether or how they are using or weighting ESG considerations or achieving their advertised impacts. That is why several of the undersigned Attorneys General recently supported the SEC's proposed rule to create greater transparency and

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laws "require that investors receive financial and other significant information concerning securities being offered for public sale," and that disclosure of information "enables investors . . . to make informed judgments about whether to purchase a company's securities").

[12] Daniel Garrett & Ivan Ivanov, *Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies*, July 11, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366. Other states, like West Virginia and Florida, have similarly attempted to impose their values by banning pension fund managers from using ESG factors to assess value. *See* Ramkumar, *Some GOP States Push Back Against ESG Investing Trend*, WALL ST. J., Aug. 2022.

[13] Janet Yang Rohr, *Public Pensions Overwhelmingly Vote for ESG*, MORNINGSTAR, Aug. 29, 2022, https://www.morningstar.com/articles/1111714/public-pensions-overwhelmingly-vote-for-esg.

[14] The Global Compact, *Who Cares Wins: Connecting Financial Markets to A Changing World*, June 2004, https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf.

[15] EPA, *Climate Change Indicators: River Flooding*, https://www.epa.gov/climate-indicators/climate-change-indicators-river-flooding#:~:text=As%20warmer%20temperatures%20cause%20more,see%20the%20Heavy%20Precipitation%20indicator); OECD, CLIMATE-RESILIENT INFRASTRUCTURE 2 (2018), https://www.oecd.org/environment/cc/policy-perspectives-climate-resilient-infrastructure.pdf.

[16] McKinsey & Company, *Delivering Through Diversity* (Jan. 18, 2018), https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/delivering-through-diversity; *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 397 (2020); Robert G. Eccles, et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60-11 MGMT. SCI. 2835, 2849 (Nov. 2014) (study finding that over a twenty-year period companies that prioritized ESG factors significantly outperformed companies that did not); Cole Horton & Simon Jessop, *Positive ESG Performance Improves Returns Globally, Research Shows* REUTERS (July 28, 2022), https://www.reuters.com/business/sustainable-business/positive-esg-performance-improves-returns-globally-research-shows-2022-07-28/ (global study finding that companies with strong corporate governance metrics outperformed benchmark portfolios by 1.42% over the past five years); Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, HARVARD BUS. REV. (July-Aug. 2018), https://hbr.org/2018/07/the-other-diversity-dividend (finding that shared ethnicity reduced venture capitalists' investment's success rate by 26.4% to 32.2%).

consistency for climate-risk disclosures.[17] We also commend the SEC for taking additional steps to establish disclosure requirements for ESG-labeled investment products. It is not just companies that must avoid "greenwashing" (misleading investors by, for example, overstating ESG efforts); asset managers, pension funds, and rating agencies must also ensure that ESG criteria are clearly and consistently defined and that those definitions are made public.[18]

II. Fiduciary and Antitrust Laws

Financial professionals and plan trustees operate under extensive regulatory requirements, including state and federal fiduciary duties and obligations, duties of care, and standards of loyalty, and must seek the best long-term value and return for their clients and beneficiaries.[19] Public pension funds support retirees who worked for many years, if not decades, and public pension fund managers should be free to use reasonable investment strategies with the goal of maximizing returns and minimizing losses. Consideration of ESG factors is consistent with legal responsibilities to evaluate potential risk and reward in assessing the merits of an investment.[20] Consideration of those factors does not categorically block investment in any given industry or sector, but merely allows for an evaluation of the expected impact of environmental, social, and governance events on returns.[21]

Public pension funds and their investment managers that consider ESG factors as part of their return-maximizing investment strategy are not doing so as a matter of morals or ethics (Values), but rather because using ESG criteria is in the best interest of investors (Value).[22] There are studies that indicate that many companies that respect human rights and promote ethical values have happier—and, in turn, more productive and stable—employees.[23] And governance-positive companies with efficient and effective corporate management systems may be less likely to face fines or other adverse government action.[24] Put simply, consideration of ESG metrics can help

[17] Ltr. from Atty's Gen. to Vanessa Countryman, Sec'y of the SEC (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131887-302340.pdf.

[18] *See, e.g.*, Hans Taparia, *One of the Hottest Trends in the World of Investing is a Sham*, N.Y. TIMES, Sept. 29, 2022.

[19] *See, e.g.*, *Introduction to Financial Services: The Regulatory Framework*, Congressional Research Service (Jan. 13, 2022), https://sgp.fas.org/crs/misc/IF11065.pdf.

[20] By contrast, trustees that blanketly oppose the consideration of ESG factors for political reasons and not because the data shows that such consideration would lead to lower returns for beneficiaries may violate their fiduciary duties. *See* Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 795 (2019) (noting the increasing consequences long-term systemic risks have on portfolios, such that "fiduciaries who ignore material long-term information may be violating their duty to be prudent investors").

[21] For example, BlackRock recognized that Russia's invasion of Ukraine "may drive short-term increases in demand for fossil fuels and associated emissions in some regions," and while the company's public position is in support of a global transition to net zero by 2050 or sooner, its "role in the transition is as a fiduciary to [their] clients," to "help them navigate investment risks and opportunities, not to engineer a specific decarbonization outcome in the real economy." BlackRock, *BlackRock's 2030 Net Zero Statement*, https://www.blackrock.com/corporate/about-us/our-2021-sustainability-update/2030-net-zero-statement. Additionally, many ESG strategies emphasize engagement with companies to improve their ESG metrics. To wit, at ExxonMobil's 2021 board elections a proxy battle ended in three new board members who seek to make the company part of the energy transition. *See* Jessica Camille Aguirre, *The Little Hedge Fund Taking Down Big Oil*, N.Y. TIMES, June 23, 2021, https://www.nytimes.com/2021/06/23/magazine/exxon-mobil-engine-no-1-board.html.

[22] BlackRock, *Pursuing Long-Term Value for our Clients* (2021), https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf.

[23] *See supra* n. 16.

[24] Witold Henisz et al., FIVE WAYS THAT ESG CREATES VALUE, MCKINSEY QUARTERLY (Nov. 2019), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Five%20ways%20that%20ESG%20creates%20value/Five-ways-that-ESG-creates-value.ashx.

public pension funds fulfill their fiduciary duty to provide the best return for beneficiaries; failing to do so appropriately can put their pensioners at risk.

In addition, the August 4 letter's claim that asset managers that consider ESG factors may be violating antitrust and competition laws is unsupported. An expression of general recommendations or a statement in favor of or against certain policies does not, without more, constitute a violation of the Sherman Act.[25] The Net Zero Managers Alliance commitment page, which the August 4 letter cites, does not appear to direct managers to avoid certain clients, or to suppress investments in particular energy resources. In fact, the Alliance makes clear that managers are not bound to any agreement other than those with their clients, and the August 4 letter provides no evidence that the managers are using their investments to reduce competition among the companies in which they are investing.[26] The Alliance's commitment page simply makes a broad recommendation that each manager can elect to follow (or not) consistent with their clients' preferences. Certainly, the existence of the commitment page does not limit choice for the investors who utilize the services of investment managers. Antitrust law protects competition to provide meaningful choice.[27] States such as those that signed the August 4 letter have other choices if they prefer to take their business elsewhere.[28]

Public pension funds and their investment managers should be free to make choices that maximize value for their beneficiaries—including the tens of millions of public employees and retirees in our country that rely on investment professionals and pension board trustees to invest their hard-earned wages in a manner that thoroughly evaluates risks and rewards. And, as explained above, a thorough evaluation of risks and rewards may properly include consideration of ESG factors as part of a sound investment strategy.

Sincerely,

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[25] *Consol. Metal Prod., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 292 (5th Cir. 1988) (holding that "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not per se violate section 1 when, for whatever reason, it fails to evaluate a product favorably to the manufacturer").

[26] The Net Zero Asset Managers Initiative – Commitment, http://www.netzeroassetmanagers.org/commitment/ ("We also acknowledge that the scope for asset managers to invest for net zero and to meet the commitments set forth above depends on the mandates agreed with clients and clients' and managers' regulatory environments. These commitments are made in the expectation that governments will follow through on their own commitments to ensure the objectives of the Paris Agreement are met, including increasing the ambition of their Nationally Determined Contributions, and in the context of our legal duties to clients and unless otherwise prohibited by applicable law.").

[27] *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983).

[28] Mordor Intelligence, *US Asset Management Market – Growths, Trends, COVID-19 Impact, Forecasts (2022 – 2027)*, https://www.mordorintelligence.com/industry-reports/usa-asset-management-industry.

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The Honorable Rep. Patrick McHenry, Chairman, Financial Services Committee
The Honorable Rep. Maxine Waters, Ranking Member, Financial Services Committee

CC: The Honorable Rep. Mike Johnson, Speaker of the House
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The Honorable Sen. Mitch McConnell, Senate Minority Leader
The Honorable Sen. Bernie Sanders, Chairman, Committee on Health, Education, Labor, and Pensions
The Honorable Sen. Bill Cassidy, Ranking Member, Committee on Health, Education, Labor, and Pensions

December 14, 2023

Dear Representatives Foxx, Scott, McHenry, and Waters:

The undersigned Attorneys General write to explain why fund managers' use of Environmental, Social, and Governance ("ESG") factors is consistent with prudent investment decision-making. This letter addresses the use of ESG factors in evaluating risks and returns to further investor objectives, outlines the current ESG regulatory framework, and responds to recent efforts to hinder the use of ESG factors, including H.R. 5339 (2023)[1] and H.R. 4237 (2023).[2] We encourage Congress to recognize the importance of fund managers' consideration of all ESG factors, including, in particular, climate change-related investment risks and opportunities.

I. BACKGROUND & LEGISLATION

ESG factors can be critical components to prudent investment decision-making. Environmental factors evaluate a company's environmental impact and ability to mitigate climate-related financial risks. Social factors examine how a company manages relationships with employees, suppliers, customers, and communities. Governance factors assess a company's leadership, executive pay, audits, internal controls, and shareholder rights.[3] As discussed below, fund managers can properly integrate ESG factors, particularly environmental factors,[4] into investment decisions to maximize returns and minimize risks.

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[1] H.R. 5339, 118th Cong. (2023), https://www.congress.gov/118/bills/hr5339/BILLS-118hr5339rh.pdf.
[2] H.R. 4237, 118th Cong. (2023), https://www.congress.gov/118/bills/hr4237/BILLS-118hr4237ih.pdf.
[3] 87 Fed. Reg. 72,822, 73,832 (Dec. 1, 2022).
[4] Although we mainly focus on climate-related risks (i.e., the "E" in "ESG"), social and governance factors also can be material to investment decision-making. Justin Sloggett & Bettina Reinboth, *ESG Integration: How Are Social Issues Influencing Investment Decisions?* at 17-22, 34, United Nations Principles for Responsible Investing (2017); *see infra* Section III.A.

A. The Current Department of Labor Rule Provides Clarity About the Use of ESG Factors

Guided by mischaracterizations of ESG investment strategies and seeking to chill their use, H.R. 5339 ("Roll back ESG To Increase Retirement Earnings Act") and H.R. 4237 ("Ensuring Sound Guidance Act") (together, the "House Bills"), if enacted, would codify language from the superseded 2020 Department of Labor ("DOL") rule pertaining to fiduciaries' duties under the Employee Retirement Income Security Act of 1974 ("ERISA").[5] In 2022, DOL concluded that the 2020 rule created substantial confusion about whether and how fiduciaries could consider climate-related financial risks and other ESG factors when making investment decisions.[6] Accordingly, DOL issued a new rule in 2022, which clarified that ERISA fiduciaries may consider ESG and other investment factors when the fiduciary determines they are relevant to financial risks or returns.[7]

The 2022 DOL rule retains the core principle of the 2020 rule by prioritizing the financial interests of plan participants while allowing fiduciaries to consider all factors that are relevant to a risk-return analysis, including the economic effects of climate change and other ESG considerations.[8] In other words, the rule does not require fiduciaries to take ESG factors into account in all instances, but it permits them to consider ESG-related risks and opportunities when relevant. The 2022 rule allows fiduciaries to select investments that may have collateral benefits other than investment returns *if, and only if,* "competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon."[9] The 2022 DOL rule eliminated the 2020 rule's chilling effect on considering material ESG factors.[10]

Rather than permitting the consideration of material ESG factors, as the current DOL rule does, the House Bills would return to the language from the 2020 DOL rule that sows confusion, improperly limits the information available to fiduciaries, and inhibits reasoned investment decision-making.

B. ESG Strategy Distinctions

Many efforts to limit or prohibit the use of ESG factors in investing over-broadly characterize all ESG-based investments as prioritizing environmental or social policy preferences over returns. Fiduciaries may incorporate ESG factors into decision-making, however, through distinct strategies depending upon investor objectives.

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[5] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020) (codified at 29 C.F.R. §§ 2509, 2550) (superseded by Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022) (codified at 29 C.F.R. § 2550)).
[6] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822, 73,825-826 (Dec. 1, 2022) (codified at 29 C.F.R. § 2550) (mandating fiduciaries consider solely "pecuniary factors").
[7] *Id*. at 73,827.
[8] 29 C.F.R. § 2550.404a-1(b)(4), (c).
[9] 29 C.F.R § 2550.404a-1(c)(2).
[10] *See* California *et al.*, Comments on Department of Labor's Proposed Rule "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," (Dec. 13, 2021), https://stateimpactcenter.org/files/AgactionComment-Letter-ISO-DOL-Proposed-Rule.pdf; 87 Fed Reg at 73,826.

Three such strategies, as described by the Securities and Exchange Commission ("SEC"), are worth mentioning here.[11] ESG-*integration* strategies consider ESG only to inform risk and return projections for a particular investment fund. An ESG-integration strategy prioritizes nothing but returns, and simply considers ESG factors alongside all other relevant factors in decision-making. ESG-*focused* strategies consider collateral benefits when choosing between funds that equally benefit investors' financial interests. ESG-*impact* strategies consider ESG in parallel or paramount to pure risk or return considerations when investors wish to direct their assets toward investments that further particular values, such as sustainability, potentially—but not necessarily—at the expense of higher returns.

Given how critical an ESG-integration strategy can be to prudent investment decision-making—and how that strategy has been mischaracterized by opponents to any consideration of ESG factors—this letter focuses on the key role of ESG-integration strategies in protecting the bottom line: investor returns.

C. ESG Mischaracterizations

Recent legislative attempts to restrict the use of ESG factors in investment decision-making,[12] as well as some challenges to private institutions' use of ESG factors,[13] conflate and confuse the numerous ways that ESG factors are utilized to inform investment decisions. The general position advanced in the letters and bills opposing ESG rely on three falsities: (1) consideration of ESG factors means that investment managers prioritize corporate

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[11] Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022) (hereinafter "SEC's Proposed ESG Disclosure Rule").

[12] *See, e.g.,* H.R. 5339, 118th Cong. (2023); *Press Release: Committee Republicans Introduce Measures to Combat the Influence of ESG Initiatives in America's Financial System*, Fin. Serv. Comm. Of the U.S. House of Rep. (July 25, 2023), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408927 (detailing several bills introduced into Congress in July seeking to limit consideration of ESG); Connor Gibson and Frances Sawyer, *2023 Statehouse Report: Right-Wing Attacks on the Freedom to Invest Responsibly Falter in Legislatures*, Pleiades Strategy (2023), https://www.pleiadesstrategy.com/state-house-report-bill-tracker-republican-anti-esg-attacks-on-freedom-to-invest-responsibly-earns-business-labor-and-environmental-opposition; Mana Behbin *et al.*, *ESG Investing Regulations Across the 50 States*, Morgan Lewis (July 21, 2023), https://www.morganlewis.com/pubs/2023/07/esg-investing-regulations-across-the-50-states.

[13] *See, e.g.,* Letter from 19 Republican Attorneys General Led by Arizona and Nebraska to BlackRock Inc. (Aug. 4, 2022), https://mcusercontent.com/cc1fad182b6d6f8b1e352e206/files/5bcd9811-ee15-e7a3-0a00-923a9b327aa7/BlackRock_Letter.pdf; Letter from 21 Attorneys General Led by Montana, Louisiana, and Utah to 53 Financial Institutions (Mar. 30, 2023), https://content.govdelivery.com/attachments/MTAG/2023/03/30/file_attachments/2453301/2023-03-30%20Asset%20Manager%20letter%20Press%20FINAL.pdf (hereinafter "Financial Institutions Letter"); Letter from Senators Cotton, Grassley, Rubia, Lee, and Blackburn to 51 Law Firms (Nov. 3, 2022), https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf (hereinafter "Law Firm Letter").

policies over returns on investment[14]; (2) ESG factors are never relevant to the bottom line[15]; and (3) considering ESG factors in investing always results in poorer returns.[16]

First, investors may consider ESG factors to advance different objectives.[17] While some investors employ ESG factors to maximize the environmental or social benefits of their investments (ESG-impact strategies, as explained above), investors may also use the factors as criteria to maximize returns in a rapidly changing market (ESG-integration strategies), among other uses.[18] The view that consideration of ESG factors always means prioritizing policies over returns stems from ESG opponents' conflation of these distinct strategies. Second, ESG factors can pertain to companies' financial exposure and opportunities, and thus may inform investors' risk-return analyses based on the investment horizon.[19] Congress should protect fiduciaries' ability to use ESG factors as prudential tools to protect the bottom line. Third, the data indicates that considering ESG factors does not have to result in poorer returns.[20] A July 2023 literature review on ESG and sustainable investment found that "empirical studies and meta-analyses consistently

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[14] Representative Rick Allen (introducer of H.R. 5339), *Rep. Rick W. Allen Introduces The Retire Act* (Sept. 6, 2023), Rick W. Allen: Press Release, https://allen.house.gov/news/documentsingle.aspx?DocumentID=5903 ("By empowering financial advisors to invest Americans' retirement savings in risky, climate-related ESG funds, the Department of Labor (DOL) is blatantly prioritizing its radical political agenda over Americans' hard-earned savings"); Law Firm Letter ("The ESG movement attempts to weaponize corporations to reshape society in ways that Americans would never endorse at the ballot box.").

[15] Financial Institutions Letter at 17 (assumptions that climate change will impact company operations "are speculative and unrealistic").

[16] Rep. Andy Barr and Rick Allen (introducers of H.R. 4237), *Barr and Allen Introduce ESG Act to Protect Investors and Preserve Access to Capital for Energy Producers*, Congressman Barr: Press Releases (June 21, 2023), https://barr.house.gov/2023/6/barr-and-allen-introduce-esg-act-to-protect-investors-and-preserve-access-to-capital-for-energy-producers ("We must take significant action to protect retail investors and retirees from the cancer within our capital markets that is ESG, which prioritizes higher-fee, less diversified and lower return investments").

[17] *See supra* Section I.B.

[18] SEC's Proposed ESG Disclosure Rule.

[19] *See infra* Section III.A.

[20] Tensie Whelan *et al*., *ESG And Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published between 2015–2020* at 2, New York University Stern School of Business (Feb. 2021), https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf; Rui Coelho *et al*., *The impact of social responsibility on corporate financial performance: A systematic literature review* at 1535, 1556, Corporate Social Responsibility and Environmental Management, Vol. 30: 1535-1560 (May 12, 2022), https://onlinelibrary.wiley.com/doi/epdf/10.1002/csr.2446 ("Our study suggests that [Corporate Social Responsibility, as measured by ESG performance indicators,] directly impacts a company's financial performance, and this impact becomes more significant as the company's [ESG] scores improve…. [They have] a direct positive impact on companies' financial performance."). To be sure, other studies suggest there is nuance to the rate of investment returns with regard to ESG-factor consideration, but even those studies do not support limiting ERISA fiduciaries' ability to consider ESG factors. *See, e.g.*, Lubos Pastor *et al*., *ESG Investment Returns Face a Slowdown*, Financial Times (July 5, 2023), https://www.ft.com/content/f3d9f74e-df3d-4ec5-b3ae-04746c4bdde7 ("green assets are a climate hedge, performing better than brown in the face of bad news about climate change"); N.C. Ashwin Kumar *et al.*, *ESG Factors and Risk-Adjusted Performance: A New Quantitative Model*, Journal of Sustainable Finance & Inv. (2016), https://www.unpri.org/Uploads/g/t/y/ESG-Factors-and-Risk-Adjusted-Performance.-A-New-Quantitative-Model.pdf (although ESG factors may negatively affect certain industries, such as automobiles, durables, banking, and insurance, even in those industries, stocks of companies considering ESG factors are less volatile; conclusion is that "integrating ESG factors into the investment decision can provide superior risk-adjusted returns and is specifically relevant for improving efficiency of low-risk investment strategies such as those followed by pension funds."). Still, the point of this letter is that fiduciaries should not be barred from considering ESG factors, regardless of how ESG funds perform.

demonstrate a positive relationship between ESG integration and financial performance."[21] Fiduciaries can make better investment decisions when they can consider all material factors that inform those decisions.[22]

II. IMPLICATIONS OF CLIMATE CHANGE

A. Physical Risks: Financial Impacts of Climate Change

Fiduciaries must be able to consider the economic risks that climate change poses to businesses and the value of their securities. Our nation is experiencing the devastating effects of climate change *right now*, including extreme heat, historic drought, wildfires, sea level rise, and coastal flooding, and the economic costs of climate change will likely increase in the coming decades. Appendix A highlights some of the physical effects of climate change on state signatories to this letter, which pose financial risks to businesses now that will only increase in years to come.

B. Transition Risks and Opportunities: State Policies Changing the Investment Landscape

Another factor that fiduciaries must be able to consider is how companies will navigate the regulatory and market changes associated with climate change. Independent of any federal action, many states have implemented policies to incentivize investments in renewable energy and climate resilience. Appendix B details the laws, regulations, and policies established by many of the undersigned states aimed at reducing emissions and facilitating the transition to renewables. Currently, 33 states have released a climate action plan or are in the process of developing one,[23] and prudent investors should anticipate this number may grow. Those policies are resulting in an increasingly rapid shift away from the use of fossil fuels to power our economy. That shift, in turn, creates material risks to carbon-intensive industries and creates opportunities for cleaner-energy

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[21] Prashant Debnath *et al.*, *An In-Depth Systematic Literature Review On ESG And Sustainable Investment: Current Perspectives And Future Directions* at 19, International Journal of Socio-Economic and Environmental Outlook, Vol. 10, No. 7 (July 2023) ("Companies with strong ESG practices tend to achieve competitive risk adjusted returns, lower costs of capital, and improved profitability."); Whelan *et al.*, *supra* note 20, at 10 ("For investors seeking to construct portfolios that generate alpha, some ESG strategies seem to generate market rate or excess returns when compared to conventional investment strategies, especially for long-term investors, and provide downside protection during economic or social crisis. Notably, very few studies found definitive negative correlations between ESG and financial performance."); *see also* N. C. Ashwin Kumar *et al.*, *ESG factors and risk-adjusted performance: a new quantitative model* at 1, Journal of Sustainable Finance & Investment (Oct. 2016), http://dx.doi.org/10.1080/20430795.2016.1234909 ("[C]ompanies that incorporate [ESG] factors show lower volatility in their stock performances than their peers in the same industry, that each industry is affected differently by ESG factors, and that ESG companies generate higher returns.").

[22] Whelan *et al.*, *supra* note 20; *see also* Debnath *et al.*, *supra* note 21, at 13 ("ESG factors can materially affect a company's financial performance…. integrating ESG factors into investment analysis can lead to more informed decision making.").

[23] Center for Climate and Energy Solutions, U.S. State Climate Action Plans (Dec. 2022), https://www.c2es.org/document/climate-action-plans/. Municipalities are also implementing their own climate action plans. *See*, *e.g.*, N.Y.C., N.Y., Local Law 97 (Apr. 2019), https://www1.nyc.gov/assets/buildings/local_laws/ll97of2019.pdf; Green Cmties. Div., Mass. Dep't of Energy Res., *Becoming a Designated Green Cmty.*, Mass.gov, https://www.mass.gov/guides/becoming-a-designated-green-community, (last visited Nov. 8, 2023); City of Berkeley, *Green Bldg. Reqts.*, https://berkeleyca.gov/construction-development/permits-design-parameters/design-parameters/green-building-requirements (last visited Nov. 8, 2023).

industries. These risks and benefits are precisely what ESG factors allow fiduciaries to weigh in making investment decisions. Fiduciaries should not be prohibited from considering how state regulations and associated market transitions may affect investments.

III. FIDUCIARY DUTY TO CONSIDER LONG-TERM INVESTMENT HORIZONS

The finance industry understands—and studies confirm—that consideration of ESG factors can yield important information about risks and rewards, which can lead to greater value for beneficiaries.[24] A 2019 article found that the "overwhelming weight of accumulated research" demonstrates that companies that pay attention to ESG concerns do not experience smaller returns—"in fact, quite the opposite."[25] Correlations exist between companies that consider and manage risks associated with ESG factors and higher equity returns, with attention to ESG factors "correspond[ing] [to] a reduction in downside risk."[26] Thus, ESG factors can be material to investor decision-making and their analyses should not be barred by law.

A. ESG Integration Protects and Advances Investment Returns

1. Climate and Environmental Considerations are Important to the Bottom Line

Climate-related risks and opportunities increasingly impact investor returns. The physical and transitional risks discussed in Section II are impacting major industries ranging from agriculture to tourism to commercial fishing. ERISA and other fiduciaries should be able to consider that reality in their investment decision-making.

A company's exposure to climate change risks is often a material factor under a long-term investment horizon. The rapidly changing climate is already forcing many companies to adapt to address associated hazards that will impact supply chain stability, degrade private infrastructure, and undermine global trade and development—and the need for that adaptation will likely grow as the world warms. Currently, only one in five companies has a plan in place to adapt to the physical risks of climate change; a company's ability to adapt can be important information fiduciaries should be able to consider in making investment decisions.[27]

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[24] World Economic Forum, *The Global Risks Report 2023: 18th Edition* (January 2023), https://www3.weforum.org/docs/WEF_Global_Risks_Report_2023.pdf ("Climate and environmental risks are the core focus of global risks perceptions over the next decade – and are the risks for which we are seen to be the least prepared."); Gunnar Friede *et al*., *ESG and financial performance: Aggregated evidence from more than 2000 empirical studies* at 210-33 (Oct. 2015), Journal of Sustainable Finance & Investment, Vol. 5, No. 4; *see also* Coelho *et al*., *supra* note 20, at 1535, 1556.

[25] Witold Henisz *et al*., *Five Ways That ESG Creates Value*, McKinsey and Company, Mckinsey Quarterly (Nov. 2019), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value; *see also* Debnath *et al*., *supra* note 21, at 19.

[26] Henisz *et al*., *supra* note 25; *see also* Niccolò Nirino *et al*., *Corporate controversies and company's financial performance: Exploring the moderating role of ESG practices* at 5, Technological Forecasting and Social Change, Vol. 162 (Sept. 2020) (ESG factors help avoid controversies detrimental to financial performance); Boffo, R., and R. Patalano, *ESG Investing: Practices, Progress and Challenges* (2020), OECD Paris, www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf.

[27] Jennifer Laidlaw *et al*., *Adaptation Planning is the Next Step for Companies to Prepare for Climate Risk* (February 21, 2023), S&P Global, https://www.spglobal.com/esg/insights/adaptation-planning-is-the-next-step-for-companies-to-prepare-for-climate-risk.

In addition to adapting to the physical risks of climate change, companies also face a world that understands climate change as an existential threat, with regulations at the municipal, state, federal, and international levels already being implemented and likely to increase. In addition to the states' efforts described in Appendix B, the European Union mandated net zero emissions by 2050 and committed to engage with industries charting the path to climate neutrality.[28] Further, to ensure the EU's climate objectives are not undermined, the EU instituted the Carbon Border Adjustment Mechanism that also accounts for, via taxation, emissions generated from the production of goods imported into the EU.[29] Companies that respond to these new regulatory pressures may present more favorable investment opportunities over the long run than those that do not. If the goal is to allow investors to make better informed investment decisions to maximize returns—which it should be—then allowing investment managers to integrate ESG factors alongside other material factors is fully consistent with that aim.

Climate change also provides opportunities. To mitigate the most devastating impacts of climate change, the United States must decarbonize our economy and enhance infrastructure resiliency as soon as possible.[30] Reducing emissions and improving resiliency offer investment opportunities. As evidenced by the participating states,[31] climate change preparations are on the rise. To achieve global net zero emissions by 2050, the consensus target to avoid catastrophic impacts,[32] annual renewable energy use must increase at an average rate of about 13% during 2023-2030, twice as much as the average over the past 5 years.[33] Indeed, a 2022 report from the International Energy Agency indicated that renewable energy resources are set to account for over 90% of global electricity expansion over the next five years, overtaking coal to become the largest generator of electricity globally by early 2025.[34] Thus, the renewable energy industry—along with other industries like sustainable infrastructure, biotechnology, HVAC, and electric vehicles—are poised to grow.[35] Fiduciaries should not be dissuaded from considering these variables as part of their risk-return analyses.

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[28] European Commission, *EU Action: European Climate Law* (July 29, 2021), https://climate.ec.europa.eu/eu-action/european-climate-law_en#:~:text=The%20Climate%20Law%20includes%3A,of%20emission%20reductions%20and%20removals.

