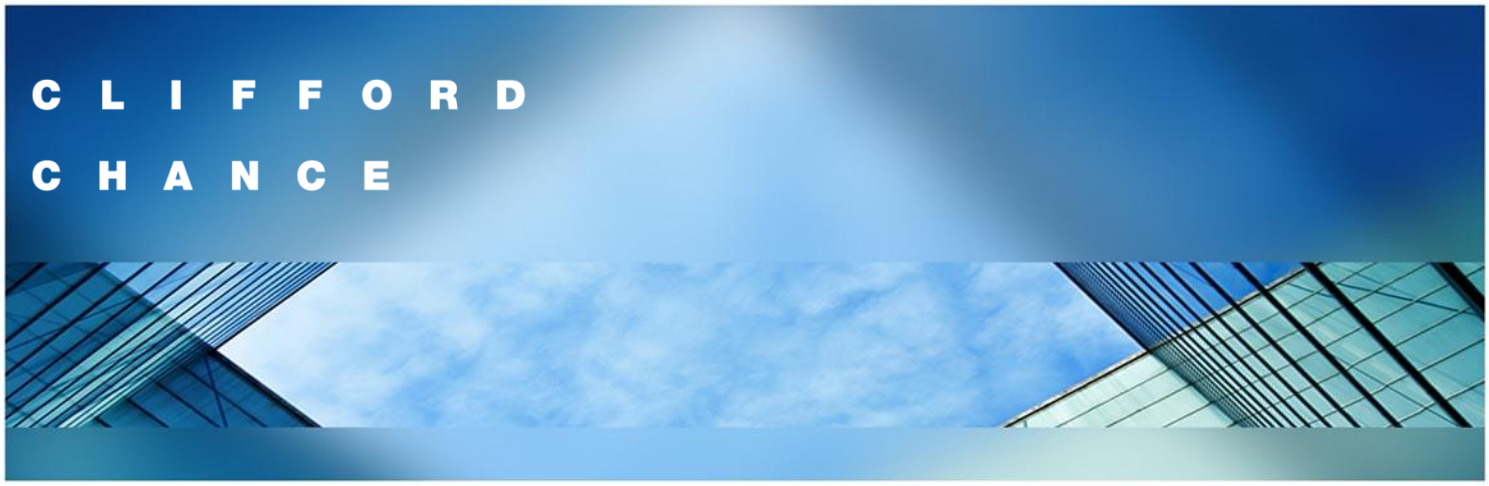

DO INDUSTRY CLIMATE ALLIANCES VIOLATE U.S. ANTITRUST LAW?

BACKGROUND

After a meteoric rise in corporate, investor, and public attention, ESG faces a backlash from conservative politicians and regulators, especially in the United States. From its beginnings as a term for assessing the impact of environmental, social, and governance factors on an enterprise, ESG has become a widely used but poorly-defined umbrella term encompassing a wide variety of environmental and social issues. As a result, ESG is now a target for those opposing "leftist politics" and the "woke agenda."[1]

At the forefront of these efforts, finance and enforcement authorities in nineteen Republican-controlled states, referred to as "Red States," are working together to limit ESG's influence, particularly with respect to efforts to address climate change. A focus of this coalition is the financial industry's climate change commitments under the UN-sponsored Glasgow Financial Alliance for Net Zero ("**GFANZ**"), launched in April 2021 "*to coordinate efforts across all sectors of the financial system to accelerate the transition to a net-zero global economy.*"[2] Throughout 2022, Red State Treasury officials and Attorneys General ("**AGs**") have issued escalating demands to asset managers and banks, charging them with failing to maximize investor return, violating their fiduciary duties, and usurping the role of corporate management. Some States have blacklisted financial institutions from government contracts and investments for allegedly boycotting fossil fuel-based energy companies.

One legal pillar of the anti-ESG movement has been the allegation that industry climate commitments are illegal group action that violate the antitrust laws. Authorities have focused this attack on pledges to reduce or withdraw investments in carbon-intensive sectors to reach "net zero" greenhouse gas emissions by 2050. In March 2022, the Arizona AG claimed in an op-ed that net-zero commitments allocate markets and restrict output, calling them *"[t]he biggest antitrust violation in history."*[3] The Missouri AG announced investigations into six

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1 Robert G. Eccles and Svetlana Klimenko, Harvard Business Review, *Shareholders are getting serious about sustainability* (Jun 2019), https://hbr.org/2019/05/the-investor-revolution; Mike Pence, *Republicans Can Stop ESG Political Bias* (May 26, 2022), https://www.wsj.com/articles/only-republicans-can-stop-the-esg-madness-woke-musk-consumer-demand-free-speech-corporate-america-11653574189?mod=Searchresults_pos20&page=2.

