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Practice Update

Antitrust Concerns About ESG Investing Are Not Going Away

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For the last several years, investor activism to further environmental, social, and governance (ESG) goals has faced significant antitrust scrutiny in the United States. This scrutiny reached a new level in June 2024 when the U.S. House Judiciary Committee released an interim majority staff report claiming that a "climate cartel" of activist shareholders and institutional investors "colluded" to force companies to reduce carbon consumption.[1] In its report, the majority staff claimed that the "climate cartel" included "collaborating" groups such as Climate Action 100+, the Net Zero Asset Managers (NZAM) initiative, and the Glasgow Financial Alliance for Net Zero (GFANZ); pension funds including the California Public Employees' Retirement System (CalPERS); nonprofit organizations; stockholder engagement services; activist investors; asset managers; and proxy advisors. The report was the culmination of an investigation launched by the Judiciary Committee in 2022, including 272,294 documents and 2,565,258 pages of non-public information that had been produced in response to subpoenas, voluntary requests for information, numerous transcribed interviews, and depositions of the leadership of various targeted entities. Perhaps unsurprisingly, the majority staff's report was roundly criticized by the minority staff report that was issued the same day, which alleged that the majority "did not find evidence of wrongdoing in the 2.5 million pages of documents they collected" over the course of their investigation.[2]

After the dueling reports were issued, the Judiciary Committee held a highly contentious hearing that was

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ostensibly intended to "examine whether existing civil and criminal penalties and current antitrust law enforcement efforts are sufficient to deter anticompetitive collusion to promote ESG-related goals in the investment industry."[3] While no anti-ESG legislation was proposed as a result of the hearing, in December 2024, the Committee sent new letters to over 60 U.S.-based asset managers demanding additional information regarding their involvement in ESG initiatives.

Now, the antitrust scrutiny appears to be significantly increasing. In a recent appearance on Donald Trump Jr.'s podcast "Triggered," Federal Trade Commission (FTC) Chairman Andrew Ferguson said that the FTC is currently investigating groups publicly agreeing that they will consider ESG factors when investing and agreeing to not invest in "fossil fuels."[4] Ferguson continued that considering ESG factors when investing is "terrible for shareholder value" and also harms workers. Ferguson concluded by stating that the FTC is "looking at this right now" and that these concerns are "really important to us."

Asset managers and investment advisors who include ESG considerations as factors in their investment strategies should be very concerned by the FTC Chair's announcement that the FTC is currently investigating the use of ESG considerations in investment decisions. An investigation by the Judiciary Committee could lead to new legislation that prospectively prevents future conduct, but it is unlikely to lead to liability for individual entities for past behavior. In contrast, an antitrust investigation by the FTC can be very invasive and burdensome, but the bigger concern is that an FTC investigation can lead to liability for past conduct and significant restrictions on future decision-making.

In addition, all of the asset managers and other entities that previously produced materials to the Judiciary Committee should expect that the FTC now has access to those materials. While the considerations when responding to a Congressional subpoena are different than responding to a subpoena from the FTC, with both Congress and the White House controlled by the same party, the expectation should be that Congress and the antitrust enforcers are now working together and the potential risks are significantly increased.

As of publication, there has been no public announcement of an investigation of a specific target, but all past and present members of Climate Action 100+, NZAM, and GFANZ and anyone else that incorporates ESG considerations in their investment strategies should be aware that a subpoena from the FTC could be on its way any day.

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[1] Staff of H.R. Comm. on the Judiciary, 118th Cong., Interim Staff Rep., "Climate Control: Exposing the Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing" (June 11, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20%28ESG%29%20Investing.pdf.

[2] Democratic Staff of H.R. Comm. on the Judiciary, 118th Cong., Democratic Staff Rep., "Unsustainable and Unoriginal: How the Republicans Borrowed a Bogus Antitrust Theory to Protect Big Oil" (June 11, 2024), https://democrats-judiciary.house.gov/uploadedfiles/2024.06.11_final_esg_report.pdf.

[3] U.S. House Judiciary Committee hearing, "Climate Control: Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing" (June 12, 2024), https://judiciary.house.gov/committee-activity/hearings/climate-control-decarbonization-collusion-environmental-social-and-0.

[4] Triggered, "TCB at the FTC, Interview with Commissioner Andrew Ferguson" (May 5, 2025), https://rumble.com/v6szutr-tcb-at-the-ftc-interview-with-commissioner-andrew-ferguson-triggered-ep.239.html.

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