[29] European Commission, Taxation and Customs Union, *Carbon Border Adjustment Mechanism*, https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en (last visited Nov. 9, 2023).

[30] IPCC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability* at 33, 66, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, https://www.ipcc.ch/report/ar6/wg2/ ("The cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a livable and sustainable future for all."), ("[P]rojected global economic damage from climate impacts are higher than previous estimates and generally increase with global average temperature…. Without limiting warming to 1.5°C global warming level, many key risks are projected to intensify rapidly in almost all regions of the world, causing damage to assets and infrastructure and losses to economic sectors and entailing high recovery and adaptation costs.").

[31] *Supra* section II.A-B.

[32] United Nations, *Climate Action: Net Zero* (Nov. 2023), https://www.un.org/en/climatechange/net-zero-coalition.

[33] International Energy Agency (IEA), *Tracking Renewables* (June 2023), https://www.iea.org/energy-system/renewables.

[34] IEA, *Renewables 2022: Analysis & Forecast to 2027* at 10 (Dec. 2022), https://www.iea.org/reports/renewables-2022.

[35] *See generally, e.g.,* US EPA, *Investing in America: Climate Action Funding Resource Guide*, https://www.epa.gov/inflation-reduction-act/investing-america-climate-action-funding-resource-guide (last visited Nov. 25, 2023); US Senate, Joint Economics Committee, *Acting On Climate Will Fight Inflation, Lower Costs And*

2. Community Relationships and Social Accountability Can Be Profitable

Social accountability is also critical to analyzing risk. For example, after allegations of child labor, sweatshops, and corporate abuse, Nike revenues and stock prices decreased by approximately 50% in 1998 alone.[36] To better address this risk, Nike implemented corporate social responsibility practices. Its efforts paid off. In its 2005 annual report, Nike announced it was moving away from using corporate responsibility as a crisis management tool and would instead be using it as an opportunity for innovation and growth.[37] And in 2013, Nike appeared in *Fortune's* list of "The World's Most Admired Companies" as the number one most admired apparel company.[38] Meanwhile, Nike's revenue more than quintupled since the sweatshop scandal, increasing from roughly $9 billion in 1998 to over $50 billion in 2023.[39]

Companies may also derive financial benefits from incorporating more diversity into their management teams. For instance, one study noted that companies in the top 25th percentile for gender diversity on their executive teams were 21% more likely to experience above-average profits, and more culturally and ethnically diverse executive teams were 33% more likely to realize above-average profits.[40] Researchers explain, "[t]hriving in a highly uncertain competitive environment requires creative thinking in those areas, and the diverse collaborators were better equipped to deliver it."[41]

Grow The Economy Faster For Decades To Come (Aug. 5, 2022), https://www.jec.senate.gov/public/index.cfm/democrats/issue-briefs?ID=43BEFE7D-1C87-4D85-9CDC-226D80B5C5A8; IEA, *World Energy Outlook 2023* (Oct. 2023), https://iea.blob.core.windows.net/assets/614bb748-dc5e-440b-966a-adae9ea022fe/WorldEnergyOutlook2023.pdf; USDA, *Biotechnology and Climate Change*, https://www.usda.gov/topics/biotechnology/climate-change (last visited Nov. 24, 2023).

[36] Auburn University, Habert College of Business, *Nike: Managing Ethical Missteps-Sweatshops to Leadership in Employment Practices* at 3 (June 19, 2019), https://harbert.auburn.edu/binaries/documents/center-for-ethical-organizational-cultures/cases/nike.pdf.

[37] *Id.* at 4.

[38] *Id.* at 7.

[39] *Compare* Nike, Inc. Annual Report 1998, https://s1.q4cdn.com/806093406/files/doc_financials/1998/main_ar.html, *with* Nike, Inc. Annual Report 2023, https://s1.q4cdn.com/806093406/files/doc_downloads/2023/414759-1-_5_Nike-NPS-Combo_Form-10-K_WR.pdf.

[40] NASDAQ Stock Market LLC, *Response to Comments and Notice of Filing of Amendment No. 1 of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity* at 29-30 (Feb. 2021), https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf; Dame Hunt *et al.*, *Delivering Through Diversity* (Jan. 18, 2018), McKinsey & Company, https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/delivering-through-diversity; *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee,* 72 Stan. L. Rev. 381,397 (2020); Robert G. Eccles *et al.*, *The Impact of Corporate Sustainability on Organizational Processes and Performance* at 2849, Management Science, vol. 60, no. 11 (Nov. 2014) (study finding that over a twenty-year period, companies that prioritized ESG factors significantly outperformed companies that did not**);** Cole Horton & Simon Jessop, *Positive ESG Performance Improves Returns Globally, Research Shows*, Reuters (July 28, 2022), https://www.reuters.com/business/sustainable-business/positiveesg-performance-improves-returns-globally-research-shows-2022-07-28/ (global study finding that companies with strong corporate governance metrics outperformed benchmark portfolios by 1.42% over the past five years)**;** Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend,* Harvard Business Review (July-Aug. 2018), https://hbr.org/2018/07/the-other-diversity-dividend (finding that lack of diversity reduced venture capitalists' investment's success rate by 26.4% to 32.2%).

[41] Gompers & Kovvali, *supra* note 40.

To avoid the market consequences of neglecting social factors, and to evaluate the strategic benefit of integrating social factors into business practices, fiduciaries should be able to consider how companies are managing their relationships when analyzing risks and returns.

3. Markets Favor Good Governance

Corporate governance factors may also affect investor returns. In recent years, attorneys general across the political spectrum have investigated corporate misbehavior related to consumer fraud and environmental compliance. For example, following disclosures of emissions cheating by Volkswagen, a coalition of 43-state attorneys general investigated the company under state consumer protection and environmental laws, which resulted in the company paying the coalition over $600 million.[42] The scandal caused a significant downgrade in Volkswagen's ESG ratings in September 2015.[43] Concurrently, Volkswagen's stock fell over 30% within days after publication of the scandal.[44] These types of violations, and their corresponding losses, can happen because of a lack of internal governance controls, like internal monitoring and compliance protocols (governance factors). Companies with good governance are better structured to reduce the risks of similar outcomes harmful to investors.[45]

Meta-analyses have shown that companies that score higher in positive-governance criteria not only are more likely to enjoy more efficient and effective corporate management systems, but may also reduce exposure to adverse government action and gain better access to finance (i.e. lines of credit, loans, and investments) at lower costs.[46] "[T]ypically one-third of corporate profits are

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[42] *See,* e.g., National Association of Attorneys General, Rules and Regulations of the VW Settlement Fund, https://www.naag.org/wp-content/uploads/2020/08/VW-Settlement-Fund-Rules-and-Regulations-Final.pdf; Jeffrey Rothfeder, *The Volkswagen Settlement: How Bad Management Leads to Big Punishment*, The New Yorker (July 1, 2016), https://www.newyorker.com/business/currency/the-volkswagen-settlement-how-bad-management-leads-to-big-punishment; see *also* Ken Paxton Attorney General of Texas, *AG Pax-ton Secures $85 Million Settlement in Principle with Volkswagen and Audi Over Their Violations of Texas Environmental Laws* (May 25, 2023), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-secures-85-million-settlement-principle-volkswagen-and-audi-over-their-violations-texas.

[43] MSCI, *Volkswagen scandal underlines need for ESG analysis* (undated, accessed on Sept. 14, 2023), https://www.msci.com/volkswagen-scandal.

[44] Paul La Monica, *Volkswagen has plunged 50%. Will it ever recover?* (Sept. 25, 2015), CNN Business, https://money.cnn.com/2015/09/24/investing/volkswagen-vw-emissions-scandal-stock/.

[45] Kelly Tang, *Exploring the G in ESG: The Relationship Between Good Corporate Governance and Stock Performance – Part 2*, S&P Global (Mar. 22, 2019), https://www.spglobal.com/en/research-insights/articles/exploring-the-g-in-esg-the-relationship-between-good-corporate-governance-and-stock-performance-part-2; Wajdi Affes & Anis Jarboui, *The impact of corporate governance on financial performance: a cross-sector study* at 19, International Journal of Disclosure and Governance (May 6, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10226873/ ("[D]espite the variation in the sectors of activity, corporate governance plays a key role in improving the financial performance of English corporations.").

[46] *See, e.g.,* Deloitte & Nyenrode Business University, *Good Governance Driving Corporate Performance? A meta-analysis of academic research & invitation to engage in the dialogue* (Dec. 2016), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/risk/deloitte-nl-risk-good-governance-driving-corporate-performance.pdf; Phillip C. James, *Does Corporate Governance Score Affect Stock Price? Evidence from a Developing Country* at 7, International Journal of Business and Social Research, Vol. 13, No. 2 (2023), https://thejournalofbusiness.org/index.php/site/article/view/1459/757 ("The results showed that stock prices are affected by a company's corporate governance structure which is in line with the literature that argues that better managed/governed companies are able to access finance at lower cost."); Affes & Jarboui, *supra* note 45, at 18 (results showed "positive and significant association between the governance score and financial performance").

at risk from state intervention."[47] Positive and active governance can decrease a company's risk of violating federal, state, or local laws and regulations and incurring the costs (including penalties) resulting from government enforcement actions because such governance may prevent violations before they occur.[48] Considering companies' compliance with regulations and their approach to avoiding violations will likely serve prudent investors in the long run. Although how one looks at ESG, and what standards one applies, is critical to its correlation with positive outcomes, it is common sense for investment professionals to look at issues that impact a company's bottom line.

B. Fiduciary Duties Must Permit Consideration of ESG Factors

Fiduciaries need to have flexibility to consider how climate change and social trends impact investment opportunities, and legislation that narrows the scope of material factors that fiduciaries may consider is inconsistent with the fundamental concept of the duty of prudence. The Supreme Court has recognized that the duty of prudence requires ongoing analyses contingent on the circumstances. "[A] trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."[49] Fiduciaries must have discretion to consider the context in which their investments are made, including whether companies exposed to climate change-related risks, among other risks, are adequately accounting for those risks, and whether companies' profits are at risk from public perceptions of their structure, governance, and adherence to human rights.

Acknowledging the risks and opportunities of the practical realities affecting market trends and conditions is part of prudent investment decision-making. Indeed, a 2018 paper found that the majority of "asset owners (81%) and asset managers (68%) already view climate change as a material risk or opportunity across their entire investment portfolio."[50] Further, a 2022 study showed that, in recent years, state and municipal public pension plans, voting directly or through their managers, voted 90% of the time in favor of shareholder proposals to address corporate ESG-related practices.[51] Indeed, in a 2023 survey issued by Russell Investments of 169 asset managers representing nearly $20 trillion in assets, only 7% of respondents said that ESG factors do not drive investment decisions, down from the 22% recorded in 2022.[52] To now restrict fiduciaries' ability to evaluate real and present risks would inhibit fund managers' ability to see

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[47] Henisz *et al.*, *supra* note 25.
[48] *See e.g. id.*; Nirino *et al.*, *supra* note 26, at 5.
[49] *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015); *Tibble*, 575 U.S. at 528 ("a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances").
[50] *See, e.g.,* Geraldine Ang & Hannah Copeland, OECD, *Integrating Climate Change-Related Factors In Inst. Inv*. at 13 (Feb. 2018), https://www.oecd.org/sd-roundtable/papersandpublications/Integrating%20Climate%20Change-related%20Factors%20in%20Institutional%20Investment.pdf.**;** *Rsch. Announcement: Moody's - Fin. Firms that Take Rapid, Predictable Pace to Zero Financed Emissions Will Win the Race,* Moody's Inv. Serv. (Oct. 12, 2021)**,** https://www.moodys.com/research/Moodys-Financial-firms-that-take-rapid-predictable-pace-to-zero--PBC_1305598.
[51] Janet Yang Rohr, *Public Pensions Overwhelmingly Vote for ESG,* Morningstar (Aug. 29, 2022), https://www.morningstar.com/articles/1111714/public-pensions-overwhelmingly-vote-for-esg.
[52] Tom Lotshaw, *Russell Survey Finds ESG Driving More Investment Decisions* (October 24, 2023), Law360, https://www.law360.com/articles/1735829/russell-survey-finds-esg-driving-more-investment-decisions ("We believe this reflects a deepening recognition that ESG issues — encompassing areas such as climate risk and labor relations — are financially material").

investments in the context of the financial risks posed by societal and environmental developments.[53]

Legislation to limit or bar consideration of ESG factors would unduly inhibit fiduciaries' abilities to maximize returns and hedge against risks. The arguments against consideration of ESG factors often only make vague references to "ESG funds" and often conflate informed, investor-driven "ESG-impact" investing with a fiduciary's consideration of material factors that affect the value of a business's securities or a fund's long-term risk. But these are separate uses for ESG factors. When those factors are material to returns, fiduciaries would be ill advised to ignore them.

Given the importance of ESG factors in evaluating plan investments, efforts to undermine consideration of ESG factors should raise red flags for policymakers. "[T]he circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give *due regard* to the range of reasonable judgments a fiduciary may make *based on her experience and expertise*."[54] ESG opponents pursue regulations that may not only expose fiduciaries to liability, but also risk their beneficiaries' financial interests by forcing those fiduciaries to ignore material information and devalue their expertise.

IV. CONCLUSION

Climate change is dramatically shifting the investment landscape for many companies. ESG factors are tools investors can use to accommodate this shift in their risk-return analyses. ESG opponents disregard the facts underlying how ESG factors may be employed to allow investors to make informed investment decisions that increase value and decrease risk. To be clear, this letter does not advocate for the use of ESG factors to promote policy goals ("ESG-impact" strategies); rather it explains why fund managers should be free to integrate ESG factors into their scope of considerations for investment decisions. In sum, we hope this letter provides information that will permit Congress to better protect investor returns and our economy more broadly.

Sincerely,

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53 "Because the content of the duty of prudence turns on the circumstances prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

54 *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022).

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APPENDIX A

Impacts of Climate Change in the Signatory States

Arizona

In Arizona, climate change has caused an increase in already-sweltering summer heat, including 2023's unprecedented heatwave of 31 consecutive days of 110+ degree temperatures in Phoenix.[55] Extreme heat poses the greatest threat to Arizona's most vulnerable populations, including children, the elderly, the disabled, and the unhoused.[56] Despite Arizona's strides to improve air quality, pollutants like ozone and particular matter are difficult to control in high temperatures, resulting in increased costs to meet federal air quality standards and higher health care costs associated with increased rates of respiratory disease.[57] Climate change has also triggered intensified droughts in Arizona. The depletion of the Colorado River and its reservoirs due to drought has already reduced Arizona's allocation of water.[58] As surface water supply depletes, Arizona becomes more reliant on groundwater resources, resulting in drying up of wells, deterioration of groundwater quality and potable drinking water supplies, and increased energy costs for pumping, all of which negatively impact the state's economic growth.[59] Finally, extreme heat and drought due to climate change increases the duration of Arizona's fire season and the size and frequency of fires. According to Arizona's Department of Forestry and Fire Management, the 2020 season was one of the worst in nearly a decade, burning nearly one million acres of public land with requisite adverse impacts on tourism and recreation.[60]

California

Climate change has long impacted California, from droughts to wildfires to mudslides. In recent months, California has seen three large insurers withdraw from or significantly limit writing new policies in California, due in large part to the rising risks from climate change.[61] California

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[55] *See* Ellie Williard, *31 days of 110-degree temperatures in Phoenix. Will the streak end Monday?*, Arizona Republic (July 31, 2023), https://www.azcentral.com/story/news/local/phoenix-weather/2023/07/30/phoenix-reaches-31-straight-days-with-110-degree-temperatures/70495444007/.

[56] *See* Arizona Department of Health Services (ADHS), *Heat-Caused and Heat-Related Deaths in Arizona by Year* (2011-2021), https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/extreme-weather/pubs/heat-related-mortality-year.pdf.

[57] *See* Arizona State University and ADHS, *Building Resilience Against Climate Effects. Arizona Extreme Weather, Climate and Health. Synthesis Report, 2015*, https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/extreme-weather/pubs/climate-and-health-profile-synthesis-report-2015.pdf.

[58] *See* Debra Utacia Krol, *Arizona loses more of its Colorado River water allocation under new drought plan*, Arizona Republic (August 16, 2022), https://www.azcentral.com/story/news/local/arizona-environment/2022/08/16/federal-officials-impose-cuts-colorado-river/10311378002/.

[59] *See* United States Geological Survey, *Excessive pumping can overdraw the groundwater "bank account,"* Groundwater Decline and Depletion (June 6, 2018), https://www.usgs.gov/special-topics/water-science-school/science/groundwater-decline-and-depletion.

[60] *See* Department of Forestry and Fire Management, *2020 Wildfire Season one of the Worst in Decade* (January 27, 2021), https://dffm.az.gov/2020-wildfire-season-one-worst-decade.

[61] *See* Matthew Kupfer, *After State Farm's and Allstate's Exits, Farmers Insurance Sets Limits in California*, San Francisco Standard (July 7, 2023), https://sfstandard.com/2023/07/07/farmers-insurance-state-farm-allstate-california/; Sam Dean, *Farmers, California's Second-Largest Insurer, Limits New Home Insurance Policies*, L.A. Times (July 11, 2023), https://www.latimes.com/business/story/2023-07-11/farmers-californias-second-largest-insurer-limits-new-home-insurance-policies.

residents are already facing adverse health effects from climate change, such as from extreme heat and wildfire smoke.[62]

Colorado

Extreme heat, droughts, wildfires, and flooding impacts are combining to materially harm Colorado's economy. Infrastructure damage from climate change, such as to buildings and roads, will cost Colorado billions.[63] Wildfires and droughts caused over $1 billion in damages in Colorado in 2020 alone.[64] The 2021 Marshall Fire in Boulder County destroyed over 1,000 homes, causing over $2 billion in damage, making it the 10th costliest wildfire in U.S. history. [65] Studies have predicted that, by century's end, ski mountains will experience a majority of days in winter with above-freezing temperatures, which will likely affect Colorado's tourism economy.[66]

Connecticut

Connecticut has already begun to experience the severe consequences of climate change. Between 1895 and 2011, temperatures in the Connecticut increased by almost 2ºF (0.16ºF per decade), and precipitation increased by approximately five inches, or more than 10% (0.4 inches per decade).[67] Between 1980 and 2018, average annual temperature in Connecticut has risen by over 2ºF. Over the same period, winter temperatures have warmed by 3ºF. According to the Governor's Steering Committee on Climate Change, the maple syrup, apple and pear production, and shellfish industries will suffer, infrastructure will become vulnerable to damage from coastal

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[62] *See* Cal. Legis. Analyst's Office, *Climate Change Impacts across California*, 7-8 (Apr. 2022), https://lao.ca.gov/reports/2022/4575/Climate-Change-Impacts-Crosscutting-Issues-040522.pdf.

[63] *See* State of Colorado, Colorado Climate Plan: State Level Policies and Strategies to Mitigate and Adapt, 48-49 https://dnrweblink.state.co.us/cwcb/0/doc/205387/Electronic.aspx?searchid=4fdc6e80-96ca-44b1-911c-57fe7793e3f6; see also S. Weiser, Glenwood Canyon I-70 closure wreaks havoc on travel and the economy, Denver Gazette (Aug. 11, 2021), https://denvergazette.com/news/glenwood-canyon-i-70-closure-wreaks-havoc-on-travel-and-the-economy/article_46f10050-f896-11eb-b05a-03c4947b5863.html.

[64] Boulder County, Marshall Fire Recovery Dashboard, available at https://bouldercounty.gov/disasters/wildfires/marshall/marshall-fire-recovery-dashboard/; Noelle Phillips, Marshall fire losses now expected to exceed $2 billion — making it the 10th costliest wildfire in U.S. history, Denver Post (Oct. 27, 2022), https://www.denverpost.com/2022/10/27/marshall-fire-property-losses-value/.

[65] Justin S. Mankin *et al*., NOAA Drought Task Force Report on the 2020–2021 Southwestern U.S. Drought, NOAA, 7, Table 1 (2021), https://repository.library.noaa.gov/view/noaa/46463.

[66] Stephen Saunders *et al*., Climate Projections in Summit County, Colorado, Rocky Mountain Climate Org., 16 (Aug. 2021), https://www.summitcountyco.gov/DocumentCenter/View/33131/55-Page-Report_Climate-Projections-in-Summit-County-Co.; *See, e.g.,* Olivia Prentzel, *Yes, it hasn't snowed yet in Denver. But it's Colorado's meager snowpack that should worry you*, The Colorado Sun (Dec. 2, 2021), https://coloradosun.com/2021/12/02/no-snow-denver-bad-mountain-snowpack/ (many Colorado mountains are already seeing historic lows for snowfall and ski days); Erica Siirila-Woodburn, *What a Low-to-No-Snow Future Could Mean for the Western U.S., Environmental System*, U.S. Department of Energy, Environmental System Science Program (Oct. 16, 2021) https://ess.science.energy.gov/highlight/what-a-low-to-no-snow-future-could-mean-for-the-western-u-s/ ("future snow losses are projected to decrease 20-30% by the 2050s and 40-60% by the 2100s" throughout the Western U.S.).

[67] *See* Horton, R., Yohe, G., Easterling, W., Kates, R., Matthias, R., Sussman, E., Whelchel, A., Wolfe, D., and Lipschultz, F. (2014). Ch. 16: Northeast. *Climate Change Impacts in the United States: The Third National Climate Assessment*, J. M. Melillo, Terese (T.C.) Richmond, and G. W. Yohe, Eds., U.S. Global Change Research Program, 16-1-nn.

flooding and stormwater, rare habitats and critical species will face elimination, and public health of its most vulnerable communities will be threatened by worsening air quality and extreme heat.[68]

District of Columbia

The District of Columbia is a densely populated area located at the confluence of two tidal rivers and accordingly is particularly vulnerable to the impacts of climate change. The District is already experiencing extreme weather such as intense, heavy rains and sea level rise which have led to frequent flooding events.[69] For instance, waters levels have increased 11 inches in the past 90 years and nuisance flooding has increased by more than 300%.[70] At the same time, heavy rain events are projected to grow more frequent and intense.[71] The combined impact of rising tides and heavier rains pose significant threats to the District's infrastructure, community resources, cultural assets, government and military facilities, and residents. In addition, the District has also suffered from record-breaking heat waves.[72] As dangerously hot days grow more frequent, heat-related illnesses are likely to increase. Hotter temperatures can also stress infrastructure like roads, rail lines, and the power grid, causing disruptions.

Illinois

Climate change has fundamentally and adversely altered Illinois' environment, resulting in harm to agriculture, shipping, and recreation. In 2012, Illinois suffered its third driest summer on record. The very next year, Illinois endured the wettest January-to-June period ever recorded, forcing farmers to delay planting and lose revenue. Heat waves and milder winters may reduce future crop yield by 15% in the next decade and up to 73% by the end of the next century.[73] In January 2013, Lake Michigan's water level hit an all-time low. In 2015, it climbed to its highest level since 1998, the second-largest recorded gain over a 24-month span. These whipsawing water levels hurt the commercial shipping industry, recreational boaters, wildlife, and beach-goers.[74] In

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[68] *See* Adaptation Subcommittee to the Governor's Steering Committee on Climate Change, *The Impacts of Climate Change on Connecticut Agriculture, Infrastructure, Natural Resources and Public Health* (2010), http://www.ct.gov/deep/lib/deep/climatechange/impactsofclimatechange.pdf.

[69] World Health Organization, Heath and Climate Change Urban Profiles: Washington, District of Columbia (May 4, 2022), https://cdn.who.int/media/docs/default-source/climate-change/55232_o3_who-city-profile_washington_web.pdf?sfvrsn=ee7b4a6b_3&download=true.

[70] National Oceanic and Atmospheric Administration (2014), *Sea Level Rise and Nuisance Flood Frequency Changes around the United States,* NOAA Technical Report NOS CO-OPS 073, http://www.noaanews.noaa.gov/stories2014/20140728_nuisanceflooding.html.

[71] District of Columbia Department of Energy & Environment (2015), *Climate Projections & Scenario Development,* p. 46, https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/150828_AREA_Research_Report_Small.pdf (stating that today's 100 year rain event could become a one in 25-year event by mid-century).

[72] *Id.* (stating that the District's heat emergency days could more than double, from the current 30 days per year to 70 days per year (low-emissions scenario) or 105 days per year (high-emissions scenario) by the 2080s.)

[73] *See* University of Illinois–Institute of Government & Public Affairs, *Preparing for Climate Change in Illinois: An Overview of Anticipated Impacts*, https://indigo.uic.edu/articles/report/Preparing_for_Climate_Change_in_Illinois_An_Overview_of_Anticipated_Impacts/15078939/1. *See also* U.S. Dept. of Agriculture Climate Hubs and Great Lakes Research Integrated Science Assessment, *Climate Change Impacts on Illinois Agriculture* (2022), https://www.climatehubs.usda.gov/sites/default/files/2022_ClimateChangeImpactsOnIllinoisAgriculture.pdf.

[74] *See* Tony Briscoe, *Lake Michigan Water Levels Rising at Near Record Rate*, CHICAGO TRIBUNE (July 12, 2015), http://www.chicagotribune.com/news/local/breaking/ct-lake-michigan-water-levels-met-20150710-story.html (last

addition, climate change-induced flooding has dramatically damaged the lives and property of Illinois residents. In 2009, a 54-mile-long fish kill occurred on the Rock River when ethanol flowed downstream, killing over 70,000 fish.[75] In 2011, a major flood struck Jo Daviess County in northwestern Illinois after 15 inches of rain fell during a 12-hour time period. The flood waters caused extensive damage to roads and train tracks and at least one fatality.[76] Climate change will only cause these calamities to occur more frequently and with greater ferocity.

Maine

Maine's coast is experiencing significant negative effects of climate change in the form of rising sea levels, ocean acidification, and the encroachment of invasive species that expand their range northward as the environment warms. The Gulf of Maine is warming faster than 99% of the world's ocean waters, and these warmer waters have brought with them an invasion of non-native green crabs that are devastating economically important soft-shell clam flats throughout southern and mid-coast Maine.[77] At the same time, ocean waters globally have become approximately 30% more acidic over the last century, and features of the Gulf of Maine, including its extensive freshwater inputs, make it particularly vulnerable to acidification. The increasing acidity inhibits shell formation in all shellfish, including lobsters, which are the basis of an industry estimated to generate $1.7 billion annually in Maine.[78] Milder winters have also hurt the ski industry and interfered with maple sugaring operations.[79]

Maryland

Maryland has over 3,100 miles of shoreline, making it particularly vulnerable to the rising sea levels and increased incidence of extreme weather events associated with climate change.

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visited Aug. 4, 2023). *See also* The Nature Conservancy, *An Assessment of the Impacts of Climate Change in Illinois* (2021), https://www.nature.org/content/dam/tnc/nature/en/documents/IL_Climate_Assessment_2020_Executive_Summary.pdf (last visited Aug. 4, 2023).

[75] See Illinois Attorney General, Attorney General Madigan Reaches Settlement to Recover Costs of Rockford Train Derailment, Ethanol Leak, https://ag.state.il.us/pressroom/2015_03/20150305.html.

[76] *See Crews Find Body of Woman Swept Away by Flood in Galena*, ROCKFORD REGISTER STAR (July 30, 2011), https://www.rrstar.com/story/lifestyle/public-safety/2011/07/30/crews-find-body-woman-swept/44585321007/.

[77] *See* Woodard, C., *Mayday: Gulf of Maine in Distress*, Portland Press Herald, October 25, 2015, http://www.pressherald.com/2015/10/25/climate-change-imperils-gulf-maine-people-plants-species-rely/; Maine Climate Council Scientific and Technical Subcommittee, *Scientific Assessment of Climate Change and Its Effects in Maine*, "Telescoping impacts of a climate-driven species invasion: the green crab and soft-shell clam story, at 175, https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/GOPIF_STS_REPORT_092320.pdf, (August 2020).

[78] *See* Gledhill, D.K., *et al*., Ocean and Coastal Acidification off New England and Nova Scotia. *Oceanography* 28(2):182–197, 2015, http://tos.org/oceanography/article/ocean-and-coastal-acidification-off-newengland-and-nova-scotia (https://tos.org/oceanography/assets/docs/28-2_gledhill.pdf); Dahlman, L, Climate Change, Ocean Heat Content, National Oceanic and Atmospheric Administration, https://www.climate.gov/news-features/climate-and/climate-lobsters; Hall, J., From Bought to Caught, Lobsters all about Economics, Portland Press Herald, August 11, 2012, http://www.pressherald.com/2012/08/11/market-forces-make-everyone-feel-the-pinch_2012-08-12/.

[79] *See* Lye, K., Rising Temperatures Threaten Fundamental Change for Ski Slopes, The New York Times, December 12, 2012, http://www.nytimes.com/2012/12/13/us/climate-change-threatens-ski-industrys-livelihood.html.; Curtis, Abigail, *How Climate Change Is Affecting The Maine Maple Syrup Industry*, Maine Public—Bangor Daily News, March 26, 2018; Taylor, C., *How Climate Change Threatens Your Breakfast*, Science Friday Initiative, March 17, 2017, https://www.sciencefriday.com/segments/how-climate-change-threatens-your-breakfast/.