2 Glasgow Financial Alliance for Net Zero, https://www.gfanzero.com/about/.

3 Mark Brnovich, *ESG May Be an Antitrust Violation* (Mar. 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.

major banks with a press release accusing them of joining "*a massive worldwide agreement by major banking institutions, overseen by the U.N., to starve companies engaged in fossil fuel-related activities of credit on national and international markets*,"[4] and the Texas AG accused the banks of "*collusion in lending practices.*" In November, five Republican Senators joined the fray, issuing letters to 51 law firms purporting to "*detai[l] the possible antitrust violations that their clients may commit if they pursue collusive ESG initiatives"* and warning the firms of a coming investigation into *"ESG-related antitrust violations."*[5]

These allegations raise the question: When do group commitments to address climate change or other "ESG issues" cross the line into an antitrust violation? Pressed on this question in a congressional hearing, the antitrust-enforcement leaders of both the US Department of Justice ("**DOJ**") and Federal Trade Commission ("**FTC**") each confirmed that there is no "antitrust exemption" for ESG.[6] Fortunately for those who must navigate this field, the concept of industry collaboration is not new, and decades of law and practice relating to trade associations, industry groups, standard-setting bodies, and other coordinated conduct provide a well-established framework for guidance.

COLLABORATIVE CONDUCT UNDER THE ANTITRUST LAWS

The allegation that financial institutions have "*agreed*" or "*colluded*" to "*starve companies engaged in fossil-fuel related activities of credit on national and international markets*" invokes the classic prohibition against competitors entering into contracts, combinations, and conspiracies that unreasonably restrain trade, reflected in Section 1 of the Sherman Act, the bar on unfair methods of competition under Section 5 of the FTC Act, and similar bars under parallel state statutes. Practices such as price fixing, bid rigging, and market allocation are "per se illegal" under Section 1 of the Sherman Act. Other "horizontal" agreements between and among competitors are assessed by weighing their pro-competitive and anticompetitive effects.

Unilateral action is much less likely to violate antitrust law unless the actor has significant market power, generally considered to be at least 50% of the relevant market. With limited exceptions, a company may unilaterally terminate business with any other company without violating U.S. antitrust laws.[7] Unilateral activity may implicate other laws, such as the State fossil fuel antiboycott statutes cited by a number of the Red States, but it generally is not an antitrust concern.

INDUSTRY INITIATIVES AS COLLABORATIVE CONDUCT

Anticompetitive agreements among competitors are generally illegal under the antitrust laws, even when they are based on good motives or advance a virtuous cause. This principle originated in a 1941 Supreme Court case involving

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4 Press Release, *Missouri Attorney General Leads 19 State Coalition in Launching Investigation into Six Major Banks Over ESG Investing* (Oct. 19, 2022), https://ago.mo.gov/home/news/2022/10/19/missouri-attorney-general-leads-19-state-coalition-in-launching-investigation-into-six-major-banks-over-esg-investing.

5 Press Release, *Cotton, Colleagues Warn Law Firms About ESG Initiatives*, https://www.cotton.senate.gov/news/press-releases/cotton-colleagues-warn-law-firms-about-esg-initiatives.

6 Hearing, U.S. Senate Subcommittee on Competition Policy, Antitrust and Consumer Rights, Oversight of Federal Enforcement of the Antitrust Laws (Sep. 20, 2022), https://www.judiciary.senate.gov/meetings/oversight-of-federal-enforcement-of-the-antitrust-laws.

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

intellectual property piracy. In *Fashion Originators' Guild of America v. FTC*, the Court found *per se* illegal a horizontal agreement among independent fashion designers to boycott distributors who sold pirated copies of their designs.[8] Although the Fashion Originators Guild argued that the boycott was "*reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs,*" the Court dismissed these beneficial justifications as irrelevant in the face of a per se illegal horizontal group boycott and declined to consider them.

More recently, in a matter involving vehicle emissions during the Trump Administration, the Antitrust Division investigated the legality of individual agreements between major auto manufacturers and the State of California to support fuel-efficiency and emissions standards. The Division stated that its concern was that the agreements amounted to a pact among automakers not to make larger, less efficient cars. Responding to criticism from Democrats, who claimed the investigation was politically motivated, the Administration noted that it was "*normal for antitrust enforcers to be concerned about such agreements between competitors within an industry*" – including for "*well intentioned goals*" or "*politically popular ends.*"[9] After five months of investigation, the Division closed the matter without comment, apparently because (1) the agreements were with the State of California and not among the automakers; (2) the agreements may have been legal under the state-action immunity doctrine, which insulates conduct allowed by state policy and supervised by the state, and (3) the agreements with California did not prevent automakers from competing with each other in multiple ways.[10]