Maryland is projected to experience between 2.1 and 5.7 feet of sea level rise over the next century.[80] In fact, sea level could be as much as 2.1 feet higher in 2050 along Maryland's shorelines than it was in 2000."[81] Sea level rise could inundate some facilities of the Port of Baltimore, placing one of the most important ports along the East Coast, and one of the 20 large ports in the nation, at risk. In 2016, for instance, the Port generated nearly $3 billion in wages and salaries, supported over 13,000 direct jobs, and moved 31.8 million tons of international cargo.[82]

Extreme weather events have also become more common in Maryland, causing significant economic damage to the state and its residents. From 2010 to 2021, Maryland experienced 38 extreme weather events, costing up to $10 billion. Between 1980 and 1989 there were 7 climate and weather-related disasters costing $1.0 to $2.0 billion; between 1990 and 1999 there were 13 disasters costing $2.0-$5.0 billion; between 2000 and 2009 there were 10 disasters costing $2.0-$5.0 billion dollars; between 2010 and 2019 there were 27 disasters costing $5.0 to $10 billion.[83]

Massachusetts

As a coastal state, Massachusetts is especially vulnerable to sea level rise triggered by climate change and the resulting exacerbation of coastal flooding and erosion from storm events. If global emissions are not significantly reduced, Massachusetts predicts sea levels to rise up to two and a half feet by 2050 and four and a half feet by 2070 as compared to 2008. Due to climate change, Massachusetts' coastal communities face increased flooding risks to homes, businesses, critical infrastructure, and natural resources.[84] As of 2022, 43% of Massachusetts' total population resides on the coast, including in the City of Boston, Massachusetts' major economic hub.[85] Estimates of projected direct flood damage to commercial and industrial structures in Massachusetts' coastal areas are expected to more than double by 2030 (up to $56 million) and the incremental cost could reach as high as $270 million by 2090, more than ten times higher than current levels.[86]

Minnesota

In Minnesota, flooding from unprecedented extreme rains has threatened more than 155,000 residential properties, 29,000 miles of roads, 13,000 commercial buildings, and 515

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[80] Maryland Commission on Climate Change, 2015 Annual Report at 13, http://mde.maryland.gov/programs/Air/ClimateChange/MCCC/Publications/MCCC2015Report.pdf.
[81] *Id*.
[82] Maryland Commission on Climate Change, 2017 Annual Report at 12. http://www.mde.state.md.us/programs/Air/ClimateChange/MCCC/Documents/MCCC_2017_final.pdf.
[83] Maryland Commission on Climate Change, 2022 Annual Report at 30, https://mde.maryland.gov/programs/air/ClimateChange/MCCC/Documents/2022%20Annual%20Report%20-%20Final%20(4).pdf.
[84] *See* 2022 Massachusetts Climate Change Assessment at Volume II, Appendix B: Additional Information on Climate Inputs and Assessment Methods, at B9, Table B-1, Panel B. https://www.mass.gov/doc/2022-massachusetts-climate-change-assessment-december-2022-volume-ii-appendix-b/download.
[85] *See id*. at p. 7.
[86] *See id*. at Appendix A: Full Statewide Impact Rankings and Scores by Sector, at A124-25, Table A40, https://www.mass.gov/doc/2022-massachusetts-climate-change-assessment-december-2022-volume-ii-appendix-a/download.

critical infrastructure facilities, causing insurance premiums to soar by nearly 400%.[87] Air pollution related to greenhouse gas emissions annually costs Minnesota more than $800 million in increased health care costs.[88] Since the early 1970s, warmer winters have decreased ice coverage in the Great Lakes by 63%, shortening the season for recreational activities like ice fishing, snowmobiling, skiing, ice skating, and snowboarding and harming local economies.[89] Agriculture, which generates $106 billion in revenue annually, will suffer as intense rain and hail events increase soil erosion, prevent spring planting, and destroy crops, and warmer temperatures and drought devastate entire crop seasons through increased crop diseases, invasive species, and other pests.[90] For example, drought decimated Minnesota's 2013 soybean harvest, at a loss of $175 million to Minnesota's agricultural economy.[91]

New Jersey

New Jersey is a coastal state vulnerable to the effects of rising sea levels. The average sea level in New Jersey is increasing at almost twice the global rate, and New Jersey already has suffered devastating human and financial losses from extreme weather events connected to climate change.[92] Superstorm Sandy in 2012 caused 38 deaths, $29.4 billion in damage, and destroyed more than 70,000 buildings, and 2021's Hurricane Ida caused 30 deaths and an estimated $2.02 billion in damage.[93] In addition, higher temperatures negatively impact livestock through loss of productivity in summer months and increased exposure to vector-borne diseases. In New Jersey, the reduction of cattle milk production is estimated to result in a $3.3 million loss to the dairy industry by 2100.[94]

New Mexico

In New Mexico, average temperatures have increased 50% faster than the global average over the past century.[95] Streamflow totals in the Rio Grande and other rivers in the Southwest were 5% to 37% lower between 2001 and 2010 than average flows during the 20th century.[96] Projections

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[87] *See* Minnesota Pollution Control Agency (MPCA), *Climate Change Impacts on Infrastructure,* https://www.pca.state.mn.us/air-water-land-climate/climate-impacts-on-infrastructure (accessed Sept. 2, 2023); Caroline Cummings, *More Extreme Weather Driving Increased Homeowner Insurance Premiums*, CBS News (Feb. 8, 2023), https://www.cbsnews.com/minnesota/news/more-extreme-weather-driving-increased-homeowners-insurance-premiums-industry-official-tells-minn-house-panel/.

[88] *See* Minnesota Environmental Quality Board, *Climate Solutions and Economic Opportunities* (April 9, 2020), https://www.eqb.state.mn.us/content/climate-change.

[89] *See* United States Environmental Protection Agency, *What Climate Change Means for Minnesota* (Aug. 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-mn.pdf.

[90] *See* Minnesota Department of Employment and Economic Development, *Food and Agriculture*, https://mn.gov/deed/joinusmn/key-industries/food-agriculture/ (accessed Sept. 2. 2023).

[91] Mark Steil, *Drought Hurts Minnesota's Soybean Crop* (Sept. 12, 2013), Minnesota Public Radio News, https://www.mprnews.org/story/2013/09/12/drought-damages-minnesota-soybean-crop.

[92] *See* New Jersey Department of Environmental Protection, *2020 New Jersey Scientific Report on Climate Change* (June 30, 2020), https://www.nj.gov/dep/climatechange/data.html (accessed Nov. 29, 2023).

[93] *See id*.

[94] *See id*.

[95] *See* Robert Repetto, *New Mexico's Rising Economic Risks from Climate Change*, DĒMOS, at 1 (2012), *available at* https://www.demos.org/sites/default/files/publications/UpdatedNMFullReport.

[96] *See* U.S. Global Change Research Program, *2014 National Climate Assessment*, at 463 (2014), *available at* https://nca2014.globalchange.gov/downloads/low/NCA3_Full_Report_20_Southwest_LowRes.pdf.

of further reduction of late-winter and spring snowpack and subsequent reductions in runoff and soil moisture pose increased risks to water supplies needed to maintain cities, agriculture, and ecosystems.[97] Severe and sustained drought will stress water sources, already over-utilized in many areas, forcing increasing water-allocation competition among farmers, energy producers, urban dwellers, and ecosystems.[98]

New York

The impacts of climate change in New York include increased temperatures, sea levels, precipitation, and storm frequency. Tropical Storm Lee, Hurricane Irene, and Hurricane Sandy collectively killed over 50 people and caused billions of dollars in damage.[99] More recently, in 2021, Hurricane Ida killed 18 people in New York and caused $7.15 billion in damage.[100] In addition, climate change results in higher health care costs due to illnesses triggered by air pollution caused by increased wildfires. In June 2023, smoke from wildfires in Canada caused the air quality index in New York City to reach 366 (24 times the World Health Organization guidelines), causing ER visits for asthma-related conditions to be the highest all year.[101]

Oregon

Oregonians have already experienced devastating impacts from climate change: wildfire smoke, deadly heat, flooding, landslides, disruption of transportation systems, drought, damaged fisheries, burnt forests, and the cost to taxpayers of responding to these impacts. The Oregon Health Authority has predicted that climate change will cause more frequent wildfires leading to increased respiratory illnesses and heart disease as well as higher temperatures with attendant heat-related hospitalizations and deaths.[102] Wildfires in September 2020 resulted in costs of $75.63 million from the State Highway Fund and $75.75 million from the State General Fund just to

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[97] *Id.*

[98] *See* The White House, Office of the Press Secretary, *FACT SHEET: What Climate Change Means for New Mexico and the Southwest*, at 3 (2014), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/state/reports/NEWMEXICO_NCA_2014.pdf.

[99] *Current & Future Trends in Extreme Rainfall Across New York State, A Report from the Environmental Protection Bureau of the New York State Attorney General* (Sept. 2014) (based on data from the 2014 National Climate Assessment and the National Oceanographic and Atmospheric Administration's Northeast Regional Climate Center), *available at* https://ag.ny.gov/sites/default/files/extreme_precipitation_report9214b.pdf.

[100] Andy Newman and Ellen Barry, *Tropical Storm Henri Brings Power Outages and Record Rain to Northeast,* N.Y. Times, (Aug. 22, 2021), https://www.nytimes.com/2021/08/22/nyregion/tropical-storm-henri.html?searchResultPosition=1; *Governor Hochul Announces Recovery Action Plan to Assist New Yorkers Impacted by Deadly Storm,* Governor's Press Release (Aug. 29, 2022), available at https://www.governor.ny.gov/news/governor-hochul-announces-hurricane-ida-recovery-action-plan-assist-new-yorkers-impacted.

[101] *See* Gina Jiménez, *ER Visits for Asthma in New York City Soared as Wildfire Smoke Blanketed the Region,* Inside Climate News (Jun 14, 2023), *available at* https://insideclimatenews.org/news/14062023/new-york-er-asthma-willdfire-smoke/.

[102] *See* Oregon Health Authority*, Climate and Health in Oregon: 2020 Report* ("OHA 2020 Report") at 3, available at https://www.oregon.gov/oha/PH/HEALTHYENVIRONMENTS/CLIMATECHANGE/Documents/2020/Climate%20and%20Health%20in%20Oregon%202020%20-%20Full%20Report.pdf; Oregon Climate Change Research Institute, *Sixth Oregon Climate Assessment* (Jan. 4, 2023), https://ir.library.oregonstate.edu/concern/technical_reports/gt54kw197.

remove ash, debris, hazardous materials, and trees that threatened to impede the roadway.[103] In June 2021, an exceptional and unprecedented heat wave occurred across Oregon, causing record-breaking temperatures in Portland of 118 on June 26, 112 on June 17, and 116 on June 28.[104] This warmer, drier climate adversely impacts Oregon's timber industry and is estimated cause a 39% loss of private timberland value by 2050.[105] Finally, climate change also affects tourism and commercial fishing in Oregon due to harmful algal blooms caused by warming ocean waters and reduced Dungeness crab and Pacific oyster productivity due to ocean acidification.[106]

Pennsylvania

The Commonwealth of Pennsylvania faces fundamental threats related to climate change. The average annual temperature statewide is expected to increase by 5.9°F by mid-century, altering the growing season, increasing the days people need to cool their homes, and leading to increased heat-related injuries and deaths.[107] In addition, tidal influenced flooding is expected to increase in the Delaware estuary coastal zone, adversely impacting communities and cities in the Delaware River Basin, including the city of Philadelphia, and increasing the risk of property loss and personal injury due to flooding.[108]

Vermont

Since 1960 in Vermont, the average annual precipitation has increased by 6.71 inches and the average annual temperature, which already has increased by 1.47°F, is expected to rise by an

[103] *See* F. Reading, Oregon Debris Management Task Force, Oregon Department of Transportation, personal communication, 16 December 2021.

[104] *See* Sixth Assessment, at 49, citing Bercos-Hickey, E., T.A. O'Brien, M.F. Wehner, L. Zhang, C.M. Patricola, H. Huang, and M.D. Risser, *Anthropogenic contributions to the 2021 Pacific Northwest heatwave*, Geophysical Research Letters (2022); Neal, E., C.S.Y. Huang, and N. Nakamura *The 2021 Pacific Northwest heat wave and associated blocking: meteorology and the role of an upstream cyclone as a diabatic source of wave activity*, Geophysical Research Letters (2022); Thompson, V., A.T. Kennedy-Asser, Y.T.E. Lo, C. Huntingford, O. Andrews, M. Collins, G.C.Hegerl, and D. Mitchell, *The 2021 western North America heat wave among the most extreme events ever recorded globally*. Science Advances (2022); Vescio, M.D., and A. Bair. 2022. *State Climate Extremes Committee memorandum on the Oregon all time maximum temperature record tied at Pelton Dam, OR and Moody Farms, OR,* NOAA National Centers for Environmental Information, www.ncei.noaa.gov/monitoring-content/extremes/scec/reports/20220210-Oregon-Maximum-Temperature.pdf, accessed August 2022; Philip, S.Y., *et al*. In press. *Rapid attribution analysis of the extraordinary heatwave on the Pacific coast of the US and Canada June 2021*. Earth System Dynamics.

[105] *See id.* at 147, citing Restaino, C.M., D.L. Peterson, and J. Littell, *Increased water deficit decreases Douglas fir growth throughout western US forests,* Proceedings of the National Academy of Sciences 113:9557–9562 (2016); Weiskittel, A.R., N.L. Crookston, and G.E. Rehfeldt. 2012. *Projected future suitable habitat and productivity of Douglas-fir in western North America*, Schweizerische Zeitschrift fur Forstwesen 163:70–78 (2012); Hashida, Y., and D.J. Lewis, *The intersection between climate adaptation, mitigation, and natural resources: an empirical analysis of forest management,* Journal of the Association of Environmental and Resource Economists 6:893–926 (2019); Hashida, Y., and D.J. Lewis, *Estimating welfare impacts of climate change using discrete- choice models of land management: an application to western U.S. forestry*. Resource and Energy Economics 68:101295 (2022).

[106] Sixth Assessment, at 148.

[107] *See* PA Climate Impacts Assessment 2021, (Revised July 28, 2021), http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=3667348&DocName=PENNSYLVANIA%20CLIMATE%20IMPACTS%20ASSESSMENT%202021.PDF%20%20%3cspan%20style%3D%22color:green%3b%22%3e%3c/span%3e%20%3cspan%20style%3D%22color:blue%3b%22%3e%28NEW%29%3c/span%3e%204/30/2023.

[108] *See id*.

additional 5-9°F, or more, by 2100.[109] In 2011, Tropical Storm Irene dumped up to 11 inches of rain on Vermont, causing $733 million in damage due to the destruction of homes, businesses, roads, bridges, and culverts.[110] On July 10-11, 2023, a storm dumped as much as 9 inches of rain on Vermont, at a time when rivers were high and soils saturated from prior storms, causing catastrophic flooding in the cities of Montpelier, Barre, Weston, Ludlow, and Johnson.[111] In addition to threatening human lives and property, climate change adversely impacts key sectors of Vermont's economy dependent on seasonal climate patterns, such as maple sugaring and winter sports.[112]

Washington

Hotter and drier summers in Washington are making forests more vulnerable to pests, disease, and wildfire, with increasing burdens on the State and its citizens. The cost to manage large wildfires in Washington averaged nearly $37 million per year between 2008 and 2012. Between 2013 and 2018, the average annual expense quadrupled to $153 million.[113] Climate change "is likely to more than double the area in the Northwest burned by forest fires during an average year by the end of the 21st century."[114] Warmer winters are also reducing mountain snowpack – a critical source of drinking water and irrigation water for agriculture.[115] Washington produces two-thirds of the nation's supply of apples, but global warming of 1.5°C will cause a twenty-three percent decline in summer streamflow, resulting in irrigation shortages for this and other crops.[116] Ocean acidification threatens marine ecosystems, including fisheries and shellfish industries critical to local economies and culture.[117]

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[109] *See* Galford, G.L., Faulkner, J., Dupigny-Giroux, L.-A., Posner, S. and Edling, L. (eds.) *Vermont Climate Assessment* (2021), https://site.uvm.edu/vtclimateassessment/.

[110] *See* Pierre-Louis, Kendra, *Five Years After Hurricane Irene, Vermont Still Striving for Resilience,* Inside Climate News (Sept. 1, 2016), https://insideclimatenews.org/news/31082016/five-years-after-hurricane-irene-2011-effects-flooding-vermont-damage-resilience-climate-change; Darren Perron, WCAX-3, *Remembering Irene: The destruction and the recovery* (Updated Aug. 24, 2021), https://www.wcax.com/2021/08/23/remembering-irene-destruction-recovery/.

[111] *See* Seven Days Staff, *'Historic and Catastrophic': Unrelenting Rain Swamped Vermont's Cities, Towns and Hamlets. The Recovery is Just Beginning.* (Updated July 13, 2023), https://www.sevendaysvt.com/vermont/historic-and-catastrophic-unrelenting-rain-swamped-vermonts-cities-towns-and-hamlets-the-recovery-is-just-beginning/Content?oid=38643810 (last visited July 18, 2023).

[112] *See* U.S. EPA, *What Climate Change Means for Vermont* (August 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-vt.pdf (last visited July 18, 2023); Vermont Agency of Agriculture Food & Markets, Vermont Sugar Season Sweet Success (June 10, 2022), https://agriculture.vermont.gov/agency-agriculture-food-markets-news/vermont-sugar-season-sweet-success#:~:text=Vermont%20remains%20the%20top%20producing,150K%20over%20the%202021%20total.

[113] *See* Wash. Dept. Natural Resources, *Safeguarding our Lands, Waters, and Communities: DNR's Plan for Climate Resilience* (Feb. 2020), 34, available at: https://www.dnr.wa.gov/publications/em_climaterresilienceplan_feb2020.pdf.

[114] *See* ENV. PROT. AGENCY, *What Climate Change Means for Washington* (2016).

[115] *See id*.

[116] *See id*.; WASH. REV. CODE § 70A.45.020, Intent - 2020 c 79 (2020).

[117] *See id*.

APPENDIX B

State Policies Changing Investment Landscape

California

California has enacted numerous climate policies and programs. California's efforts include, for example, in 2006, the legislature required California to reduce its overall greenhouse gas emissions to 1990 levels by 2020 and 40% below 1990 levels by 2030.[118] To meet the 2030 reductions, the California Air Resources Board established a Cap and Trade program and developed a Climate Change Scoping Plan that outlines the state's approach to achieving greenhouse gas reduction targets.[119] The Draft 2022 Scoping Plan Update includes the goal of carbon neutrality by 2045.[120] Other recent laws and policies include Senate Bill 100 and Senate Bill 350, requiring the state to procure 60% of all electricity from renewable sources by 2030 and 100% carbon-free sources by 2045, and the Green Building Standard, providing energy efficiency standards for new construction and retrofitting of existing buildings.[121]

Colorado

Colorado has put in place numerous regulatory and legislative frameworks to address climate change. Notably, Colorado released its first Greenhouse Gas Pollution Reduction Roadmap in January 2021 which laid out an achievable pathway to meet the state's science-based climate targets of 26% by 2025, 50% by 2030 and 90% by 2050 from 2005 levels.[122] Colorado tracked the implementation of an identified list of Near Term Actions, and by December 2022 was underway or completed with over 90% of the identified actions.[123] The state is now working to update the Greenhouse Gas Pollution Reduction Roadmap, including an updated inventory of emissions and a new set of Near Term Actions that will guide implementation in the state.

District of Columbia

The District of Columbia has enacted many significant policies focused on reducing greenhouse gas emissions to help address climate change. In August 2018, the District's Department of Energy and Environment released its Clean Energy DC Plan ("Plan") which set a

[118] *See* California Global Warming Solutions Act of 2006, AB-32, § 1 (2006).
[119] *See* CAL. CODE REGS., tit. 17, § 95800, et seq.; CAL. AIR RES. BD., AB 32 Climate Change Scoping Plan, https://ww2.arb.ca.gov/our-work/programs/ab-32-climate-change-scoping-plan.
[120] *See* CAL. AIR RES. BD., Final 2022 Scoping Plan Update and Apendices (December 2022), https://ww2.arb.ca.gov/our-work/programs/ab-32-climate-change-scoping-plan/2022-scoping-plan-documents.
[121] *See* California Renewables Portfolio Standard Program: Emissions of Greenhouse Gasses, SB-100 (2018); Clean Energy and Pollution Reduction Act of 2015, SB-350 (2015); CAL. ENERGY COMM'N, Renewables Portfolio Standard–RPS, https://www.energy.ca.gov/programs-and-topics/programs/renewables-portfolio-standard; CAL. GREEN BUILDING STANDARDS CODE, tit. 24, part 11 (2019).
[122] *See Colorado Greenhouse Pollution Reduction Roadmap* (2021), available at https://drive.google.com/file/d/1jzLvFcrDryhhs9ZkT_UXkQM_0LiiYZfq/view.
[123] *See* Colorado Energy Office, GHG Pollution Reduction Roadmap 2.0, https://energyoffice.colorado.gov/climate-energy/ghg-pollution-reduction-roadmap-20.

target to achieve greenhouse gas reductions of 50% below 2006 levels by 2035.[124] Shortly after the Plan was released, the District strengthened its Renewable Energy Portfolio Standard laws to require 100% of retail electricity sales to come from renewable energy by 2032.[125] In 2021, the Climate Commitment Act of 2021 codified the District's GHG reduction goals by mandating carbon neutrality by 2045.[126] The District laws and programs focus on reducing greenhouse gas emissions in predominantly three sectors – buildings, transportation, and energy supply. Thus, in addition to laws requiring an increase in electricity from renewable energy, the District has also set aggressive targets for reducing emissions in its buildings[127] and achieving transportation electrification goals.[128]

Maryland

Maryland has a long history of action to address climate change, including participation in the Regional Greenhouse Gas Initiative (RGGI). Most recently, the legislature passed the Climate Solutions Now Act of 2022, which established, among other things, targets of a 60% reduction in greenhouse gas emissions from a 2006 baseline by 2031 and net-zero emissions by 2045.[129] The state is currently in the process of developing plans, that when implemented, will meet those ambitious targets.

Massachusetts

Massachusetts has enacted a number of laws and regulations to hasten the transition to a low-carbon economy. Pursuant to the 2021 law, An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, which amended the 2008 Global Warming Solutions Act, the Commonwealth of Massachusetts is mandated to achieve economy-wide net-zero greenhouse gas emissions by 2050.[130] To achieve that target, the Commonwealth has set interim statewide greenhouse gas emissions limits of 33 percent below 1990 levels by 2025 and 50 percent below 1990 levels by 2030 as well as sector-specific emissions sublimits.[131] Massachusetts also participates in the Regional Greenhouse Gas Initiative ("RGGI"), a cap and trade program for greenhouse gas emissions from the power sector.[132] In addition, the overwhelming majority of municipalities in Massachusetts have opted into the "Green Communities" program, which

[124] Department of Energy & Environment, Clean Energy DC: The District of Columbia Climate and Energy Action Plan (Aug. 2018), *available at* https://doee.dc.gov/cleanenergydc.
[125] D.C. Code § 34-1432(c)(22).
[126] D.C. Law 24-176.
[127] D.C. Law 22-257 (Title III. Building Energy Performance Standards and Benchmarking (requiring large buildings to reduce their energy consumption by 20% over a 5-year period); D.C. Law 24-177 (requiring all new buildings to be constructed to meet a net-zero-energy standard beginning in 2027).
[128] D.C. Law 22-257 (Title V. Transportation Emission Reduction); Department of Energy & Environment, Transportation Electrification Roadmap (Sept. 2022), *available at* https://electrificationcoalition.org/wp-content/uploads/2022/10/DC-Roadmap.pdf.
[129] *See* Climate Solutions Now Act of 2022, S.B. 528, 2022 Gen Assemb., Reg. Sess. (MD 2022).
[130] 2021 Mass. Acts Ch. 8 §§ 8–10, https://malegislature.gov/Laws/SessionLaws/Acts/2021/Chapter8.
[131] Mass. Exec. Off. of Energy & Env't Affairs, *Mass. Clean Energy & Climate Plan for 2025 and 2030* (June 30, 2022), https://www.mass.gov/doc/clean-energy-and-climate-plan-for-2025-and-2030/download.
[132] Reg'l GHG Initiative, www.rggi.org (last visited Nov. 16, 2023).

provides financial and technical support to municipalities that have committed to various energy efficiency and emissions reduction targets.[133]

Minnesota

In Minnesota, bipartisan legislation called the Next Generation Energy Act was passed into law in 2007 requiring an 80% reduction in GHG emissions by 2050.[134] In 2019, the Governor of Minnesota signed executive order 19-37 to "identify policies and strategies that will enhance the climate resiliency of Minnesota's natural resources, working lands, and communities and assist the state enterprise, families, businesses, and local communities to prepare for climate change impacts that cannot be avoided or mitigated."[135] And, in 2023, the Minnesota Legislature amended the act to mandate the state achieve net zero emissions by 2040.[136] In furtherance of these goals, Minnesota developed a Climate Action Framework—a plan to reduce Minnesota's contribution to climate change and prepare for its most devastating effects. The Climate Action Framework outlines investments in renewable energy, electric vehicles, resource management and recycling, protection, and expansion of forested areas for carbon sequestration, among many others.[137]

New Jersey

New Jersey's Global Warming Response Act requires reducing "emissions to 80 percent below the 2006 level by the year 2050."[138] Further, New Jersey's Clean Energy Act requires 35% of electricity sold in the state to be from renewable sources by 2025, and 50% of electricity to be renewable by 2050.[139] The Clean Energy Act also directs the Board of Public Utilities to "establish a process and mechanism for achieving the goal of . . . 2,000 megawatts of energy storage by 2030."[140] The Clean Energy Act further creates various credits and programs to increase production of renewable energy in New Jersey.[141] Following the Clean Energy Act, New Jersey has passed additional laws and executive action to rapidly develop offshore wind and solar energy resources.[142] As a result of these efforts, the portion of New Jersey's electricity mix supplied by fossil fuels such as methane gas is projected to decrease by over 50% by 2030.[143]

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[133] See Green Cmties. Div., Mass. Dep't of Energy Res., Becoming a Designated Green Cmty., https://www.mass.gov/guides/becoming-a-designated-green-community (last visited Nov. 16, 2023).
[134] MPCA, *Climate Change Initiatives*, https://www.pca.state.mn.us/air-water-land-climate/climate-change-initiatives (accessed Sept. 2, 2023); *see also* Minn. Stat. § 216H.02, subd. 1 (2022).
[135] Minnesota Governor Tim Walz, Exec. Order 19-37: Establishing the Climate Change Subcabinet and the Governor's Advisory Council on Climate Change to Promote Coordinated Climate Change Mitigation and Resilience Strategies in the State of Minnesota (Dec. 2, 2019).
[136] Minnesota Department of Commerce, *Governor Walz Signs Bill Moving Minnesota to 100 Percent Clean Energy by 2040* (Feb. 7, 2023), https://mn.gov/commerce/news/?id=17-563384.
[137] Minnesota Department of Commerce and MPCA, *2023 Biennial Greenhouse Gas Emissions Reduction Report* at 1 (January 2023).
[138] N.J. Stat. § 26:2C-38.
[139] N.J. Stat. §§ 48:3-87(d)(2), 48:3-51.
[140] *Id.* § 48:3-87.8(d).
[141] *See id.* § 48:3-87.8(e).
[142] *See, e.g.,* Offshore Wind Development Act, codified at N.J.S.A. 48:3-87 et seq. (as amended); Solar Act of 2021, codified at N.J.S.A. 48:3-114 et seq.
[143] *See* Sanem Sergici, *et al*., New Jersey Energy Master Plan Ratepayer Impact Study at 52 (2022), https://tinyurl.com/pf4tufuf ("Ratepayer Impact Study").

New York

By investing the proceeds from auctioned carbon pollution allowances under the Regional Greenhouse Gas Initiative program in energy efficiency and renewable energy programs, New York has reduced the demand for electricity, preventing consumer electricity prices from increasing.[144] New York's efforts to fight climate change, reduce harmful air pollution, and ensure a diverse and reliable low carbon energy supply are codified into law through the Climate Leadership and Community Protection Act (CLCPA). As one of the most ambitious efforts in the U.S. to reduce emissions, the CLCPA has greenhouse gas emission reduction requirements of 40% by 2030, and at least 85% from 1990 levels by 2050.[145] As the regulatory body behind the CLCPA, the Department of Environmental Conservation has decided on the cap-and-invest rule to fulfill the statutory requirement of having regulations in place, by next year, that require greenhouse emission limits.[146] Proceeds from the cap-and-invest auctions will be invested to bolster carbon reductions and help ensure the program is affordable for all New Yorkers and delivers benefits to disadvantaged communities, with at least 35% of benefits directed to disadvantaged communities.[147] In addition, the Public Service Commission has adopted a Clean Energy Standard to require that 70 percent of New York's electricity be generated by renewable sources by 2030 as part of a strategy to have 100 percent zero-emission electricity by 2040.[148]

Oregon

Oregon adopted laws and programs to significantly reduce its greenhouse gas emissions. Oregon has required its major investor-owned utilities, PGE and PacifiCorp, to transition to 100% renewable electricity by 2040.[149] Those utilities represent 87.8% of greenhouse gasses that electricity suppliers emitted as of 2020.[150] Oregon has also adopted regulations requiring reductions in greenhouse gas emissions from fossil fuels used throughout Oregon in transportation, residential, commercial and industrial settings (for purposes other than electricity generation).[151] Those regulations impose a declining cap that will require an 89% reduction in greenhouse gas emissions from those sources by 2050. The overall cap declines from 28,081,335 metric tons of CO_2e in 2022 to 15,021,080 in 2035 and to 3,004,216 in 2050.[152]

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[144] *See* http://www.dec.ny.gov/energy/rggi.html; *see also* The Analysis Group, *The Economic Impacts of the Regional Greenhouse Gas Initiative on Ten Northeast and Mid-Atlantic States* (Nov. 15, 2011), available at: http://www.dec.ny.gov/docs/administration_pdf/ag11rggi.pdf; The Analysis Group, *The Economic Impacts of the Regional Greenhouse Gas Initiative on Nine Northeast and Mid-Atlantic States* (July 15, 2015), http://www.dec.ny.gov/docs/administration_pdf/ag15rggi.pdf.

[145] New York State Dept. of Envtl. Conservation, Reducing Pollution, Investing in Communities, Creating Jobs, & Preserving Competitiveness, https://capandinvest.ny.gov/.

[146] Environmental Conservation Law § 75-0109.

[147] New York State Dept. of Envtl. Conservation, New York's Cap-and-Invest Stakeholder Sessions Announced, https://climate.ny.gov/.

[148] *See* New York State Energy Research & Development Authority, Clean Energy Standard, https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard.

[149] OR. REV. STAT. § 469A.410 (2021).

[150] *See* Oregon Department of Environmental Quality, Greenhouse Gas Emissions from Electricity Use 2010-2020, (15,065,072 metric tons of CO_2e from PGE and PacifiCorp compared to a statewide total of 17,155,607), https://www.oregon.gov/deq/ghgp/Documents/ghgElectricityEms.xlsx.

[151] OR. ADMIN. R. Ch. 340, Div. 271.

[152] OR. ADMIN. R. 340-271-9000 (2021), Table 2.

Washington

Washington has set incremental limits on statewide emissions, which by 2050 will be 95 percent below 1990 levels.[153] In the electric sector, all retail sales of electricity to Washington customers must be greenhouse gas neutral by 2030.[154] By 2045, retail electricity must be 100 percent renewable.[155] Other sectors also must cap emissions and reduce them over time, consistent with Washington's emission limits.[156] For buildings, Washington code restricts the use of methane or other fossil fuels for HVAC systems in new buildings, and the Washington Department of Commerce has set energy performance standards to reduce energy use in large buildings.[157]

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[153] RCW § 70A.45.020(1).
[154] RCW § 19.405.040 (2019).
[155] RCW § 19.405.050 (2019).
[156] RCW § 70A.65.060 (2021).
[157] *See* WASH. ADMIN. CODE § 51-11C-40314 (2023) (effective Oct. 29, 2023); WASH. ADMIN. CODE § 194-50 (implementing Washington State Energy Performance Standard, WASH. REV. CODE § 19.27A.210 (2021))

Testimony of Minnesota Attorney General Keith Ellison
House Financial Services Committee
July 12, 2023

Mr. Chairman, Ranking Member, and distinguished members of the House Financial Services Committee, my name is Keith Ellison and I serve as Minnesota Attorney General.

It is a pleasure to be back at the House Financial Services Committee where I had the honor to serve for 12 years while I was in Congress. I founded the Congressional Antitrust Caucus and understand these issues well. The issues you are talking about today are also central to my work as Minnesota's Attorney General.

As Attorney General, I serve on the governing board of the Minnesota State Board of Investment, which we call the SBI. The SBI is a fiduciary for approximately $125 billion of assets, serving over 820,000 active and retired Minnesota Public Employees, as well as various agencies of the State of Minnesota.

Active public employees entrust the SBI with a portion of their salaries in return for a secure retirement.

Public employers across the state entrust SBI with a portion of their balance sheets in return for a critical future benefit for their employees.

I am proud that the SBI pays more than $5 billion a year in benefits to our members. In many cases, these benefits payments are the recipient's most important financial asset.

One of our investment values that we have expressly adopted is that addressing environmental, social, and governance-related issues can lead to positive portfolio and governance outcomes. We believe that by taking a leadership role in promoting responsible corporate governance, SBI can contribute significantly to implementing ESG best practices — which should in turn add long-term value to SBI's investments.

And I am also proud that year over year, the Minnesota SBI is one of the highest-performing public pension funds in America. The Minnesota SBI is proof that ESG best practices and high market returns can and do go hand in hand.

The SBI has a covenant to help ensure a secure retirement for Minnesota's public employees. Their futures are in our portfolios. What beneficiaries want from us is simple: to invest wisely.

As fiduciaries and elected officials, we are charged with carefully considering all relevant investment risks and opportunities. We have a duty to hold companies accountable and to ensure they are meeting their fiduciary duties.

Indeed, it is the fiduciary duty for investment managers, banks, insurers, and other market leaders everywhere, in every sector, to consider the risks and opportunities that could impact their investments and their businesses.

Allow me to say this clearly: When it comes to ESG, the available data indicates that these desires — for wise investment, for evaluating risks and opportunities, and for ensuring companies are meeting their fiduciary duties — are not in conflict. Quite the opposite: they go hand in hand.

Allow me also to say *this* clearly: legislation that attempts to hijack investment decisions for purely political purposes are a threat to the financial security of retirees and families in every community in every state.

Most Americans aren't clear what ESG means, but at the end of the day, it's a bread-and-butter issue. So allow me to say this even *more* clearly: these bills hurt American families.

The private sector now overwhelmingly recognizes that it is vital to consider risk factors such as climate change and water usage, workplace safety, and corruption, among other environmental, social, and governance factors.

Simply put, prohibiting professionals, business executives, and asset managers from considering those factors is interfering with the free market. To prohibit professionals from adapting to recognized risks and opportunities is irresponsible, harmful, and dangerous.

When it comes to the urgent need to consider environmental factors in investing, consider that the last several days have been the hottest ever recorded on earth. Human-made climate change is real, and it is not going away. Quite the opposite: its effects and the risks it poses are intensifying.

According to the National Oceanic and Atmospheric Administration, weather-related disasters that caused more than $1 billion in damages each have cost the United States more than $2.5 trillion since 1980.

That's bad enough. What's worse is that they are becoming much more frequent.

In the 1980s, we saw about 3 weather disasters per year that caused more than $1 billion in damages. In just the last 3 years alone, we have seen 20 occurrences of $1 billion disasters per year. These are real risks for investors.

And yet there are also opportunities for investors, in the form of significant new business opportunities in renewable energy and emerging technologies, and the spin-off from the Inflation Reduction Act.

ESG is nothing more than looking clear-eyed at risks and opportunities in the real world and making sound investment decisions on that basis. As Illinois State Treasurer Mike Frerichs plainly stated in another congressional hearing on this topic: “ESG is data.”

Some politicians may want to ignore data and look the other way. They may refuse to see clear threats or what’s obvious to the rest of us. If they want to invest their own money blindly without regard to these risks, they’re free to do so.

But fiduciaries don’t look the other way. They can’t ignore the clear risks or the opportunities.

Indeed, according to a recent poll, 80% of asset owners believe ESG factors are material and 96% of the largest 250 global companies now issue a sustainability report. They don’t do it out of the goodness of their bleeding hearts. They do it because it’s good for business, customers, shareholders, and profits.

The data speak for themselves.

In 2019, McKinsey determined that in over 2,000 studies on the impact of ESG propositions on equity returns, there was a 63% share of positive findings and only 8% negative.

Similarly, a New York University study examined the relationship between ESG and financial performance in more than 1,000 research papers from 2015-2020. They found a positive relationship between ESG and financial performance in 58% of the studies, with only 8% showing a negative relationship.

Despite this data, in states across this country there is an effort to rewrite the time-tested laws that govern the relationship between fiduciaries and beneficiaries and to prohibit consideration of large classes of risk. These are attacks on the freedom to invest.

Here are some states that have passed or threatened to pass this legislation that infringes on the freedom to invest, and the additional tax burden these states now bear or will bear:

- In Texas, anti-free market legislation may have cost taxpayers up to $532 million in higher interest costs in just one year.
- In Indiana, an anti-sustainable investing bill could cut state pension returns by $6.7 billion over the next 10 years.
- Kansas could lose upwards of $3.6 billion in the same time frame from a similar bill.
- The Arkansas Public Employees Retirement System estimated they could lose $30-40 million a year under a similar proposal.
- Taxpayers in six states — Florida, Kentucky, Louisiana, Missouri, Oklahoma, and West Virginia — could have been on the hook for up to $700 million in excess interest payments if restrictions on sustainable investing had been passed and implemented in those states.

These attacks on the freedom to invest will lead to distorted capital markets and more costs and lower returns for businesses, pensioners, and taxpayers.

But perhaps this issue is *not* about hard data or fiduciary duty. Perhaps it has nothing to do with ESG at all. Perhaps it *is* about running roughshod over the freedom to invest in order to protect the prerogatives of one industry in particular — the fossil-fuel industry — that bears so much responsibility for the costs of climate change and has waged a well-documented, decades-long campaign of deception to deflect that responsibility.

Fiduciary duty is simply the responsibility to act solely in the best interest of another person. As 16 attorney general colleagues and I wrote this committee last November, "Consideration of ESG factors is consistent with legal responsibilities to evaluate potential risk and reward in assessing the merits of an investment." This is a real consideration in the real world in which we live — not the world in which some members or some corporations wish we live, but the one in which we actually live today, with all its risks *and* opportunities.

In fact, the refusal to take into consideration environmental, social, or governance risks of an investment would be a breach of fiduciary duty in many circumstances.

Federal and state action that forbids professional investors from evaluating ESG risks forces them to breach that duty. It is irresponsible and dangerous for public officials to dictate which investments the managers must favor by censoring relevant financial consideration. It is exactly what Congress should *not* be doing.

Similarly, the effort to limit shareholders from voicing their concerns is also rewriting decades of work that guarantees that as part of being a stockholder, you have a voice in managing your money.

Investors and asset managers simply cannot afford to ignore financial risk. Now, to the politicians who want to block asset managers, banks, and insurance companies from considering these risks, I say: bet your own money. But common-sense Americans cannot afford to have climate deniers, ideologues, and apologists for corporations run amok gamble with their life savings.

Thank you for your consideration.

Antitrust and Sustainability: A Landscape Analysis

By Denise Hearn, Cynthia Hanawalt, and Lisa Sachs

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> *"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."*

– former Supreme Court Justice Thurgood Marshall[1]

> *"We stand now where two roads diverge. But unlike the roads in Robert Frost's familiar poem, they are not equally fair. The road we have long been traveling is deceptively easy, a smooth superhighway on which we progress with great speed, but at its end lies disaster. The other fork of the road — the one less traveled by — offers our last, our only chance to reach a destination that assures the preservation of the earth."*

— Rachel Carson[2]

1 United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).
2 Rachel Carson, Silent Spring, Houghton Mifflin, 1962.

EXECUTIVE SUMMARY

Competition policy and antitrust law are experiencing a global renaissance. New market realities such as digital market gatekeepers, the financialization of firms, highly concentrated markets, a rising labor movement, industrial policy, and trade wars, among others, are radically reshaping how this policy area is understood and applied.

Sustainability concerns have also been a driving force for reconstituting antitrust to meet twenty-first century challenges. It is now widely accepted that competition policy – both its aims and its enforcement – has wider societal impacts beyond competition, including effects on democracy, economic inequality, growth and innovation, racial and gender imbalances, privacy, geopolitical implications and more. Its effects on the environment can also no longer be ignored.

Increasingly, private-sector firms say that antitrust is chilling the mobilization of non-state actors to address climate change and other sustainability challenges. Activities such as joint standard-setting, industry-wide competitor collaborations, and information sharing have raised new questions and controversies. Coordinated engagement by investors and financial institutions has become a particular target of politicized attack in the United States, further muddying the waters. These trends have generated confusion among private actors regarding permissible behavior, which has prompted many international competition agencies to issue updated guidelines.

Although a common narrative emphasizes that antitrust law is getting in the way of coordination, antitrust law is, fundamentally, an allocator of coordination rights.[3] It defines what kind of market coordination is pro-social or benign, and where private actor coordination becomes anti-social (for example, cartel behavior). Competition agencies, since their inception, have wrestled with how to define what constitutes pro-social coordination, and how to measure any anti-competitive harms against other social and economic benefits.

For these reasons, competition policy is a profound shaper of markets. Competition enforcers and regulators must grapple with the role that it can play in advancing or hindering sustainability objectives. Various competition agencies define the scope of sustainability considerations differently, but broadly they can include: mitigating environmental impacts, accelerating the energy transition to clean energy, protecting human rights, and advancing worker rights and prosperity.

Vigorous debates about the normative goal of competition policy have renewed urgency. For every position on what antitrust law should accomplish,

3 Sanjukta Paul, "Antitrust As Allocator of Coordination Rights", UCLA Law Review, 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337861

differences in methodology and technical implementation follow. Biden administration antitrust enforcers are experimenting with a wholesale revival of the antimonopoly origins of antitrust and are exercising long-dormant enforcement authorities, focusing on addressing concentrations of power and protecting the competitive process. Due to both the increasingly politicized nature of the debate in the US, and the Neo-Brandesian belief that ancillary benefits like environmental or social benefits follow from increased market competition, US agencies largely remain silent on sustainability issues. Instead, the US is debating and experimenting with what new goal should replace the longstanding "consumer welfare standard" that has guided antitrust application for more than four decades. The US federated system – whereby states enforce their own antitrust laws parallel to federal law enforcement – creates additional complexity.

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In contrast, Europe is still largely operating under the consumer welfare standard, expanding who is considered a 'consumer' ("in market" or "out of market") while moving to new semantic versions like the 'citizen welfare standard,' which allow for a wider set of welfare considerations beyond price or efficiency gains. Compared to the US, the EU, UK, and Dutch agency approaches to sustainability collaborations are more permissive, more experimental, and more oriented around exceptions and safe harbors. European agencies are now directly incorporating environmental and other sustainability concerns into their mandates and updated guidelines. Using the long-standing "balance of harms" approach for sustainability collaborations raises new and substantial challenges of measurement and enforcement.

The anti-ESG ("Environmental, Social, Governance") narrative battles have also heightened focus on financial institution coalitions such as the Global Financial Alliance for Net Zero (GFANZ), Climate Action 100+, Ceres, and others. In the US, Republican Attorneys General and Congressional representatives have launched investigations for alleged antitrust violations. The claim that coordinated behavior among financial institutions such as banks, asset managers, or insurers is a violation of antitrust, and a "collective boycott" in particular, has dominated headlines, although no lawsuits have

While the weighing of benefits and harms of these collaborations is not new to competition policy, 'sustainability gains' are now becoming the new 'efficiency gains' that companies propose as deserving of new regulatory or legislative carve outs.

been brought to date. As the political pushback has intensified, some major asset managers and insurers have withdrawn from their respective climate alliances.

The rising anti-ESG movement overlaps and intertwines with antitrust concerns but must be parsed closely to differentiate narrative fiction from legal reality. In the US, state-level anti-ESG bills employ "boycott" language but are more concerned with questions of fiduciary duty than antitrust violations. Nevertheless, the coordinated state-level activity means that firm risk from purported antitrust violation investigations is difficult to mitigate, even if federal agencies offered updated guidelines or safe harbors (as other international competition agencies are doing). For this reason, it is nearly impossible to provide a unified US approach to these questions, in contrast to international jurisdictions.

Other industries – like fashion and agriculture – claim that a "first mover disadvantage" afflicts companies pursuing sustainability goals which may entail higher costs. For this reason, they assert that collective action amongst competitors – such as standard-setting and industry association activities, collective purchasing requirements or mandatory standards, information sharing, and others – is an important way to institute needed reforms, and they perceive antitrust as standing in the way of these collaborations. Most competition agencies have long-standing competitor collaboration guidelines to inform businesses about what kinds of collaborations are permissible under the law; there is also existing case law which has provided clarity on various kinds of collaborations. But some collaborations and activities with sustainability objectives continue to raise challenging questions.

Some contend that antitrust's focus on reducing prices or maximizing output is fundamentally in tension with sustainability goals. Competition agencies now wrestle with what amount of a reduction of competition among firms – if any – should be permissible to obtain certain sustainability benefits. How should agencies assess the benefits and harms of restrictions of competition against consumer or citizen benefits? And does this require legislative change, or simply updated guidelines? Discussions about how sustainability benefits should be quantified, to whom, and over what time horizon are ongoing.

Incentivizing private actors to align their practices with sustainability and climate goals will require policies and regulations throughout the economy. Antitrust policies and agencies should be a coherent part of this robust policy framework.

These technical questions absorb much of the European dialogue on “green antitrust.” However, it is worth noting that competition agencies have wrestled with technical questions relating to competitor collaborations for decades. Historically, competitor collaborations have been assessed using the lens of maximizing efficiency, rather than sustainability benefits. So, while the weighing of benefits and harms of these collaborations is not new to competition policy, ‘sustainability gains’ are becoming the new ‘efficiency gains’ that companies propose as deserving of new regulatory or legislative carve outs.

To provide increased clarity on these issues in the US, financial institution coalitions and other non-financial industry collaborations can seek advisory opinions or business reviews from the Department of Justice (DOJ) and the Federal Trade Commission (FTC). They can also request that the FTC use its power to compel information (known as 6(b) authority, from section 6 of the FTC Act) to conduct market studies on critical industries relevant to energy transition or sustainability, which may raise new questions about permissible collaborations. This can help the agency investigate the unique competitive dynamics of a relevant industry, and perhaps yield specific case studies for updated competitor collaboration guidelines which would take sustainability-oriented collaborations into consideration.

Concurrently, the whole-of-government approach to competition policy – instituted under President Biden’s Executive Order on Promoting Competition in the American Economy in July 2021 – provides an opportunity to infuse sustainability considerations through existing interagency collaborations. While the FTC and DOJ are primarily responsible for enforcing the federal antitrust laws, other agencies such as the Department of Transportation, US Department of Agriculture, National Labor Relations Board, and many others also have antitrust authority. And increasingly, the FTC and DOJ have memorandums of understanding (MOUs) with other federal agencies, and often comment on rulemakings, as they intersect with competition concerns. At a time where the antitrust agencies are politically constrained from engaging questions of sustainability directly, they can support other agencies which may consider sustainability considerations in their rulemaking and other regulatory actions.

Ultimately, competition policy and its enforcement agencies are one component of a broad policy framework that shapes private sector activities and their alignment with, or contributions to, climate or other policy objectives. Incentivizing private actors to align their practices with sustainability and climate goals will require policies and regulations throughout the economy. Antitrust policies and agencies should be a coherent part of this robust policy framework.

1. INTRODUCTION

1A. ANTITRUST AND THE COORDINATION PROBLEM

The coordination problem – how we produce, distribute, and allocate resources, goods, and capital in society – was previously thought largely resolved through free markets and the mechanism of price. Neoclassical economic theory posits that consumers rationally optimize their choices based on utility, and those individual choices aggregate into the highest social good. Increasingly dire global challenges like climate change, biodiversity loss, and inequality have called these market fundamentalist ideologies into question and have engendered a rethink of how best to catalyze economic coordination at scale.

Competition policy is a profound shaper of market structure. Antitrust – focused on protecting competition – is often portrayed as getting in the way of needed coordination; however, as Professor Sanjukta Paul of the University of Michigan emphasizes, "the central function of antitrust law is to allocate economic coordination rights."[4] The questions, then, that antitrust law must answer are: Who should be allowed to coordinate to shape markets? Under what terms? And in whose benefit?

Today, many of the largest global firms function as para-state institutions and are some of the biggest economic actors in the world (far surpassing many nation states). Private firms often act as de facto private regulators, setting the terms and norms of markets. Over the last 50 years, global antitrust enforcement has primarily allocated coordination rights to larger, dominant firms, while harboring more suspicion towards coordination among workers or between smaller firms.[5]

The emergence of stakeholder capitalism, universal ownership theory,[6] a rising labor movement, and an anti-ESG backlash have challenged the corporation and its role in society. Each movement asserts its own theory of societal organization, and whose stakeholder interests (and coordinated demands) should be foregrounded.

Proponents of universal ownership theory argue that shareholders and shareholder coalitions should have special antitrust accommodation to coordinate on ESG issues which affect their long-term returns.[7] Companies in the same industry, or direct competitors, claim a desire to coordinate on sustainability projects and goals, already receiving special accommodation from many European and Asian antitrust agencies. An uptick in labor organizing in 2022, amidst a longstanding decline in unionization in the US, signals a rising labor movement trying to reassert its right to coordination rights.[8]

Even US federal antitrust enforcers are seeking greater levels of cooperation both domestically and internationally. The DOJ and FTC have signed new memorandums of understanding with other federal agencies with antitrust authority, and a June 2023 public comment period asks for input on how the FTC can better coordinate on cases with state Attorneys General.[9] At the international level, the FTC and DOJ have come under fire from the Chamber of Commerce

4 European Commission. "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", European Commission, June 1, 2023. https://competition-policy.ec.europa.eu/system/files/2023-06/2023_revised_horizontal_guidelines_en_0.pdf.

5 Ibid

6 Universal ownership theory proposes that investors who own the entire market are exposed to 'systemic risk' and are therefore incentivized to have portfolio companies internalize previously ignored externalities that may affect future returns. Institutional investors who see themselves as "universal owners" of the market now exert additional pressure on companies, and indeed entire sectors, to help mitigate environmental and social risks. This raises additional questions regarding what forms of industry collaborations – at both the investor and firm level – are permissible under antitrust law, which we plan to explore in future research.

7 See, for example, the Shareholder Commons website which states, "We believe that our financial system requires fundamental reform to root out practices that prioritize the financial return of individual companies over the health of the systems that support all companies and the human beings they are meant to serve. In order to accomplish this change, it is critical that legislators, regulators, and courts clarify that the impact that companies have on the economy and diversified portfolios is material to most investors, and that laws meant to protect investors recognize that principle." For this reason, they support "securities and antitrust rules that create safe harbors for collective shareholder action." https://theshareholdercommons.com/policy-proposals/

8 For example, "Only one in ten American workers is now in a union, down from nearly one in three workers during the heyday of unions back in the 1950s." From: Greg Rosalsky. "You may have heard of the 'union boom.' The numbers tell a different story", NPR, February 28, 2023. https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story

9 Federal Trade Commission, "Commission Seeks Public Comment on Collaboration with State Attorneys General", Federal Trade Commission, June 7, 2023. https://www.ftc.gov/news-events/news/press-releases/2023/06/commission-seeks-public-comment-collaboration-state-attorneys-general

for coordinating with other international competition agencies on "big tech" merger cases.[10]

So, while private firm coordination gets more attention within the sustainability and antitrust debates, and is indeed the focus of this paper, these wider considerations around which system actors should coordinate to set economic conditions are critically important.

The EU,[11] the UK,[12] Japan,[13] and other jurisdictions have moved to incorporate sustainability concerns directly into their agency mandates. Some agencies have provided updated guidelines which include exemptions and safe harbor provisions. Other National Competition Authorities within the EU, like the Bundeskartellamt (or Federal Cartel Office) in Germany, have also issued their own guidance.[14] The most significant legislative change has been the Austrian Cartel Act, which was amended in 2021 to include a sustainability-related exemption to protect "cooperation for the purpose of an eco-sustainable or climate-neutral economy from the cartel prohibition."[15] Its effects are yet to be fully studied and understood.

"Sustainability" has many definitions. Competition agencies – like the Netherlands Authority for Consumers and Markets (ACM), the European Commission's Directorate General for Competition (DG COMP), and the UK's Competition and Markets Authority (CMA) – have issued updated competitor collaboration guidelines which include specific advice on sustainability collaborations. Each agency has definitional variations of "sustainability" and, therefore, which activities fall in scope. The ACM's guidelines have wide latitude, defining sustainability agreements as those "aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature."[16] The EC also has a wide definition of sustainability which encompasses "activities that support economic, environmental and social (including labour and human rights) development."[17] The UK's guidelines are narrower in scope, only focusing on environmental-related collaborations, with more permissive exemptions for climate-related collaborations in particular.[18] Their guidance explicitly does not cover biodiversity or living wage concerns.

The emergence of stakeholder capitalism, universal ownership theory, a rising labor movement, and an anti- ESG backlash have challenged the corporation and its role in society. Each movement asserts its own theory of societal organization, and whose stakeholder interests (and coordinated demands) should be foregrounded.

10 Sean Heather, "When Cooperation Crosses the Line: Is the Federal Trade Commission working foreign authorities to deny due process?", Chamber of Commerce, February 23, 2023. https://www.uschamber.com/finance/antitrust/when-cooperation-crosses-the-line

11 European Commission, *supra* note 4.

12 Competition and Markets Authority, "Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements", Competition and Markets Authority, February 28, 2023. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document__.pdf

13 Japan Fair Trade Commission, "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act", Japan Fair Trade Commission, January 13, 2023. https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118.html (last visited May 30, 2023).

14 See Press Release, German Federal Cartel Office (FCO), "Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives", Bundeskartellamt, January 18, 2022. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html?nn=3599398.; and Press Release, German FCO, "Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law", Bundeskartellamt, January 25, 2022. https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.html?nn=3599398. These press releases provide guidance on the conditions under which sustainability goals in cooperation agreements between competitors may be sufficient to exempt such agreements from the prohibition against anti-competitive agreements.

15 Organisation for Economic Co-operation and Development (OECD), "Environmental Considerations in Competition Enforcement – Note by Austria", OECD December 1, 2021. https://one.oecd.org/document/DAF/COMP/WD(2021)46/en/pdf

16 The Netherlands Authority for Consumers and Markets, "Draft guidelines 'Sustainability Agreements'", Authority for Consumers and Markets, September 7, 2020. https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements

17 The guidelines go on to say, "The notion of sustainability objectives therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc." Section 517.

18 UK Competition and Markets Authority, "Closed consultation – Draft guidance on environmental sustainability agreements", Crown Copyright, February 28, 2023. https://www.gov.uk/government/consultations/draft-guidance-on-environmental-sustainability-agreements (last visited May 30, 2023).

Sustainable development must incorporate socially inclusive, and environmentally sustainable, economic development. This means protecting the planet's natural resources (water, air, land, biodiversity), as well as sustainably provisioning critical social needs and services, like decent jobs, living wages, food security, affordable housing, peace and security, education, gender and racial equity, healthcare, and so on.

Sustainability, then, encompasses an enormous range of markets and goals, and competition law and its enforcement agencies must grapple with the role that competition policy can play in advancing or hindering such objectives. The wider the definition of 'sustainability,' the more economic activities fall into purview, potentially enlarging the traditional mandate of the agencies, and inviting inevitable challenges around trade-offs. It also raises questions about what is truly novel or necessary about sustainability-related projects that require new approaches by the agencies. Some contend that antitrust's focus on reducing prices or maximizing output are fundamentally in tension with sustainability goals, and thereby require internalizing long-externalized costs and reducing production.[19] Should this, then, alter the enforcement mandate of competition agencies, or be left to other policy areas to set market guardrails?

There is no monolithic "sustainability law" – sustainability challenges suffuse many areas of law and regulation beyond competition law, including environmental law, trade policy, tax law, industrial policy, and labor laws. Nevertheless, competition policy plays an important role in enforcing against anticompetitive business conduct that harms stakeholders like workers, consumers, and small and medium-sized enterprises.[20]

Current discussions about how antitrust may support sustainability broadly consider:

- areas in which competition – among firms, investors, and even countries[21] – might drive more innovation in sustainability;

Sustainability, then, encompasses an enormous range of markets and goals, and competition law and its enforcement agencies must grapple with the role that competition policy can play in advancing or hindering such objectives.

- areas in which collaboration might drive more ambition or impact in sustainability – in other words, instances where acting in concert can enable sustainability gains which would not be otherwise achievable through unilateral action, or not achievable at scale;
- areas in which competitor collaborations or mergers and acquisitions result in concentrations of power – or abuses of dominance – which have an impact on sustainability;
- areas in which consumer preferences for sustainability have an impact on consumer welfare analysis.

Within this debate, ideologies diverge on:

- **Goals / Normative questions:** What should competition law/policy aim to do? What are the boundaries of competition law?
- **Methods** of achieving those goals: What tools can competition agencies use to support those goals?
- **Technical questions:** How best to achieve those outcomes?