FOCUS ON GFANZ, THE NZBA, AND NZAM

The Red State actions have targeted two sector alliances under GFANZ: the Net Zero Asset Managers ("**NZAM**") and the Net Zero Banking Alliance ("**NZBA**"). In joining these sector alliances, members sign sector-specific "Commitment Statements," each containing a commitment to transition clients and portfolios to align with pathways to "net-zero" emissions by 2050 or sooner; to set 2030, 2050, and 5-year intermediate targets; and to publish their progress. To accomplish these goals, each Commitment Statement includes sector-specific commitments for client engagement, investment, and advocacy.[11]

The progression of the GFANZ commitments over the course of 2022 reflects both an awareness of the antitrust hazards of collaborative action and the potential difficulty of navigating them. As prerequisite to membership, GFANZ institutions initially were required to meet the minimum criteria of another UN-affiliated group,

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8 312 U.S. 457 (1941).

9 Harper Neidig, THE HILL, *Trump DOJ under fire over automaker probe (Sep. 26, 2019)*, https://thehill.com/policy/transportation/463127-trump-doj-under-fire-over-automaker-probe/; Letter to Assistant Attorney General Makan Delrahim (June 9, 2020), https://www.whitehouse.senate.gov/news/release/whitehouse-presses-antitrust-head-for-answers-on-politicized-investigation-of-california-fuel-economy-agreement.

10 The New York Times, *Justice Department Drops Antitrust Probe Against Automakers That Sided With California on* Emissions (Feb 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

11 *See, e.g.,* Net-Zero Banking Alliance Commitment Statement, available at: https://www.unepfi.org/wordpress/wp-content/uploads/2021/04/UNEP-FI-NZBA-Commitment-Statement.pdf; The Net-Zero Asset Managers Commitment, available at: https://www.netzeroassetmanagers.org/media/2021/12/NZAM-Commitment.pdf; The Net-Zero Insurance Alliance, Statement of commitment by signatory companies, available at: https://www.unepfi.org/psi/wp-content/uploads/2021/07/NZIA-Commitment.pdf.

"Race to Zero."[12] From the outset, these criteria have been a focus of Red State allegations of collusion and fossil fuel boycotts. These allegations came to a head in June 2022, when Race to Zero issued an "interpretative update" that expressly required participants to *"[r]estrict the development, financing and facilitation of new fossil fuel assets,"* and stated that *"[a]cross all scenarios, this includes no new coal projects."*[13] The revision sparked a crisis within GFANZ, with US banks reportedly threatening to leave the alliance in part due to antitrust concerns.[14]

Race to Zero soon backtracked, revising its language to state that institutions would "*independently*" take an approach "*based in the best available science*" to phase out "*unabated*" fossil fuel emissions. The head of the campaign explained *"[w]e had to make one very tiny correction because we got some legal counsel that said that a particular choice of words was problematic from an antitrust point of view."*[15] GFANZ ultimately dropped its requirement that members commit to the Race to Zero criteria, stating in October that "*member alliances are encouraged, but not required, to partner with the Race to Zero.*"[16]

ANTITRUST RISK MITIGATION STRATEGIES FOR ESG COLLABORATIONS

The coal dust-up will not be the end of scrutiny for GFANZ, the Net Zero Alliance, and other industry efforts addressing the climate change crisis and broader ESG-related concerns. But neither is the industry likely to drop those efforts, as regulators (including in the oppositely-aligned "Blue States"[17]), shareholders, investors, and consumers continue to demand action to mitigate climate change. And while there have been calls from some quarters to relax antitrust scrutiny for climate-related collaborations,[18] the law is unlikely to change soon. What, then, are some rules of the road?

The cardinal rule for participants in industry coalitions is to maintain independent decision-making authority. Coalitions may set targets, for example, but the group may not penalize members for non-compliance. The Antitrust Division addressed one such coalition over a decade ago involving a group of colleges and universities pursing "collaborative social responsibility initiatives" who sought to promote fair wages and working conditions among their licensed apparel suppliers. Acting on a request for a Business Review Letter from the Worker Rights Consortium ("**WRC**"), the Division determined that the program was unlikely to have anticompetitive effects because it was optional for each school and licensee, was unlikely to have a substantial effect on licensing competition among

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12 Mark Carney, *Race to Zero and GFANZ: Ensuring the rigor and impact of financial sector net zero commitments and action* (Nov. 1, 2021), https://climatechampions.unfccc.int/race-to-zero-and-gfanz-ensuring-the-rigour-and-impact-of-financial-sector-net-zero-commitments-and-action/.

13 Press Release, *'Race to Zero' campaign updates criteria to raise the bar on net zero delivery* (Jun. 15, 2022), https://climatechampions.unfccc.int/criteria-consultation-3-0/.