While these considerations are not mutually exclusive, they can create divergences of approach. For instance, one might believe that competition law should account for sustainability, but that the best way to promote sustainability is to encourage more competition, which in turn can drive more green innovation. Then, the methodological and technical debate of how to encourage more competition follows: Is it through stronger merger review, through structural presumptions against certain thresholds of market concentration, through structural break-ups of companies, stronger remedies and consent decrees, or some combination of these?

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19 John M. Newman, "The Output-Welfare Fallacy: A Modern Antitrust Paradox", 107 Iowa Law Review, June 23, 2021. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866725

20 In her speech, Cardell states that: "There are 3 ways in which I believe the CMA can and should contribute to promoting environmental sustainability and helping accelerate the transition to a net zero economy, as we have set out in our new strategy. First, we can help ensure that markets for sustainable products or services develop in competitive ways. Second, we can help consumers make informed choices about the climate impact of the goods and services they use. Third, we can help ensure that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives." From: Sarah Cardell, "Sustainability – Exploring the possible", United Kingdom Competition and Markets Authority (UK CMA), Speech at the Scottish Competition Forum, January 24, 2023. https://www.gov.uk/government/speeches/sustainability-exploring-the-possible.

21 Robinson Meyer, "These Tiffs Over Electric Vehicles Are Not What They Seem", New York Times, April 7, 2023. https://www.nytimes.com/2023/04/07/opinion/electric-vehicles-europe-trade-wars.html

Or perhaps one believes that the best way to promote sustainability is to better enable competitor collaborations that raise both the ambition and potential impact of corporate activities. Questions of methods and technical implementation to allow for more prosocial collaboration follow. Should legislation exempt sustainability collaborations from cartel law? Should agencies clarify competitor collaboration guidelines or offer sustainability-related exemptions and safe harbors?

In practice, the agencies try to incorporate a range of tools to accomplish multiple ends. For example, Michelle Meagher and Simon Holmes – UK competition law experts – use a "sword and shield" analogy to claim that competition policy can be used as a "sword" to attack corporate power and unsustainable practices, while "shielding" legitimate collaborations by not impeding sustainability initiatives.[22]

Normative, Methodological, + Technical questions

Goals	■ Competition, consumer welfare, dispersion of market power, fairness, preservation of democracy, protection of small and medium sized businesses, workers, sustainability considerations, etc.
Methods	■ Legislation, enforcement, rule-making, information collection • Merger review, consumer protection, policing anti-competitive behavior and unfair methods of competition, doing market studies ■ Whole of government approaches, intra-agency collaboration both domestically and internationally
Technical implementation	■ Guidelines, safe harbors, structural presumptions, definitions on harms and benefits, business reviews and advisory opinions, role of economists, etc.

The overarching purpose, or normative goal, of antitrust law varies among jurisdictions and is increasingly contested, particularly in the US. Antitrust and competition policy are in a moment of renaissance, not only in the strength of enforcement globally, but also with fierce academic and practitioner debates about how to reconstitute this field to meet 21st century challenges.

New market realities are shuffling long-held assumptions about antitrust, and sustainability is one factor among many driving a partial or wholesale rethink of the field. Additional trends and developments driving the re-formulation of competition policy include:

- Digital markets and new digital gatekeepers
- Artificial intelligence (AI), data, and privacy concerns
- Market concentration concerns
- The rise of private equity
- Financial complexity and the financialization of firms
- Labor movements regaining strength

The 'consumer welfare standard,' which has been the predominant analytical framework for antitrust policy for the last forty years, is largely not concerned with externalities like societal benefit, environmental considerations, market power questions, effects on democracy, privacy, and other impacts. The consumer welfare standard focuses on consumer-specific outcomes – such as price, convenience, or product quality – arguably subjugating a citizen's identity beneath their consumer identity. It also posits that firm behavior is anticompetitive "only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality."[23] As applied, this has meant that aggregations of market power by large technology firms have been left unaddressed, in addition to other market outcomes like loss of privacy or the erosion of democracy. For this reason, the consumer welfare's narrow focus has been the subject of widening critique.

22 Simon C. Holmes and Michelle Meagher, "A Sustainable Future: how can control of monopoly power play a part?", SSRN, May 3, 2022. https://www.ebcam.eu/images/SSRN-id4099796.pdf

23 Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)

New standards are arising in replacement. Lina Khan, Chairperson of the Federal Trade Commission, and Jonathan Kanter, Assistant Attorney General for the Department of Justice's Antitrust Division, promote the 'competitive process standard,' which focuses on market structure and aims to protect the competitive process itself. This standard, also embraced by former White House Special Advisor on Competition and Technology, Tim Wu, contends that antitrust law should not have to justify its benefits against a singular overarching purpose, but rather should declare bright-line rules to which companies must adhere.[24] More progressive antitrust scholars have advocated for an even broader mandate through their proposed 'effective competition standard,'[25] which aims to protect fairness and challenge concentrations of economic power.[26] Neither of these two proposals explicitly mentions sustainability or environmental considerations.

For every normative position on competition law's purpose – and the factors that it should consider – there may be differences of opinion on desired methods, and how to technically implement those methods to serve that purpose. Therefore, much of the current "green antitrust" discussion sits inside wider debates about antitrust law's purpose, enforcement strategies, and ideological approaches. While Europe continues to operate largely under the consumer welfare paradigm, with sustainability considerations expanding or altering aspects of these theories, the US is reckoning broadly with the consumer welfare paradigm and is actively pursuing alternatives,[27] some of which – like focusing on harms to independent workers – have already found merit in the courts.[28] Sustainability concerns have been less present in US discussions, in part, due to the politicized nature of the debate.

While competitor collaborations – the subject of this paper – are an important area for considering how antitrust law can support or inhibit sustainability, many other areas of antitrust agency authority can take environmental or social goals into consideration. Revamping merger policy to address concentrations of corporate power which may undermine environmental aims is one promising avenue. Additionally, consumer protection mandates can be used to address greenwashing and deceptive marketing, as corporate claims related to sustainability have increased dramatically in recent years.

The below chart shows the US antitrust agency mandates, and where competitor collaborations sit alongside other areas of remit. The highlighted blue sections show where competitor collaboration considerations emerge.

24 Tim Wu, "The Consumer Welfare Standard is Too Tainted", Promarket, April 19, 2023. https://www.promarket.org/2023/04/19/the-consumer-welfare-standard-is-too-tainted/

25 Marshall Steinbaum and Maurice E. Stucke, "The Effective Competition Standard: A New Standard for Antitrust", Roosevelt Institute, September 25, 2018. https://rooseveltinstitute.org/publications/the-effective-competition-standard-a-new-standard-for-antitrust/. The effective competition standard goes further than the competitive process standard. Concerned with rising corporate concentration and its effects on stakeholders, their proposed standard aims to restore "the primary aim of antitrust laws, namely to protect competition wherever in the economy it has been compromised, including throughout supply chains and in the labor market." They propose legislative amendments to the Sherman and Clayton Acts which incorporate several goals, including: "1) to protect individuals, purchasers, consumers, and producers; 2) to preserve opportunities for competitors; 3) to promote individual autonomy and well-being; and 4) to disperse and de-concentrate private power." Detractors fear this proposal will widen the mandate of the agencies too far, and complicate antitrust analysis in ways that make it very difficult to administer.

26 Eric A. Posner, "Toward a Market Power Standard for Merger Review", Promarket, April 7, 2023. https://www.promarket.org/2023/04/07/toward-a-market-power-standard-for-merger-review/.

27 University of Chicago – Booth School of Business, Stigler Center for the Study of the Economy and the State. "2023 Antitrust and Competition Conference - Beyond the Consumer Welfare Standard?", The University of Chicago Booth School of Business, April 20-21, 2023. https://www.chicagobooth.edu/research/stigler/events/2023-antitrust (last visited May 30, 2023).

28 Ground-breaking legal precedent involving workers was set in the Simon-Schuster/Penguin Random House proposed merger (which was blocked in late 2022). The DOJ's case focused on the proposed firm having too much power over authors, arguing it would create a monopsony in the "markets for content acquisition." Monopolies have power as sellers, whereas monopsonies have power as buyers in markets. The DOJ case did not focus on downstream harms to consumers (like higher book prices), but was successful, creating new precedent for future monopsony cases.

Mergers and Acquisitions (DOJ & FTC)	Consumer Protection (FTC)[29]	Anti-competitive Behavior (DOJ & FTC)
Premerger notification (under the Hart-Scott-Rodino Act)	Advertising and marketing claims, including deceptive marketing (e.g., greenwashing)	**Cartels and invitations to collude**
Merger review (horizontal, vertical, and uncategorized mergers) culminating in approvals or challenges	Product safety	**Group boycott / refusal to deal**
Post-merger monitoring of consent decrees	Policing unfair, deceptive, and fraudulent business practices	**Price fixing, market allocation, bid rigging**
	Privacy and security	Monopolization, including attempts and conspiracies to monopolize
		Unfair methods of competition (Section 5) and single-firm conduct including exclusionary and unfair contracts terms
		Price discrimination (Robinson-Patman Act violations)

Ultimately, the question of how best to incentivize global collaboration, at scale, in ways that advance ecologic and civilizational thriving remains open. Competition policy's role in bolstering this effort will continue to be contested.

29 In the US, antitrust and consumer protection law enforcement are institutionally housed together, as complementary tools for achieving the benefit of market competition. The FTC integrates consumer protection and antitrust, whereas the DOJ has a separate consumer protection division that is functionally separate from the antitrust division. Consumer protection is generally viewed as a separate area of law, despite the overlaps in its impact.

1B. THE ROLE OF BUSINESSES IN ADDRESSING SUSTAINABILITY

Businesses are increasingly responding to societal and investor pressure to minimize environmental and social harms and contribute toward societal goals. Some businesses claim they are filling the gaps left by stalled or slow-moving policy action, both nationally and internationally. The International Chamber of Commerce (ICC) report, *How competition policy acts as a barrier to climate action*, puts it this way:

> *"As frequently occurs, when regulation lags behind in driving and promoting change, the private sector has stepped forward and taken action. Rising sustainability concerns have created increasing pressure on businesses to make environment-friendly investments, innovations and purchasing decisions...When all, or most, competitors move together and in the same direction, change will occur. What if such change benefits the environment and society, but at the cost of temporarily reducing competition? How much of a reduction of competition are we ready to accept?"*[30]

While policy can be slow-moving, the ICC claim ignores the ways in which corporate political spending, lobbying, and revolving door dynamics may undermine or forestall regulator's attempts to bring forward comprehensive reforms. For example, a recent study found a positive correlation between market power and lobbying spend – the more market power a corporation acquires, the more it lobbies. The results suggested a "significant empirical link between increased corporate consolidation and increased corporate political power."[31]

Our position is that robust, timely government action is the best way to make progress on global sustainability goals; and investors and businesses should not intentionally undermine policy progress. However, private sector actions can also be important – both in addressing regulatory gaps and in shifting norms for what responsible business conduct looks like. In some industries, leading private actors can be ahead of regulatory action in finding solutions, especially when the challenges are cross-border or require new technical solutions and approaches.

Large corporations have been analogized to keystone species, in that their role in affecting change through their respective industries can cascade throughout the supply chain.[32] Some believe that working with dominant firms on climate or social goals is the fastest and most efficient way to make progress. In this view, larger firms with more capital are better positioned to invest in green technology or sustainability initiatives, and that when large firms address their own negative impacts through their operations and supply chains, the effects can be substantial. It may also be the case that large, multinational firms are better equipped to deal with corruption issues or low social and environmental standards in foreign countries.

Mark Roe, a Law professor at Harvard, has advanced a theory that monopolistic firms – concentrated targets of widening pressure to move beyond profit maximization – can redirect their excess profits from shareholders to stakeholders: to customers, employees, or the public good.[33] This line of reasoning echoes allocative efficiency arguments often used to support the consumer welfare standard, which sidestep other effects from concentrated economic power.

In contrast, others believe that increased competition – and challenges to dominant incumbents – produces the necessary firm incentives to innovate and invest in sustainability-related initiatives.[34] Some research has shown that market concentration proxies are negatively related to widely used corporate social responsibility

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30 International Chamber of Commerce (ICC), "How competition policy acts as a barrier to climate action", ICC, November 10, 2022. https://iccwbo.org/publication/how-competition-policy-acts-as-a-barrier-to-climate-action/

31 Reed Showalter, "Democracy for Sale: Examining the Effects of Concentration on Lobbying in the United States", American Economic Liberties Project, Working Paper Series on Corporate Power No. 10, August 2021. https://www.economicliberties.us/wp-content/uploads/2021/08/Working-Paper-Series-on-Corporate-Power_10_Final.pdf

32 Marios Iacovides, "Why Aligning Antitrust Policy With Sustainability is a Moral Imperative", Promarket, March 22, 2022. https://www.promarket.org/2022/03/22/sustainability-antitrust-policy-anticompetitive-climate-change/

33 Mark J. Roe, "Corporate Purpose and Corporate Competition", SSRN, European Corporate Governance Institute – Law Working Paper No. 601/2021), April 6, 2021. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788

34 Caroline Flammer, "Does product market competition foster corporate social responsibility? Evidence from trade liberalization", Strategic Management Journal, October 2015. https://doi.org/10.1002/smj.2307; and Caroline Flammer, "Does Product Market Competition Foster Corporate Social Responsibility?", Academy of Management, February 9, 2014. https://ssrn.com/abstract=2146280

(CSR) measures, and that firms in more competitive industries have a superior environmental performance, as measured by firm pollution levels.[35]

Recently, two European researchers, Dr. Marios Iacovides and Chris Vrettos, found “ample evidence of an overlap between market dominance and unsustainable business practices”, and that “the wide prevalence of breaches of environmental protection indicate that dominant firms systematically contribute to ecological breakdown.”[36] They contend that this offers an opportunity to adapt competition law to recognize environmental abuses as unfair methods of competition, which would make ecologically destructive firms subject to greater antitrust scrutiny.

Whether the market power of dominant firms should be harnessed to advance climate and social goals – or prevented and challenged through increased regulatory scrutiny or even structural remedies like antitrust breakups – is answered according to differing theories of change. In navigating these ideologies and approaches, various considerations come into play including jurisdictional challenges, the strength of existing environmental, consumer, and worker protection laws, and the speed at which structural remedies can realistically be applied.

Our position is that robust, timely government action is the best way to make progress on global sustainability goals; and investors and businesses should not intentionally undermine policy progress. However, private sector actions can also be important – both in addressing regulatory gaps and in shifting norms for what responsible business conduct looks like.

While competition agencies grapple with the size of their role and scope of their remit,[37] there will need to be concurrent shifts across many systems to properly incentivize private actors to align their practices with sustainability and climate goals. These will include: increased liabilities for environmental harms; sector

Ultimately, a strategy that deploys many tools within the antitrust toolkit – as well as concurrent regulatory changes in other areas – is necessary to harness the full potential of the private sector in addressing sustainability challenges at scale.

standards for emissions reductions or efficiency; other regulations related to labor rights, data protection, and privacy; incentives and other benefits for prosocial investments and practices; and redefinitions or interpretations of fiduciary duty; among others.[38] All these considerations intersect the more narrow ‘antitrust and sustainability’ problem.

While beyond the scope of this paper, trade policy, geopolitical relations, and international collaboration and competition dynamics also influence the application of antitrust law. Issues of national security and access to critical resources regularly intersect antitrust enforcement considerations. Countries may want to bolster national champions or increase concentration in critical industries to reach economies of scale or network effects that can put them on stronger footing to compete with global rivals.[39] As many industries with sustainability considerations (such as mining, semiconductor production, energy, shipping, agriculture, and so forth) connect to struggles over key global resources and critical minerals, new geopolitical considerations intersect the application of antitrust law.

For the purposes of this landscape mapping, we focus on the existing legal, structural, and political challenges to existing private-sector efforts to mitigate climate change and environmental degradation. Larger questions about social harms, like worker welfare and inequality, are beyond the scope of this initial research, though many of the principles of this analysis would apply to other areas of social policy. There is also robust literature[40] documenting the link between highly concentrated markets and rising inequality, which should inform subsequent research on these topics.

Ultimately, a strategy that deploys many tools within the antitrust toolkit – as well as concurrent regulatory changes in other areas – is necessary to harness the full potential of the private sector in addressing sustainability challenges at scale.

35 Daniel Fernández-Kranz and Juan Santaló, “When Necessity Becomes a Virtue: The Effect of Product Market Competition on Corporate Social Responsibility”, 19 Journal of Economics and Management Strategy, June 2007, https://ssrn.com/abstract=997007

36 Iacovides, supra note 32.

37 Jean Tirole, “Socially Responsible Agencies”, Comptition Law and Policy Debate 171, April 28, 2023. https://www.elgaronline.com/view/journals/clpd/7/4/article-p171.xml?tab_body=pdf.

38 Denise Hearn. “Probing Our Profit Paradigms”, Embodied Economics, December 3, 2021. https://embodied-economics.ghost.io/probing-our-profit-paradigms-part-1/.

39 Niharika Mandhana and Newley Purnell, “Modi’s Vision for India Rests On Six Giant Companies: Conglomerates are executing projects with a scale and speed that have eluded India in the past. ‘Era of great concentration’”, The Wall Street Journal, June 21, 2023. https://www.wsj.com/articles/modi-india-economy-reliance-industries-adani-group-tata-d2c4f89e

40 For example: Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age, Columbia Global Reports, November 2018.; Zephyr Teachout, Break ‘Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money, Macmillan, July 2020.; Matt Stoller, Goliath: The 100-Year War Between Monopoly Power and Democracy, Simon & Schuster, October 2019.; Jonathan Tepper and Denise Hearn, The Myth of Capitalism: Monopolies and the Death of Competition, Wiley, November 2018.

2. US ANTITRUST – CURRENT POLITICAL CONTEXT AND CONSTRAINTS

While European competition agencies forge ahead with new guidelines regarding competition policy and sustainability, the US remains mostly silent. The current political climate in the US – including increased polarization, the federalist system whereby states have co-jurisdiction to enforce antitrust laws, and conservative efforts to undermine the current FTC and DOJ's more robust enforcement agenda – mean that the federal agencies are reluctant to engage in sustainability conversations.

This reluctance is not new: antitrust agencies in the US have had a tepid willingness to acknowledge the link between competition and environmental and social concerns over the past 50 years. In 1977, Mike Pertschuk, the FTC Chair, gave a speech at the New England Antitrust Conference saying that the agency needed to move beyond economic considerations alone, and think about the agency's effects on environmental issues:

> *"Although efficiency considerations are important, they alone should not dictate competition policy. Competition policy must sometimes choose between greater efficiency, which may carry with it the promise of lower prices, and other social objectives, such as the dispersal of power, which may result in marginally higher prices. In 1977, no responsive competition policy can neglect the social and environmental harms produced as unwelcome byproducts of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of marketing-stimulated demands."*[41]

Though the speech was prescient in many ways, it became notorious as a symbol of enforcement overreach after the consumer welfare standard subsequently attained prominence in antitrust thinking in the late 1970s and early 1980s. It became a cautionary tale, or perhaps an intentional illustration during the Reagan-era, about the dangers of adding non-economic goals to antitrust enforcement.

Robert Bork's 1978 book *The Antitrust Paradox* laid the intellectual foundation for a revolution in antitrust – away from considerations of competition and market power, towards a structural presumption that large firms were more efficient and provided consumer benefit. The resulting 'consumer welfare standard' intellectually captured the administration of antitrust law in the US and abroad. Originating from a desire to make enforcement more "objective" and bring scientific certainty, the role of economists swelled within the application of the law as theories of harm had to increasingly be justified using econometric quantification tools.

Despite attempts to position itself as purely 'mathematical' in its analysis, antitrust law, like many other areas of law, has allocative effects across the economy. Swings in interpretation have radically affected market structure, which innovations reach the market, and which stakeholders benefit and lose as a result. It is now widely accepted that competition policy – both its aims and its enforcement – has wider societal impacts, like inequality, effects on democracy, and so forth. Today, its effects on the environment must also be recognized in US antitrust circles.

Despite attempts to position itself as purely 'mathematical' in its analysis, antitrust law, like many other areas of law, has allocative effects across the economy. Swings in interpretation have radically affected market structure, which innovations reach the market, and which stakeholders benefit and lose as a result.

41 Neil Averitt, MLex US, "Neil Averitt commentary: Let us now remember Michael Pertschuk's famous speech", FTC Watch, Mlex US, February 14, 2018. https://www.mlexwatch.com/articles/3029/print?section=ftcwatch.

2A. ANTITRUST IN THE PRESIDENT BIDEN ADMINISTRATION

The substance of US federal antitrust enforcement is derived from 3 primary statutes: the Sherman Act of 1890, the Federal Trade Commission Act of 1914, and the Clayton Antitrust Act of 1914. Additional laws, such as the Robinson-Patman Act of 1936, the Celler-Kefauver Merger Act of 1950, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, aimed to close loopholes in the original laws, and gave the agencies expanded authority to police other methods of unfair competition and merger review. While the FTC's primary statutes are the Clayton Act and the FTC Act, it has enforcement or administrative responsibilities under more than 70 laws.[42]

Both Trump and Biden Administration antitrust enforcers have stated, or signaled, that there are no particular exemptions from antitrust law for environmental, social, and governance (ESG) considerations. Makan Delrahim, Assistant Attorney General of the Department of Justice Antitrust Division under Trump, once said, "Even laudable ends do not justify collusive means in our chosen system of laws."[43] His successor, Jonathan Kanter, has stated, "[Even in the ESG context] collusion is anticompetitive…When firms have substantial power and they use that power to achieve anticompetitive ends, that should be actionable under antitrust laws."[44]

A group of consumer welfare standard opposers, dubbed the Neo-Brandeisians (named after Louis Brandeis, a Supreme Court Justice from 1916 to 1939) received historic appointments at the White House, Department of Justice, and Federal Trade Commission under the Biden Administration. They leapfrogged many Obama-era Democrat antitrust establishment lawyers and pundits, ushering in a new era for antitrust enforcement.

Guided by a plain-text reading of the Sherman and Clayton Acts, Lina Khan and Jonathan Kanter have led an effort to revitalize the dormant power of the agencies. Their ideology focuses on protecting competition, and the competitive process, from abuses of concentration of economic power. This worldview is also presumptively suspicious of monopolies because of the range of social and economic ills that flow from monopoly power. It also desires to return to an emphasis on a 'rule of law' approach and a greater focus on the agency's role as law enforcers.

Discussing this new approach, former White House official Tim Wu "acknowledges that economic activity and competition are highly complex processes involving much that is unknown and unknowable. The [competitive process] standard punishes attacks on competition: it does not aspire to and is not keyed in to the impossibly ambitious task of assessing the full welfare effects of any individual conduct or transaction."[45] This is in stark contrast to the European approach, which is engaged in expanding consumer or 'citizen' welfare analysis – using a "balance of harms" approach – to include sustainability metrics in competition enforcement.

42 See Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-229 (1921), which promotes fair market conduct by animal stockyard owners, dealers, packers, and contractors; Deep Seabed Hard Minerals Act, 30 U.S.C. §§ 1401-1473 (1980), as amended, which allows the FTC to provide recommendations on the antitrust implication of proposed deep-sea mineral extraction licenses; and the Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6201-6422 (1975), as amended, which gives limited exemption to oil and gas companies on voluntary agreements in times of energy shortages.

43 Makan Delrahim, "DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion", USA Today, September 12, 2019. https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/.

44 Jeffrey Martino and Grant Murray, "Prevent Antitrust Laws From Complicating Business Sustainability", Bloomberg Law, December 16, 2022. https://news.bloomberglaw.com/us-law-week/prevent-antitrust-laws-from-complicating-business-sustainability.

45 Wu, supra note 24.

Kanter and Khan generally contend that increased competition will naturally lead to better social and environmental outcomes. They believe that competition law should consider more than consumer welfare, and that is best achieved by more market competition and deconcentrations of private power. For instance, in a January 2023 speech to Howard University Law School, Kanter advocated for a return to Supreme Court precedent and the congressional mandate as laid out in the Sherman and Clayton Acts as the cleanest path to economic justice:

> *"At the Antitrust Division, we aspire to fight for and win economic justice. …Americans are more than just consumers. Americans are workers, creators, and inventors. Freedom and justice in the economy mean that everyone has a fair opportunity on a level playing field. We all deserve competition for our labor and our ideas."*[46]

And the White House Executive Order on Promoting Competition in the American Economy references[47] this 1958 Supreme Court ruling:

> *"[T]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions… But even were that premise open to question," the majority wrote, "the policy unequivocally laid down by the Act is competition."*[48]

Using these guiding principles, the DOJ Antitrust division brought more cases under Section 2 of the Sherman Act (monopolization cases) in 2022 than in the previous 25 years, and, according to Kanter, has initiated the "broadest enforcement program in the history of Section 8 of the Clayton Act" which prohibits interlocking directorates on corporate boards.[49]

Meanwhile, the FTC produced an extensive report[50] as the basis to re-invigorate their Section 5 enforcement ability, which gives the agency broad latitude to police unfair methods of competition. It also announced a proposed rulemaking on banning non-competes across the country.[51] And both agencies are re-writing the merger guidelines, withdrawing previous vertical and horizontal guidelines[52] in favor of combined guidelines. The agencies have claimed credit for more than 26 abandoned mergers under their tenure,[53] and have doubled the average number of complaints against filed merger transactions.[54]

This flurry of antitrust enforcement has provoked a backlash against the agencies and their mandates. Conservative lawmakers and business groups like the Chamber of Commerce are seeking to constrain the existing – let alone more expansive – mandate of the antitrust agencies.

The FTC, in particular, is facing attacks from conservative groups related to 1) its rulemaking and statutory authority 2) its enforcement authority and 3) its general approach and philosophy.

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46 Jonathan Kanter, "Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at Howard Law School", U.S. Department of Justice (DOJ) Antitrust Division, January 12, 2023. https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-howard-law.

47 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

48 The White House, "Executive Order on Promoting Competition in the American Economy", The White House, July 9, 2021. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

49 Jonathan Kanter, "Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks at the Keystone Conference on Antitrust, Regulation & the Political Economy", U.S. Department of Justice (DOJ) Antitrust Division, March 2, 2023. https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-keystone.

50 Federal Trade Commission (FTC), "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act", FTC, November 10, 2022. https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission

51 Federal Trade Commission, "FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition", FTC, January 5, 2023. https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition (last visited May 30, 2023).

52 Horizontal mergers are mergers between direct competitors which eliminate a competitor from the market. Vertical mergers are mergers or acquisitions of other firms in a company's supply chain. Traditionally, antitrust differentiated between these and treated them slightly differently, with more scrutiny applied to horizontal mergers. The new approach aims to lessen the differentiation between these ways of accumulating market power through M&A.

53 Leah Nylen and Michelle F. Davis, "US Antitrust Enforcers Are Chilling Big Mergers", Bloomberg, May 10, 2023. https://www.bloomberg.com/news/articles/2023-05-10/m-a-deal-pace-slows-as-biden-administration-cracks-down-on-antitrust?sref=q0qR8k34.

54 Id. "In the 12 months through September, the antitrust agencies filed complaints against a record 13 transactions compared to an average of six per year over the previous five years."

1. **Rulemaking and Statutory authority:** Conservatives are using the proposed non-compete rulemaking to question the FTC's statutory authority under the major questions doctrine[55]. In a February 28 Chamber Coalition letter to Congress,[56] the Chamber states: "The FTC lacks the constitutional or statutory authority to issue such a rule and, in attempting to do so, the agency is improperly usurping the role of Congress."[57] Walmart challenged the constitutionality of the FTC's authority after the FTC brought a Section 5 case against them,[58] and Microsoft withdrew[59] a similar challenge to FTC constitutionality after being challenged[60] by a public advocacy group.

2. **Enforcement authority:** There are similar challenges to the FTC's enforcement authority: for example, the Supreme Court recently decided *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175 (2023). Axon Enterprise manufactures police body-cameras and tasers, and it was the subject of an antitrust investigation by the FTC when it sued to challenge the FTC's authority. A similar challenge to the SEC's enforcement abilities appeared in *Securities and Exchange Commission v. Cochran*. On April 14, 2023, the Supreme Court issued a consolidated ruling in these cases, finding that the respondents to an administrative proceeding may raise constitutional claims in federal court prior to exhausting their administrative remedies, signaling an openness for others to further challenge the FTC's structure and authority. Additionally, the Chamber of Commerce has attacked Khan's FTC for supposedly going beyond its authority in collaborating with international competition agencies on merger cases,[61] despite a Trump-era MOU between agencies in the US, Canada, UK, New Zealand, and Australia, signed under her predecessor.[62]

3. **Approach and Philosophy:** Critics also deploy the anti-ESG narrative to discredit the FTC's enforcement efforts. Republicans have pejoratively labeled any movement away from the consumer welfare standard and previously lax enforcement norms as "ESG." In December 2022, twelve House Republicans wrote a letter to Chair Khan claiming that the FTC is pursuing a partisan ESG-related agenda, and that they are afraid the new merger guidelines will offer a loophole to prioritize ESG considerations in antitrust. The letter also took issue with the new Section 5 FTC statement, which the GOP claims is "a much broader, more amorphous, reading of Section 5 that can easily be manipulated by the political whims of a majority of the Commission."[63]

Understandably, the agencies have been reluctant to engage in any dialogue or debate on 'green antitrust' or how antitrust enforcement may aid climate change efforts or broader social goals, as they fight to maintain and reinvigorate their existing agency mandates.

55 Congressional Research Service. "The Major Questions Doctrine", Congressional Research Service, November 2, 2022. https://crsreports.congress.gov/product/pdf/IF/IF12077 (last visited May 30, 2023). The Major Questions Doctrine is a novel court doctrine addressing how much regulatory authority federal government agencies have relative to Congress. If agencies undertake rulemakings of major national significance or of vast 'economic and political significance', the action must arguably be supported by clear Congressional authorization.

56 Letter from the U.S. Chamber of Commerce to U.S. Congress, "Coalition Letter to Congress on the FTC's Proposed Rule on Noncompete Agreements", U.S. Chamber of Commerce, February 28, 2023. https://www.uschamber.com/finance/antitrust/coalition-letter-to-congress-on-the-ftcs-proposed-rule-on-non-compete-agreements.

57 Suzanne P. Clark, "The Chamber of Commerce Will Fight the FTC", Wall Street Journal, January 22, 2023. https://www.wsj.com/articles/chamber-of-commerce-will-fight-ftc-lina-khan-noncompete-agreements-free-markets-overregulation-authority-11674410656; and Randy Picker, "The FTC's Non-Compete Ban Will Force Questions Over the Scope of its Authority", Promarket, January 11, 2023. https://www.promarket.org/2023/01/11/the-ftcs-non-compete-ban-will-force-questions-over-the-scope-of-its-authority/.

58 Alan S. Kaplinsky, "Walmart challenges FTC's constitutionality in motion to dismiss", Consumer Finance Monitor, September 7, 2022. https://www.consumerfinancemonitor.com/2022/09/07/walmart-challenges-ftcs-constitutionality-in-motion-to-dismiss/.

59 Stephen Totilo, "Exclusive: Microsoft, Activision back off aggressive claim in FTC case", Axios, January 5, 2023. https://www.axios.com/2023/01/05/microsoft-activision-ftc-constitution.

60 American Economic Liberties Project – Press Release, "Microsoft's Brad Smith is No Different Than Any Other Monopolist", American Economic Liberties Project, December 23, 2022. https://www.economicliberties.us/press-release/microsofts-brad-smith-is-no-different-than-any-other-monopolist/.

61 The Editorial Board, "The FTC's Antitrust Collusion", Wall Street Journal, February 3, 2023. https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-grail-acquisition-a78e03d0.

62 Federal Trade Commission, "Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities", FTC, September 2020. https://www.ftc.gov/legal-library/browse/cooperation-agreements/multilateral-mutual-assistance-cooperation-framework-competition-authorities (last visited May 30, 2023).

63 Letter from Members of Congress of the United States to Lina Khan, Chairwoman of the FTC, December 5, 2022. http://fitzgerald.house.gov/sites/evo-subsites/fitzgerald.house.gov/files/evo-media-document/12.5.22-letter-to-ftc-on-sec-5-and-esg-factors-.pdf.

2B. FEDERALIST ANTITRUST SYSTEM – THE ROLE OF STATES

Various jurisdictions around the world employ a federalist or subnational approach to antitrust policy, including the EU, Australia, and the US. The federated system, whereby states have authority to enforce antitrust law alongside federal agencies, is typically viewed as a strength of the US antitrust system, as it provides wider enforcement coverage. However, increased polarization has complicated compliance obligations and increased the risk for companies as antitrust law is weaponized at the state level.

In addition to the designated federal agencies responsible for antitrust enforcement in the US, fifty-six attorneys general (of the fifty states, the District of Columbia and five territories) can bring antitrust cases against firms. The states can bring cases under federal antitrust laws, and many states also have their own antitrust and consumer protection laws, sometimes referred to as "Little FTC Acts." These laws give state attorneys general the broad authority to police anticompetitive conduct, and usually cases allege violations of both state and federal antitrust laws when state AGs sue.[64] Some state antitrust laws – like California's Cartwright Act – also reach conduct that federal laws cannot. Resource constraints associated with bringing antitrust suits against very large companies often produce multi-state coalitions that bring a single, combined case.

State antitrust laws actually preceded the Sherman Act of 1890: 13 states had competition laws before the Act's passage. Additionally, many states have constitutions with antimonopoly provisions, going back to the founding of the country. States continue to have an active role in investigating and prosecuting anti-competitive behavior. According to antitrust law expert Stephen D. Houck, "The states have come to be regarded as a significant feature of the institutional antitrust enforcement landscape in this country."[65]

The relationship between state and federal enforcers has waxed and waned over time, but states can act as an important counterbalance to changing ideological perspectives at the federal level, and vice versa.[66] Despite increasing polarization, state AGs have cooperated across partisan lines in bringing landmark antitrust cases against large technology companies in recent years[67]; however, the divergence on ESG-related issues is growing wider, which we cover further in Section 4b1.

64 Section 4C of the Clayton Act includes state authority to bring antitrust cases for citizens of that state (for consumer protection) and allows states to bring antitrust cases as purchasers of goods and services (e.g., bid rigging claims). State attorneys general can bring cases individually, or as a multi-state group, and can bring both civil and criminal cases.

65 Stephen D. Houck, "Transition Report: The State of State Antitrust Enforcement", 2009. https://static1.squarespace.com/static/577e9d93b3db2b9290cd7005/t/5a04a3b853450afe16fb4291/1510253498807/Houck-AntitrustEnforcement-2009.pdf

66 Ibid.

67 Examples of bipartisan US State antitrust cases against big tech: a coalition of 36 state AGs led by Colorado (including Puerto Rico and Guam) against Google Search – Colorado Attorney General, States' Complaint against Google LLC, https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf (last visited May 30, 2023).; a coalition of 9 states, led by Texas, against Google Ad Tech – Texas Attorney General, States' Complaint against Google LLC, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf (last visited May 30, 2023).; and a 48 state co-sponsored case against Facebook – New York State Attorney General, States' Complaint against Facebook, Inc. https://ag.ny.gov/sites/default/files/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf (last visited May 30, 2023).

3. ANTITRUST'S TREATMENT OF COMPETITOR COLLABORATIONS

3A. NEW SUSTAINABILITY QUESTIONS

A central question in antitrust is: What forms of collaboration are pro-social, and which are anti-social (or anti-competitive). Collaboration is permitted, provided it does not tip into cartel or collusive behavior. Typically, agreements which do not appreciably restrict competition, and which have no effect on price or output, fall outside the scope of competition agency scrutiny. However, sustainability concerns have raised new challenges to established antitrust norms.

As global governments have coalesced around collective climate goals, ratified in the Paris Agreement, Europe and other jurisdictions are attempting to align their competition policy regimes with international treaties and national environmental strategies. In the recently confirmed European horizontal cooperation agreement guidelines,[68] the EC clarifies that agreements which require compliance with legally binding international treaties related to sustainability fall outside of scrutiny.[69]

However, the more challenging questions emerge when sustainability-related efforts among competitors may have an impact on price or output. A core argument in favor of rethinking existing paradigms is that many sustainably produced projects require increased production costs or the internalization of previously unaccounted for environmental or social externalities. Firms argue that they have a "first mover" disadvantage if they pursue projects on their own, or that there is limited effectiveness if a firm acts unilaterally. Therefore, firms desire more flexibility to act in concert.

For this reason, international competition agencies are contending with these questions:

- What amount of a **reduction in competition** among firms – if any – should be permissible to gain certain sustainability benefits? In what instances are the agencies willing to re-interpret antitrust violations in light of sustainability benefits, if any? And does this require legislative change, or simply updated guidelines?

- Are these competitor agreements **indispensable** to achieving sustainability gains, or can the sustainability benefits be achieved by unilateral firm action?

- How should **sustainability benefits** be quantified, to whom, and over what time horizon? What level of benefit will justify any associated harms?

  - If the consumer welfare standard is maintained, how should regulators define the consumer when sustainability benefits might accrue to wider groups of 'out of product market' consumers?

    - Should benefits accrue to future consumers, potential consumers, current consumers, or public welfare generally?

  - There is also the question of how 'welfare' is defined, and which wider considerations beyond price should be considered and quantified.

- **Price externalities** – what level of coordinated price increases – if any – are regulators and enforcers willing to permit? Price fixing (both in selling and buying) has historically been considered a *per se* (or inherently illegal) violation of antitrust law (referred to as 'by object' in the EU); however, some allowances for coordinated increases in price from sustainability initiatives have made it into new EU guidelines.

  - In non-US jurisdictions, discussions on a consumer's 'willingness to pay' for sustainability benefits is a part of the exercise of balancing consumer harms and benefits.

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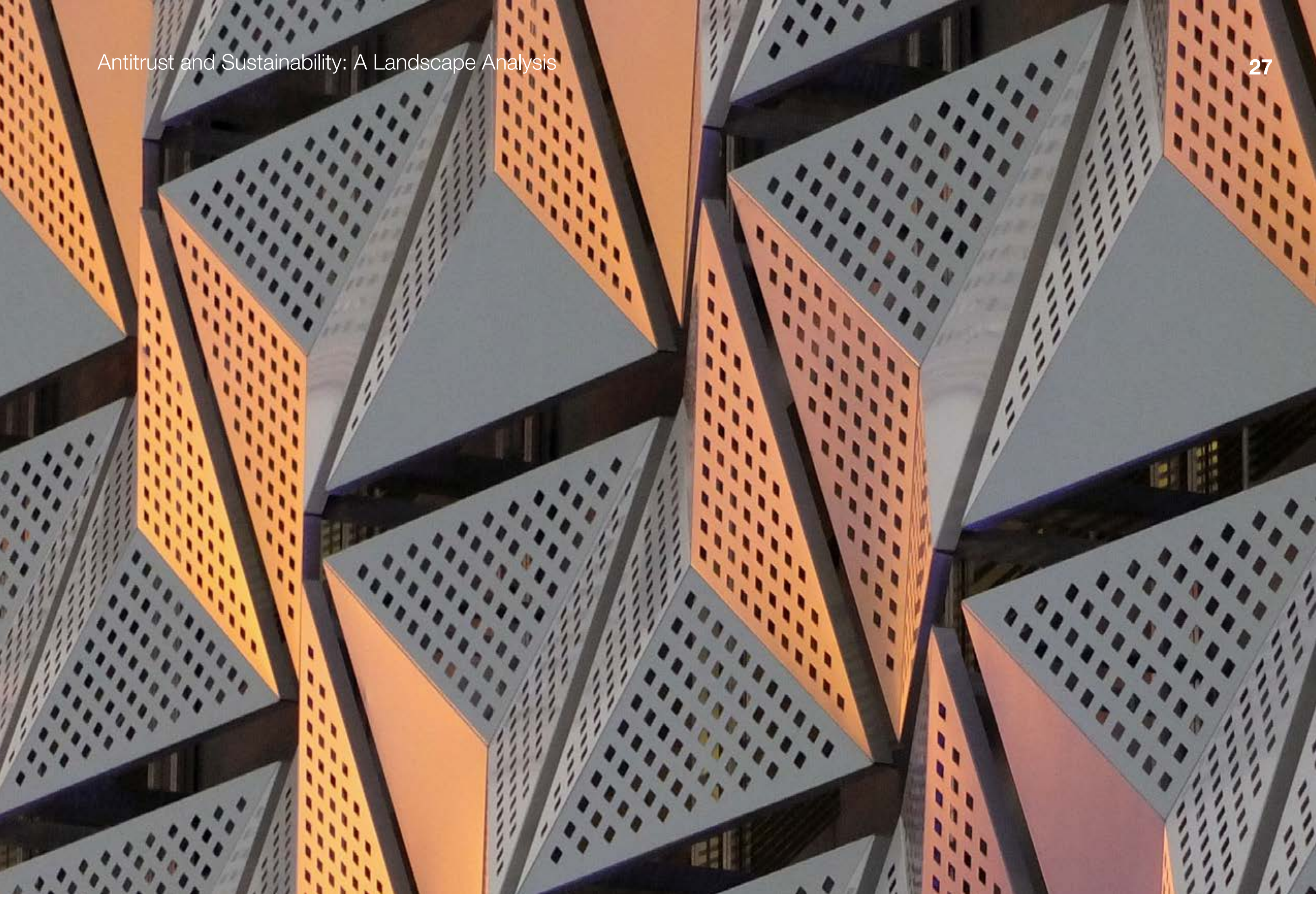
68 European Commission, supra note 4.

69 European Commission, supra note 4. Examples listed include: "compliance with fundamental social rights or prohibitions on the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants…Such agreements may be an appropriate measure to enable undertakings to implement their sustainability due diligence obligations under national or EU law and can also form part of wider industry cooperation schemes or multi-stakeholder initiatives to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector."



While these considerations are complex, it is worth noting that competition agencies have wrestled with technical questions relating to competitor collaborations for decades. Historically, when collaborations restricted competition, they were evaluated by weighing the anti-competitive effects against any pro-competitive benefits. The pro-competitive benefits have, under the consumer welfare standard, typically been measured in efficiency gains, which are said to be passed onto the consumer by way of lower prices (in theory).[70] Purported efficiency gains have also come under increasing scrutiny. [71] So, while the weighing of benefits and harms of these collaborations is not new to competition policy, 'sustainability gains' are now becoming the new 'efficiency gains' that companies propose as deserving of new regulatory or legislative carve outs.

70 John Kwoka, a competition policy expert, analyzed over 3000 US mergers and found that when mergers led to six or fewer significant competitors, prices rose in nearly 95% of cases. And on average, post-merger prices increased 4.3%. See: John Kwoka. "U.S. antitrust and competition policy amid the new merger wave," Washington Center for Equitable Growth, July 27, 2017. http://equitablegrowth.org/report/u-s-merger-policy-amid-the-new-merger-wave/

71 Canada's Competition law, as an example, has an efficiencies defense and business justification rule which allows anti-competitive behavior if the benefits from efficiency gains can be proven during merger review or during investigations of otherwise illegal competitor collaborations. Many groups, including the current and former Commissioners of Competition, have called for it to be removed from the law.

3B. SUSTAINABILITY-RELATED COMPETITOR COLLABORATIONS: THE UK'S APPROACH

As companies face increasing pressure to collaborate with industry partners to address sustainability challenges, questions of the details surrounding permissible competitor collaborations have become more salient. Collaborations can include: joint standard-setting ("standardization") and voluntary agreements, group purchasing or production agreements, joint research and development (R&D), joint ventures, and information or data sharing, among others.

Guidelines for competitor collaborations have been in effect for decades, and there is precedent to inform more difficult cases. In different jurisdictions, existing competitor collaboration guidelines provide safe harbors for instances where firms have a relatively small market share (20% in the US guidelines, 10%, 15%, or 20% in the UK guidelines depending on the type of collaboration, and 20% in the EU for certain types of agreements).[72]

In the last year, both the UK CMA and EU DG Comp have issued updated guidelines to specifically address sustainability-related collaborations. However, the US competitor collaboration guidelines have not been updated since 2000, and they make no explicit mention of sustainability or environmental factors for consideration.

To better understand how competition agencies are evaluating various tradeoffs, we cover the CMA guidelines here as an illustration. The CMA has stated that it takes a three-pronged approach to thinking about its mandate, and how it can support sustainability:

1. Encouraging competition in new markets like electric vehicle charging, residential energy options like heat pumps or improved insulation. The agency believes that encouraging firms to compete will spur innovation and benefit consumers.

2. Ensuring that customers have accurate information about the products and services they purchase by policing greenwashing.

3. Giving clarity to businesses about what kinds of collaborations are permissible under the law, which may potentially run afoul of the law, and which collaborations restrict competition, but will be exempted from legal action if the sustainability benefits outweigh the anti-competitive harms.[73]

72 European Commission, supra note 4.
73 Dr. Michael Grenfell, "Can we protect the environment and keep the benefits of competition?", Economic Impact, March 15, 2023. https://impact.economist.com/sustainability/resilience-and-adaptation/can-we-protect-the-environment-and-keep-the-benefits-of-competition

The below chart from UK law firm Shepherd and Wedderburn LLP is a helpful summary of the guidance the CMA has provided.[74]

1 – Agreements unlikely to breach	2 – Agreements that may breach	3 – Agreements that would breach, but capable of exemption
The CMA considers that agreements which are unlikely to infringe the Chapter 1 prohibition include agreements to phase out unsustainable inputs (such as moving to more environmentally friendly packaging), so long as there is no appreciable increase in pricing. Other more benign examples unlikely to raise concerns include joint awareness campaigns on environmental issues, or joint industry training funds – so long as the main parameters of competition are unaffected (i.e. price, choice, quality or innovation).	The clear examples here from the CMA focus on agreements which will likely breach the prohibition 'by object' (i.e. simply their existence is problematic). The obvious example is an agreement between competitors on the price at which they will sell products meeting an agreed environmental sustainability standard. On the other hand, some agreements might be problematic 'by effect' – e.g. in the case of an agreement to introduce a new sustainability labelling system, whether other businesses are able to take advantage of the system on non-discriminatory terms.	The CMA sets out some examples of where an agreement would likely infringe the Chapter 1 prohibition, but sets out its thinking in terms of the Section 9(1) exemption criteria. For instance, an agreement amongst furniture producers to only import and use sustainable timber in their products – but where this would significantly increase furniture prices. In such circumstances the benefit of higher sustainability might 'offset' the dis-benefit of increased cost to consumers. The CMA does make clear however, that any potential benefits must be clearly evidenced.

For sustainability agreements which restrict competition the guidance includes four necessary factors:

1. "the agreement must **contribute to certain benefits**, namely improving production or distribution or contribute to promoting technical or economic progress;
2. the agreement and any restrictions of competition within the agreement must be **indispensable** to the achievement of those benefits;
3. consumers must receive a **fair share of the benefits**; and
4. the agreement **must not eliminate competition** in respect of a substantial part of the products concerned."

These are nearly identical to existing EU Article 101(3) guidance, which lays out the same four conditions for exemptions which restrict competition.[75]

However, the UK guidelines are even more permissive for climate-change related agreements. And most notably, the CMA has also shifted its posture to create an 'open door' policy so that firms can bring their proposed agreements forward and receive additional advice or guidance from the agency. In these instances, the agency will not issue fines for agreements that were discussed with them ahead of time, and which did not raise competition concerns.

Some want the guidance to go further, by issuing block exemptions for sustainability agreements altogether,[76] or to provide similar exemptions for biodiversity agreements, which are currently excluded. Others have raised the possibility of amending the law to specifically mention sustainability agreements. The guidelines are set to be finalized later this year.

74 Gordon Downie, John Grady, Scott Rodger, Euan Murphy, and Ashley French, "UK: CMA Signals More Flexibility For Sustainability Agreements – Back To The Future?", Shepherd and Wedderburn, March 17, 2023. https://shepwedd.com/knowledge/cma-signals-more-flexibility-sustainability-agreements-back-future

75 European Commission, "Exempted agreements (Article 101(3) TFEU)", European Commission, June 10, 2017. https://ec.europa.eu/competition/antitrust/legislation/art101_3_en.html

76 Downie et al., supra note 74.

3C. FIRM RISK – VIOLATION PENALTIES

Competitor collaborations face antitrust risk under Section 1 and 2 of the Sherman Act (agreements in restraint of trade; monopolization and attempts to monopolize), as well as Section 5 of the FTC Act (unfair methods of competition). The DOJ Antitrust Division (DOJ ATR) is a law enforcement agency which predominantly deals with cases related to monopolization and anti-competitive behavior. It can administer criminal penalties. The FTC, on the other hand, is both law enforcer and regulator, with rule-making authority. The FTC only has the authority to issue civil penalties, but it has a criminal liaison unit which refers cases to other prosecutors and agencies with criminal jurisdiction.[77]

Some cartel behavior is treated as *per se* illegal and criminal under Section 1 of the Sherman Act. Examples of *per se* violations are: price fixing, bid rigging, boycotts, or market allocation schemes. Sherman Act criminal penalties can include up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. In certain cases, the maximum fine can be increased to twice the amount the conspirators gained from the illegal scheme or twice the money lost by the victims, if either of those amounts is over $100 million.[78] In addition, the Clayton Act (1914) gives the victims of bid-rigging or price-fixing schemes the ability to seek civil recovery up to three times the amount of damages suffered (treble damages).

Applied fines for a Sherman Act Section 1 violation have not yet exceeded $1 billion in the US. The largest fine applied by the Justice Department Antitrust Division was $925 million, after Citibank Group pleaded guilty to manipulating foreign exchange rates in 2017.[79] Barclays and JPMorgan Chase & Co. were also fined $650 million and $550 million, respectively. All other fines for Section 1 violations were $500 million or less. For the largest companies, fines such as these are often seen as a cost of doing business and do not dramatically affect corporate valuations.

In 2021, the DOJ Antitrust Division brought cases attempting to create new precedent that wage fixing and no poach agreements are also *per se* illegal violations of the Sherman Act, but these actions have struggled in the courts with multiple appeals.

Section 2 of the Sherman Act, dealing with monopolization, attempted monopolization, and conspiracies to monopolize, can also be prosecuted criminally. In contrast with Section 1 violations, criminal prosecutions of Section 2 violations have been dormant for decades – since the late 1970s.[80] In October 2022, the DOJ Antitrust Division brought and resolved its first criminal violation case of Section 2 in nearly 50 years in *United States v. Zito* in which a paving company president pleaded guilty to attempting to monopolize the market for publicly-funded highway crack-sealing services in Montana and Wyoming.[81] This case indicates, alongside public statements, that current leadership at both the DOJ and FTC desires to revive criminal prosecutions for violations.

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77 Federal Trade Commission, "FTC's Bureau of Consumer Protection Issues Criminal Liaison Unit Report Detailing Efforts to Ensure Wrongdoers Face Accountability", FTC, January 30, 2023. https://www.ftc.gov/news-events/news/press-releases/2023/01/ftcs-bureau-consumer-protection-issues-criminal-liaison-unit-report-detailing-efforts-ensure

78 Federal Trade Commission, "Guide to Antitrust Laws", FTC. https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited May 30, 2023).

79 Department of Justice, "Sherman Act Violations Resulting In Criminal Fines & Penalties Of $10 Million Or More", U.S. Department of Justice Antitrust Division, February 3, 2022. https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (last visited May 30, 2023).

80 Andre Gerevola, The Return of Criminal Sanctions for Violating Section 2 of the Sherman Act", Arnold & Porter Advisory, March 9, 2022. https://www.arnoldporter.com/en/perspectives/advisories/2022/03/criminal-sanctions-for-section-2

81 Carsten Reichel, "US DOJ files first criminal charge under Sherman Act Section 2 in nearly 50 years", Norton Rose Fulbright, November 2022. https://www.nortonrosefulbright.com/en-us/knowledge/publications/14f4c7e7/us-doj-files-first-criminal-charge-under-sherman-act-section-2-in-nearly-50-years. In March 2023, Nathan Zito was sentenced to six-months house arrest, three years of probation, and a $27,000 fine. See: Mike Scarcella, "Rare criminal antitrust case results in probation, not prison", Reuters, March 30, 2023. https://www.reuters.com/legal/government/rare-criminal-antitrust-case-results-probation-not-prison-2023-03-30/

In practice, most competitor collaborations are evaluated under a *rule of reason* analysis – which looks at the specific facts of each case to determine whether the conduct 'unreasonably' restrained trade. In *rule of reason* cases, the agencies will often take into consideration: market definition, market share and market power, evidence of anticompetitive harm, coercion (e.g., mandatory enforcement of industry association standards), exclusion (if one or more firms may be excluded from an initiative or qualification), and other relevant factors when determining whether the activity is illegal.[82] Given these opportunities to present favorable evidence, and that the burden of proof rests with the plaintiff, it is typically difficult for plaintiffs (which can be government entities or private parties[83]) to win *rule of reason* cases.

Guidance from the US competitor collaboration guidelines asks whether the collaboration is necessary to achieve certain efficiency-enhancing procompetitive benefits.[84] Under the existing guidance, the agencies state that they will analyze cases under the *rule of reason* when collaborations "benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation."[85] The guidelines express a supportive approach to efficiency-enhancing collaborations, stating that they "typically combine…significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately."[86] In other words, there is a structural presumption that collaborations between competitors, especially with low market shares, are typically benign or beneficial for consumers. While a focus on efficiency gains is out of step with the approach of current agency leadership, they have not yet issued updated guidelines, and have made no public signals that they plan to do so.

82 Id at 7. "The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."

83 According to the FTC's website, the majority of antitrust lawsuits originate from private parties – businesses or individuals seeking damages for antitrust violations – which they can bring under the Sherman or Clayton act, as well as state antitrust laws. See: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers

84 See FTC and DOJ, Antitrust Guidelines for Collaborations Among Competitors, 4 (2000).

85 Ibid.

86 Ibid.

4. FINANCIAL INSTITUTION COALITIONS AND CLIMATE COMMITMENTS

4A. FINANCIAL INSTITUTIONS UNDER FIRE FROM PROGRESSIVES AND CONSERVATIVES

Despite a proliferation of corporate net-zero pledges, new financial alliances, and other such private-sector efforts to achieve 'net zero' greenhouse gas emissions, global emissions have continued rising, and reached an all-time high in 2022.[87]

Global efforts to engage financial institutions in the race to 'net zero' have intensified in recent years. Financial institutions (banks, asset managers, insurers, asset owners, and so forth), have been criticized for continuing to finance or support new fossil fuel projects in the face of the urgent need to transition to a low-carbon economy.[88] The IPCC report is clear that aligning with the Paris Agreement means no financing of fossil fuel (oil, gas and coal) exploration or expansion, and that some projects must be decommissioned before the end of their useful lifetime (known as "stranded assets").

In response, financial actors have made pledges to align their investment strategies with the Paris Agreement. The most significant collective pledge has been the Glasgow Financial Alliance for Net Zero (GFANZ)[89] started by former central banker, Mark Carney. The alliance represents 550 members across 50 jurisdictions, according to a November 2022 progress report, and supports seven different sub-alliances, including:

- The Net Zero Banking Alliance, with a collective $72 trillion in financial assets
- The Net Zero Asset Managers initiative, with $66 trillion in assets under management
- The Net Zero Asset Owner Alliance, with $11 trillion
- The Paris Aligned Asset Owners, with $3.3 trillion
- The Net Zero Insurance Alliance with $700 billion[90]
- The Net Zero Financial Service Providers Alliance with 23 member firms
- The Net Zero Investment Consultants Initiative with 10 member firms[91]

As these alliances and other financial sector networks, coalitions and initiatives gained traction, pushback from conservative, pro-fossil fuel groups intensified. Organizations such as GFANZ and some of its sub-alliances like NZAM, NZIA, and NZBA as well as other investor coalitions like Climate Action 100+ and Ceres have all received investigative letters from US Republican state Attorneys General and Congressional Representatives, alleging potential antitrust violations.

US Republicans began arguing that financial sector coalitions, aimed at addressing climate change, were akin to an industry boycott and that asset managers and banks were engaged in a collusive effort to "starve" oil and gas companies of capital,[92] raising energy prices on consumers. C. Boyden Gray, a lawyer and former U.S. Ambassador to the European Union, called these actions "invitations to collude on a boycott of a critical segment of the U.S. economy" which would invite "billions of dollars in antitrust liability."[93]

87 International Energy Agency, "CO2 Emissions in 2022", International Energy Agency, March 2023. https://www.iea.org/reports/co2-emissions-in-2022 (last visited May 30, 2023).

88 Lisa Sachs, Nora Mardirossian, and Perrine Toledano, "Finance for Zero: Redefining Financial-Sector Action to Achieve Global Climate Goals," Columbia Center on Sustainable Investment, June 2023. https://ccsi.columbia.edu/finance-for-zero

89 Glasgow Financial Alliance for Net Zero (GFANZ), "Glasgow Financial Alliance for Net Zero", GFANZ, 2023. https://www.gfanzero.com/ (last visited May 30, 2023).

90 The recent departure of Munich Re, a German re-insurer, Zurich Re, and Hanover Re from the Net Zero Insurers Alliance has revived calls for clarified guidance from regulators. "In our view, the opportunities to pursue decarbonisation goals in a collective approach among insurers worldwide without exposing ourselves to material antitrust risks are so limited that it is more effective to pursue our climate ambition to reduce global warming individually," Joachim Wenning, CEO of Munich Re, stated. From: Munich Re, "Munich Re discontinues NZIA membership", Munich Re, March 31, 2023. https://www.munichre.com/en/company/media-relations/media-information-and-corporate-news/media-information/2023/media-release-2023-03-31.html

91 GFANZ, "2022 Progress Report", GFANZ, 2022. https://assets.bbhub.io/company/sites/63/2022/10/GFANZ-2022-Progress-Report.pdf (last visited May 30, 2023).