14 *See, e.g.,* Financial Times, *US banks threaten to leave Mark Carney's green alliance over legal risks* (Sept. 21, 2022) https://www.ft.com/content/0affebaa-c62a-49d1-9b44-b9d27f0b5600.

15 Alastair Marsh, Bloomberg, *Wall Street Hit by New Reality as Legal Risks of CO2 Pact Grow* (Nov. 11, 2022), https://www.bloomberg.com/news/articles/2022-11-11/wall-street-hit-by-mad-reality-as-legal-risk-of-co2-pact-grows.

16 Isla Binnie and Ross Kerber, REUTERS, *Mark Carney-led grouping drops U.N. climate initiative requirement* (Oct. 27, 2022), https://www.reuters.com/business/environment/mark-carney-led-grouping-drops-un-climate-initiative-requirement-2022-10-28/#:~:text=GFANZ%20said%20in%20a%20statement,the%20United%20Nations%20will%20continue.

17 *Letter from New York City Office of the Comptroller to BlackRock* (Sep. 21, 2022), https://comptroller.nyc.gov/wp-content/uploads/2022/09/Letter-to-BlackRock-CEO-Larry-Fink.pdf.

18 *See, e.g.*, International Chamber of Commerce, *When Chilling Contributes to Warming: How Competition Policy Acts as a Barrier to Climate Action* (Nov. 2022), available at https://iccwbo.org/publication/how-competition-policy-acts-as-a-barrier-to-climate-action/.

participating schools or downstream competition for apparel sales, and involved only a "tiny portion" of the labor market. Significantly, the Division also noted that the collaboration could facilitate competition in a new area, by providing assurances that certified apparel was produced using fair labor standards.[19]

Indeed, the DOJ and FTC have recognized that collaboration can be benign and procompetitive in their guidelines for competitor collaboration. The *Antitrust Guidelines for Collaborations Among Competitors*, jointly published by the FTC and DOJ, provide a facts-and-circumstances framework of factors such as the purpose of the collaboration, the preservation of independent decision-making, confidential information sharing, and the impact on relevant markets.

The FTC's "Spotlight on Trade Associations" similarly notes the potential procompetitive effects of certain industry-level activities such as establishing safety and interoperability standards and representing members before legislatures and government agencies, when done with adequate safeguards. A particular area of concern is exchanging price or other sensitive business data among competitors, which can lead to uniform price setting.[20]

Simple Dos and Don'ts for collaboration include:

Do:

- Consider antitrust compliance at the outset and throughout the conduct of the collaboration, including by creating a written antitrust policy to govern association and member conduct.
- Consider and document the procompetitive and consumer-protective purposes of the association (e.g., product innovation or other benefits that may be passed on to customers).
- Educate association officials and members as to the content and application of the policy.
- Conduct meetings pursuant to established agendas, with minutes.
- Include antitrust counsel in meeting preparations, in meetings, and when preparing documents.
- Engage in any sensitive information and data sharing only on an aggregated, redacted, or de-sensitized basis and with advice of counsel.
- Maintain any analyses of antitrust risks in separate documents subject to legal privilege.

Don't:

- Don't share confidential, competitively sensitive business information – including pricing, financial projections, terms of contracts, product innovations, employee compensation, and confidential business methods and practices.

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19 DOJ, *Response to Baker & Miller PLLC's Request for Business Review Letter* (Dec. 16, 2011), https://www.justice.gov/atr/response-baker-miller-pllcs-request-business-review-letter.

20 FTC, *Spotlight on Trade Associations*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations; *see also* https://www.justice.gov/atr/antitrust-issues-and-your-small-business/participating-information-sharing-and-trade-associations.

- Don't enter into any agreement with competitors to allocate customers or divide up geographic markets in which you compete.
- Don't enter into any agreement with competitors to boycott suppliers or limit new entrants into the market.
- Don't enter into a joint venture or collaboration with competitors unless you have received guidance from qualified antitrust counsel.

Attention and collaboration with respect to ESG-related issues and goals is certain to continue, and so is political and regulatory scrutiny. Amid the high-stakes and contentious debates about critical matters such as measures to control climate change, companies and collaborative associations should not lose sight of antitrust considerations that may impact their efforts. We encourage parties and organizations to consult qualified counsel at the outset to effectively manage the antitrust risks of these collaborations.

CLIFFORD
CHANCE

CONTACTS

Steve Nickelsburg
Partner

T +1 202 912 5108
E steve.nickelsburg
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Weisiyu Jiang
Associate

T +1 202 912 5303
E weisiyu.jiang
@cliffordchance.com

Adam Thomas
Associate

T +1 202 912 5914
E adam.thomas
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 2001 K Street NW, Washington, DC 20006-1001, USA

Clifford Chance US LLP

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