92 Clayland Boyden Gray, "Banks' Energy Boycott Is an Antitrust Problem", Wall Street Journal, July 14, 2020. https://www.wsj.com/articles/banks-energy-boycott-is-an-antitrust-problem-11594746486

93 Ibid.

Arkansas senator Tom Cotton wrote to BlackRock in July 2022 over its involvement in Climate Action 100+, arguing that its “anti-drilling coercion threatens our national security, hurts Americans struggling to buy a tank of gas, and appears to violate antitrust laws.”[94] And the Arizona state AG went as far as arguing that ESG in general – a difficult generalization to make, in light of the varied use cases and meanings of the term ESG[95] – is an antitrust violation.[96]

This pushback continues even though asset managers like BlackRock, Vanguard, and State Street remain in the top five financiers of fossil fuel industries globally, and many other GFANZ-member banks continue to extend capital to new fossil fuel projects.[97] Notably, the wider anti-ESG campaign has been revealed to be heavily financed by the oil and gas lobby, demonstrating the political machine behind these arguments.[98]

As the rhetoric increased in intensity, financial institutions responded. Whether truly concerned about liability or the risk of further investigations, or a convenient excuse to renege on climate commitments, various GFANZ members threatened to pull out of their respective alliances due to the fear of breaching antitrust law. In response, in October 2022, GFANZ dropped[99] the UN partnership Race to Zero requirements which had required members to “phase out development, financing and facilitation of new unabated fossil fuel assets, including coal, in line with science-based scenarios.”[100]

Nevertheless, Vanguard made global news when it pulled out of GFANZ in December 2022, stating “we have decided to withdraw from NZAM so that we can provide the clarity our investors desire about the role of index funds and about how we think about material risks, including climate-related risks—and to make clear that Vanguard speaks independently on matters of importance to our investors.”[101] While not mentioning antitrust liability directly, the emphasis on independence seemed to reference those concerns.

Simultaneously, Blackrock distanced itself from the narrative of controlling capital allocation to energy industries. In Blackrock CEO Larry Fink’s March 2023 letter to investors, he stated “it is for governments to make policy and enact legislation, and not for companies, including asset managers, to be the environmental police.”[102] And Blackrock’s 2030 Net Zero statement stated, “Our role is to help [our clients] navigate investment risks and opportunities, not to engineer a specific decarbonization outcome in the real economy. The money we manage is not our own – it belongs to our clients, many of whom make their own asset allocation and portfolio construction decisions.”[103]

The Net Zero Insurance Alliance has perhaps been the most affected, as many of its members – including a majority of its founding signatories – left the alliance following pushback from US Republicans. Swiss Re, Munich Re, Hannover Re, AXA, Allianz, and SCOR are among the firms that have left.[104]

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94 Tom Cotton, “Cotton Demands Answers From Blackrock About Involvement With Climate Action 100+, Potential Antitrust Violations” Tom Cotton Senator for Arkansas, July 14, 2022. https://www.cotton.senate.gov/news/press-releases/cotton-demands-answers-from-blackrock-about-involvement-with-climate-action-100-potential-antitrust-violations (last visited May 30, 2023).

95 Denise Hearn, “ESG’s Many Sharpshooters”, Embodied Economics, March 23, 2023. https://embodied-economics.ghost.io/esgs-many-sharpshooters/

96 Mark Brnovich, “ESG May Be an Antitrust Violation”, Wall Street Journal, March 6, 2022. https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807

97 Truzaar Dordi, Sebastian A. Gehricke, Alain Naef, and Olaf Weber, “Ten financial actors can accelerate a transition away from fossil fuels”, Environmental Innovation and Societal Transitions, Volume 44, September 2022. https://doi.org/10.1016/j.eist.2022.05.006

98 See: Saul Elbien. “Documents reveal how fossil fuel industry created, pushed anti-ESG campaign”, The Hill, May 18, 2023. https://thehill.com/policy/equilibrium-sustainability/4010800-documents-fossil-fuel-anti-esg-campaign/; and: “Documented, Dark Money Group Weaponizes State Treasurers in Attacks on Climate Policy”, Documented, August 5, 2022. https://documented.net/investigations/dark-money-group-weaponizes-state-treasurers-in-attacks-on-climate-policy (last visited May 30, 2023).

99 GFANZ, “GFANZ Launches Critical Resources for Financial Institutions to Convert Net-Zero Ambitions to Actions, Calls on G20 Governments to Close Climate Policy Gap”, GFANZ, November 1, 2022. https://www.gfanzero.com/press/gfanz-launches-critical-resources-for-financial-institutions-to-convert-their-net-zero-ambition-into-action/ (last visited May 30, 2023).

100 Mark Segal, “Mark Carney-led GFANZ Drops Requirement for Race to Zero Commitment for Members”, ESG Today, October 28, 2022. https://www.esgtoday.com/mark-carney-led-gfanz-drops-requirement-for-race-to-zero-commitment/

101 Vanguard, “An update on Vanguard’s engagement with the Net Zero Asset Managers initiative (NZAM)”, Vanguard, December 7, 2022. https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/update-on-nzam-engagement.html

102 Larry Fink, “Larry Fink’s Annual Chairman’s Letter to Investors”, BlackRock, September 30, 2022. https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter

103 BlackRock, “BlackRock’s 2030 net zero statement”, BlackRock, 2021. https://www.blackrock.com/corporate/about-us/our-2021-sustainability-update/2030-net-zero-statement (last visited May 30, 2023).

104 Tommy Wilkes, Alexander Hübner and Tom Sims, “Insurers flee climate alliance after ESG backlash in the U.S.”, Reuters, May 26, 2023. https://www.reuters.com/business/allianz-decides-leave-net-zero-insurance-alliance-2023-05-25/

Thus far, there have not been any U.S. court decisions finding antitrust violations in connection with climate pledges. The closest analogy is a 2019 antitrust investigation by the Trump-era Justice Department into four automakers that reached an agreement with the state of California on tailpipe emissions standards. DOJ officials announced a concern that the agreement between California and the four companies – Ford Motor Co., Honda Motor Co., BMW AG, and Volkswagen AG – to follow emissions standards higher than those proposed by the Trump administration could restrict competition, in violation of federal competition law, by limiting the types of vehicles offered to consumers. Justice Department lawyers closed that investigation a year after it was announced, acknowledging that the automakers had not broken any laws. This case was largely seen as illegitimate by antitrust practitioners, and there was a subsequent inspector general investigation into its impropriety.

4B. HOW LEGITIMATE ARE WEAPONIZED ANTITRUST CLAIMS?

Given the flurry of investigative letters, legislative campaigns, and bombastic op-eds, it is useful to disentangle three conversations happening at the intersection of antitrust and ESG:

- Republican Attorneys General conducting antitrust investigations of banks, investor coalitions, and asset managers regarding ESG or net-zero considerations. These investigations allege violations of fiduciary duty, or that alliances constitute a ‘collective boycott’ in violation of antitrust law (however, no antitrust lawsuits have been filed as of July 1, 2023);
- The Republican-led anti-ESG bills proliferating at the state-level, which posit that ESG-related strategies, including climate-related strategies, constitute a breach of fiduciary duties. Some of these bills use ‘boycott’ language, but they are more about fiduciary duty debates than about antitrust;
- Competitor collaborations among companies focused on sustainability or ESG projects (which are covered in Section 5 of this report).

Each of these distinct areas have slightly different antitrust considerations.

It is also worth noting that the term “boycott” is quickly becoming political shorthand for a range of business decisions that would not be considered antitrust boycotts under traditional legal principles, and it is therefore necessary to distinguish between narrative and legal reality.

4b1. Republican AG Investigations into Financial Institution Coalition “Boycotts”

Republican AGs have initiated various antitrust investigations into coalitions of financial institutions and investors under the guise of consumer protection. Regarding climate or ESG-related coalitions, it is useful to distinguish between industry associations (with either voluntary or mandatory standards, which we cover in greater detail in Section 5a) and group boycotts.

Industry Associations

Industry associations have always faced scrutiny under federal and state antitrust laws: These groups are designed to facilitate communication among competitors, and thus by their very nature invoke the specter of potential antitrust violations. Competitor coordination runs contrary to the broad goals of antitrust law to deliver competitive prices while ensuring that businesses operate at high levels of quality and efficiency.

Robust antitrust case law has developed to guide the behavior of trade associations and standard-setting organizations, however there is little which deals with financiers directly. When professional associations have been found to violate antitrust laws, it is often because the conduct in question veers too closely to cartel behavior. Permissible behavior typically involves coordinated action far outside pricing mechanisms.

It is also worth noting that the term “boycott” is quickly becoming political shorthand for a range of business decisions that would not be considered antitrust boycotts under traditional legal principles, and it is therefore necessary to distinguish between narrative and legal reality.

Group Boycotts

In the case of financial institution coalitions, standards-setting efforts – which are often protected and encouraged under antitrust law – are not akin to a boycott or an effort to starve an industry of capital. Industries often move away from one input and toward another, and collective decisions on investment direction happen ubiquitously both through standard-setting bodies and through semi-organic coordination. As an example, pledges and cohorts to invest in artificial intelligence (AI) are not an effort to starve older technologies of capital; they are simply the recognition of shifting market dynamics.

Mere ‘parallel conduct’ is not a violation of antitrust statutes. The law distinguishes between impermissible active coordination and independent conduct that runs in a similar direction. Industries constantly evolve, and it is not considered a boycott when producers and consumers move toward innovation – from a horse-and-buggy to cars. This trend is evident with changing market dynamics around energy sources, as renewables such as solar and wind have steadily come down in cost and increased their efficiency.

Furthermore, financial institutions have a fiduciary duty to act in the best interests of their clients, shareholders, or beneficiaries, and to consider long-term market trends. As the UN Principles for Responsible Investment (UN PRI), "Fiduciary duty in the 21st century" project emphasizes, the integration of ESG factors – including climate considerations – is a requirement of financial institutions' fiduciary duty.[105] As investment in the oil and gas industry carries increasing financial and regulatory risk, the impacts of climate change could create a *de facto* collective boycott that would not warrant antitrust scrutiny to the extent the parallel conduct has arisen from market forces and not collusive action.

However, climate or ESG-related coalitions have been accused of "boycotting" oil and gas or coal companies by causing financial institutions to restrict capital, debt, or insurance provision to the fossil fuel industry. As discussed above, no such disinvestment boycott exists. Membership is voluntary, and financing decisions are taken on an individual firm level basis. Indeed, many firms continue to finance new fossil fuel projects. The more interesting question is, what if the financial institution coalitions actually did engage in a boycott?

A "collective boycott" such as this – known as a concerted refusal to deal – could theoretically raise antitrust concerns. The Colgate doctrine,[106] a longstanding Supreme Court precedent, gives companies the right to unilaterally decide not to do business with another company without triggering antitrust laws, provided the refusal is not an exclusionary strategy to acquire or maintain a monopoly. Unilateral decisions to disinvest in specific companies or industries do not typically face antitrust risk, however concerted action is judged more harshly by antitrust laws.

In the case of financial institution coalitions, standards- setting efforts – which are often protected and encouraged under antitrust law – are not akin to a boycott or an effort to starve an industry of capital. Industries often move away from one input and toward another, and collective decisions on investment direction happen ubiquitously both through standard- setting bodies and through semi-organic coordination.

Collective boycotts occur when two or more competitors agree to refuse to deal with a particular customer or supplier (usually in an attempt to drive them out of business or force a change in practices).[107] Collective boycotts are considered anti-competitive because they reduce the number of potential suppliers or customers in a market, which can lead to higher prices, reduced innovation, and reduced consumer choice. Such refusals to deal are evaluated under the *rule of reason* analysis, a balancing test that requires an examination of the unique facts of the case.

There is no existing case precedent for a group of competing financial firms that decide to refuse financing to a specific industry or set of companies. Critically, financiers do not compete directly with their financed entities, and therefore do not fit traditional notions of economic boycotts.

For this reason, it is unclear how Republican AGs would build a case of this kind, and how a collective boycott case of this kind would be treated by US federal or state courts. In the specific case of a group of banks refusing to supply capital to new coal or oil projects, various factors would likely be taken into consideration, including: market definition, whether the financial institutions have significant market control over the provisioning of finance, whether new entrants were prevented from entering the market, and other relevant market analysis.

For *rule of reason* cases, the burden of proof rests with the plaintiff, and these complaints rarely succeed: the courts want to see clear market power, and it must be coupled with negative ramifications from exercising that power, such as barriers to entry, raised prices, or lower innovation.[108]

105 UN Principles for Responsible Investment (PRI), "Fiduciary duty in the 21st century final report", PRI, October 22, 2019. https://www.unpri.org/fiduciary-duty/fiduciary-duty-in-the-21st-century-final-report/4998.article (last visited May 30, 2023).

106 United States v. Colgate & Co., 250 U.S. 300 (1919).

107 European Commission Staff Working Document, Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, (C 2014).

108 To bring a group boycott case in the US, the firms would likely need to maintain at least ~60% market collective share, which signals durable market power, and makes a case more likely to succeed. In this case, if 60% or more of capital – or capital providers – had an agreement, that would be enough to form a colorable antitrust case against the group. The question is: do these groups collectively control a monopoly share of the capital? However, another definitional question might arise: are investors buying stock or selling capital? Thresholds for buyer power are much lower than seller power, typically ~30% compared with ~60% market share. If courts decided that investors were buying stocks from companies, instead of provisioning / selling capital, there might be a lower threshold upon which to bring a monopolizaton / monopsonization case. On market definition, there might be niche markets depending on how widely markets are defined. For example, are there particularly dirty coal projects or shale oil projects that are the subject of investigation? Perhaps a smaller group of financial institutions which finance these industries could have market power depending on how small or large the market is defined.

Despite the weak antitrust grounds for a case of this kind, the specter of antitrust litigation can still have a chilling effect.[109] Companies do not typically have the appetite for a lengthy and visible litigation process. Europe has a “loser pays” system, in which the plaintiff pays the legal fees if they lose – this helps deter frivolous suits. The US legal system has no such deterrent, unless the case is clearly in bad faith.

Political vs. Economic Boycotts

Investment firms – alongside all other private firms – are permitted to undertake joint marketing or awareness campaigns regarding environmental or human rights issues under antitrust law. They may also form trade associations to jointly lobby for legislative changes or new laws. These actions are protected under the *Noerr-Pennington* doctrine and the First Amendment, though they may still be found illegal if firms act in concert to fix markets outside of the political advocacy process.

Competitors may also agree to boycott a particular company or industry without violating antitrust laws when the boycott is intended to effectuate political change, as in the passage of a law or in spurring regulatory action. Economic boycotts intended to spur sustainability-related legislative change could potentially be exempted from antitrust law under the *Noerr-Pennington* exemption, although this has not yet been tested in the courts. This approach could also bolster arguments that the climate-related financial institutions are primarily attempting to impose a political agenda, making it a less appealing approach. Additionally, financial institutions will prefer to use materiality and fiduciary duty arguments to justify their business decisions.

4b2. Anti-ESG Laws in US States

The increasing polarization of states and ‘anti-ESG’ measures have significantly muddied the waters for firms. As discussed above, Republican officials in many fossil-fuel dependent states have used a variety of legal maneuvers and pressure campaigns to oppose even the reference to environmental or social factors in investment decisions. In addition to the investigations discussed above, a 21-state coalition is objecting to the proposed SEC rules that would require increased disclosure with respect to ESG investment practices,[110] and a 24-state coalition is objecting to proposed disclosures regarding climate-related financial risk.[111]

Several Republican states have passed “Anti-ESG” laws, which instruct state pension funds not to consider ESG factors in their risk assessments of investment opportunities, or which seek to punish companies that offer investment products that exclude funding to fossil fuel companies.[112]

Some of the bills borrow the language of “boycotting” to target asset managers or banks doing business with state governmental entities. These anti-boycott bills target financial institutions that are perceived as disfavoring certain industries, like oil and gas, or firearms, due to “ESG considerations.” They essentially try to boycott the purported boycotters. It is worth re-emphasizing that the deployment of this usage of “boycott” has little to do with how antitrust law treats commercial boycotts.

These laws claim to emphasize fiduciary obligations to focus on pecuniary factors in investment decision-making, despite arguments from financial professionals that the use of ESG factors can enhance their risk-return analysis. In 2023, conservative states have proposed over 150 anti-ESG bills, compared with 39 in 2022, and only a handful in 2021.[113] Over 25 have become law, though many more have been defeated based on objections ranging from fiduciary duty arguments to the increased borrowing costs imposed by the bills. Numerous[114] studies[115] have been released that suggest these state boycott measures will result in millions of dollars in losses for taxpayers and pensioners.

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109 International Chamber of Commerce, supra note 30.

110 Letter from Patrick Morrisey, Attorney General of West Virginia, to Secretary Vanessa A. Countryman, August 16, 2022. https://ago.wv.gov/Documents/2022.08.16%20ESG%20Funds%20Comment.pdf

111 Letter from Patrick Morrisey, Attorney General of West Virginia to Secretary Vanessa A. Countryman, June 15, 2022. https://www.sec.gov/comments/s7-10-22/s71022-20131409-301574.pdf

112 Mitchell Ferman, “Texas bans local, state government entities from doing business with firms that “boycott” fossil fuels”, Texas Tribune, August 24, 2022. https://www.texastribune.org/2022/08/24/texas-boycott-companies-fossil-fuels/; and “Kentucky Senate passes bill aimed at energy boycotts”, AP News, March 8, 2022. https://apnews.com/article/business-boycotts-kentucky-state-governments-david-yates-8e3688ac714e43990ed0849110708b0c

113 Ross Kerber, “Business fights back as Republican state lawmakers push anti-ESG agenda”, Reuters , April 24, 2023. https://www.reuters.com/business/sustainable-business/business-fights-back-republican-state-lawmakers-push-anti-esg-agenda-2023-04-22/

114 Daniel Garrett and Ivan Ivanov, “Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies”, Jacobs Levy Equity Management Center for Quantitative Financial Research Paper, May 30, 2022. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366

115 ESI Econsult Solutions Inc., “ESG Boycott Legislation in States: Municipal Bond Market Impact”, Ceres, January 12, 2023. https://www.ceres.org/news-center/press-releases/new-research-shows-legislation-boycott-esg-may-cost-state-taxpayers-700

5. OTHER TYPES OF COMPETITOR COLLABORATIONS

A wider, and more complex, set of considerations comes into view when evaluating competitor collaborations across all industries (not simply financial institutions). More than 700 of the largest 2,000 publicly traded companies now have net zero commitments,[116] and efforts to evaluate, measure, and address emissions – including Scope 3 emissions – are gaining traction. Firms are increasingly looking to integrate environmental considerations into their core business strategy.

As previously stated, competitor agreements which do not negatively affect parameters of competition – such as price, quantity, quality, choice, or innovation – are free from antitrust concerns. Those which do are evaluated on a case-by-case basis, and we provide some examples and analysis of such activities below.

5A. STANDARD-SETTING AND INDUSTRY ASSOCIATIONS

Industries have long come together in associations to do joint standard-setting (whether voluntary or mandatory) or to share information. Standard-setting organizations and voluntary industry standards broadly maintain a safe harbor from antitrust scrutiny.[117] The Supreme Court has held that companies involved in trade associations do not represent an illegal restraint of trade.[118]

Typically, industry associations doing standard-setting steer well clear of antitrust scrutiny when initiatives are voluntary, non-exclusionary of rival firms (do not foreclose market access), and firms are free to meet the agreed upon standards on their own terms. Antitrust law also prohibits the sharing of competitively sensitive information.

Despite latitude for business associations, the European guidelines identify that sustainability standards can limit competition in three primary ways: through "price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors."[119] As various sustainability standards proliferate, these competition concerns will remain.

However, some have argued that voluntary, non-exclusionary standards with no enforceability have limited effectiveness from a sustainability perspective.[120] While voluntary agreements tend to raise fewer antitrust risks, they tend to be implemented in a piecemeal fashion, and companies can reject or drop out of such agreements at any time. For these reasons, activists both within and outside of industries have advocated for stronger mandatory industry standards.[121]

116 John Goddard, "Why Companies Aren't Living Up to Their Climate Pledges", Harvard Business Review, August 11, 2022. https://hbr.org/2022/08/why-companies-arent-living-up-to-their-climate-pledges.

117 It is worth nothing that when economic effects result from competitor collaborations, these are treated equally under antitrust law whether there is a formal trade association (or membership group responsible for a decision), or whether the firms agree among themselves without a formal structure.

118 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567 n.12 (2007).

119 European Commission, supra note 4.

120 MSI Integrity, "Not Fit for Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", MSI Integrity, July 2020. https://www.msi-integrity.org/not-fit-for-purpose/.

121 Columbia Center on Sustainable Investment, supra note 88.

5a1. Mandatory Standards

Mandatory standards are an important component of competitor sustainability agreements, as they can substantially increase environmental impact across an entire industry. The International Chamber of Commerce report – which is said to represent real scenarios that businesses are facing, but which are anonymized or generalized for the purposes of the report – offers the following example relating to more sustainable base materials or inputs to production:

- "Road pollution is caused by emissions as well as fine particles from tyres and brakes.
- Industry successfully creates an alternative material for tyres and brakes which vastly reduces the amount of fine particles "emitted".
- This alternative is significantly more expensive but the cost could be significantly reduced if adopted by all manufacturers.
- Industry wants to agree that all new tyres and brakes manufactured will only use the new material.
- This will increase all manufacturers' costs (at least in the short term) and each manufacturer is free to decide whether and how to pass on the price increase."[122]

This kind of mandatory standard would typically not violate antitrust law unless the manufacturers agreed to a fixed purchase price of the input or raw material that makes manufacturing more expensive, or if they collectively agree to raise prices on consumers to pay for the more expensive material, which would constitute price fixing.

Still, without those elements, a mandatory standard of this kind may still be evaluated by antitrust agencies under a *rule of reason* analysis, and the agencies would need to identify the market benefits both to direct consumers, or a wider definition of consumers that are out-of-market. To lessen antitrust risk in instances of mandatory standards, companies should be free to exceed the set standards, to compete against other industry members (including on non-price related aspects of competition) and should continue to make business decisions independently.

The European Commission's June 2023 Horizontal Guidelines provide a 'soft safe harbour' for sustainability 'standardisation' agreements, provided six conditions[123] are met (including no *significant* increases in price), which implies there is room for some small price increases resulting from such standards. This is unique for an agency to permit. The guidelines also later state that "in cases where a sustainability standardisation agreement is likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation, the agreement may nonetheless fulfil the conditions of Article 101(3)" – which details the existing block exemptions. These exemptions rely on a demonstration of efficiency gains, of which a "fair share" are passed on to consumers. This language, seems to leave room for significant, coordinated increases in price to be exempted from prosecution, which could lead to abuses.

To lessen antitrust risk in instances of mandatory standards, companies should be free to exceed the set standards, to compete against other industry members (including on non-price related aspects of competition) and should continue to make business decisions independently.

122 International Chamber of Commerce, supra note 30.

123 "First, the procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard.
Second, the sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with the standard.
Third, in order to ensure compliance with the standard, binding requirements can be imposed on the participating undertakings, but they must remain free to apply higher sustainability standards.
Fourth, the parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard.
Fifth, effective and non-discriminatory access to the outcome of the standard-setting process must be ensured. This includes allowing effective and non-discriminatory access to the requirements and conditions for using the agreed label, logo or brand name, and allowing undertakings that have not participated in the process of developing the standard to adopt the standard at a later stage.
Sixth, the sustainability standard must satisfy at least one of the following two conditions:
(a) The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned;
(b) The combined market share of the participating undertakings must not exceed 20 % on any relevant market affected by the standard." https://competition-policy.ec.europa.eu/system/files/2023-06/2023_revised_horizontal_guidelines_en_0.pdf.

A European case from 2000 demonstrated these price and sustainability trade-offs resulting from an output restriction by an industry association. The European Commission permitted the use of a mandatory agreement among household machine manufacturers to phase out less efficient washing machines, water-heaters and dishwashers, despite it corresponding with higher prices for consumers. In the "CECED"[124] agreement, participants were required to stop producing and importing certain domestic washing machines that belonged to specified energy efficiency classes.[125] Participants were also required to contribute data on their respective weighted energy consumption data.

Despite the anti-competitive aspects of the arrangement, the European Commission allowed this agreement on the basis that the energy savings to individual consumers outweighed the higher cost of the appliances; notably, the Commission also cited environmental considerations in its final ruling. The Commitment was approved by the EC in 2000 and remained valid until the end of 2001. Since then, the participants have not been bound to comply with the commitment, but findings show that the transformation of the market has been permanent. This EU case law also helpfully distinguished between industry standards and group boycotts, which usually involve an effort by competitors to eliminate another competitor, as we discuss next.

The Allied Tube & Conduit v. Indian Head case helped distinguish between standard-setting and boycotts. The case demonstrated that when an industry is evolving to the use of better technologies and codifying that in an industry standard, it is not problematic. However, anticompetitive behavior arises when an entrenched player uses its power within a standard-setting process to keep out new entrants.

5a2. Collective Pressure / Boycott Applied to Polluters

Another example of a sustainability-related collaboration is when a trade association wants to force suppliers to use a less polluting technique in their manufacturing process. In this case, the less toxic technique has a higher cost than the alternative. Trade association members want to agree not to buy from any suppliers who use the polluting technique as a way to compel changes throughout the supply chain.

This could be viewed as a group boycott, which would be evaluated under a *rule of reason* analysis, weighing the procompetitive benefits against the anti-competitive harms of such an agreement. If the participating companies unilaterally passed on price increases from increased supply costs, this would lessen their risk, however, this may not necessarily be enough to shield companies from liability.

The *Allied Tube & Conduit v. Indian Head*[126] case helped distinguish between standard-setting and boycotts. The case demonstrated that when an industry is evolving to the use of better technologies and codifying that in an industry standard, it is not problematic. However, anticompetitive behavior arises when an entrenched player uses its power within a standard-setting process to keep out new entrants. This case found that a firm had abused its power in the standard-setting process, and that was anti-competitive, although the resulting standard itself was not (as it was a result of changing market dynamics).[127]

The same logic could potentially apply to an industry association pursuing more environmentally-friendly manufacturing inputs.

124 "CECED" stands for the "Conseil Européen de la Construction d'appareils Domestiques" or, the "European Committee of Domestic Equipment Manufacturers."

125 Commission Decision 2000/475/EC of 24 January 1999 (CECED I: Washing Machines); Commission Decision 2001/C 250/03 of 8 September 2001 (CECED II: Water Heaters); Commission Decision 2001/C 250/02 of 8 September 2001 (CECED III: Dishwashers).

126 Allied Tube & Conduit v. Indian Head, 486 U.S. 492 (1988).

127 The National Fire Protection Association (a private organization) ("NFPA") sets and publishes product standards and codes related to fire protection. Its National Electrical Code ("Code") establishes requirements for the design and installation of electrical wiring systems. The Code is routinely adopted into law by a substantial number of state and local governments and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, electrical inspectors, contractors, and distributors. The Code used to permit the use of electrical conduit made of steel. Indian Head proposed to include plastic conduit as a type of approved conduit in the 1981 edition of the Code. This was approved by an NFPA panel and was scheduled for consideration at the 1980 annual meeting, for adoption by simple majority. Allied Tube, the largest producer of steel conduits, concerned about the competitive threat posed by the plastic conduit to its products, worked with other steel conduit manufacturers to block the approval of the use of plastic conduits in the 1981 Code. Indian Head filed suit against Allied Tube, alleging that the latter restrained trade in the electrical conduit space, in violation of Section 1 of the Sherman Act. The jury verdict found that Allied Tube had unreasonably restrained trade in violation of antitrust laws by colluding with decision makers who have similar economic interests to influence private standard-setting.

As competition authorities with consumer protection mandates increase their efforts to halt deceptive environmental claims by companies, new considerations will emerge regarding the ability of industry-led groups to set appropriate environmental or broader sustainability standards.

5a3. Standard-setting Organizations and Greenwashing

While standard-setting organizations have come under antitrust scrutiny for competition-related concerns in the past, they are now also facing accusations of deceptive marketing and greenwashing. Currently in Canada, two standard-setting organizations responsible for standards on sustainable forestry are being investigated by the Competition Bureau. A consortium of environmental groups claim that the Sustainability Forestry Initiative's (SFI) 'sustainable' logging certification is 'misleading' and 'false' because it "allows clearcutting, spraying of toxic chemicals, and logging in the primary habitat of threatened species such as caribou and spotted owl."[128]

The second industry alliance to face greenwashing charges is the Pathways Alliance – a group of oil sands producers collaborating on strategies to cut greenhouse gas emissions. Pathways Alliance is also being investigated by the Competition Bureau for its "Let's clear the air" advertising campaign, in which the companies claimed to be on track to achieve net-zero emissions by 2050, despite their increasing fossil fuel extraction and production.

As competition authorities with consumer protection mandates increase their efforts to halt deceptive environmental claims by companies, new considerations will emerge regarding the ability of industry-led groups to set appropriate environmental or broader sustainability standards. This may provide new case precedent on this aspect of competitor collaborations.

128 Dina Ni, "Competition Bureau launches investigation into greenwashing complaint against North America's largest forest certification scheme", Greenpeace, January 31, 2023. https://www.greenpeace.org/canada/en/press-release/57244/competition-bureau-launches-investigation-into-greenwashing-complaint-against-north-americas-largest-forest-certification-scheme/

5B. GROUP BUYER POWER / PURCHASING AGREEMENTS

Some businesses have claimed that, in certain cases, sponsoring upstream sustainability can only happen through exercising joint buyer power or group purchasing agreements.

The ICC report provides the following example: in the agricultural sector, to advance regenerative farming techniques at scale, a minimum number of farms need to participate in a given initiative – whether it relates to soil erosion, reducing the need for fertilizers, or changing livestock feed. No one company can purchase all of the crops or outputs from a large number of farms, and so competing purchasers want to collectively support farms with financial incentives or technical support to deploy more sustainable techniques.

The ICC report claims it is necessary in this example for the competitors to agree how much each party will buy and from which farm, and that "it might even be necessary to agree upon a common price in order to convince the farms to join the programme," but that "there will be no agreement as to how any increased costs are passed on to customers and no more exchange of commercially sensitive information than is strictly necessary."[129]

Enforcers and regulators will need to parse the issues closely. Will the joint purchasing of dominant buyers drive the prices down below a competitive level for farmers? If regenerative or sustainable farming techniques are more expensive, will the farmers and the purchasers agree to collective price increases on goods? If they did, this would typically be seen as price fixing and potential cartel behavior, and competition agencies would need to balance the negative effects of higher consumer prices against the purported sustainability benefits of any particular program.

One antitrust lawyer interviewed for this analysis said, "When it comes to sustainability, the joint purchasing activity is about making higher prices more viable, rather than using buyer power to drive down prices." This, again, raises the question of who will pay to internalize higher costs associated with changing to more sustainable methods or products. Is it consumers? Producers? Retailers? Shareholders? And under what conditions should a higher cost be tolerated?

However, there may be other ways of incentivizing upstream sustainability without direct competitor agreements. Initiatives like Frontier[130] and the First Movers Coalition[131] are using the mechanism of an advance market commitment by aggregating both purchasing commitments and purchase pledges, respectively, to stimulate the market for these types of schemes. This arrangement could potentially address the desire to sponsor upstream sustainability without needing to specify a common price among competitors. Frontier aggregates purchasing commitments from companies for carbon removal credits, in which deals are negotiated through a third-party intermediary instead of directly among competitors. This may help avoid direct price-fixing issues typically resulting from joint purchasing.

129 International Chamber of Commerce, supra note 30.
130 Frontier, https://frontierclimate.com/ (last visited May 30, 2023).
131 First Movers Coalition, https://www.weforum.org/first-movers-coalition (last visited May 30, 2023).

5C. INFORMATION SHARING

Firms should avoid sharing confidential or proprietary information with their competitors (prices, marketing or product plans, profit, or cost details). However, some sustainability-related projects may require new forms of information sharing.

For example, in 2006, the Fair Factories Clearinghouse ("FFC") requested a business review for a proposal to operate a joint database for member companies in the apparel industry to collect and voluntarily share information about workplace conditions in manufacturing facilities around the globe. The purpose of the database was to help companies monitor labor practices in their supply chains by exchanging information related to "child labor, forced labor, wages and hours, health and safety, workers' rights, and related issues" so as to eliminate the use of "sweatshop" suppliers, and to ensure their suppliers were in compliance with international laws and universally-recognized workplace standards. Though the project raised theoretical antitrust concerns, the DOJ cleared this project because participation was voluntary, and the member businesses would only have access to aggregated competitor wage and hour information in the database. All members also had to agree to signing an antitrust policy statement, saying they would operate within the boundaries of the law, and outside antitrust counsel was present at all meetings.[132]

In the updated EU guidelines, the following is listed as an information exchange which may be exempt from antitrust scrutiny, given its potential pro-competitive / efficiency-enhancing benefits: "Pooling data on producers supplying sustainable products or producers using sustainable production processes may help undertakings fulfil their sustainability obligations under EU or national law."[133]

Increases in vast data pools, vertically integrated with compute resources and software, make policies on data sharing, interoperability, and privacy paramount as new market reality concerns.

The ICC report names two forms of information sharing projects with sustainability considerations. The first involves horizontal data sharing for energy saving purposes:

- "Big Data and artificial intelligence applications are more and more used to optimise system performance to make networks as sustainable and cost-efficient as possible.
- The data transmitted by smart meters is used for the targeted implementation of energy efficiency solutions, such as the application of standby mode to limit energy consumption when traffic is slowed down.
- Sharing this data among network operators would allow for large energy savings, but would also require competitors to share some competitively sensitive information which could potentially reduce competition among them."[134]

Without knowing more details on this specific example, it is difficult to assess. While data sharing among incumbent firms may make operations more efficient, it may also serve to shore up existing moats while failing to make that data accessible, portable, and interoperable with both consumers or other third-party providers.[135] As the ability to process data requires increasing compute resources, available mostly to the largest players, market power considerations as well as who else may have access to such data – aside from competing firms – should be considered.

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132 Thomas O. Barnett, "Response To Fair Factories Clearinghouse's Request For Business Review Letter", U.S. Department of Justice Antitrust Division, January 9, 2017. https://www.justice.gov/atr/response-fair-factories-clearinghouses-request-business-review-letter (last visited May 30, 2023).

133 European Commission, supra note 4.

134 International Chamber of Commerce, supra note 30.

135 For example, the Mission Data report "DEACTIVATED: How Electric Utilities Turned Off the Data-Sharing Features of 14 Million Smart Meters" discusses how the real-time data-sharing capabilities on federally funded smart meters have been deactivated by dominant utilities companies: "Despite 89.7% of federally funded meters having real-time access capabilities, today only 2.9% are enabled. This means information that should be readily available to consumers is deliberately withheld." From: http://www.missiondata.io/s/Deactivated_white_paper.pdf (last visited May 30, 2023). See also: Mission Data, "Reports", www.missiondata.io/reports (last visited May 30, 2023).

The second ICC example involves horizontal data pooling across different sectors:

- "Data centres, cloud services and connectivity account for a large part of the environmental footprint of the information technology sector.
- Agreements among competitors to share some B2B data and infrastructures and the creation of large data pools enabling Big Data analytics and machine learning would result in substantial energy savings and reduce carbon emissions, at the potential risk however of reducing competition among them."[136]

Currently, Amazon, Microsoft, and Google (Alphabet), account for two thirds of all cloud infrastructure revenue. The top 8 firms account for 80% of all global revenue.[137] In this example, data sharing among competitors may produce some sustainability benefits, but again would likely serve to enhance the existing moats of dominant firms, while potentially weakening the bargaining position of their B2B customers.

Amazon and Walmart have already been using AI to negotiate contract terms with suppliers, touting the ability to gain price concessions. Since introducing the program in early 2021 (during the Covid-19 pandemic), Walmart claims it saves about 3% on contracts handled through its software. An article outlining the initiative states, "the company is using the tool to squeeze savings from contracts that might not be big enough to justify taking up much—if any—of a procurement manager's time. [The] software can haggle over a wide range of sticking points, including discounts, payment terms and prices for individual products. ...Suppliers cede profit in at least some of the negotiations, but [the software provider] says they can get concessions such as better payment terms and longer contracts in return."[138]

In April 2023, the DOJ, FTC, CFPB, and Equal Employment Opportunity Commission issued a joint statement on their commitment to police unfair uses of automated systems and AI, citing the potential for data and datasets to lead to discriminatory behavior.[139]

Additionally, current US enforcers recently rescinded three healthcare-related guidelines[140] which provided safe harbors related to competitively-sensitive data sharing. Some think it reflects a broader stance on information sharing, regardless of industry. Principal Deputy Doha Mekki said:

> *"The safety zones were written at a time when information was shared in manila envelopes and through fax machines. Today, data is shared, analyzed, and used in ways that would be unrecognizable decades ago. We must account for these changes as we consider how best to enforce the antitrust laws."*[141]

Increases in vast data pools, vertically integrated with compute resources and software, make policies on data sharing, interoperability, and privacy paramount as new market reality concerns. It remains to be seen how the US agencies will attempt to account for competitor collaborations related to information sharing more broadly, which would potentially impact sustainability-related collaborations.

136 International Chamber of Commerce, supra note 30.

137 Felix Richter, "Big Three Dominate the Global Cloud Market", Statista, April 28, 2023. https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/

138 Daniela Sirtori-Cortina and Brendan Case, "Walmart Is Using AI to Negotiate the Best Price With Some Vendors", Bloomberg, April 26, 2023. https://www.bloomberg.com/news/articles/2023-04-26/walmart-uses-pactum-ai-tools-to-handle-vendor-negotiations

139 Rohit Chopra, Kristen Clarke, Charlotte A. Burrows, and Lina M. Khan, "Joint Statement from the Bureau of Consumer Financial Protection, DOJ Civil Rights Division, U.S. Equal Employment Opportunity Commission, and FTC on Enforcement Efforts Against Discrimination and Bias in Automated Systems". (https://www.dwt.com/-/media/files/blogs/artificial-intelligence-law-advisor/2023/eeoccrtftccfpbaijointstatementfinal.pdf?la=en&rev=48dcf764e19242cab6379768cbd6c2bc&hash=B2EB1EB0ABBE14E08400CA95DEB35F2A)

140 Department of Justice, "Justice Department Withdraws Outdated Enforcement Policy Statements", U.S. Department of Justice Office of Public Affairs, February 3, 2023. https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements

141 Doha Mekki, "Principal Deputy Assistant Attorney General, Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023", U.S. Department of Justice Office of Public Affairs, February 2, 2023. https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0

5D. TECHNICAL DEVELOPMENT, JOINT VENTURES, R&D

Many other types of competitor collaborations – such as technical development, joint ventures, and research and development – are covered under the existing DOJ guidelines. We do not address those substantially in this analysis.

However, it is worth noting that in 2021, the European Commission found car manufacturers Daimler, BMW, and the Volkswagen group (comprised of Volkswagen, Audi, and Porsche) liable for breaching EU antitrust rules by colluding on technical developments in diesel engines. The car manufacturers all possessed the technology to reduce harmful emissions beyond what was legally required under EU emission standards, but for over five years, the car manufacturers – during regular meetings – agreed to avoid competition in the area of nitrogen oxide cleaning, as the technology radically reduced emissions, but also lowered the performance of their profitable combustion engines. The manufacturers were fined a total of EUR 875M ($1B). Daimler did not pay a fine because it was the first to alert the competition agency of the collusion. This case was significant because it was the first in the EU which considered how a technical development collaboration actually “spilled over” into a collusion not to compete, which led to worse environmental outcomes. It was the first time the EC prosecuted technical development collaborations as cartel behavior, using a restriction of innovation theory to demonstrate harm.

6. AVENUES FOR CLARIFICATION

As evident from the variety of commercial scenarios which address evolving sustainability needs, and the case-specific standards applied by the courts, there are limited circumstances where legal certainty is available. This section recommends some potential pathways for businesses seeking clarification on sustainability-related competitor collaborations.

6A. REQUEST THAT THE FTC CONDUCT MARKET STUDIES

The FTC has authority under Section 6(b) of the FTC Act to conduct studies on specific industries, and to compel information from companies. The FTC could conduct one or multiple market studies on critical new markets related to the energy transition (or other sustainability-related industries) to ensure they operate on competitive terms, and to see where issues of competitor collaborations emerge in context. This would allow the agency to surface case-studies in specific industries which grapple with the nuances of restrictions of competition against sustainability benefits. The EU has taken this approach, and also released updated competitor collaboration guidelines specifically for the agriculture industry, which enforcers felt had unique sectoral challenges that were difficult to address with the broad competitor collaboration guidelines.

Increasingly, global agencies are using market studies to better understand the changing nature of critical sustainability-related industries. The agencies should also regularly be conducting horizon-scanning exercises to anticipate anti-competitive concerns in critical industries related to energy transition and sustainability (deep sea mining for rare earth minerals, heat pumps, EV charging stations, and others).

As Sarah Cardell, the UK's Competition and Markets Authority Chief Executive, said in a January 2023 speech, "How will this market develop? Strong competition and the right regulatory framework will be required, and that's why we conducted a market study into EV charging, which led to a set of recommendations on how governments can enable the market to work more effectively, now and in the future. That's not a diversion from the work of a competition authority. It's a core part of doing our job."[142]

The French competition authority also recently opened market studies on EV charging infrastructure and land passenger travel. And in the US, more than 200 rooftop solar companies and advocacy organizations requested that the FTC conduct a market study of utilities companies, which they claimed were stymying commercial and residential retrofitting attempts.[143]

The FTC can share information it has compelled from firms with other regulatory and enforcement agencies. And sometimes, when it serves the public interest, can make portions of their 6(b) studies public. These studies can have wide impact, as other regulatory agencies and public advocacy organizations can utilize the information and research gleaned when considering wider sectoral regulation in combination with robust competition enforcement.

142 Cardell, supra note 20.

143 Letter from 239 consumer, antimonopoly advocates, public interest and environmental organizations, and rooftop solar companies to FTC Chairwoman Lina Khan on investigation of electricity utility's practices that impede renewable energy competition, June 14, 2022. https://www.biologicaldiversity.org/programs/energy-justice/pdfs/FTC-Petition-Re-Utilities-2022-05-16.pdf. See also: Emily Pontecorvo, "Utility monopolies are hurting rooftop solar. Can antitrust lawsuits rein them in?", Grist, February 18, 2022. https://grist.org/energy/utility-monopolies-are-hurting-rooftop-solar-can-antitrust-lawsuits-rein-them-in/

6B. ADVISORY OPINIONS AND BUSINESS REVIEWS

A group of companies – or an investor coalition – could request an advisory opinion or business review from the FTC or DOJ on a sustainability-related competitor collaboration. Agencies say they can typically provide opinions within 60 days. These advisory opinions could also offer opportunities to provide clear examples where competitor collaborations do not run afoul of antitrust law and could be used as examples in updated competitor collaboration guidelines. However, these reviews are not legally binding at the federal or state level, so they only offer a certain amount of comfort to parties who wish to undertake them, and therefore would provide only an interim step towards longer-term clarity for firms in the US.

The UK's CMA now offers an open-door policy for businesses to receive informal guidance on proposed environmental sustainability agreements. It also states that companies which discuss their proposals with the CMA ahead of time (where there are no significant competition concerns) will not be fined. The Dutch ACM has gone further to say that it is not necessary for companies to quantify the potential sustainability benefits in every case, and that they will not fine companies which try to follow their sustainability guidelines "in good faith" even if they later take a different view on the legality of their agreements.[144] While these approaches can be debated, they show willingness from the agencies to clarify permissible behavior for firms, so they can no longer claim that the fear of antitrust is 'chilling' necessary collaborations.

6C. CLARIFIED COMPETITOR COLLABORATION GUIDELINES

Updated competitor collaborations guidelines offer the most clarity for firms. Interested parties could write a letter to the FTC and DOJ requesting clarified competitor collaboration guidelines (last updated in 2000), which explicitly mention sustainability agreements (or use examples of permissible sustainability-related collaborations, perhaps garnered through advisory opinions).

Businesses could also request that the agencies better align their strategies with other jurisdictions internationally under the International Competition Network (ICN) or clarify why current Biden agency enforcers may take a different approach than other international agencies.

144 Autoriteit Conusment & Markt, "Sustainability agreements: Opportunities within competition law (Draft Guidelines)" Autoriteit Conusment & Markt, https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf (last visited May 30, 2023).

7. US STRATEGY FOR CONSIDERATION: WHOLE-OF-GOVERNMENT APPROACH TO COMPETITION (AND SUSTAINABILITY)

At a time when the federal antitrust agencies are politically constrained or unwilling to discuss sustainability concerns directly, it may be useful to look to other strategies that already have political support and broad buy-in from other federal agencies. The Whole-of-Government Approach offers an opportunity to advance deeper integration of sustainability concerns in the administration of antitrust law.

7A. BIDEN'S EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY

In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy.[145] The order established a historic whole-of-government approach to competition policy, recognizing the sweeping problem of consolidation across industries in the United States.

The Order established a White House Competition Council,[146] led by the Assistant to the President for Economic Policy (then: Tim Wu) and Director of the National Economic Council, who acts as Chair. The heads of many government agencies are included on the council. The Order catalyzed 72 initiatives by more than a dozen federal agencies, including a requirement for some agencies to report on how competition issues affect their industry.

The Order also called on the Department of Justice and Federal Trade Commission to enforce antitrust laws vigorously, and to potentially challenge prior bad mergers that were approved under previous administrations. It also affirms that America's geopolitical policy stance regarding foreign monopolies and cartels is "not the tolerance of domestic monopolization, but rather the promotion of competition and innovation by firms small and large, at home and worldwide."[147]

The Assistant Attorney General of Antitrust at the Department of Justice, Jonathan Kanter, explains how the agency has embraced and built upon this executive order:

> *"The Department is eager to help other federal departments and agencies win cases targeting anticompetitive conduct that violates industry-specific statutes, including through direct litigation support and by formalizing our cooperation in MOUs. We call the new initiative Antitrust Enforcement for All-of-Government. Our cooperation through this initiative could transform our approach to competition policy and law enforcement. We plan to work collaboratively with partner agencies to ensure that competition issues are thoroughly considered, and pursued, under all of the statutes that promote competition in the economy."*[148]

This new collaboration between antitrust agencies and other federal agencies is an opportunity for sustainability-related goals to manifest at the intersection of competition policy and other industries.

145 Executive Order No. 14036, 80 Fed. Reg. 36,987, July 9, 2021.
146 The White House, "White House Competition Council", The White House. https://www.whitehouse.gov/competition/ (last visited May 30, 2023).
147 Ibid.
148 Jonathan Kanter, "Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section", U.S. Department of Justice Office of Public Affairs, January 24, 2022. https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york#_ftnref7

Take, for example, the March 2023 report "More and Better Choices for Farmers: Promoting Fair Competition and Innovation in Seeds and Other Agricultural Inputs," released by the US Department of Agriculture (USDA), in consultation with the Patent and Trademark Office (USPTO), the Department of Justice Antitrust Division, and the Federal Trade Commission. The report discussed competition dynamics in the seed industry, detailing its cross-over effects on systems resiliency, sustainability, and environmental protection.[149] In 2022, the DOJ and USDA also initiated the "Farmer Fairness" complaint portal if farmers "suspect a violation of the Packers and Stockyards Act or any other Federal law governing fair and competitive marketing and contract growing of livestock and poultry."[150]

Other initiatives, like the Right to Repair movement,[151] were also encouraged with the executive order. This campaign fights for a consumer's right to repair their purchased products – either themselves or at a third-party repair shop. Right to Repair helps reduce waste and counter the planned obsolescence of some consumer products. The executive order encouraged the FTC to use its authority to police "unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment."

In January 2023, farmers and independent contractors won the right to repair their John Deere agricultural equipment.[152] And Apple similarly announced the right for consumers and third-party repair shops after facing regulatory pressure. Many states are passing right to repair legislation, but the executive order called on the FTC to create a country-wide repair rulemaking, which has yet to be introduced.

These are only a few examples of how the whole-of-government approach to competition, crystallized by the July 2021 Executive Order, has shown concurrent sustainability benefits and harbors the potential to go even further.

149 U.S. Department of Agriculture (USDA), "Promoting Fair Competition and Innovation in Seeds and Other Agricultural Input Industries", USDA. https://www.ams.usda.gov/about-ams/fair-competitive-seed (last visited May 30, 2023).
150 USDA, "Farmer Fairness", USDA. https://www.usda.gov/farmerfairness (last visited May 30, 2023).
151 The Repair Association, https://www.repair.org/ (last visited May 30, 2023).
152 Monica Miller, "US farmers win right to repair John Deere equipment", BBC, January 9, 2023. https://www.bbc.com/news/business-64206913

7B. OTHER FEDERAL AGENCIES WITH ANTITRUST AUTHORITY

Often, federal agencies work together to administrate and enforce their respective policy areas. The DOJ does not have rulemaking authority for competition regulations, but it often weighs in on the rulemaking processes of other federal agencies or files amicus briefs in other federal agency cases. The DOJ can also file comments on proposed state and federal legislation. And the Department of Justice has a number of interagency MOUs with other federal agencies.[153]

In addition, many other federal agencies enjoy joint or concurrent statutory authority with the DOJ and FTC, and have the authority to enforce various aspects of antitrust law.

Some examples include:

- US Department of Agriculture (USDA) – the USDA is considering broader interpretations of "unfair methods of competition" under the Packers and Stockyard Act, a specific agricultural antitrust law, to help eliminate unfair, discriminatory, or deceptive practices in the livestock, meat, and poultry industries while also reducing economic uncertainty for smaller farms and increasing their access to retail markets. This was also called for in the executive order.[154]
  - The USDA has also proposed a new rule on meat labeling, so that "Product of USA" labels can only apply to animals which are "born, raised, slaughtered and processed in the United States" instead of only slaughtered or meat that has been repackaged in the US.[155]
- The Federal Energy Regulatory Commission (FERC) oversees mergers and regulates electricity generation products.
- The National Oceanic and Atmospheric Administration is involved in antitrust review of ocean thermal energy conversion facilities.

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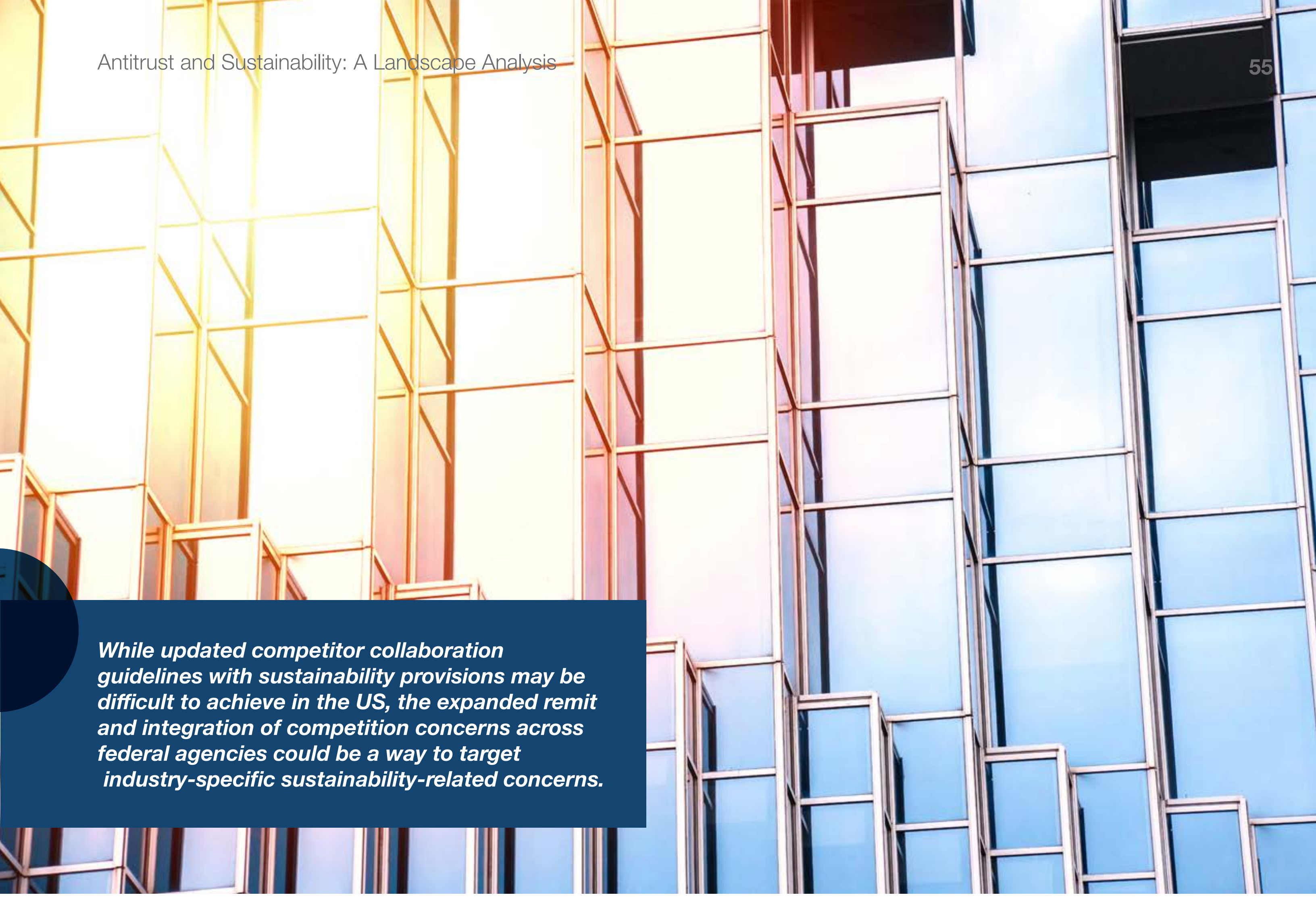
153 Department of Justice, "Interagency Memoranda of Understanding", U.S. Department of Justice Antitrust Division. https://www.justice.gov/atr/interagency-memoranda-understanding (last visited May 30, 2023).

154 Executive Order No. 14036 provides:
"The Secretary of Agriculture shall:
to address the unfair treatment of farmers and improve conditions of competition in the markets for their products, consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture's regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences, advantages, prejudices, or disadvantages, with the purpose of furthering the vigorous implementation of the law established by the Congress in 1921 and fortified by amendments. […]
(C) measures to enhance price discovery, increase transparency, and improve the functioning of the cattle and other livestock markets;
(D) enhanced tools, including any new legislative authorities needed, to protect whistleblowers, monitor agricultural markets, and enforce relevant laws;
(E) any investments or other support that could bolster competition within highly concentrated agricultural markets; and
(F) any other means that the Secretary of Agriculture deems appropriate; […]
to improve farmers' and smaller food processors' access to retail markets, not later than 300 days after the date of this order, in consultation with the Chair of the FTC, submit a report to the Chair of the White House Competition Council, on the effect of retail concentration and retailers' practices on the conditions of competition in the food industries, including any practices that may violate the Federal Trade Commission Act, the Robinson-Patman Act (Public Law 74-692, 49 Stat. 1526, 15 U.S.C. 13 et seq.), or other relevant laws, and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises; and
to help ensure that the intellectual property system, while incentivizing innovation, does not also unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act (see 35 U.S.C. 100 et seq. and 7 U.S.C. 2321 et seq.), in consultation with the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, submit a report to the Chair of the White House Competition Council, enumerating and describing any relevant concerns of the Department of Agriculture and strategies for addressing those concerns across intellectual property, antitrust, and other relevant laws."

155 Jonel Aleccia, "Made in the USA? Proposed rule clarifies grocery meat labels", ABC News, March 6, 2023. https://abcnews.go.com/Business/wireStory/made-usa-proposed-rule-clarifies-grocery-meat-labels-97657745



While updated competitor collaboration guidelines with sustainability provisions may be difficult to achieve in the US, the expanded remit and integration of competition concerns across federal agencies could be a way to target industry-specific sustainability-related concerns.

- The Department of Transport can police unfair and deceptive practices, unfair methods of competition, approve international air route antitrust exemptions, and oversees the air, rail, and trucking industries.
    - The DOT has independent merger review authority and can block mergers for reasons other than anti-competitive concerns under a public interest standard, which is broader than antitrust standards for merger cases. This has recently been seen with the DOT investigating the JetBlue-Spirit merger under a public interest standard.156
- The Federal Communications Commission (FCC) shares merger oversight with the DOJ under a public interest standard.

While updated competitor collaboration guidelines with sustainability provisions may be difficult to achieve in the US, the expanded remit and integration of competition concerns across federal agencies could be a way to target industry-specific sustainability-related concerns. For example, meat and poultry producers have outsized greenhouse gas emissions and have been linked to environmental degradation and water pollution. Advocates could potentially ask for an investigation or a new rulemaking by the USDA, under the Packers and Stockyard Act, arguing that environmental degradation is an ‘unfair method of competition.’ The DOJ and FTC could work in collaboration with the USDA, in this example, to either bring a case or issue rulemakings. This is only one example of what might be possible as the full range of antitrust impacts on sustainability efforts comes into view.

156 Leah Nylen, “JetBlue-Spirit DOT Action Paused Until Antitrust Suit Is Decided”, Bloomberg, March 13, 2023. https://www.bloomberg.com/news/articles/2023-03-13/jetblue-spirit-action-by-dot-paused-until-antitrust-suit-is-decided

CONCLUSION

As we have hopefully demonstrated in this report, governments and regulatory agencies should be the primary actors setting global sustainability thresholds and guardrails. Antitrust is a critically important contributor, as it sets market terms and allocates market power, including the power to collaborate. Private actions are important secondary tools for achieving global sustainability goals, and antitrust agencies must continue to provide clarity on what kinds of private-sector collaborations are pro-social and which undermine the public good.

As antitrust law faces wholly new market realities, it can look to its early history for philosophical inspiration and guiding principles. Antitrust law, and its application, involves all aspects of market structure – not only those aspects which affect us as consumers, but also those which concern our rights as citizens. In the words of Supreme Court Justice Louis D. Brandeis, “The only title in our democracy superior to that of President is the title of citizen.”

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